JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CIVIL APPEAL NO: 26/82

BEFORE: The Hon. Mr. Justice Kerr, J.A.
The Hon. Mr. Justice White, J.A.
The Hon. Mr. Justice Campbell, J.A.

IN THE MATTER OF PARAMOUNT BETTING COMPANY LIMITED

A N D

IN THE MATTER OF THE COMPANIES ACT 1965

BETWEEN	WINSTON ALBERT CHANG PARAMOUNT BETTING COMPANY LIMITED	APPELLANTS
A N D	THE ADMINISTRATOR GENERAL FOR JAMAICA	RESPONDENT

Enos Grant & Orrin Tonsingh for the Appellants

R.N.A. Henriques, Q.C., & Steve Shelton instructed by Myers, Fletcher & Gordon, Manton & Hart for Respondent

July 23, 24, 25, 26, 27, 1984 & March 8, 1985

CAMPBELL J.A.

On 8 November, 1979 Mr. Winston Albert Chang in his capacity as a shareholder and director of Paramount Betting Company Limited (the company) applied by Originating Summons for an order under section 129 (2) of the Companies Act. In his affidavit in support he deponed that it was impossible to secure a quorum at the Annual General Meeting of the Company which had been convened on 30 October, 1979. The inability to secure a quorum was due to the fact that Mr. Frank Spaulding was a majority shareholder owning 55 per centum of the shares in the company. His attendance at company meetings was thus necessary in order to secure a quorum which under Article 42 of the company's Articles consisted in not

less than three members present whose shareholding in the aggregate was not less than seventy-five per centum of the issued share capital of the company for the time being. Mr. Frank Spaulding was now deceased and no personal representative had been appointed to his estate. Such personal representative was the only person whom the company under Article 16 of its Articles could recognize as having title to the shares and consequently entitled to attend and vote at meetings of the company.

The Court was accordingly asked to make an order under section 129 (2) of the Companies Act in terms that the Annual General Meeting which had been summoned for 30 October, 1979 and which had to be adjourned for want of a quorum, should be reconvened seven days after the order and that the Annual General Meeting do by resolution substitute Regulation 4 of Part II of Table A scheduled to the Companies Act for Article 42, in order to unfetter the quorum from the minimum shareholding restriction.

Regulation 4 of Part II of Table A states:

> "4. No business shall be transacted at any general meeting unless a quorum of members is present at the time when the meeting proceeds to business; save as herein otherwise provided two members present in person or by proxy shall be a quorum."

The learned judge made an order on 17 December, 1979 that the Annual General Meeting should be reconvened on or before 28 December, 1979. That it should consider a resolution to alter Article 42 as prayed for. That a copy of the order of the court should be served on each member at his last known address and should additionally be advertised by notice in a Daily Newspaper.

A notice of the "Reconvened Annual General Meeting" was advertised in the Jamaica Daily News dated December 28, 1979, The reconvened meeting was held on the very same date. The notice did not specify the time and place of the meeting but being a reconvened meeting it would presumably, like the aborted meeting

of 30 October, 1979, have been held at 17 Avon Park Crescent at 10.00 a.m. in the forenoon.

Arising out of this meeting the share capital of the company was increased from 17,700 shares of $2.00 each to 50,000 shares of $2.00 each. All the increased shares except six were acquired by Mr. Winston Chang who thus became the majority shareholder with an equity of 80 per centum in the company. The equity of the estate of Mr. Frank Spaulding correspondingly declined from its original 55 per centum to a little over 19 per centum. The estate ceased to be a majority shareholder.

The Administrator General was, at the time when the Originating Summons was brought, the duly appointed personal representative of the Estate of Mr. Frank Spaulding deceased. He had been appointed on 30 January, 1979 some ten months prior to the filing of the said summons. The application for Letters of Administration had earlier been gazetted in the Jamaica Gazette dated 25 January, 1979. He had not been served with notice of the Originating Summons. He had not attended the Annual General Meeting called for 30 October, 1979 nor the reconvened meeting on 28 December, 1979 as he had not been served with any notice nor did he otherwise have notice of the said meetings.

Feeling aggrieved by the order of Miss Justice McKain and by the course of events consequent thereon, the Administrator General by summons under the same Originating Summons filed by Mr. Chang moved for an order vacating the Order of Miss Justice McKain and all subsequent proceedings thereon. The Summons was heard by Vanderpump J. who on April 30, 1982 duly set aside and vacated the order and subsequent proceedings thereon.

