IN THE SUPREME COURT OF BELIZE, A.D. 2014

CLAIM NO. 513 of 2014

ROBERT'S GROVE LTD. CLAIMANT

AND

JEAN-MARC TASSE DEFENDANT

BEFORE THE HONOURABLE MADAM JUSTICE SONYA YOUNG

Hearings
2014
11th November
18th November

Ms. Iliana Swift for the Claimant/Respondent.
Mr. Hubert Elrington, SC with Mr. Arthur Saldivar for the Defendant/Applicant.

Keywords: Company Law – Striking Out – Authority to litigate in Company's name – Delegation of Directors' Powers – Exclusive Authority not implied by appointment of Managing Director – No Need for General Meeting Ratification of the Board's Decision to Litigate.

RULING

1. This is an application to strike out the Claimant's claim on the following grounds:

   1. *That only the Managing Director could have authorized the institution of legal proceedings for or on behalf of Robert's Grove Limited pursuant (sic) the Articles of Association and the Memorandum of Association of Robert's Grove Limited.*

   2. *The duly elected Managing Director of Robert's Grove Limited is Jean-Marc Tasse who did not authorize the issue of the proceedings 513 of 2014. Article 79 of the Articles of Association for Robert's Grove Limited expressly provides that*

the managing director is vested with the exclusive authority to act on behalf of the company and the managing director can only be removed by a resolution from the shareholders at General Meeting. The said claim was issued by MICHAEL KRAMER who has no official position or directorship in the Claimant. He does not have locus standi to bring the claim and therefore it should be struck out.

3. Pursuant to the Articles of Association and the Memorandum of Association that the Claimant/Respondent has no real prospect of successfully defending the claim.

2. The basic facts in this matter are that the Applicant/Defendant is a director and the Managing Director of the Claimant Company. The Claimant has brought the current action against the Defendant inter alia for an account of all monies paid to and goods received by the Defendant on the Claimant's behalf for a period of almost three years and for the sum of some $2,842,228 or whatsoever sum was found to be owing and the delivery up of any property found to belong to the Claimant and being held by the Defendant. Following an unsuccessful application for an injunction the Defendant has now applied to have the claim struck out.

3. **Striking Out Proceedings:**

These proceedings are to be used sparingly and is confined to plain and obvious cases. They deprive a party of his right to trial and the possibility of strengthening his case through the various case management procedures. Equally though, a party ought not to endure the rigors of a trial if a claim or defence is bound to fail. This Defendant has brought his application pursuant to Rule 26.3(1)(c) which empowers the court to strike out a statement of case or part thereof if it discloses no reasonable ground for bringing or defending a claim.

4. It seems that during the course of the oral submissions by the Defendant, the application perhaps became for a stay of proceedings. Whether this was in the alternative or otherwise is unclear as it was not an application captured by the notice filed on the 28th October, 2014, which was under consideration by the court. There was no application for an amendment either.

5. Counsel for the Claimant drew the court's attention to ***Belize Telemedia Limited and Dean C Boyce v Magistrate Ed Usher and the Attorney General of Belize Supreme Court Decision No. 695 of 2008***. There the Hon. Chief Justice Abudlai Conteh, quoting from ***the Green Book, The Civil Practice 2008, CPR 3.4 [4] at P 76***:

> *That a claim ought only to be struck out under Rule 26.3(1)(c)*
>
> *(i) When the content of a statement of case is defective in that even if every factual allegation contained in it were proved, the party whose statement of case it is cannot succeed; or*
>
> *(ii) Where the statement of case no matter how complete and apparently correct it may be, will fail as a matter of law.*

6. **Consideration:**

The main ground of the application was that the Managing Director, once appointed, is <u>vested</u> exclusively with all the powers of the board. No authorities were presented by the applicant in support. Counsel for the Respondent merely stated that the Board of Directors were the ones vested with the power but offered nothing by way of authority. As far as this court is concerned the powers of the Managing Director is not a matter which is dealt with by the Companies Act Cap 250 or the Articles of Association.

