

THE EASTERN CARIBBEAN SUPREME COURT
IN THE HIGH COURT OF JUSTICE
ANTIGUA AND BARBUDA
(CIVIL)

CLAIM NO: ANUHCV 2007/0268

BETWEEN:

**GILBERT GOMES
PAULINE GOMES
DRB LIMITED**

Claimants

And

**ELIZABETH SIBEL
ALISTON CUMMINGS**

Defendants

Appearances:

Mr. Vere C. Bird Jr. for the Claimants

Ms. Tracy Benn of Roberts & Co for the 1st named Defendant

.....
2007: November 02

2008: May 07
.....

JUDGMENT

[1] **Harris J:** This is an application filed on the 1st /August /07 by the 1st Defendant Elizabeth Sibel for an order that:

“(1) The entire statement of case along with the Application without Notice and Affidavit in Support filed herein on May 11, 2007 be struck out and/or any orders made pursuant thereto be dismissed;

(2) Alternatively the 1st and 2nd Claimants be struck out as Claimants in this matter.

(3) The costs of this application be provided for by the 1st and 2nd Claimants.”

[2] The substantive matter was commenced by way of a Claim Form. The Claimant's claim on the substantive action is for:

“(1) An injunction to restrain the Defendants by themselves, their servants or agents or otherwise from

(a) molesting the Claimants

(b) Causing damage to the property of the Claimants i.e. the perimeter fence in order to gain access to their property rather than using the allocated gate.

(c) Harassing the managing director either verbally or through telephone calls or via e-mail

(2) A declaration that the Claimants as owners of the mother Parcel 65 is entitled to payment for the maintenance and upkeep of the areas surrounding the villas.

(3) A declaration that the Claimants are entitled to payment for security and the use of the facilities owned by the Claimants.

(4) Damages for trespass and breach of agreement.”

HISTORY/BACKGROUND

[3] The 3rd named Defendant DRB Ltd is the registered proprietor of a property more particularly described as Parcel 65 Block 45 1595B of McKinnons Registration Section which comprises a Resort Development situate at Runaway Bay, Antigua.

[4] Included in the Resort Development are various villas inclusive of the one owned and occupied by the 1st named Defendant and her husband David Sibel. The villas are sited on smaller parcels of land subdivided from the parent parcel 65. The 1st Defendant owns and occupies Parcel 44. The entire resort area contains 6.5 acres.

[5] The Claimants allege that an existing agreement between the previous owner of the resort development providing for the villa owners to pay a maintenance fee for the upkeep, maintenance (generator electricity and water) and security is not being complied with by the Defendants. Further, it is alleged that the 1st Defendant has modified her villa thereby

encroaching on parcel 65¹ without permission from the Claimants. The allegations include that of threats, physical and verbal abuse.

- [6] The 1st Defendant, a 68 year old woman, asserts that the claim is “completely vexatious and without any merit whatsoever” (para. 1 of the Defence filed May 23/07).
- [7] She says that she has owned this villa for 17 years having purchased the freehold interest in it and at the time of purchase was ‘100’ from the high water mark. However, due to erosion she is now on the waters edge and well within ‘100’ public access to the beach.
- [8] The 1st Defendant avers that the Claimants have obstructed her lawful access to her property over parcel 65 and have interfered with her utility connections which run over the said parcel 65.
- [9] Several applications between the parties for injunctive relief have been made and relief obtained.
- [10] On June 18, 2007 the 1st Defendant amended her Defence and Counterclaim and re filed it.
- [11] At the time of the application to strike out, 1st August 07, the Claimant had already filed an application dated May 11th for injunctive relief. The two (2) applications were heard severally and relief granted accordingly. The Court made two (2) visits to the locus in quo in relation to the said applications.

GROUND FOR THE APPLICATION TO STRIKE OUT

- [12] The Defendant relies on as the ground for the application² that:

¹ The parcel registered in the name of DRB Ltd.