Against this Order Mr. Winston Chang for himself and purportedly on behalf of the company has appealed. The grounds of appeal are that:

(a) The learned trial judge misdirected himself in law in holding that he has jurisdiction to entertain the application of the respondent and/or to set aside the holding of the Annual General Meeting of the second appellant which the second appellant was obliged to hold under the Companies Act.

(b) The learned trial judge misdirected himself in Law as to his functions on the hearing of the Application of the Respondent in that he assumed the role of a Court of Appeal in respect of the Order of the Honourable Miss Justice McKain made on the 17th day of December, 1979.

(c) The decision of the learned trial judge is unreasonable having regard to the evidence before him.

Before us Mr. Grant submitted with regard to grounds (a) and (b) that the application under section 129 (2) of the Companies Act was by virtue of Order 102 (2) of the Rules of the Supreme Court (U.K.) an inter partes application with the company as the only necessary respondent. Since the proceeding before Miss Justice McKain was thus not an ex parte application but was inter partes and since the order of the said learned judge had been perfected, it could not be set aside by summons taken out in the original proceeding as this would amount to a rehearing of the proceeding. The wrong procedure, he submitted, had been adopted and Vanderpump J. had no jurisdiction to hear the summons. The only way in which the order of Miss Justice McKain could be challenged was by appeal or by action commenced by Writ on the ground, for example, of fraud if such could be established. Further, he submitted, the Administrator General not being a necessary party to the Originating Summons could not complain at not being served. Not being a party to the Originating Summons he had no locus standi to seek to set aside the order made in the proceeding. Finally, on the merit, Mr. Grant submitted that the order of Miss Justice McKain was unassailable and unimpeachable because the affidavit of Mr. Chang in support of the Originating Summons, contrary to the complaint of the Administrator General, contained

nothing which could amount to fraud nor was it vitiated by a non-disclosure of any material fact. This is so, says Mr. Grant, because even if the statement in the affidavit of Mr. Chang that no personal representative had been appointed to the estate of Frank Spaulding was false, it was not fraudulent, nor did it amount to a material non-disclosure, inasmuch as, even if the Administrator General had in fact been appointed, he not having made any request to be placed on the register of members of the company, was not entitled to notice of the General Meeting. He was not entitled to attend and vote at the General Meeting. A quorum under Article 42 would still be impossible notwithstanding his appointment, hence Miss Justice McKain had not been misled as to the reason for seeking the order under section 129 (2) of the Companies Act.

Mr. Henriques in his response, submitted that Vanderpump J. had jurisdiction to set aside the order of Miss Justice McKain on either of two bases namely under the Judicature (Civil Procedure Code) Law, because section 686 thereof incorporates the English practice and procedure where no specific provision exists in the local Law, or in exercise of the inherent jurisdiction of the Court. On either basis an ex parte order could be set aside by summons taken out in the original proceeding and the order of Miss Justice McKain was made in proceedings which, though in form inter partes, was in substance an "ex parte" application.

In this regard he submitted that the application, though in form "inter partes" in compliance with Order 102 (2) of the Rules of the Supreme Court (U.K.) contained in the White Book (U.K.) it was in the peculiar circumstances of the present case an ex parte application, because the applicant Mr. Chang as Managing Director of the company was its, "alter ego". There was thus no true or distinct respondent. Further with regard to the

Administrator General the Originating Summons was also ex parte. The Administrator General's interest would be materially affected by any order of the judge. He was thus a party whom the learned judge most certainly would have ordered to be served had his appointment been made known to her.

We have no doubt whatsoever that in substance the Originating Summons before Miss Justice McKain was "ex parte." Mr. Chang was not only a shareholder and director as deponed in his affidavit, he was in addition the Managing Director of the company, and as such was responsible for the day to day management of the affairs of the company including the securing for it of adequate legal representation in legal proceedings. Service of any legal proceeding would normally and in all probability be on him, as provided for under section 35 of the Judicature (Civil Procedure Code) law or on the Secretary of the company. If service is on the Secretary he would undoubtedly bring the same to the attention of Mr. Chang as Managing Director. In this particular case, as Mr. Chang is the applicant he could not properly accept service of the proceeding on behalf of the respondent company. There is, however, no evidence as to any person who to the contrary may have been served.

