

**COMMONWEALTH OF THE BAHAMAS**

**IN THE SUPREME COURT  
CIVIL SIDE  
2004/CLE/GEN/00399**

**Between**

**THE TENESHELES TRUST  
First Plaintiff**

**HAWTHORNE-STERLING FAMILY OF FUNDS  
Second Plaintiff**

**NANCY LAKE  
Third Plaintiff**

**AND**

**BDO MANN JUDD  
(a Firm carrying on the business of professional Accountants and Consultants)  
First Defendant**

**GEORGE CLIFFORD CULMER  
(carrying on the practice of accountant and consultant under the name of BDO Mann Judd)  
Second Defendant**

**MICHAEL R SCOTT  
(carrying on the practice of Counsel and Attorney under the name of Callenders Co)  
Third Defendant**

**BEFORE:** His Lordship The Honourable  
Mr Justice K Neville Adderley

**APPEARANCES:** Mr Maurice Glington, for the Plaintiffs

Ms Metta MacMillan-Hughes, Mr Marco Turnquest  
with her, for the First and Second Defendants

Mrs Diane Stewart, Ms Justine Cleare with her, for the  
Third Defendant

Mr David Higgins, Ms Bernadette Butler and Mrs  
Ingrid Cooper-Brooks with him for the Attorney  
General as Amicus Curiae on behalf of the Registrar  
General

3 March 2008, 22, 23 April, 6 and 13 July, 16 October 2009

**Final Submissions:** 30 October 2009

## **DECISION**

### **Adderley J**

1. The applications seek to strike out the writ of summons filed herein on 7 April 2004 under Order 18, Rule 19 of the Rules of the Supreme Court on the ground that it is scandalous, frivolous or vexatious and under its inherent jurisdiction because it is an abuse of the process of the court. Alternatively, the defendants apply to have the judgments in default of defence entered on 30 June 2004 set aside and the order for assessment of damages stayed on the ground that each of the defendants has a good defence.

2. The applications on behalf of the first and second defendants are by summons filed 29 April, 28 June and 9 July 2004 and those on behalf of the third defendant by summonses filed 5 July, 19 October and 15 December 2004. They were re-filed on 25 September 2007 upon direction of the Listing Officer.

3. The writ of summons was filed 7 April 2004. A memorandum of appearance of the third defendant was filed 20 April 2004. A memorandum of appearance of the first and second defendants was filed 23 April 2004. A statement of claim was filed 10 June 2004. The writ and statement of claim sought damages against the defendants for breach of contract, breach of fiduciary duty, loss caused by breach of confidentiality and conflict of interest, misrepresentation, repayment of monies paid to them, exemplary damages, interest and costs. The primary claim is that the defendants wrongfully induced the Securities Commission of The Bahamas to place the 35 underlying companies which comprise The Hawthorne- Sterling Family of Funds ("the Fund

Companies”) into a “protective liquidation”. This liquidation according to the plaintiffs was carried out by the defendants in such a way that it stripped the Fund Companies of their monetary assets which primarily went by way of payment of fees to the defendants, their servants and agents.

4. The defendants having filed summonses to strike out the action requested by letter to the plaintiffs that the filing of defences abide the outcome of the strike out action. They also filed summonses in which they requested an extension of time in which to file their defences.

5. The plaintiffs refused the extension and entered a default judgment against the first defendant for damages to be assessed plus interest and costs, and against the second defendant for \$208,850.30, plus interest and costs.

### **Preliminary Issues**

6. The defendants raise two preliminary issues:

- 1) the first plaintiff “the Tenesheles Trust” lacks juristic capacity
- 2) the second plaintiff lacked juristic capacity at the time the action was commenced having been struck off the Register of Companies (“the Register”) for non-payment of fees and the purported restoration to the Register by the Registrar General (“the Registrar”) is a nullity.

7. The court invited the Office of the Attorney General to present submissions as *amicus curiae* on behalf of the Registrar on the second of the preliminary issues.