² ‘Notice of Application’ of Elizabeth Sibel filed August 01, 2007

- “(1) The 1st and 2nd Claimants’ are not the registered owners of the land located at Old Runaway and which is more particularly registered as Registration Section: McKinnons; Block No: 45 1595 B; Parcel No: 65.*
- (2) The 1st and 2nd Claimants have failed to accurately represent to the Court their legal position in relation to the lands they claim to own and/or have entitlements thereto and also in relation to the 3rd Claimant and in doing so willfully misled the Court into making certain assumptions, findings and orders;*
- (3) The 1st and 2nd Claimants have not produced any documentation and/or other evidence to verify their legal positions and/or relationship in relation to the 3rd Claimant and have thereby misled the Court by their representations and behaviour into believing that they are the registered owners of the land;*
- (4) That by the above failures and non-disclosures the Claim and Statement of Claim, Application and Affidavits in Support filed herein on May 11th 2007 ought to be struck out with costs to the Defendants.”*

- [13] In support of her application Mrs. Sibel the 1st Defendant filed an affidavit from a legal search clerk who exhibited a copy of the land register showing DRB Ltd as the sole registered proprietor of the property referred to by the Claimant as belonging to the 1st and 2nd Claimant.
- [14] Further the Affidavit from the legal search clerk was exhibited to her *affidavit in support* dated 1/8/07 along with several documents from the Company Registry revealing; the Directors of the Company DRB Ltd being persons other than the claimants 1 and 2 , in these proceedings, the shareholding as being held by a receiver for the Estate of a non party to these proceedings and that the last annual returns for the company was filed in the year 2002.
- [15] The 1st Claimant in a “Supplemental Affidavit” filed on October 8, 2007 exhibits his share certificate with the signature of the ‘receiver’ endorsed thereon. The Claimant asserts that he is the 90% share shareholder of DRB Ltd having purchased the shares¹ from the Receiver for the Estate of Robert M. De Shazo Jr. and from John De Shazo.

¹ These shareholders names are reflected in the Company Registry documents exhibited in support of the 1st Defendants application to strike out

- [16] The 1st Claimant Gilbert Gomes deposes further¹, that to the best of his knowledge the Company had not held a shareholders meeting for several years and that the duration of the appointment of the last board of directors had expired² leaving the company without any board of Directors.
- [17] Mr. Gomes goes on to depose to having convened a shareholders meeting on the 14th September 2007 where he was appointed a Director (Chairman) and Pauline Gomes, the 2nd Claimant, was appointed General Manager of DRB Co. Ltd.
- [18] The upshot of these circumstances is that at the time of commencing this action neither Gilbert Gomes nor Pauline Gomes were appointed Director or Officers of the DRB Ltd and neither of the said first two (2) Claimants were registered proprietors of the subject or adjoining lands in this matter nor have they disclosed any other proprietary interest in those lands. A company does not hold its property on trust for its members and so they cannot be described as the “beneficial owners” of its property.³
- [19] The 1st Claimant was appointed a Director of the Company and the 2nd Claimant appointed Manager/Secretary of the Company on the 14th day of September 2007 some four (4) months after the filing of the substantive action and after bringing and defending respectively, two interlocutory applications for injunctive relief, on behalf of the Claimants herein.
- [20] The evidence of the Claimants disclose on a balance of probability that they carried out all activities of manager/owner/agent. However having perused the Claim Form, Statement of Claim, Defense and Counterclaim, and the various applications and Affidavits thereto including that in support of and in reply to the application to strike out, I note that there is no detailed factual content with respect to who is really carrying on the resort business,

¹ Para. 7 of the Supplemental Affidavit of Gilbert Gomes filed October 8, 2007 in Claim ANUHCV 2007/0268

² The Companies Act of Antigua and Barbuda (18 of 1995) does not provide for the “expiration” of a directorship in the manner suggested by the 1st claimant. Section 72 of the said Act provides the specific circumstances under which a directorship ceases.

