IN THE COURT OF APPEAL OF BELIZE AD 2016

CIVIL APPEAL NO 17 OF 2016

ST. MATTHEWS UNIVERSITY SCHOOL OF MEDICINE LIMITED — Appellant

v

JEFFREY SERSLAND, M.D.
SEFERINO PAZ JR. — Respondents

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BEFORE

The Hon Mr Justice Samuel Awich	Justice of Appeal
The Hon Mr Justice Murrio Ducille	Justice of Appeal
The Hon. Mr. Justice Franz Parke	Justice of Appeal

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I Swift, for the appellant.
D Bradley, for the respondents.

23 October 2017, 27 November 2018.

AWICH JA

[1] On 28 January 2015, the learned trial judge Abel J, sitting in the Supreme Court, the court below, heard the claim by originating summons, of the claimants, now respondents, Jeffrey Sersland M.D. and Seferino Paz, Jr. On 11 April 2016, the judge made the following orders:

ORDER

"The 11th day of April 2016

UPON the matter coming up for trial.

UPON READING the Statement of Case filed by the Claimants on the 26th day of September, 2013, the Defence filed by the Defendant on the 22nd day of April, 2014 and the Reply filed by the Claimants on the 6th day of May, 2014

AND UPON READING the Affidavits filed on both sides in relation to the substantive claim

AND UPON HEARING Mr. Michael Young SC, appearing for and behalf of the Claimants and Mr. Eamon Courtenay S.C., appearing for and on behalf of the Defendant

AND THE CLAIMANTS having in pursuance of the Order made by the Court on the 1st of February 2016 and perfected on the 9th of February 2016 provided security for the costs of the Inspector

THIS COURT DOTH DECLARE AND ORDER AS FOLLOWS:

(1) That in pursuance of Section 110 of the Companies Act Chapter 250 the affairs of the Defendant Company St. Matthews University School of Medicine Limited be investigated by an Inspector to be appointed by the Court.

(2) That the Court appoints Attorney-at-Law Denys Barrow S.C. to be the Inspector.

(3) That the Terms of Reference for the Inspection shall be as set out in the Schedule hereto

(4) That the Inspector, after conducting the inquiry, prepare and submit a written report to the Court [to be addressed to the Registrar of the Supreme Court] and send a copy thereof to the Attorney for the respective parties.

(5) That the Claimants shall bear the fees and costs of the Inspector.

BY ORDER

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REGISTRAR"

[2] On 5 May 2016 the defendant/appellant, St Matthews University School of Medicine Limited, appealed against the court orders on the following grounds:

> **"3. Ground of Appeal**
>
> (i) The learned trial Judge erred in concluding that the Claimants satisfied the conditions set out in section 110 of the companies Act and wrongly assumed jurisdiction in this Claim.
>
> (ii) The decision of the learned trial Judge was against the weight of the evidence**.**
>
> (iii) In light of the fact that the Defendant is defunct, the decision of the learned trial Judge was a wrong exercise of his discretion**.**
>
> **4. Reliefs Sought**
>
> The Appellant seeks the following Orders and Declarations:
>
> (i) An order setting aside the Order of the Supreme Court Dated 21st April 2016 in Claim No. 500 of 2013;
>
> (ii) That the Respondents did not satisfy the conditions set out in section 110 of the Companies Act; and
>
> (iii) That the Respondents pay the Appellant's costs in the Appeal and the Court below."

[3] In short, the claim of the claimants/respondents on which the judge made the orders was for a court order appointing an inspector or inspectors to investigate the affairs of the defendant/appellant under s 110 of the Companies Act, Cap 250 Laws of Belize. The further claim for the order that the company produce all books and documents to the inspectors simply asked for what the law authorizes once court has appointed an inspector. The defendant/appellant opposed, the claim, in short, mainly on the ground that, "all its corporate decisions were taken in compliance with the applicable provisions of its memorandum of association and articles of association and the relevant sections of the Companies Act," there was no good reason for the court to appoint an inspector under s.110 of the Act.

The Facts.

[4] We outline in the paragraphs that follow, the major items of evidence accepted by the trial judge, and on which he made the orders on 11 April 2016. Most of the evidence was common fact in the case for the claimants/respondents and the case for the defendant/appellant.

[5] On 17 January 1997, the second respondent, Seferino Paz Jr. and one Artemio Juan Cardenez subscribed to a memorandum of association of a company limited by shares that they proposed to incorporate in Belize. They named the company St. Matthews University School of Medicine Limited. On 21 January 1997, the company was incorporated and a certificate of incorporation signed by the Registrar of Companies issued under s.16 of the Companies Act. The company is the appellant. Its office was situate at San Pedro, Ambergris Caye, Belize. It opened and ran a school of medicine in Belize.