8. For the reasons given below I strike out the writ and statement of claim and dismiss the action.

### **Other Issues**

9. The defendants maintain that the Fund Companies which have allegedly suffered loss must be parties to the action and that the third plaintiff who is a

director and trustee of the Fund Companies cannot sue for the reflective loss allegedly sustained by them. Nor does she, they contend, have a cause of action in her own right because all of the alleged loss was sustained in her capacity as trustee and director of the Fund Companies. Nor according to the defendants, can she sue in a representative capacity because she has not been so authorized by the companies.

10. The defendants raised the further ground of issue estoppel. They contend that although the action is not *res judicata* within the principle of ***Henderson v Henderson*** nevertheless the factual matrix is identical to that raised in Supreme Court Action No 585/2000 on its Equity Side: *Securities Commission of The Bahamas v Alastair-Prescott Ltd et al* (“Action 585/2000”) where Lyons J, as he then was, considered the same issues as those in the instant case and made findings of fact and dismissed the applications. The factual matrix, say the defendants, is also applicable to actions #889 of 2001 relating to the execution of a related Seizure Order dated 26 July 2001, and Public Action No 2004/Pub-con/00003. They submit further that on principle the findings of fact arising out of the post judgment summons, including what he called a final adjudication, that the second defendant’s actions as receiver were entirely proper, are binding on the court because a final appeal to the Privy Council has already been denied by order of the Court of Appeal on 10 October 2007 in Appeal No. 85 of 2002. In the latter case the second and third plaintiffs were the 17<sup>th</sup> and 37<sup>th</sup> defendants respectively. In a post judgment summons taken out at the instance of the plaintiffs they contend that Lyons J’s decision in Action No 585 of 2000 is *per incuriam* because among other things it was based on evidence not before the court and because it went outside the remit of the Court of Appeal of their decision handed down on 10 October 2007. He also points out that Lyons J refused to grant a stay of Action No 2004/Pub-con/00003 because he determined that it concerned different legal issues.

## THE LAW

11. During the course of the hearing I already upheld the submission of the defendants that the first defendant has no juristic capacity. It is trite law that a trust lacks legal capacity to sue; a trust is an arrangement not an entity. In ***Freeport Licencees and Property Owners Association (a Non-profit Trust ...)* v *The Grand Bahama Port Authority, Limited et al*** the Court of Appeal (Osadebay, Longley and Blackman, JJA) dismissed the appeal made against the decision of Adderley, J where he held that the appellants *Freeport Licencees and Property Owners Association* purporting to be a trust was not a body corporate and therefore lacked the legal capacity to constitute or maintain the action in its name.

12. Hawthorne-Sterling Family of Funds Inc, intended to be the second plaintiff, was struck-off the Register for non-payment of fees on 31 August 2002. The writ was filed 7 April 2004. It was purportedly restored to the Register by the Registrar on 7 June 2004. The International Business Companies Act 2000 as amended by Statutory Instrument No. 128 of 2001 was the relevant Act in effect at the time.

13. To place the power of the Registrar to strike off and to restore in context counsel for the defendants helpfully traced the evolution of the International Business Companies Act.

14. The International Business Company (“IBC”) was introduced as a corporate vehicle in The Bahamas by The International Business Companies Act 1989 (“the 1989 IBC Act”) which commenced on 15 January 1990.

15. In the 1989 IBC Act in separate sections the Registrar had the power to strike-off IBC’s:

- 1) under section 97(4) for failing to comply with prescribed requirements.

2) under section 97(6) for failing to pay licence fees

16. If the Registrar had struck off an IBC certain persons could apply to the court (section 98(1)) to have it restored if it was struck off under s 97(4). Alternatively they could apply to the Registrar (section 98(3)) if it was struck-off for non payment of fees under section 97(6).

