ST. VINCENT AND THE GRENADINES

IN THE HIGH COURT OF JUSTICE

CIVIL SUIT NO. SVGHCV211/1997
CONSOLIDATED WITH SUIT NO 212/1997

BETWEEN:

ORMISTON KEN BOYEA
HUDSON WILLIAMS

Claimants

and

EASTERN CARIBBEAN FLOUR MILLS

Defendant

Appearances:

Mr. Joseph Archibald Q.C., Mr. Stanley K. John and Mr. Sydney A. Bennett for the claimants.
Sir Henry de B. Forde Q.C., Mr. B.L.V. Gale Q.C. and Mr. Douglas Williams for the defendant

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2003:January 20,21,31

JUDGMENT

In Chambers
ALLEYNE J.

[1] On 4TH October 2002 Justice Charmaine Pemberton made a case management order in these consolidated suits by which she directed, inter alia,

> "That the issue as to the effect of Article 138 of the Articles of Association of the Defendant Company be tried as a preliminary issue of law.
>
> - Do the provisions of Article 138 of the Articles of Association of the Defendant Company effectively bar the Defendant from

relying on the accounts submitted in accordance with the Article to justify the dismissal of the Claimants?

- If the answer to the above is yes, can this be displaced by an act of alleged fraud or misconduct by the claimants?"

[2] Article 138 of the said Articles of Association is in the following terms:

> "138. Every account of the Directors, when audited and approved by a general meeting, shall be conclusive, except as regards any error discovered therein within six months next after the approval thereof. Whenever any error is discovered within that period, the account shall forthwith be corrected and thenceforth shall be conclusive."

[3] These issues arise out of amendments to the claimants' respective Reply and Defence to Counterclaim made with permission of the court, which read (with a single variation reflecting the differing paragraph in the respective Counterclaims):

> "Further, in relation to paragraph 54 (47) of the Counterclaim, the Claimant says that the Defendant is estopped from alleging that the below mentioned transactions were improper, or that the Defendant is entitled to be re-imbursed by the plaintiff for any losses sustained by the Defendant as a result of the below mentioned expenditures, investments or transactions."

This paragraph is followed by a list, in each case, of transactions, the particulars of which are not really relevant to the issue to be decided.

[4] In his response to the submissions of Mr. Archibald, Q.C., Mr. Gale, Q.C. submitted that the Preliminary Issue as formulated by the Learned Judge is wholly defective and unanswerable by this court, that a determination thereof will be determinative of no material issue in dispute in these consolidated cases, and that the court should order that the matter for consideration should be tried at the trial of the cases in due course. Learned Queens Counsel relied on **Blackstone Civil Practice 2001** at page 636 paragraph 59.31 and **The Supreme Court Practice** 1999 Volume 1 at page 645 to the effect that it is important that the issue is defined with precision so as to avoid future difficulty or interpretation.

[5] No appeal was made against the learned judge's order, and it is not competent for this court to act as a court of appeal against that order. In any event I perceive no lack of clarity or precision in the order, and propose to consider the questions posed for determination as a preliminary issue.

[6] Learned counsel for the defendant Mr. Gale took further objection to the hearing of the issues on the ground that the proceedings are proceedings under Part 15 of the **Civil Procedure Rules 2000 (CPR)** for summary judgment, and that the claimants had not complied with the provisions of R.15.5 and had not provided an evidentiary basis on which the hearing could properly proceed. Counsel's submission is based on a comment made by the learned judge at paragraph 14 of her written judgment that the preliminary issue of law "can be argued as such (i.e. as a preliminary issue of law) at a summary hearing under part 15 of the **CIVIL PROCEDURE RULES 2000.**" It seems to me, however, that this comment is nothing more than a passing observation, but that the substance of the learned judge's order was that the matter be dealt with as a preliminary issue of law, pursuant to the judge's power, at a Case Management Conference, under R. 26.1(2)(e), to direct a separate trial of any issue. It may well be that in some cases coming under this procedure evidence may be necessary for a satisfactory determination of the question, in which case the Case Manager would probably order such evidence on affidavit, or an agreed statement of facts. Obviously in this case this was not considered necessary, and no such order was made. The principal issue is one of the interpretation and application of the article, which is not dependent on any facts that might be proved or not in the course of the trial. See Lord Roskill in **Allen v Gulf Oil Ltd.** [1981] A.C. 1001, at 1022 A:

> "The preliminary point procedure can in certain classes of case be invoked to achieve the desirable aim both of economy and simplicity. But cases in which such invocation are desirable are few. Sometimes a single issue of law can be isolated from the other issues in a particular case whether of fact or of law, and its decision may be finally determinative of the case as a whole. Sometimes facts can be agreed and the sole issue is one of law."

