

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN EQUITY

SUIT NO. E. 179 of 1979

IN THE MATTER OF JAMAICA PUMP AND
VALVE LIMITED

A N D

IN THE MATTER OF THE COMPANIES ACT.

BETWEEN	NEVILLE WILLIAMS	PLAINTIFF
A N D	JAMAICA PUMP & VALVE LIMITED	1st DEFENDANT
A N D	CLEVELAND BRYAN	2nd DEFENDANT
A N D	PANSEATA BRYAN	3rd DEFENDANT
A N D	JEFFERY WILLIAMS	4th DEFENDANT
A N D	ELSWORTH WILLIAMS	5th DEFENDANT
A N D	LLOYD PERKINS	6th DEFENDANT
A N D	HOPE ATKINSON	7th DEFENDANT
A N D	MERRIDIAN INVESTMENT CORP. LIMITED	8th DEFENDANT

Enos Grant instructed by S.E.O. Hamilton for Plaintiff

Hillary Phillips instructed by D. Tomlinson of Perkins, Tomlinson, Grant, Stewart & Company for the First, Fourth, Fifth, Sixth, Seventh and Eighth Defendants.

Ferdinand Johnson for the Second and Third Defendants.

Heard on: July 13, 14 & 15, 1981, March 22, 23, 24, 25 & 26;
June 21, 22, 23 and 24, 1982 and January 17, 1983.

ORR J:

During the hearing of this case, I enquired of Mr. Grant whether the use of an Originating Summons was appropriate in this matter. He made submissions in support of its use. Mrs. Phillips and Mr. Johnson submitted that it was inappropriate.

The relevant sections of the Judicature (Civil Procedure) Code are as follows:

" 531. Any person claiming to be interested under a deed, will, or other written instrument, may apply by originating summons for the determination of any question of construction arising under the instrument, and for a declaration of the rights of the persons interested.

- " 531A. Any person claiming any legal or equitable right in a case where the determination of the question whether he is entitled to the right depends upon a question of construction of a Law or an instrument, made under a Law, may apply by originating summons for the determination of such question of construction, and for a declaration as to the right claimed.
- 531B. The Court or a Judge may direct such persons to be served with the summons as they or he think fit.
- 531C. The application shall be supported by such evidence as the Court or a Judge may require.
- 531B. The Court or a Judge shall not be bound to determine any such question of construction if in their or his opinion it ought not to be determined on originating summons".

The summons asks for the following:

- (a) A Declaration that on the true and proper construction of the Articles of Association of the Company and the Companies Act:
- (i) The plaintiff is still a Director of the abovenamed Company;
 - (ii) The plaintiff is still the Managing/Director of the Company;
 - (iii) The Fourth and/or Fifth and/or Sixth defendants are not properly appointed as Directors of the Company;
 - (iv) The Fourth defendant is not properly appointed as Managing Director of the Company;
 - (v) Any meeting of the Company and in particular of the Board of Directors that is held without due Notice thereof being given to the plaintiff is null and void and is of no effect,
- (b) A Declaration that the Contract between the plaintiff and the Second and Third defendants to purchase the 80,000 shares is a valid contract having regard to the approval of the Director of Exchange Control dated the 8th August, 1979;

- (c) A Declaration that the purported purchase of the said 80,000 shares by the Eighth defendant is null, void and of no effect; and/or that the Eighth defendant is not a shareholder of the First defendant.
- (d) Specific performance of the said contract between the plaintiff and the Second and Third defendants;
- (e) An injunction restraining the Second and Third defendants or either of them from attempting to sell or pledge or in any other manner to deal with the said shares to or in favour of any other person apart from the plaintiff or his nominee;
- (f) Damages in lieu of Specific Performance;
- (g) Further and in the alternative that an Extraordinary General Meeting of the Company comprising the plaintiff and/or Leo Bryan or the plaintiff by himself be convened by the Court of the purpose of appointing a Board of Directors;
- (h) The Court may give directions as to the manner in which the said meeting is to be called, held and conducted and also such ancillary and consequential directions as it may think expedient;
- (i) A Declaration that the sum of \$20,189.99 is due and owing by the Company to the plaintiff;
- (j) The Company do repay the plaintiff the said sum of \$20,189.99;
- (k) An injunction restraining the Fourth and/or Fifth and/or Sixth and/or Seventh defendant from interfering in the management and/or affairs of the Company by themselves or through their servant and/or agents and/or nominees;
- (l) Further and in the alternative, damages for wrongful dismissal and/or inducing breach of contract.