17. The court had the power to restore a company that had been struck off for failing to comply with the prescribed requirements [section 98(2)]. The Registrar had the power to restore a company which had been struck off for non payment of fees [section 98(3)].

18. The 1989 IBC Act was repealed by Statutory Instrument No. 45 of 2000 except for part X which dealt with fees and penalties. This brought into force the International Business Companies Act 2000 (“the 2000 IBC Act”) on 29 December 2000. That Act was amended by Statutory Instrument No. 19 of 2001 and later by No. 128 of 2001. Although there were two subsequent amendments it is the IBC Act 2000 as amended up to S I No. 128 of 2001 that was in force when the second defendant was struck-off the Register for non payment of fees. Part X was repealed on 1 January 2002.

19. Like the 1989 Act, the 2000 IBC Act provided for a company to be struck off by the Registrar on two separate grounds:

- 1) under section 164(3) if he reasonably believed that the company no longer satisfied the prescribed requirements of an IBC;
- 2) under section 164(5) if he was of the opinion that the company was in default of paying any prescribed fee

20. Certain persons were enabled to apply to have it restored.

21. Both the Court (Section 166(2)) and the Registrar (section 163(3)), if application was made by the proper party within 5 years immediately following the strike-off, had the power to restore the IBC struck-off for non-compliance with prescribed conditions.

22. However, the IBC Act 2000 contained no express provision nor does it contain one now for the Registrar to restore a company to the Register if struck-off for non-payment of fees. The question is should such a power be implied.

23. One of the consequences of being struck-off the Register was that the IBC could not *inter alia* legally commence legal proceedings. I take the words *legally* commence to mean it does not have the legal *capacity* to commence proceedings. Section 167 (1)(a) read, and still reads, as follows:

“167. (1) Where the name of a company has been struck-off the Register, the company and the director, members, liquidators and receivers thereof, may not legally –

- (a) commence legal proceedings, carry on any business or in any way deal with the assets of the company.”

## SUBMISSIONS

24. The canons of construction for implying the power to the Registrar were thoroughly explored by Mr Ginton including those in support of the principle that an Act must be read as a whole, and words must be read in light of the relevant sections of the Act. He enumerated them as follows:

i. “a statute is never supposed to use words without a meaning.”<sup>1</sup>

ii. “a statute is designed to be workable, and the interpretation thereof by the court should be to secure that the object, unless crucial omission or clear direction makes that end unattainable.”<sup>2</sup>

iii. “we are entitled, and indeed bound, when construing the terms of any provision found in a statute, to consider any other parts of the Act which throw light on the intention of the legislature, and which may serve to show that the particular provision ought not to be construed as it would be alone or apart from the rest of the Act”<sup>3</sup>

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<sup>1</sup> Auchterarder Presbytery v. Lord Kinnoull (1839) 7 E R 841, p. 856 (*per* Lord Brougham).

<sup>2</sup> Whitney v. Inland Revenue Commissioners [1926] A C 37, p. 52 (*per* Lord Dunedin).

<sup>3</sup> Colquhoun v. Brooks (1889) 14 App. Cas. 493, p. 506 (*per* Lord Herschell).

iv. "it is obeying the very first principle of construction to read the whole instrument before pronouncing upon the interpretation of any single section, and still more of any single word in that section."<sup>4</sup>

v. "every clause of a statute should be construed with reference to the context and other clauses in the Act, so as far as possible, to make a consistent enactment of the whole statute or series of statutes relating to the subject matter."<sup>5</sup>

vi. "the object of the construction of a statute being to ascertain the will of the legislature it may be presumed that neither injustice nor absurdity was intended. If therefore a literal interpretation would produce such a result and the language admits of an interpretation which would avoid it, then such an interpretation may be adopted."<sup>6</sup>

vii. "nothing short of impossibility should allow a judge to declare a statute unworkable."<sup>7</sup>

25. Mr Higgins adopted the submissions of Mr Ginton citing additional authorities and pointed out several instances where over the years parliament amended the IBC Act 2000 to eliminate absurdities under section 165 of the Act.