7. Article 79 under which the Managing Director was appointed states:

> *The directors may from time to time appoint one or more of their body to the office of managing director or manager for such term, and at such remuneration (whether by way of salary or commission, or participation in profits, or partly in one way and partly in another) as they think fit, and a director so appointed shall not, while holding that office, be subject to retirement, or taken into account in determining retirement of directors; but his appointment shall be subject to determination ipso facto if he ceased from any cause to be a director, or if the company in general meeting resolve that his tenure of the office of managing director or manager be determined.*

8. The section is completely silent as to powers and delegation thereof. No contract with the Company was alluded to nor exhibited by the applicant. Therefore, if one exists, this court did not have the benefit of its content. To my mind there has been no proven expressed delegation of powers. Therefore the applicant's quantum leap from the absolute silence of the articles to exclusive authority is simply confounding.

9. Nonetheless, the question remains what powers, if any, may have been impliedly delegated by the appointment. There is surprisingly very little case law on this issue.

10. One view is that the appointment does not in itself carry with it any implied powers at all – ***Mitchell & Hobbs (UK) Ltd. v Mill [1996] 2 BCLC 102***. See also ***Palmers Company Law 24th Edition at 61.07***:

> *"... the day to day management and decisions are normally left to one or more managing directors. A managing director as such has no specific powers or duties recognized by law: what powers and duties he is to have must be derived from the company itself. It is common to find provisions in the articles authorising the appointment by the directors of one or more of their body as*

managing directors (see Arts 72 and 74), and in such cases the articles must be looked at to see the terms upon which such appointment may be made by the directors; subject thereto, the actual agreement made between the company and the Managing Director has to be considered ...

Subject to the Articles, the powers and duties of a managing director are defined by his contract with the company... The scope of his appointment depends upon the terms of his contract with the Company."

11. On the other hand, the appointment itself is said to constitute an implied power to do anything which falls "*within the usual scope of that office*." – ***Hely Hutchinson v Brayhead Ltd. (1968) 1 QB 549***. See also **Gore-Browne on Companies at paragraph 145[9**]:

> "A company whose business has many details to be attended to requires a manager with considerable powers. He may either be one of the directors appointed as managing director or be actually appointed as the manager, and such powers may be delegated to him by the board as the articles, allow, or, if they are silent, such as in a similar business would usually be entrusted to a managing director or manager."

12. The recent case of ***Smith v Butler (2012) EWCA Cir 314*** seems to prefer the latter view. There, Arden LJ when considering a Managing Director's silent service contract with a private company, accepted "that in principle, the implied powers of a managing director are those that would ordinarily be exercisable by a managing director in his position." This, of course, is subject to the articles and any expressed agreement between the parties. She stressed here the need for clarity and precision in the drafting of these articles and agreements. During her discussion of ***Mitchell Hobbs (ibid) and Fusion Interactive Communications Solutions Ltd. v Venture Investment Placement Ltd. (2005) EWHC 736 (Ch)*** Arden LJ commented

that the power to bring proceedings may also be implied providing the board approves that course of action or was likely to ratify the commencement of the proceedings. One cannot however overlook Rimer J's pointed refusal, in his short concurring judgment, to express a general view on this particular power being implied.

13. It seems to me therefore that even if the delegation of the power to litigate in the Company's name could possibly be implied, that power certainly does not reside exclusively with the managing director as the applicant postulates. I therefore reject that submission wholesale.

14. This court is of the view that the powers available to the board through the Articles are to the directors acting collectively: Article 77: *"The Management of the business of the Company shall be vested in the Directors who in addition to the powers and authorities by these presents or otherwise expressly conferred upon them, may exercise all such powers and do all such acts and things as may be exercised or done by the Company and are not hereby or by statute expressly directed or required to be done by the company in General Meeting but subject, nevertheless, to the provisions of the Ordinance and of these presents and to any regulations from time to time made by the Company in General Meeting; provided that no regulation so made shall invalidate any prior act of the directors which would have been valid if such regulations had not been made."* Article 87: "*The directors may meet together for the dispatch of business, adjourn and otherwise regulate their meetings, as they think fit."* And Article 88*: "The quorum necessary for the transaction of the business of the directors may be fixed by the directors and unless and until so fixed shall be two directors."*

15. To my mind even if the Managing Director, using his implied power, could bring an action, in an ordinary case it is the Board of Directors not the

Shareholders who would still be able to ratify his actions. The appointment of a managing director does not supplant the role of the board. The board remains duty bound to supervise those who are carrying out its delegated functions. The responsibility and liability for fulfilling those duties remains with the board. Delegation and abdication are not the same thing.