³ Pp 141 Mayson, French & Ryan on Company Law 16th edit. (Blackstone Press Ltd.)

who received profits, who was actually conducting the business, who appointed those persons, who was the head and brains of the venture(s) and who was in effective and constant control of the business. I am unable also, to determine whether, the business of the Resort is operated separate and apart from the company DRB Ltd who is registered proprietor of the property.

[21] The issues that arise to be determined are:

1. Whether, prior to the 1st Claimants appointment as Director/ Chairman he could in his own name as a shareholder or otherwise commence and continue this specific action against the defendant in this matter.
2. Whether the 2nd Claimant, Pauline Gomes, prior to her appointment to the position of Manager/Secretary, could in her own name or as de facto manager or otherwise commence and sustain this specific action against the Defendant in this matter.
3. Whether the mere act of appointing the 1st and 2nd Claimant as Director and Manager/Secretary of the Company respectively and thereafter taking further steps in this matter, acts to ratify the unauthorized commencement and maintenance of the claim by the 3rd Claimant.
4. Whether the 1st and 2nd Claimant acting as Manager in fact, by conducting all the management activities of the company, are deemed managers and consequent upon that, deemed officers of the Company or agents of the company or that the company be deemed agents of the shareholders, both, with the capacity to commence legal action in the name of the company.

THE LAW

[22] The Company and registered proprietor of the subject lands DRB Ltd is a company registered under the Companies Act 1995 of Antigua and Barbuda.

[23] Section 17 of the Companies Act 1995 ("the Act") provided that "A company has the capacity, and subject to this Act the rights, powers and privileges of an individual."

[24] Further, so far as is relevant to this matter, S.58 of the Act provides that "Subject to any unanimous shareholders agreement, the directors of a company shall (a) exercise the

powers of the company directly or indirectly through the employees and agents of the Company, and

(b) Direct the management of the business and affairs of the Company.”

[25] The Act goes on to provide the basis for the termination of Office of a Director¹.

THE SALOMAN PRINCIPLE –THE LAW

[26] On incorporation, a company becomes a separate legal entity distinct and separate from its shareholders and it is not the agent of those shareholders, not even if it is a one man company with one shareholder controlling all its activities².

[27] There are however, two (2) exceptions to the principle that a company is a distinct entity from, and is not an agent of, its shareholders. Other than fiscal legislation including income tax legislation the two exceptions are; (i) where on the facts of the case an agency relationship does exist between the shareholders and the corporate entity and, (ii) where the corporate structure is a mere facade, concealing the true facts³.

[28] The first exception – agency – is perhaps the only exception material to this matter before me. If an agency relationship between the shareholders and the company is in fact established then the exception is satisfied. In **Smith, Stone & Knight Ltd v Birmingham Corp.** Atkinson J. in determining the issue of whether the relationship of agency existed posed the question as to; whether the company is carrying on the business as the shareholders business or as its own.

[29] In the case at bar the question is inter alia whether DRB Ltd is carrying on the business as the shareholders (Mr. Gomes) business or as Drab’s Ltd business. The mere fact that Mr.

¹ See exhibit to the application.

² See pp 63 Company Law, Brenda Harrigan, Butterworths, Saloman v Saloman & Co Ltd [1897] AC 22 H.L.

³ Lifting the ‘corporate veil’

Gomes owns 90% of the shares of DRB Ltd does not make the business carried on by DRB Ltd his business¹.

[30] There are insufficient facts disclosed² in this matter to make the determination as to whether DRB Ltd was in fact an agent of the 1st Claimant or whether the 1st and/or 2nd claimant were agents of the 3rd claimant, DRB Ltd. The existence of the relationship of agency is relevant to the court's determination with respect to *ratification* ³

[31] The 1st Claimant still does not acquire a sufficient interest in the registered property⁴ to give him any locus standi to bring an action for trespass or in any event to bring any action requiring an interest in real property or the company's business disclosed in Claim #ANUHCV2007/0268⁵, in his own name. The 2nd Claimant is not even a shareholder of the 3rd claimant company and certainly cannot in her own name or in any other for that matter, bring this action.

