C.A. Company Petition — S196 and 203 Companies Act — Petition by respondent who was resident in Jamaica at time memorandum of association signed — whether petitioner had locus standi — whether subscription of memorandum invalid — S10(2) Exchange Control Act — Test of residence — Appeal against order of Cooper J that petitioner had locus standi allowed. Held Petitioner/respondent has no locus standi.

Cases referred to: See p13 - book

IN THE COURT OF APPEAL

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SUPREME COURT CIVIL APPEAL NO. 25/88

BEFORE: THE HON. MR. JUSTICE ROWE, PRESIDENT
THE HON. MR. JUSTICE WRIGHT, J.A.
THE HON. MR. JUSTICE FORTE, J.A.

Lawer Associates

BETWEEN	CHINA TOWN RESTAURANT LIMITED	APPELLANTS
A N D	DENNIS HUGH	
A N D	EXLEY HO	
A N D	JOE WONG O/C CHOSANG WONG	RESPONDENT

Lloyd Barnett, Anthony Levy, Allan Wood, instructed by Levy, Hanna and Co. for Appellants

Enos Grant and Orrin Tonsingh for Respondent

January 23, March 1, 1989

ROWE P.:

This appeal was allowed at the conclusion of the arguments on January 23 for the reasons contained herein.

The respondent filed a petition pursuant to Sections 196 and/or 203 of the Companies Act praying for relief as under:

"(a) A Declaration that the Respondents Chan, Hugh and Ho are in breach of their fiduciary duties to the Company.

(b) A declaration that the said Respondents are trustees for the Company of the said shares in China Town (Ocho Rios) Company Limited, and/or all the monies that they have received from the use of the Company's property and/or funds to finance their personal investments and/or the profits made therefrom.

"(c) A Declaration that the said Ho is not a member of the Company and consequential orders;

(d) An account of what is due from the said Respondents in respect of all monies, profits or gains, which would have been realised by the Company but for the wilful default and/or neglect by the said Respondents and/or the breach of the fiduciary duty owned by the said Respondents to the Company.

(e) An Order for payment by the said Respondents to the Company of any such monies received by the said Respondents and/or any sum found due upon the taking of such account with interest thereon at 14% or at such other rate as may seem just.

(f) An Order that the said Respondents are personally liable for all debts that they have incurred in the name of the Company to further their personal interests and that they take immediate steps to release and/or indemnify the Company from any liability whatsoever therefor.

(g) An Order that the said Respondents purchase his Shares at a fair value.

(h) An Order that a Receiver/Manager of the Company be appointed.

(i) Further and in the alternative, an Order that the Company be wound up.

(j) For such further or other relief as to this Honourable Court may seem just."

In support of that petition he filed an affidavit which, so far as is material to this appeal, sets out the circumstances in which he came to live in Jamaica and to be associated with the appellant Company. The second appellant, Dennis Hugh, visited Scotland in 1980 and discussed with the respondent the possibility of establishing a joint-venture restaurant project in Jamaica. It was agreed that on his return to Jamaica, the appellant Hugh, would look for a suitable location for the restaurant upon which the respondent and Kenny Chan would visit

Jamaica to conclude the business arrangement. In August 1981 Kenny Chan and the respondent flew to Jamaica and had discussions with the appellant Hugh. As deponed by the respondent, agreement was reached as follows.

> "(a) that we would form the Company to operate a restaurant, known as 'China Town Restaurant';
>
> (b) that we would be the Directors and shareholders of the Company, the shares being divided equally among us;
>
> (c) that the said Kenny Chan and I would give up our business in Scotland and come to live in Jamaica to manage the said Company, he as Maitre-De and I as Chef/Manager of the Company;
>
> (d) that I would return to Scotland to tie up my affairs, while the said Kenny Chan would remain in Jamaica to assist the said Dennis Hugh in locating and fitting out suitable premises as a restaurant."

On August 24, 1981 the respondent, Kenny Chan, and the appellant Hugh signed the memorandum and articles of association for the formation of China Town Restaurant Limited. Each subscriber became a Director of the Company and each gave his address as 5 Dupont Avenue, Kingston 20. The respondent said in his affidavit that he returned to Scotland to clear up his affairs and shortly after he arrived there Kenny Chan informed him by telephone that a location at Central Plaza had been determined as the site of the restaurant and that the respondent should provide an advance of U.S. $20,000.00 to purchase equipment, food supplies, furniture, cutlery, carpeting etc. To this the respondent said he agreed and he said further that he did provide the money as promised.