The order of Miss Justice McKain dated 17 December, 1979 recited the fact that the respondent had not appeared nor was it represented at the hearing of the Summons. There is no evidence that the legal representation of the company had been put by Mr. Chang or by any other competent person in the charge of independent attorneys. Mr. Grant asserts that in proceedings under section 129 (2) of the Company's Act, only the company is required to be made a respondent and this as disclosed on the face of the Originating Summons had been done. In our view what he has however failed to address his mind to, is the issue whether, having regard to the peculiar circumstances of the

applicant, the formal "inter partes" proceeding was not a sham to obscure what in reality and in substance was an ex parte application due to the company having been devitalized into a "paper respondent" only by being disabled by the applicant, its own functional trustee, from respondeng to the claim made against it by the said trustee. The company not having been shown to have been properly served, or at all, and also having been otherwise disabled from appearing at the hearing, the proceedings before Miss Justice McKain was an ex parte proceeding, and accordingly, the principle that an order which has been made and perfected cannot be set aside except by appeal or by Writ in independent proceeding has no application to the matter under consideration.

Once it is established, as it has, in this case, that the order that was made was in reality an ex parte order, it is liable to be set aside ex debito justitiae by the party who had been prevented from obtaining a hearing, and by any other person who can show that he has been adversely affected by the order and had not been served with the Originating Summons.

Mr. Henriques submits that the Administrator General was such a person whose interest was adversely affected by the order. He was thus a person who ought to have been served. He thus had both a locus standi and a right to have the offending order set aside. Mr. Grant, before us, as he did before Vanderpump J., submits that in proceedings under section 129 (2) of the Companies Act the person required to be made respondent by Order 102 (2) of the Rules of the Supreme Court (U.K.) is the company. Since there is no specific provision in our Judicature (Civil Procedure Code) Law or in any other statute regulating the procedure for applications under section 129 (2) of the Companies Act, the practice and procedure for the time being in England is by section

> " That on the 17th day of December, 1979 the Originating Summons came up for hearing before the Honourable Miss Justice McKain; that I appeared for the applicant Mr. Winston Chang and that the company did not appear nor was represented; that upon referring to the affidavit of Winston Albert Chang sworn to on the 8th day of November, 1979 and filed herein the Honourable Miss Justice McKain raised the question of the necessity for notice to be given to the Administrator General; that I advised the Honourable Miss Justice McKain that on my instructions no personal representative had been appointed to the estate of Frank Spaulding deceased and that in any event on a proper construction of the Articles of Association of the Company, in particular, Article 105, it was not necessary to serve notice of any meeting of the Company on the Administrator General; that accordingly Miss Justice McKain made the order herein and that the said order was duly perfected and filed."

We are totally unable to perceive the relevance of the disentitlement of the Administrator General to receive notice of meetings of the company, even if such a proposition is well founded, to his entitlement to be served with the Originating Summons. The right to receive notice of meetings is contractual as laid down in the Articles. The right to be served with an Originating Summons, the outcome of which could have adverse effects on the estate of Mr. Frank Spaulding and on his personal representative has its origin, not in contract but in the more fundamental principle of natural justice, namely, that no one shall suffer a loss of property or be injured in his proprietary interest or right without being afforded a fair opportunity of being heard in defence of such property interest or right. In this regard the words of Lord Greene M.R. in Craig v. Kanseen (1943) 1 A.E.R. 108 at p. 113 is most apposite. He said:

> "The question we have to deal with is whether the admitted failure to serve the summons upon which the order in this case was based was a mere irregularity or whether it was something worse which would give the defendant the right to have the order set aside. In my opinion it is beyond question that failure to serve process where service of process is required is a failure which goes to the root of our conceptions of the proper procedure in litigation. Apart from proper ex parte proceedings the idea that an order can validly be made against a man who had no notification of any intention to apply for it is one which has never been adopted in England."

The fact that on Mr. Grant's own admission Miss Justice McKain did raise the question of the necessity for the Administrator General to be served, showed most plainly that she realised that if he had been appointed the personal representative of Mr. Frank Spaulding deceased, he would be a necessary and proper person to be served with the summons having regard to the ultimate purpose for which the order was being sought. The fact that she eventually made the order was unquestionably due to her acceptance that the Administrator General had not been appointed as personal representative in consequence of which there would be no basis whatsoever for him to be served. She made the order solely, in our view, because of her acceptance of the fact deponed by Mr. Chang that with regard to Mr. Frank Spaulding the deceased majority shareholder, "no personal representative has yet been appointed to his estate."