[7] The instant case does not fall precisely within the parameters addressed by His Lordship. However, the learned judge, in applying the powers of the court at case management, clearly determined that the overriding objective of the **Civil Procedure Rules** were likely to be advanced by directing a separate trial of that issue in accordance with R. 26.1(2)(e). It only remains for me to comply with that direction and to determine the issue placed before the court. This is not an application for summary judgment under R. 15 and the requirements of that rule do not apply to these proceedings.

[8] Learned Queens Counsel for the claimants relied on the definition of the term "conclusive evidence" in **Words and Phrases Legally Defined** third edition, and **Re Hadleigh Gold Mines Ltd**. [1900] 2 Ch. 419 at 421 – 423, per Cozens-Hardy J. and **Kerr v John Mottram Ltd.** [1940] Ch. 657 at 660:

> "Now, art. 114 which I have read represents the bargain between the shareholders as to what is to be, between them, the value and effects of the minutes of the company as recorded in its minute book, and signed by the chairman, and their bargain is that it is to "be conclusive evidence without any further proof of the facts therein stated." I have no doubt that the words "conclusive evidence" mean what they say; that they are to be a bar to any evidence being tendered to show that the statements in the minutes are not correct."

[9] I am in entire and respectful agreement with this proposition. However, this dictum of Simonds J. addresses another important issue, indeed the principal issue, raised by the claimants and directed to be decided as a preliminary issue, that is the question "Do the provisions of Article 138 of the Articles of Association of the Defendant Company effectively bar the Defendant from relying on the accounts submitted in accordance with the Article to justify the dismissal of the Claimants".

[10] Section 14(1) of the **Companies Act CAP. 6 Title XXIII** of the 1966 Revised Laws of St. Vincent provides that the articles of association of a company

> "shall bind the company and the members thereof to the same extent as if each member had subscribed his name and affixed his seal thereto, and

> there were in such articles contained a covenant on the part of himself, his heirs, executors and administrators, to conform to all regulations contained in such articles".

[11] This provision is continued in effect with respect to the defendant company by section 360 of the **Companies Act** No. 8 of 1994. Learned Queens Counsel for the defendants Mr. Gale emphasised the fact that these consolidated cases are actions for wrongful dismissal by former employees and officers of the defendant company. He submitted that the clear intention of the articles of the company is that the company and its shareholders should be bound by the articles as a matter of contract. Counsel cited in support of the proposition that the articles constitute a binding contract between the company and its members on the one hand and between its members inter se on the other hand the cases of **Beattie v E & F Beattie Ltd** [1938] Ch. 721, **Hickman v Kent & others** [1915] 1 Ch. 881, **Browne v La Trinidad** [1887] Ch. 1, and **Eley v Positive Life Assurance Company** [1876] Ex. D. 88 (C.A.).

[12] Relying on the same authorities learned Queens Counsel further submitted that an outsider, that is a person other than a shareholder of the company, or even a shareholder acting in a capacity other than that of shareholder, for example as an employee or a director, cannot rely on the articles as conferring on him any right or obligation given the contractual nature and effect of the articles.

[13] In **Beattie** Sir Wilfred Greene M.R. at page 721 referred to what he called Astbury J.'s careful review of all the decisions in **Hickman**, and his conclusion that those decisions amounted to this:

> "An outsider to whom rights purport to be given by the articles in his capacity as such outsider, whether he is or subsequently becomes a member, cannot sue on those articles treating them as contracts between himself and the company to enforce those rights. Those rights are not part of the general regulations of the company applicable alike to all shareholders and can only exist by virtue of some contract between such person and the company." Then, again, he said: "no right merely purporting to be given by an article to a person, whether a member or not,

> in a capacity other than that of a member, as, for instance, as a solicitor, promoter, director, can be enforced against the company."

The learned Master of the Rolls continued:

> "With those two statements (of Ashbury J.) I respectfully agree. They are statements with regard to the true construction and operation of s. 20, and they have the result in the present case of preventing that section from giving contractual force to the article as between the company and its directors as such."

Section 20 of the Act referred to by His Lordship is *in pari materia* with section 14(1) of the Companies Act reproduced at paragraph 10 *supra.*

[14] Learned Queens Counsel for the defendant also cited **Farrar on Company Law** 4th edition at page 120:

> "The articles bind members qua members only. It has been held that articles create a contract binding each member of the company but that member is only bound qua member."

And further at page 121:

> "The articles do not per se create an enforceable contract between a company and an outsider."