In November 1981 the respondent came to Jamaica by way of Miami and immediately set about to assist in the establishment of the restaurant. The venture prospered. Nevertheless differences developed between the adventurers and on September 29, 1987 the respondent was dismissed from his position as Manager/Chef of the restaurant effective October 7, 1987. Following the break-down of negotiations to secure an amicable settlement of the differences consequent upon the dismissal of the respondent, he brought the petition for winding up on the basis that the affairs of the Company are being conducted in a manner oppressive to him as a member of the Company.

When the petition came on for hearing in April 1988, the appellants took the preliminary point that the respondent had no locus standi to present the petition under Section 196 or 203 of the Companies Act for the reason that at the time he signed the memorandum of association, he was not resident in Jamaica.

Gordon J. in his findings of fact said:

"I find:

(1) That it was an integral part of the agreement that the Petitioner should reside in Jamaica.

(2) From the moment the decision was taken by the Petitioner he decided to reside in Jamaica.

(3) He assumed a Jamaican address - 5 Dupont Avenue and this was maintained in returns made under the Companies Act up to 1986.

(4) He, in terms of paragraph 8 of the petition 'returned to Scotland to clear up his affairs.'

(5) He returned to Jamaica in November 1981 and he remained here since.

" (6) Residence is a question of fact and I find that in taking the decision to enter into business relationship with the Respondents the Petitioner decided to reside in Jamaica. When he signed the memorandum of association which had to be prepared after oral agreement was reached he was resident in Jamaica and he returned to Scotland to wind up his affairs and returned to Jamaica to continue his settled intention to reside in Jamaica."

Fox v. Stirk and Anor. (1970) 3 All E.R. 7, was cited to the trial judge who extracted and relied upon the definition of "residence" given by Viscount Cave L.C. in Levene v. I.R.C. (1928) A.C. 217, as also a passage from the judgment of Widgery L.J. on page 13 where he said inter alia:

" ..... Some assumption of permanence, some degree of continuity, some expectation of continuity, is a vital factor which turns simple occupation into residence."

Section 196 of the Companies Act enables a member of a Company to petition the Court for redress if he considers that the affairs of the Company are being conducted in a manner oppressive to himself in his capacity as a member of the Company. A subscriber of the memorandum of a Company is, by Section 28(1) of the Companies Act deemed to have become a member of the Company and the Act provides that upon registration of the Company, such a subscriber "shall be entered as a member(s) in its register of members". A statutory provision, similar to Section 28(1) of the Companies Act of Jamaica was construed in The Dalton Time Lock Company v. Dalton (1892) 56 L.T. N.S. 704, where it was held that the share for which a person had subscribed the memorandum of association was issued to him immediately upon the registration of the Company and consequently the subscriber was liable to pay cash therefor.

For the purposes of this appeal it is necessary to determine whether the respondent is a member of the China Town Restaurant Limited. The appellants rely on Section 10 of the Exchange Control Act. Section 10(2) in particular, renders invalid the subscription of the memorandum of association by a non-resident for the purposes of making that subscriber a member or shareholder in the Company, unless the subscriber has the permission of the Minister. No evidence was produced that the respondent sought or obtained permission from the Minister responsible for Finance to enable him to subscribe to the memorandum. Indeed, from the affidavit evidence the inescapable inference is that no such permission was ever obtained.

Section 10(2) does not provide for the automatic invalidation of the incorporation of the Company in the event that one or more of the subscribers are non-resident in Jamaica and act without the Minister's permission. The invalidity is confined to membership in the Company by the non-resident. Section 10(2) provides:

> "(2) The subscription of the memorandum of association of a company to be formed under the Companies Act, by a person resident outside the scheduled territories, or by a nominee for another person so resident, shall, unless he subscribes the memorandum with the permission of the Minister, be invalid in so far as it would on registration of the memorandum have the effect of making him a member of or shareholder in the company, so, however, that this provision shall not render invalid the incorporation of the company; and if by virtue of this subsection the number of the subscribers of the memorandum who on its registration become members of the company is less than the minimum number required to subscribe the memorandum, the provisions of the said Act relating to the carrying on of business of a company the number of whose members is reduced below the legal minimum shall apply to the company as if the number of its members had been so reduced."