Enough in our view has been shown why the Administrator General ought to have been served with the summons, and why he had locus standi, and a right to seek to have the order set aside. Vanderpump J. came to a similar conclusion; he was correct and grounds (a) and (b) are accordingly dismissed as without merit.

As regards ground (c), the complaint of Mr. Grant is that the decision of Vanderpump J. is unreasonable having regard to the evidence before him. Vanderpump J. in his judgment said:

> " I have discretion to set aside an order made ex parte where the applicant has failed to make sufficient or candid disclosure ... against the background of the knowledge which he must have had of estate of deceased, for him to say merely that no personal representative had yet been appointed, when all the circumstances pointed the other way it could not be said to be sufficient or indeed a candid disclosure of the fact. I so find. It does appear most material that the Administrator General was very much in the picture and he must have so known. I draw the reasonable inference that there was an intent to deceive also."

The affidavit of Mr. Chang in our view failed to disclose material facts. Firstly, he failed to disclose the fact that he was not a mere director shareholder but was rather the managing director of the respondent company which would have alerted Miss Justice McKain to the real danger, as in fact occurred, that the respondent would be without representation in the proceedings. Secondly, he failed to disclose the fact, which he must have known, that the Administrator General had been appointed personal representative. Rather he stated specifically that no personal representative had been appointed. He exhibited to his affidavit a letter from the Betting, Gaming and Lotteries Commission dated 28 August, 1979, in which the Commission in paragraph 8 of the said letter exhorted him to consult with the Administrator General. The paragraph reads thus:

> "The Committee suggested that you consult with Mr. Bell, secretary, to obtain information regarding the shares of Mr. F. Spaulding, Dec'd who was the majority shareholder and with the Administrator General who now holds these shares on behalf of the estate."

He further exhibited to his affidavit the reply on his behalf by his legal adviser Mr. Grant to the letter of the Commission. This reply dated 20 September, 1979 antedates the Originating Summons. It was distinctly misleading if not amounting to a "suppressio veri." The relevant parts are as follows:

> "I act on behalf of Paramount Betting Limited and refer to your letter dated 28th August, 1979 - your reference 60/6.
>
> I have been requested by the Managing Director to whom the letter was addressed to reply to you on paragraphs 2, 4, 5 and 7 to 9 inclusively."

There follows detailed answers to paragraphs 2, and to paragraphs 4 and 5 taken together. However there was no specific answer to paragraph 8 dealing with consultation with the Administrator General. The reply concluded thus:

> "7 - Annual General Meeting
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> Article 42 was discussed at the Annual General Meeting and both the Secretary and the Auditor agreed with me that as Table A of the Companies Act was not expressly excluded by the Articles of Association of the Company then Regulation 4 of Part II of Table A which fixed the quorum at 2 prevailed over the terms of Article 42. It was on this basis that the meeting was held. I can assure you that everything is being done to regularize the affairs of the company."

In our view the impression which the exhibition of the letter of September 20, 1979 was intended to convey to Miss Justice McKain was that enquiry had in fact been made by the deponent concerning the status of the Administrator General, and that arising out of such enquiry he was in a position to depone affirmatively that no personal representative had been appointed.

This was a deliberate effort to conceal the appointment of the Administrator General. Had the deponent acted on the suggestion of the Betting, Gaming and Lotteries Commission he would have known, if in fact he had not already known, that the Administrator General had been appointed personal representative.

The penultimate paragraph of Mr. Grant's letter disclosed that from as early as December 1978, at a time when no personal representative had as yet been appointed, an attempt was made to brush aside the interest of the estate of Mr. Frank Spaulding who had died on 25 June, 1978 by invoking the supremacy of Regulation 4 of Part II of Table A over Article 42. In our view the Originating Summons was not a bona fide application seeking the assistance of Miss Justice McKain in removing an otherwise irremovable obstacle to the company lawfully operating. It was brought with the sinister design of using the court to strip the estate of Mr. Frank Spaulding deceased of such proprietary rights and interest which it had by virtue of being the majority shareholder in the company.

Vanderpump J. in our view was correct in his conclusion that there had not been a sufficient and/or candid disclosure of material facts to Miss Justice McKain. He was also correct in his conclusion, even though this was not a necessary additional requirement, that in the present case the reasonable inference to be drawn was that there was an intent to deceive.

It was for the above reasons that we dismissed the appeal on July 27, 1984 and confirmed the order of Vanderpump J. setting aside and vacating the order of Miss Justice McKain and all subsequent proceedings thereon.