26. Further, Mr Higgins sought to call in aid sections 35 through 37 of the Interpretation and General Clauses Act ("Interpretation Act") which states that if an entity has the power to receive an application it must be presumed to have the power to render a decision in respect thereof. He raised this in relation to section 167(2) of Act in S I No 14 of 2004 which enables, and also enabled by the Act then in force, the company or a director, member, liquidator or receiver thereof to make application for restoration. It reads as follows:

" 167(2) ...where the name of the company has been struck-off the register, the company, and the directors, liquidators, and receivers thereof may-

(a) make application for restoration of the name of the company to Register;..."

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<sup>4</sup> Minister for Lands v. Jeremias (1917) 23 C L R 322, p. 332 (per Isaacs J.).

<sup>5</sup> Canada Sugar Refining Co. v. The Queen [1898] A C 735, p. 741 (per Lord Davey).

<sup>6</sup> Mangin v. Commissioner of Inland Revenue [1971] A C 739, p. 746 (per Lord Donovan).

<sup>7</sup> Murray v. Inland Revenue Commissioners [1918] A C 451, p. 553 (per Lord Shaw).

He then makes reference to the power of the Registrar under sections 166(1) to 166(3) of Act as set out in No 14 of 2004 to review the application. This power was contained in section 166(2) of the version of the IBC Act 2000 in force when the second plaintiff was struck-off. He argues that it follows that the Registrar, by virtue of sections 35 through 37 of the Interpretation Act, has the power to restore the company where it has been struck off for non payment of fees. He especially relies on sections 36(3) and (4) which read as follows:

“36 (3) Without prejudice to the generality of subsection (1) [which provides that where a written law confers any power or imposes any duty on the holder of public office the power may be exercised and the duty performed by the holder for the time being of that office] whenever in any written law the expression “as the Governor-General may appoint” or “as the Governor-General may specify” or “ as the Governor -General may prescribe”, or “as may be designated by the Governor-General”, or any similar expression referring to the Governor-General appears and no power is expressly conferred upon the Governor-General to make the appointment, give the discretion or specification, prescribe or make the designation, as the case may be, such power shall nevertheless be deemed to be conferred.

(4) Subsection (3) shall have effect in relation to a Minister, a public officer, a public body or other person as it has effect in relation to the Governor-General.”

27. The retort to that by counsel for the defendants is that section 167(2) is an enabling section; subsection 1 states what a struck-off IBC cannot do and subsection 2 states that notwithstanding section 1 it can continue to do certain things including applying to be restored. However, the Act is clear and unambiguous that the Registrar has power to restore when a company has been struck-off under section 165(3) which does not include having been struck-off for non payment of fees. Therefore the Interpretation Act cannot be called in aid.

28. For completeness it is observed that under the current version of the IBC Act 2000 the power of the Registrar to strike-off the company for non payment of fees is contained in section 176(4) which reads as follows:

“176.(4) If a company fails to pay the increased licence fee referred to in this section by the 31<sup>st</sup> December, the Registrar shall strike the name of the company off the Register from the 1<sup>st</sup> January next ensuing.”

29. The power of the Registrar to restore is contained in section 166 but this applies only to companies which were struck off under section 165 ( no longer satisfying prescribed requirements of the Act) and there is still no express provision for the Registrar to restore an IBC if it was struck off under section 176(4) (nonpayment of fees).

30. I nevertheless agree with Mr Glinton that it appears that the subsections in section 166 need rearranging.

31. Finally, Mr Higgins submits that the IBC Act 2000 is part of a legislative scheme. He submits that when read as a whole with the Companies Act, Chapter 308 which is *in para materia* with that Act it is clear that Parliament intended that the Registrar should have power to restore the company for having been struck-off for non payment of fees because its sister Act gives such power to the Registrar to restore companies for non payment of fees if the application is before the expiration of 20 years from the publication of the notice in the gazette of its having been struck off. This, he points out, is even more liberal than the maximum of 5 years provided for restoration by the Registrar under the IBC Act 2000.