16. The applicant further contends that as soon as the issue of lack of authority to bring an action in the Company's name is raised, the court is obligated to stay the proceedings so that the shareholders may in a general meeting give definite word as to whether they agree to the action being brought - ratify or object. He presented in support ***Breckland Group Holding v London Suffolk Properties Ltd., and others [1989] BCLC 100***, ***Danish Mercantile Co. Ltd., and others v Beaumont and others [1951] Ch 680 and Alexander Ward & Co. Ltd., v Samyang Navigation Co. Ltd. [1975] All ER 424***.

17. Having considered each case this court finds that none of them assist this contention. ***Breckland Group*** clearly supports the view that where the board has been delegated the power to sue in the Company's name, (as in the instant case) the Company in general meeting cannot later restrain it from doing so in any particular case. In this case it was conceded that the action at the date of the issue of the writ was unauthorized. The ability to ratify this unauthorized act, Harman J said, was within the remit of the board pursuant to the agreement between the company and its directors contained in the Articles of Association. So too in ***Danish Mercantile,*** it was clearly stated that the action had been started with neither the approval of the Company in general meeting nor the board. There being a deadlock between the

directors. Subsequent adoption and ratification by the liquidator was held to be a sufficient cure for the original defect.

18. Lord Hailsham in ***Alexander Ward*** rejected the view that where proceedings had been brought without authority they could not later be ratified by the Company acting through a liquidator. In this case the Company had no directors and had held no relevant general meetings. The action was instituted on the instruction of two individuals acting without the authority of the Company. The Company eventually went into liquidation and the liquidator adopted and ratified the action. It was contended and the court held, that ***Danish Mercantile*** could be relied upon and no attempts at distinguishing one case from the other would be countenanced. As Lord Kilbrandon stated at page 432: "*... the ratification by the liquidator, in my opinion would set the matter right ...*"

19. The last two cases are distinguishable since there was no true functioning board of directors. In none of the above matters was the issue merely of the possibility of the matter being brought without authority raised. In each of them it was clear that the actions had been brought without the requisite authority. In fact, the very authorities brought by counsel for the applicant cast doubts on his proposition: "*Certainly **Danish Mercantile**, in so far as it has given rise to the practice whereby when there is a dispute as to authority to litigate, the court will adjourn the proceedings in order to convene a general meeting to decide the matter, seems to be questionable where the company's articles contain a management article as outlined above.*" ***Farrar's Company Law 3rd Edition page 368***. The management article referred to was identical to Article 77, the one presently before the court (see

paragraph 14). ***Farrars*** goes on to call this "*a usurping by the general meeting of the management powers vested in the board."*

20. Where the company delegates its vast powers of management to the board (as provided by the articles in the present case) any residual powers of management which the general meeting may have is limited to where the board is deadlocked, unable to act, or for all practical purposes has ceased to exist. I add to that list – where the directors themselves are the *wrongdoers. "As Warrington J noted in* ***Barron v Potter [1914] 1 Ch 895 at 902 "....*** *I am not concerned to say that in ordinary cases where there is a board ready and willing to act it would be competent for the company to override the power conveyed on the directors by the articles except by way of special resolution for the purpose of altering the articles." Farrars (ibid) pg 367*.

21. This is an ordinary case where there is a board properly constituted which is ready and willing to act. I am not convinced on what is before the court that there is no truly functioning Board of Directors. Since the exclusive right to bring the action does not rest with the applicant as the managing director or with the shareholders, but rather with the Board of Directors, there seems to be no reasonable or legal ground for seeking or awaiting the approval (or otherwise) of the general meeting. The Claimant/Respondent has produced evidence of a resolution by a quorum of the board, in keeping with the provision of the Articles of Association. The Applicant seemed to have rightly abandoned the issue of Michael Kramer not being a director of the Claimant as he never addressed that issue in his submission. There is therefore no dispute as to the Board's authority to litigate in the Company's name.

22. The application to strike out is accordingly dismissed. I find no reason to stay or adjourn these proceedings. The matter will proceed to case management forthwith.

Cost to the Respondent/Claimant to be taxed if not agreed.

SONYA YOUNG
JUDGE OF THE SUPREME COURT