[6] Subsequent to the incorporation, more shares in the company were allotted and taken by other people including Jeffrey Sersland M.D., the first respondent, Michael D. Harris M.D. who became the chairman of the board of directors.

[7] By 31 December 2000, the shares in the appellant were held by the following shareholders:

Seferino Paz, Jr.	7,145
Oakland Securities Limited	4,022
Jeffrey Sersland M.D.	10,666
Camden Securities Limited	500
Antitrust International Inc.	21,666
Galen P. Swartzendruizer M.D.	5,000
Sushil K. Asthana M.D.	1,500
	50,499

So, as at 31 December 2000, the first and second respondents held a total of 17,811 shares, which was about 35.3% of the total shares issued.

[8] As at that date (31 December 2000), the members of the board of directors of the appellant included the respondents; they were:

Michael D. Harris
Seferino Paz Jr.
Jeffrey S. Sersland M.D
Galen P. Swartzendruber M.D.

[9] The first respondent, by his office of director and as a matter of fact, participated in the management of the appellant up to 26 May 2001. His wife, Renae Sersland M.D., also participated in the management as a matter of fact. That, however, changed.

[10] On or about 1 June 2001, Michael Harris had the locks on the doors of the offices of the first respondent and of Renae Sersland changed. On the same date he changed the signatories to the bank accounts of the appellant at the Belize Bank. On 5 June 2001 the appellant, at the instance of Michael Harris, obtained a without notice court injunction order restraining Jeffrey Sersland M.D. and Renae Sersland, "from having access to SMU School of Medicine premises." The order was set aside 14 days after on 20 June 2001. On 13 June 2001, a list of directors excluding the first respondent was filed at the Registry of Companies.

[11] On 27 November 2001, the majority shareholders in the defendant/appellant in an "extraordinary meeting" held at Shalimar, Florida, USA, passed a resolution substituting new articles of association of the appellant for the original one. The respondent did not receive notice of the "extraordinary shareholders meeting," and did not attend. On the same date at the same place the majority shareholders also, passed a resolution substituting a new memorandum of association of the appellant for the original memorandum of association. Furthermore, the shareholders passed a resolution increasing the authorized capital from $50,000.00 to $1,000,000.00.

[12] Pursuant to the resolutions altering the memorandum of association and the authorized capital, the appellant applied to the Supreme Court for an order confirming the resolutions. On 25 January 2002, the court made an order confirming the resolutions. The respondents did not know of the application to the Supreme Court.

[13] On 8 February 2002, in a shareholders meeting a resolution was passed authorizing that, the increased shares be offered to members, except, "those whose conduct [had] been contrary to the best interest of the company." The respondents did not receive notice of the shareholders meeting.

[14] On 19 March 2002, the appellant, St. Matthews University School of Medicine Limited (the company incorporated in Belize) allotted 949,050 shares to a company incorporated in Cayman, named, St. Matthew University School of Medicine (Cayman) Limited.

[15] The defendant/appellant then disposed of some of its assets, transferred others to Cayman Island, closed its medical school in Belize, closed its operation in Belize and closed its office in Belize. Its last annual return was filed at the Registry of Companies in 2004.

[16] In 2005, the respondents and Camden Securities Limited brought a claim No. 486 of 2005, in the Supreme Court of Belize against the appellant and the majority shareholders. The claimants claimed several declaratory orders, and orders setting aside the resolutions: altering the memorandum of association, the articles of association and the authorized capital. They further claimed orders for account to be rendered, return of assets, damages, costs and several other orders. The claim was dismissed on the ground that, it was in substance, a derivative claim made without the authorization of shareholders in a general meeting. The court held that, the claimants were required by law to obtain authorization of the shareholders in a meeting before filing the claim, and that they had not obtained the authorization when they brought the claim. On 1 October 2013, the respondents brought this claim No. 500 of 2013, in which the trial judge made the orders now appealed against.

[17] Nothing was pointed out to this Court to cause it to reject the above findings of fact. Most were actually common facts between the parties. The ground of appeal that, "the decision of the trial judge was against the weight of the evidence, is dismissed.

Determination

[18] In our view, despite the many well founded items of complaint by the claimants/respondents against the actions of the defendant/appellant, this appeal depends entirely on the question raised *in limine* in the trial, namely, whether the respondents together held not less than one-tenth (10 percent) of the shares in the appellant, in order to qualify them to bring an application under ***s.110 of the Companies Act***, for the appointment of an inspector to investigate the affairs of the appellant company.