[32] Even if DRB Ltd was the agent of the 1st Claimant, the 1st Claimant being the principal, DRB Ltd would initiate the action on behalf of the principal. In this case the principal, 1st Claimant, has no proprietary interest in the disputed lands and issues thereto. Therefore the action, to the extent it is hinged on a proprietary interest or for that matter hinged on any interest peculiar to the 1st claimant, will here also fail.

THE RULE IN FOSS V HARBOTTLE – THE LAW

[33] Two elements are disclosed in this rule the Classic Statement of which is formulated in the Judgment of Jenkins CJ in *Edwards v Halliwell*⁶:

“First the proper plaintiff in an action in respect of a wrong alleged to be done to a company or association of persons is prima facie to the company or association of persons itself. Secondly, where the alleged wrong is a transaction which might be made binding on the company an association and on all its members by a simple majority of the member, no individual member of the company is allowed to maintain an action in respect of that matter for

¹ Re FG (Films) Ltd [1953] 1 All ER 615

² In any event ascertaining these facts are best left for the trial

³ See para. 40 and 41 below for issues in relation to ratification

⁴ See para. 18 above

⁵ See para 2 above for relief claimed by the claimants

⁶ [1950] 2 All ER 1064

the simple reason that, if a mere majority of the members of the company or association is in favour of what has been done, then question.”

- [34] The learning on the application of the rule is extensive. The rule establishes the distinction between the personality of a company and that of its shareholders. Suffice it to say, that it does not create any exception that allows the 1st and 2nd Claimants herein, on the facts in this matter, to bring a claim against the Defendant herein in their own respective names or that of the 3rd claimant company, for deeds done against the said 3rd claimant company.

FINDINGS

- [35] The 2nd Claimant is neither a shareholder nor registered proprietor of the property over which the dispute has arisen. There is no evidence that she was appointed to the position of Manager of the Company by the registered Director(s) at the time this action was filed. Further, there is no detailed evidence of her role in DRB Ltd or the business conducted on the property registered in the name of DRB Ltd sufficient to satisfy the court that she was an agent of the company or the company was her agent. Further, to use this High Court trial procedure¹ to pursue a remedy for “threats”, “physical and “verbal abuse”² in the circumstances of this case is an abuse of the process and in any event does not satisfy Part 8.1 of the CPR 2000.
- [36] The 1st Claimant is a substantial shareholder in the 3rd Claimant, Company DRB Ltd. At the time of the filing of the claim he was not a registered proprietor of the property over which the dispute, the subject of this claim, has arisen. Further, like in the case of the 2nd Claimant, there is no evidence that at the time of filing of the action that he was appointed Director/Manager or any other Officer of the Company DRB Ltd. The Claimants in their claim form claim an injunction to restrain the defendants from *molesting* them. Then, in the statement of claim the claimants define molesting as “(a) causing damage to the property of the claimants...” and “(b) Harassing the managing director...” The first act of molestation is predicated upon the subject “property” being that of the claimants. This cannot be

¹ This applies to both Claimants.

² See the statement of claim.

- sustained in law¹ . The second act of molestation is predicated on the 1st claimant being the managing director at the material time. This too, cannot be sustained ², the 1st claimant holding no such position until after the filing of the action.
- [37] The dispute between the Defendants and DRB Ltd does not fall within the class of dispute that would permit shareholders to initiate legal action on behalf³ of the Company or in the name of the Company.
- [38] Further, even if the 1st Claimant was to establish that DRB Ltd was his agent in relation to the resort 'business', that fact forms no basis upon which he can commence legal proceedings for or in the name of DRB Ltd. against the Defendant.
- [39] I accept that DRB Ltd at a general meeting of its shareholders duly appointed the 1st Claimant as a Director and the 2nd Claimant as a Manager and Secretary of the Company all after the commencement of the action.
- [40] The Claimants submit that by virtue of these formal appointments, the commencement and continuation of the proceedings in the name of the company/3rd Claimant, is ratified⁴. The claimants presumably suggest an implied ratification in the absence of an express declaration in the form of, for instance, a copy of a resolution by the company to that effect. In the **Danish Mercantile**⁵ case, a case concerning an unauthorized act of an attorney, Jenkins LJ quoted Blackburn J in *Renolds v Howell* LR 8 QB 398: "*I may add that, in my opinion, if a plaintiff after action brought in his name by an attorney without authority hears of it, and does not repudiate it, he will be supposed to have ratified the attorney's act.*" This, I hold, supports the view that ratification can be implied from the conduct or omission of the 3rd claimant as in the case at bar .Several further steps have been taken in this

¹ See the rule in **Foss v Harbottle** in para 33 and 34 above.