### **The function of the Courts**

32. It is the function of the courts in construing laws to ascertain the intention of Parliament on the basis of the words used in the Statute. It is not the function of the courts to otherwise find out the intention of Parliament and of Ministers of the Government. This principle of law is enunciated in numerous authorities and in the leading case of ***Magor and St. Mellons Rural District Council v Newport***

1952 AC 189 cited by Ms MacMillian-Hughes and Mrs Stewart where Lord Simonds said inter alia:

“It is sufficient to say that the general proposition that it is the duty of the court to find out the intention of Parliament and not only of Parliament but of Ministers also cannot by any means be supported. The duty of the court is to interpret the words that the legislature has used. Those words may be ambiguous, but, even if they are, the power and duty of the court to travel outside them on a voyage of discovery are strictly limited.”

At page 192 Lord Morton agreed with Lord Simonds and concluded:

“In so far as the intention of Parliament or of Ministers is revealed in Acts of Parliament or Orders, either by the language used or by necessary implication, the courts should, of course, carry these intentions out; but it is not the function of any judge to fill in what he conceives to be the gaps in an Act of Parliament. If he does so, he is usurping the function of the legislature.”

This principle was followed by Sawyer, J (as she then was) in ***First Trade International Bank and Trust*** (Re) (1998) BHS J. No. 162 with respect to the interpretation of section 266 of the 1992 Companies Act. In reviewing the relevant canons of construction she said this at paragraphs 16, and 30:

“16. Against that background, I am asked to read into section 266 words which, admittedly, are not there. I am to do so in order to give effect to the intention of Parliament. In other words, the enactment of section 266 of the 1992 Act was a "casus omissus" and I should read into the section the words "under the law of bankruptcy with respect to the estates of persons adjudged bankrupt"...

30. Regrettably, although one would wish very much that the words "under the law of bankruptcy with respect to the estates of persons adjudged bankrupt" were included in section 266 of the 1992 Act, clearly they are not there and it is, I think, beyond the power of any judge to place them there.

## CONCLUSION

33. Despite the very able arguments of counsel for the plaintiffs and for the Registrar the fact is that Parliament in the 1989 IBC Act had expressly placed the power in the Registrar to restore a company that had been struck off for non-payment of fees but it repealed that Act by the IBC Act 2000.

34. Parliament did not expressly place the power in the successor Act despite four amendments thereto including the amendments to eliminate the absurdities to which Mr Higgins referred during his presentation. There is no ambiguity as it relates to the power of the Registrar and since it was a simple matter to set it out it seems to me evidence that the removal of that power from the Registrar was a deliberate act of Parliament. Alternatively, its a *casus omissus*.

35. In either event it is not open to the courts to substitute its will for that of the legislature where, as in this case, the language of the relevant provisions of the statute are clear and unambiguous. If at any stage in the future Parliament wishes to restore that power to the Registrar it knows how to do it.

36. Mr Ginton sought, finally, to call in aid section 20 of The Interpretation and General Causes Act which so far as it is material to this case reads as follows:

“Section 20. Where a written law repeals in whole or in part any other written law, the repeal shall not-

...

(b) affect the previous operation of any written law so repealed or any written law so repealed;

...

(c) affect any right, privilege, obligation or liability acquired, accrued or incurred under any written law so repealed;

...

(e) affect any investigation, legal proceeding or remedy

in respect of any such right, privilege, obligation, liability, ...and any such investigation, legal proceeding or remedy may be instituted, continued or enforced ... as if the repealing Act had not been passed.”