[19] **Section 110** states:

> **110.- (1) The court may appoint one or more competent inspectors to investigate the affairs of any company and to report thereon in such manner as the court directs,**
>
> > **(a) in the case of a banking company having a share capital, on the application of members holding not less than one-third of the shares issued;**
> >
> > **(b) in the case of any other company having a share capital, on the application of members holding not less than one-tenth of the shares issued;**
> >
> > **(c) in the case of a company not having a share capital, on the application of not less than one-fifth in number of the persons on the company's register of members.**
>
> **(2) The application shall be supported by such evidence as the court may require for the purpose of showing that the**

applicants have good reason for, and are not actuated by malicious motives in requiring the investigation, and the court may, before appointing an inspector, require the applicants to give security for payment of the costs of the inquiry.

(3) It shall be the duty of all officers and agents of the company to produce to the inspectors all books and documents in their custody or power.

(4) An inspector may examine on oath the officers and agents of the company in relation to its business, and may administer an oath accordingly.

(5) If any officer or agent refuses to produce any book or document which under this section it is his duty to produce, or to answer any question relating to the affairs of the company, he shall be liable to a fine not exceeding twenty-five dollars in respect of each offence.

(6) On the conclusion of the investigation, the inspectors shall report their opinions to the court, and a copy of the report shall be forwarded by the Registrar of the court to the registered office of the company, and a further copy shall, at the request of the applicants for the investigation, be delivered to them.

(7) The report shall be written or printed, as the court may direct.

(8) All expenses of and incidental to the investigation shall be defrayed by the applicants, unless the court directs them to be paid by the company, which the court is hereby authorized to do.

[20] The question was one of *locus standi*, standing, of the claimants/respondents. It is not one of jurisdiction of the trial court, as counsel on both sides assumed, and tried to persuade us to accept. The appellant's ground of appeal No. 1 is that, the respondents did not hold "not less than one- tenth (10%) of the shares issued" in other words, held less than one-tenth shares in the appellant on 1 October 2013, when they made their claim to the Supreme Court for the appointment of an inspector.

[21] The submission by learned counsel Ms. I. Swift, for the appellant, was that, on 27 November 2001, the authorized capital of the appellant was increased from $50,000.00 to $1,000,000.00 and on 19 March 2002, some 949,050 shares in the appellant were issued; the result was that, the shares held by the respondents were diluted on that date up to 1 October 2013, when the respondents filed their claim; so, the respondents' shares were less than one-tenth (10 percent) of the shares issued, when they brought their claim under s. 110 of the Companies Act. The total shares of the respondents became just about 1.8 percent, argued Ms. Swift.

[22] Learned counsel Mr. D. Bradley for the respondents, submitted that, the original shareholding of the respondents, which was 17,811 shares, about 35.3 percent, was the shareholding to be taken for the purpose of making the claim under s.110 of the Companies Act, because the resolutions to, substitute the memorandum of association, substitute the articles of association and increase the authorised capital, and the allotment of 949,050 of the new shares to St. Matthews University School of Medicine(Cayman) Limited, were all unlawful, and those matters were part of the affairs about which the investigator would be appointed to investigate.

[23] The response by Ms. Swift was that, the investigator could not determine whether the allotment of the 949,050 shares was a nullity; and that, the court could not grant permission to a claimant on the basis that, the claimant may or may not be holding not less than one-tenth of the shares issued. A further response was that, the allotment and dilution of the shares of the respondents had already been challenged unsuccessfully in court.

[24] We right away reject the last response by Ms. Swift. Her speaking notes referred to pages 189,192 to 195 of the record of proceedings. Those pages are part of the judgment of Sir Muria, delivered on 23 July 2008 in Supreme Court Claim No. 486 of 2005. The claim did not include a challenge to the allotment of the 494,050 shares at all. The claim was dismissed for the reason that the claim was in substance a derivative claim brought without authorization of members in a general meeting.

[25] In the written submission, Claims No. 49 of 2011 was also mentioned. That claim, like the present, was for a court order for the appointment of an inspector under s. 110 of the Companies Act. It was not a claim challenging the increase of the authorised capital or the allotment of the increased shares. The claim was withdrawn, no reason was given.

[26] We accept, however, Ms. Swift's argument that, the trial judge could not under s.110 (1) (b) of the Companies Act , "grant permission" to the shareholder claimants, "on the basis that they may or may not hold 10 percent [of the shares issued]". We do not accept that, a trial judge is authorised under ***s. 110 (1) (b) of the Act*** to grant audience to a shareholder claimant on the ground that the ratio of his shareholding would be determined at a later stage as part of the proceedings under ***s.110 of the Companies Act***. What assures the judge that during the proceedings, up to the very end of the proceedings, the judge will be able to determine that the shareholder claimant holds not less than one-tenth of the shares issued?