What is the test of residence which ought to be applied? In Halsbury's Laws of England, 4th Ed. Vol. 8 at para. 444, the Author writes:

> "Generally, 'residence' means physical presence other than casually or as a traveller. In considering whether residence is established the Court considers a man's whole environment, especially in relation to his wife and family, and not merely his physical situation. ..... It is possible to be resident in a country without enjoying exclusive possession of any premises there."

That general definition is to be used with great caution as the term "residence" bears varying meanings according to its statutory context. Fox v. Stirk (supra) was decided on the meaning of the word "resident" in the Representation of the People Act, 1949, (U.K.). In the 4th Ed. of Halsbury's Laws, Vol. 15 at para 414, the Author says:

> "Any question as to a person's residence is to be determined in accordance with the general principles formerly applied in determining questions arising under the Representation of the People Act, 1918 as to a person's residence on a particular day of the qualifying period; in particular, regard must be had to the purpose and other circumstances, as well as to the fact, of his presence at or absence from the address in question."

It is clear therefore that the dicta in Fox v. Stirk is not intended to be of universal application in construing the term "resident".

Koitaki Para Rubber Estates Limited vs. The Federal Commission of Taxation (1941) 64 C.L.R. 241 was decided under the Income Tax Assessment Act 1936-37 (Australia). Williams J. in delivering his judgment at p. 249 of the Report said:

> "The place of residence of an individual is determined, not by the situation of some business or property which he is

> "carrying on or owns, but by reference to where he eats and sleeps and has his settled or usual abode. If he maintains a home or homes he resides in the locality or localities where it or they are situate, but he may also reside where he habitually lives even if this is in hotels or on a yacht or some other place of abode."

In this formulation Williams J. makes no reference to intention to reside. Importance is placed on the fact that the individual has a settled or usual place of abode. This coincides exactly with the approach of Viscount Cane L.C. in Levene v. I.R.C. (supra), where he said that "reside" means "to dwell permanently or for a considerable time, to have one's settled or usual abode, to live in or at a particular place."

Fox v. Stirk (supra) was decided against the background of an earlier decision, Tanner v. Carter, Banks v. Mansell (1885) 16 Q.B.D. 231 where it was held that students in the Universities of Oxford and Cambridge, who occupied their rooms in circumstances very similar to the appellants in Fox v. Stirk were not entitled to be registered as voters. The Court of Appeal held that the trial judge had placed undue weight on the Tanner v. Carter decision and proceeded to examine the matter afresh in the light of the current legislation.

Lord Denning M.R. in his judgment said:

> "I would also take into account, as the Act says, the general principles formerly applied and have regard to the purpose and other circumstances of a man's presence at or absence from the address. Hence I derive three principles. The first principle is that a man can have two residences. ..... The second principle is that temporary presence at an address does not make a man a resident there. A guest who comes for the week-end is not a resident. A short-stay visitor is not a resident. The third principle is that

> "temporary absence does not deprive a person of his residence."

Widgery L.J. in his judgment said:

> "..... although I recognise that the word (resident) is in some ways an ambiguous word, I think it nevertheless follows that a man cannot be said to reside in a particular place unless in the ordinary sense of the word one can say that for the time being he is making his home in that place."

Later he added:

> "Indeed this conception of residence is of the place where a man is based or where he continues to live, the place where he sleeps and shelters and has his home. It is imperative to remember in this context that 'residence' implies a degree of permanence."

The use by Widgery L.J. of the phrase 'some expectation of continuity" was precisely tailored to suit the facts of Fox v. Stirk (supra) in which the students were obliged to live in hall or college for twenty-six or thirty weeks each year for at least two years, yet were not permitted to use their rooms during specific periods of each year. This case does not appear to be authority for the proposition that if one is on a temporary visit to a particular place, his formation of an intention to remain there permanently, without more, would instantly transform that temporary visit into residence.

Sir John Donaldson M.R. in Hipperson v. Electoral Officer (1985) 2 All E.R. 456 referred to Fox v. Stirk (supra) which he said was authority for, inter alia, the proposition that:

> " 'reside' and 'resident' are to be construed in their ordinary meanings, namely as connoting dwelling permanently or for a considerable time, having one's settled or usual abode, living in or at a particular place."

All the authorities require that there be a physical presence, not of a transitory or temporary nature, at a place which is called home, in order that there be a sufficiency of facts to amount to residence.