37. I had occasion to consider the meaning of section 20 in ***Kemp and another v Mamlakah Ltd.***(2008) 73 WIR 16; [2008] 1 BHS J No 16. That case dealt with whether Dower had been abolished by virtue of the Dower Act having been repealed by the Inheritance Act 2002. After considering the authorities of *Selangor United Rubber Estates Ltd v Craddock (a bankrupt) and others (No 4)* (1969) 3 All ER 965, and the Privy Council cases of *The Director of Public Works and Another v Ho Po Sang* (1961) AC 901 and *Free Lanka Insurance Co Ltd v Ranasinghe* [1964] 1 ALL ER in ruling that dower had been abolished I had to consider the nature of the “*right privilege obligation or liability accrued or incurred* and of “*any investigation legal proceeding or remedy*” which “*may be instituted continued or enforced*” in respect thereof. I formed the view in accordance with the authorities that they must be vested actual, inchoate, or contingent rights and not merely a hope of acquiring such rights. No process to restore the company had commenced prior to the repeal of the 1989 IBC Act, neither had this action commenced so no such right could have vested or accrued in either case. It seems to me that for section 20 to apply it would have been necessary for the second plaintiff to have applied for restoration under the 1989 IBC Act, and the Act repealed before the matter had been decided by the Registrar. In such case in my view a right would have accrued for it to be considered for restoration under the relevant provisions of the 1989 IBC Act notwithstanding its repeal. But that is not the situation in this case.

38. In the circumstances, the purported restoration by the Registrar is a nullity as he had no power to do so and having been struck off the Register on 31 August 2002 after the 1989 IBC Act was no longer in force, under section 167(1) of the IBC Act 2000, the second plaintiff did not have juristic capacity to sue on 7 April 2004.

39. It follows from the above that when the second plaintiff commenced its action it had no juristic capacity to do so and I find for the defendants on that preliminary point.

40. In the circumstances, I do not find it necessary to make findings on the other issues set out in paragraphs 9 and 10 above except to say that on the face of his decision in Action 585/2000 Lyons, J appears to have searched the internet and it is unclear what reliance he placed on that to reach his decision.

41. With respect to the third plaintiff, based on the rule against reflective loss expressed in *Prudential*, I would have struck out all paragraphs of the Statement of Claim except those in which she purports to claim in her personal capacity. These appear to be paragraphs 83 and 91. However, they are not pleaded in the writ, nor any relief is sought in respect of the allegations contained in them. No application to amend the writ in this regard was forecasted. Therefore I strike them out also.

## **Ruling**

42. I find that since the repeal of the 1989 IBC Act the Registrar ceased to have the power to restore a company that had been struck-off the Register for non payment of prescribed fees and any such purported restorations by him are null and void.

43. It follows that the second plaintiff, having been struck-off the Register on 31 August 2002 and purportedly restored by the Registrar on June 7 2004, had no juristic capacity to commence this action on 7 April 2004. As I have previously ruled that the first defendant is not a legal entity and therefore incapable of suing or being sued in its own name, I order pursuant to Order 15 rule 6 of the Rules of the Supreme Court that the plaintiffs cease to be parties. The writ and the statement of claim are hereby struck out and the default judgments are set aside.

44. This action is accordingly dismissed with costs to be taxed if not agreed.

Since the first and second plaintiffs were incapable of giving a retainer to commence these proceedings, following the principle set forth in ***Gas Del Tropico S.A. v Pasa Del Norte International Ltd.*** [1988] BHS J. No 120, costs are to be paid by counsel for the first and second plaintiffs.

45. Because of the implication of this decision for IBCs which have purportedly been restored by the Registrar under the IBC Act 2000 for non payment of fees, and its consequential implications for the Business Sector and the Financial Services Sector I hereby stay my ruling in respect of the Registrar for a period of four months from the date hereof. This is to allow Parliament to take such action, if any, that it deems appropriate. After the expiration of four months the decision shall take full force and effect. Nevertheless the decision that this action is dismissed shall take effect immediately.

Dated the 16th day of November 2009.

**K Neville Adderley  
Justice**