[27] Further, it is our view that, the court order made on 25 January 2002, confirming the resolution increasing the authorised capital remains valid until set aside. Accordingly we hold that, Abel J erred when he stated at paragraph 64 of his judgment: "Given the nature of allegations which are before this Court, and which may be considered by any investigation, this Court does not consider that it is bound by, and nor indeed would any investigator be bound by, the alleged allotment and dilution of the Claimant's shareholding."

[28] The learned judge erred to the extent that, he regarded himself as not bound by the court order confirming the resolution increasing the authorised capital when he decided whether the claimants/respondents held not less than one-tenth of the shares issued.

[29] We do not say though that, the judge wholly erred when he intimated that, an investigator (meaning an inspector) appointed to investigate the affairs of the appellant would not be bound by the allotment of the 494,050 shares which resulted in diluting the shares of the respondents. The investigation applied for would not have the effect of automatically nullifying the court order made on 25 January 2002, but its findings of fact could be used to bring court proceedings nullifying the court order, or to bring other proceedings such as a petition by a minority shareholder on the ground of unfair and prejudicial acts against the minority wherein the minority may claim that his shares be bought by the company at market value – see for examples: ***Rock Nominess Ltd. v R (Holdings) plc (in liquidation)*** and ***Others [2004] EWCA (W118,*** and ***Re Astec (BSR) plc [1998] 2BCLC 556***. The findings may also be used to bring a winding-up by court petition under ***s.130 (1) (f) of the Companies Act*** on the ground that, it is just and equitable that the company should be would up.

[30] Because of the error we have identified, this Court allows the appeal, and sets aside the entire order made on 11 April 2016, appointing an inspector, Mr. Denys Barrow, SC (an attorney at law then). Given our decision to allow the appeal, it is not appropriate for us to explain what may be regarded as good reason in ***s.110 (2) of the Act*** on which a judge may appoint an inspector. It is also not appropriate to consider cases such as, ***Norwest Holst v Trade Secretary [1978] Ch. 201 CA and Wallersteiner v Moir, Moir v Wallersteirner and other [1974] 3 ALL ER 217*** which provide guidance in the approach the judge may adopt.

[31] In reaching our decision, we have not been oblivious to the many seemingly merited items of complaint against the many actions of the majority shareholders. We simply concluded that, given the court orders made on 11 April 2016, a claim for appointment of inspectors under s. 110 of the Companies Act could not be brought by the respondents because they did not hold at least one-tenth of the shares issued.

[32] We note here that the power to alter a memorandum and articles of association must be exercised *bona fide* for the benefit of the company as a whole- see for examples, ***Allen v Gold Reef of West Africa [1900] 1 Ch. 656, and Sidebottom v Kershaw, leese Co. Ltd. [1920] Ch. 154 CA.*** However, because we decided this appeal on the questing of the standing of the respondents we did not have to decide whether the memorandum and articles of association of the appellant were lawfully substituted.

[33] The respondents complained extensively about certain officers of the appellant unlawfully liquidating the appellant. We note that the evidence accepted by the judge shows that the appellant's assets in Belize may have been liquidated, but the appellant as a corporation has not been terminated, that is, wound up or liquidated under ***Part v of Companies Act***. It has not even been struck out from the Register of Companies by the Registrar of Companies. A company need not be actively trading or pursuing its object when a winding up petition is brought. Sometimes the petition is brought mainly for the purpose of identifying wrongdoing and wrongdoers. Moreover, in winding up, officers of a company may be summoned for cross-examination, and a criminal action or a civil case claim may be brought against them. The liquidator in carrying out his duty, may also be able to trace assets of the company wherever they may be.

The order on appeal.

[34] The orders that we make are:

1. The appeal is allowed.

2. The set of orders made by Abel J on 11 April 2016 is set aside

3. Costs of this appeal and costs in the court below are to be paid by the respondents; the costs are to be taxed unless agreed. This order for costs is provisional, it shall become absolute in 14 (fourteen) days, unless an application is made for a different order for costs.

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AWICH JA

DUCILLE JA

[35] I concur in the reasons for judgment given, and the orders proposed, in the judgment of Awich JA, which I have read in draft.

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DUCILLE JA

PARKE JA

[36] I have read the judgment of Awich JA, in Civil Appeal No. 17 of 2016, St. Matthews University School of Medicine Limited and Jeffrey Sersland MD. I agree with the judgment as well as the orders for the disposal of the case.

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PARKE JA