Mr. Grant submitted that if a person comes to Jamaica and while here he forms an intention to reside permanently in Jamaica, then from the moment he forms that intention he would become a resident of Jamaica. The two requisite factors in his submission, physical presence and the intention to remain permanently would coincide. He said that in law no overt act was necessary to convert a temporary visit into residence although in the instant case he was relying on specific overt acts. He further submitted that once a person is resident in a particular country, absence from that country for a temporary and specific purpose does not affect his resident status. On his submissions the respondent formed the intention in August 1981 to reside permanently in Jamaica; that the respondent decided while in Jamaica to enter into business in Jamaica, that this decision necessitated his living in Jamaica; that flowing from this decision he signed the memorandum of association of the Company; that he acquired a Jamaican address 5 Dupont Avenue and that he left Jamaica for the temporary purpose of winding up his affairs in Scotland and then returning to his place of residence, that is Jamaica. He therefore contended that the trial judge had ample evidence on which to find that the respondent was resident in Jamaica in August 1981.

Dr. Barnett did not agree. He said that the evidence clearly showed that the visit of the respondent to Jamaica was an exploratory one and dependent upon the outcome of the business discussions, the respondent would at some future date come to Jamaica to reside. He said that it was not open to the respondent to unilaterally decide to reside in Jamaica so as to convert his

temporary visit into permanent residence. On arriving in Jamaica, the respondent being a non-national would be landed in the Island for a stated period which could only be legally extended by the Immigration Officers. To enable the respondent to work in Jamaica, it was necessary for the prospective employer to obtain a Work Permit for him. The affidavit evidence showed that an application was made to the Ministry of Labour for a Work Permit for the respondent and one was issued to him on October 30, 1981 with Validity for the period October 29, 1981 to October 28, 1984. The respondent having left Jamaica in August 1981, returned in November 1981 after the issue of the Work Permit.

We accept the submission of Dr. Barnett that the purpose of Section 10(2) of the Exchange Control Act is the protection of the foreign exchange position of the Island and to place a high degree of control over persons who are not settled in Jamaica in relation to their acquisition of property in Jamaica. The objective of the statute would be defeated if a non-Jamaican, with the flimsiest of connection with the Island could acquire Jamaican assets and in due course seek to have it transferred into foreign currency. A non-resident who brings foreign currency into the Island with the permission of the Minister has a guarantee that it will be repatriated on demand. This guarantee cannot hold if the Minister is unaware of the inflows of foreign currency at the instance of a non-resident.

We would expect more stringent proof to establish residence under the Exchange Control Act, than if a person admittedly resident in Jamaica was seeking to show that for electoral purposes he was resident in a particular constituency within the Island.

The assertion in the memorandum of association that the respondent's address was 5 Dupont Avenue cannot in the light of the other evidence be of any evidential value. Clearly it was an address used by the respondent as well as the other two subscribers to formally satisfy the requirements for registration. At best, the respondent's position was that of a visitor who had good prospects to return to Jamaica in another capacity if and when certain eventualities, then set in motion, would materialize. In those circumstances, the respondent who lived, while in Jamaica in August 1981, as a guest of the appellant Hugh, cannot be said to have acquired a residence in Jamaica. When he returned to Scotland to clear up his affairs he had returned to his home from which he had been temporarily absent. Unless the respondent had acquired a resident status in Jamaica in August 1981, it cannot be said that he left Jamaica in that month for the temporary purpose of clearing up his affairs in Scotland. We held that in August 1981 the respondent was not resident in Jamaica.

Accordingly, in our view the respondent has no locus standi, as a member of the Company, to present a petition for winding up under Section 196 or 203 of the Companies Act.

WRIGHT J.A.:

I agree. I must confess however that the dealing among the adventurers makes me regret the inevitability of the conclusion. It is obviously a case in which the respondent did not have the necessary legal advice at the outset. Such a situation would tend to jeopardize joint-venture enterprises which have recently attracted much attention.

FORTE J.A.

I have had the opportunity of reading in draft the judgment of the Hon. President and also the sentiments expressed by my brother Wright J.A. and I agree with the reasons and conclusion. I have nothing further to add.

Cases referred to

1) Fox v Stirk and Anor (1970) 3 All ER 7
2) Lawrence v I.R.C. (1928) A.C. 217
3) Dalton Time Lock Company v Dalton (1892) 58 L.T.N.S. 71
4) Kolotsha Para Rubber Estates Limited vs The Federal Commissioner of Taxation (1924) 34 C.L.R. 224
5) Tanner v Carter, Bankes & Manisty (1885) 16 Q.B.D. 231
6) Hipperson v Electoral Officer (1985) 2 All ER 456