The declaration at (a) (i)(ii)(iii)(iv) and (v) involve not only construction of the Articles of Association of the Company but an

examination of the Minutes of the Company and Affidavits.

Declarations (b) and (c) require me to find on disputed facts whether or not there was a contract, and if so, whether such contract is valid. There is no instrument presented for construction. The letter from the Director of Exchange Control Exhibit N.G.W. vi. does not require construction, it is merely an item of evidence tendered as part of the proof of the existence of the Contract. Declarations (d) (e) (f) (g) (h) (i) (j) (k) and (l) do not involve questions of construction. These are reliefs sought consequent on the declarations.

The true nature and scope of a declaration on an originating summons was explained by Warrington J. when considering the English Order 54A on which our Rule was modelled. In Lewis vs. Green ([1905] 2 Ch. 340 at page 343) he explained the position as follows:

" In the first place, the order is confined to questions of construction. Of course, in a sense, every question of construction may involve some question of fact. It may be a question about which there is no dispute, but in order to raise any question of construction some facts must be proved or admitted. But for all that the order is confined to enabling the Court to decide questions of construction and nothing else, and the order does not enable the Court to grant any relief; it can only determine the question of construction, and declare the right of the parties".

This decision was followed by the Court of Appeal of Trinidad and Tobago in Pierre v. Mbanefo and others (1964) 7 W.I.R. 433 where Wooding C.J. at page 437 after citing the Rules, the first of which is identical to our 531 said:

" It will be observed that both these rules make it plain beyond dispute that they are concerned with the determination of questions of construction only. Any declaration which may be made thereunder is, in our judgment, entirely consequential.

" In this respect we find ourselves in full agreement with Warrington J. in Lewis v. Green"

and he quotes the passage cited above.

Both these decisions were followed by the Full Court of Guyana in Harry v. Thom (1970) 10 W.I.R. 348. At page 353 Crane J. delivering the judgment of the Court, referring to Order 42 r. 2 which was modelled on the English Order 54A, said:

" Order 42 r. 2 enables him (the judge) to grant no consequential relief apart from the question of construction sought of him".

He then goes on to refer with approval to the judgment of Warrington J. in Lewis v. Green Supra and Wooding C.J. in Pierre v. Mbanefo. He continues:

" Such it is submitted, is the true nature of declaratory proceeding under Order 42 r.2, and it is in this vital respect, which is frequently lost sight of, that they differ from proceedings under Order 23, r.3. The declaration merely proclaims the existence of the legal relationship, it does not contain an order which may be enforced against a defendant. Once this fact is appreciated the role of the Court is easily understood".

In the light of the authorities cited, the only declarations which could possibly fall within the ambit of Section 531 are those requested at (a).

Section 531D states that the Court or a Judge shall not be bound to determine any such question of construction if in their or his opinion it ought not to be determined on originating summons.

Assuming the declarations at (a) are granted, this will not settle the dispute between the parties. The plaintiff will still have to institute action in respect of the reliefs sought.

I adopt the dictum of Warrington J. in *Lewis v. Green*

Supra at page 344:

" It seems to me that where one finds circumstances such as I find here, the procedure under Order LIVA is improper. It is only intended to enable the Court to decide questions of construction where the decisions on those questions, whichever way it may go, will settle the litigation between the parties. It is not intended that questions of construction which, if they are decided in one way will settle the dispute between the parties, should come up for decision on an originating summons. It would be most inconvenient to resort to the order in a case where it is quite uncertain what may be the ultimate decision on the point of construction, and where if the decision is in one way it involves further litigation".

These words are apposite to the instant case.

I was invited to invoke the provisions of Section 686 of the Judicature (Civil Procedure) Code and have resort to the English Rule 28 r.8 which empowers the Court to order the proceedings to be continued as if they had been begun by writ. This rule is not embodied in our Code.

In *Lopez v. Geddes Refrigeration Limited* (1968) 10 J.L.R.

558. Fox J.A. delivering the judgment of the Court of Appeal referring to Section 686 of the Code said:

" The section supplies the machinery whereby any gap in the Code may be filled by making reference to the procedure and practice in England. If there is no gap in the Code, the section does not apply".

There is a gap in our Code and the instant case is an example where such a rule should be applied.

Accordingly I order that the proceedings be continued as if the case had been begun by writ.