² See para 19 above and the last sentence in para 35 herein.

³ See 'derivative actions' and the rule in **Foss v Harbottle** above.

⁴ Every ratification relates back and is deemed equivalent to an antecedent authority (per Jenkins L.J. *Danish Mercantile Co. Ltd. And others v Beaumont and another* [1951] 1 Ch 680 (686)

⁵ At pp 684 -685

matter by the 3rd claimant since the matter was commenced and since it appointed its officers.

- [41] In the case at bar, much turns on the question of ‘ratification’ in relation to the survival of the claim in the name of the 3rd claimant, the last remaining claimant. The state of the law in relation to ratification by a company of an unauthorized act of a third party(the 1st and 2nd claimants in this case) and an application to strike out the claim and/or claimants, is best captured by Jenkins LJ in the closing paragraph¹ of his judgment in the **Danish Mercantile** case and I adopt it with the necessary adaptations and so set it out here verbatim: *“I think that the true position is simply that a solicitor who starts proceedings in the name of a company without verifying whether he has proper authority so to do, or under an erroneous assumption as to the authority, does so at his own peril, and that, so long as the matter rests there, the action is not properly constituted. In that sense it is a nullity and can be stayed at any time, provided that the aggrieved defendant does not unduly delay his application; but it is open at anytime to the purported plaintiff to ratify the act of the solicitor who started the action to adopt the proceedings, to approve all that has been done in the past, and to instruct the solicitor to continue the action. When that has been done, then, in accordance with the ordinary doctrine of ratification, in my view, the defect in the proceedings as originally constituted is cured; and it is no longer open to the defendant to object on the ground that the proceedings thus ratified and adopted were, in the first instance brought without proper authority.”*

- [42] The jurisdiction to strike out is to be used sparingly. It is limited to plain and obvious cases where there is no point in having a trial². The rules governing striking out in Antigua and Barbuda are to be found at Part 26 of the CPR 2000. I find that the case for the 1st and 2nd claimants is a plain and obvious case for striking out and for the reasons provided earlier there is no point in having a trial with these two (2) parties. However, the case for striking out the 3rd claimant as a party is not a plain and obvious one and there is good reason for having a trial. Even if I were wrong in holding that the 3rd claimant, by taking a further step

¹ Pp 687-688

² Blackstone’s Civil Practice 2003 para. 33.5

in this matter after the appointment of its officers, has by that act impliedly ratified the unauthorized commencement of the proceedings, no useful purpose is served by striking out the 3rd claimant's case. This is so because it is presumably open to the 3rd claimant to bring the claim again within the limitation period and it is also still open to the 3rd claimant company and its shareholders to expressly ratify the unauthorized commencement of these proceedings before taking any further action in this matter and to **forthwith** disclose the 'resolution' or other documented process by which it achieved the ratification.

ORDER

[43] IT IS HEREBY ORDERED AS FOLLOWS:

- (i) From the reasons provided above, the 1st and 2nd claimants and claim thereto cannot be sustained and are hereby struck off forthwith with costs in any event, to the 1st Defendant of \$1,500.00 payable from each of the 1st and 2nd claimants respectively.
- (ii) That the application to strike out the 3rd claimant is dismissed with costs to the said 3rd claimant DRB Ltd in any event, of \$1,500.00 to be paid before the Claimant takes any further action whatsoever in this matter.

DAVID C. HARRIS
Judge
The High
Court of Justice
Antigua and Barbuda