[15] In **Kerr v John Mottram Ltd** *supra* Cozens-Hardy J. makes the point at page 660 that the bargain is "between the shareholders as to what is to be, *as between them*, the value and effect of the minutes". The point is further reinforced in the head note of that case:

> "Held, that the words "conclusive evidence" meant evidence which was not to be displaced and was conclusive *as between the parties bound by the minutes."*

[16] **Palmer's Company Law** 12th edition makes a number of references that support the proposition that the provisions of the Articles of Association of a company are binding on the company and the shareholders *qua* shareholders. I quote some of the relevant statements from the text:

Paragraph 2.1108; "The language of article 11 was that of a mutual obligation between the offering shareholder and the directors."

Paragraph 2.1110; "Articles when registered bind the company and its members to the same extent as if they had been signed and sealed by each member and contained covenants on the part of each member to observe all the provisions of the articles."

Paragraph 2.1111; "The articles of association by section 16 are to bind all the company and all the shareholders as much as if they had all put their seals to them."

Paragraph 2.1112; "The articles of association constitute a contract not merely between the shareholders and the company, but between each individual shareholder and every other.

"If this statement is taken literally it can be contended that it means that one shareholder can enforce the articles, or any covenant in them, against another shareholder, at any rate in the capacity of shareholder. It is submitted that this contention is not entirely correct. Lord Herschell said in *Welton v Saffrey,* and this has never been dissented from:

> "It is quite true that the articles constitute a contract between each member and the company, and that there is no contract in terms between the individual members of the company; but the articles do not any the less, in my opinion, regulate their rights inter se."

At paragraph 2.1113, quoting Scott J. in **Cumbrian Newspapers Group Ltd. v Cumberland & Westmoreland Herald Newspaper and Printing Co. Ltd.** [1987] Ch. 1 at 36 – 37;

> "First there are rights and benefits which are annexed to particular shares ... A second category of rights or benefits which may be contained in articles (although it may be that neither "rights" nor "benefits" is an apt description), should cover rights or benefits conferred on individuals not in the capacity of members or shareholders of the company but, for ulterior reasons, connected with the administration of the company's affairs or the conduct of its business ...
>
> That leaves the third category. This category would cover rights or benefits that, although not attached to any particular shares, were nevertheless conferred on a beneficiary in the capacity of member or shareholder of the company."

> At paragraph 2.1114; "The company is bound to its members in the same way as the members are bound to the company, and just as the liabilities imposed on the members are limited to the liabilities incurred by him in this capacity, so are the rights which he has against the company limited to rights qua member. Consequently, a right purported to be conferred upon him by the articles as a director or as an outsider cannot normally be enforced by him by virtue of the articles.
>
> The wording of section 14(1), "the articles shall bind the company", makes it clear that the company is to be deemed to have covenanted with the members as such.
>
> Paragraph 2.1115; "Where rights are by the articles given to members not as such, but in some other capacity (e.g. as directors, policy holders or otherwise), a member claiming to enforce them cannot, it seems, sue on the articles, treating them as a contract by the company with him; he must make out a contract outside the articles."

[17] It is my view that the provisions of article 138 of the Articles of Association of the company, unquestionably binding on the company and the shareholders as between them in their capacities as company and shareholders, is not binding on the company in its relationship with others, and is not binding on the company in its relations with shareholders in any capacity other than that of shareholder, for example as employee or director. I agree with counsel for the defendant that the articles in law only create a contract between the shareholders, and between the shareholders as such and the company, and that outsiders, which in the instant case the claimants clearly are, even if one of them may also be a shareholder, cannot rely on the articles as conferring on them any right, privilege or protection.

[18] Having so found, the answer to the first part of the question for decision is no, the provisions of article 138 of the articles of association of the defendant company do not effectively bar the defendant from relying on the accounts submitted in accordance with the article to justify the dismissal of the claimants.

[19] Having so found it is unnecessary for me to address the second part of the question.

[20] The learned judge in the case management order further directed that further directions may be given at the hearing. It seems clear to me that further case management orders are necessary in this matter. I did not, however, have the benefit of the views of counsel on what further orders need to be made or on an appropriate timetable for preparation of this case for a full hearing. In light of that and in consideration of the complexity of this case and the volume of documentary material that may be in issue, the possibility that expert testimony may be proffered by either side, and other considerations, I do not consider it wise to venture to make a further case management order without first hearing the parties. I therefore direct that the parties seek to settle a draft case management order for consideration by a Case Manager at the sitting of the Master in St. Vincent for the purpose of case management in the month of March 2003.

[21] The costs of these preliminary proceedings to be costs in the cause.

[22] I thank all counsel for the tremendous assistance which they have given me in this matter, and for their careful and comprehensive preparations and presentations.

Brian G.K. Alleyne
High Court Judge