

*Civil Code - whether decision on question was a matter unnecessary  
the question of fact - Constitution of Association  
whether Plaintiff enjoys right of property under Articles of Association  
against order of Court that JAMAICA should be made defendant*

**IN THE COURT OF APPEAL**

**SUPREME COURT CIVIL APPEAL NO. 56/95**

**COR: THE HON MR JUSTICE CAREY JA  
THE HON MR JUSTICE GORDON JA  
THE HON MR JUSTICE PATTERSON JA**

**BETWEEN ANTHONY FERRARI APPELLANT**

**AND JOHN ISSA**

**AND MIDDLE EAST VENTURES LTD RESPONDENTS**

**Dennis Goffe QC & Miss Michele Henry  
for appellant**

**Richard Mahfood QC & Dr. Lloyd Barnett for  
John Issa**

**Hugh Small QC & Charles Piper for  
Middle East Ventures Ltd**

**10th, 11th, 12th October  
& 6th November 1995**

**CAREY JA**

By a writ issued on 3rd March 1995, the plaintiff (the appellant in these proceedings) claimed (inter alia) as follows:

- (a) Against the Defendants for damages for conspiracy to procure a breach of the contract between the Plaintiff and a company known as Village Resorts Limited relating to pre-emption rights, the terms of which contract are contained in the Articles of Association of the said company of which the Plaintiff was at all material times a member and shareholder, for damages for wrongfully and fraudulently procuring the same, and interest pursuant to the Law Reform (Miscellaneous Provisions) Act on any damages awarded.

(b) Alternatively for damages against the First defendant as a Director of Village Resorts Limited for wrongfully depriving the Plaintiff of an opportunity to exercise his pre-emption rights in relation to the sale of the shares of one Frank Hall, a member of the said Company, by acting in breach of his powers under the Company's Articles of Association and wrongfully and/or fraudulently procuring a transfer of the said shares to the Second Defendant, and interest pursuant to the Law Reform (Miscellaneous Provisions) Act, on any damages awarded."

The statement of claim spelt out in detailed averments allegations of fraud and conspiracy by the defendants to deprive him of his rights of pre-emption under the Articles of Village Resorts Ltd in procuring the transfer of sixty thousand (60,000) shares to Middle East Ventures Ltd. By their defence, both defendants raise the proper construction of articles 26 and 27 as a complete answer to the plaintiff's suit. The first defendant applied for this issue to be tried as a preliminary issue under section 323 of the Civil Procedure Code. The question formulated was in the following terms:

"WHETHER, on its proper construction, Article 26 of the Articles of Association of Village Resorts Ltd, the company mentioned in the Endorsement to the Writ, the Amended Statement of Claim and the Defence of the First Defendant permits transfer of shares from one member to another whether by sale, gift or otherwise without such transfers being subject to the rights and procedures set out in Article 27 of the said Articles."

On 26th May 1995 Edwards J ordered that the question of law which was raised on the pleadings be tried as a preliminary issue before the trial of the action. He further ordered consequentially that all further proceedings in the

action should be stayed pending the determination of the preliminary issue.

This appeal is from that determination and order.

The legal principles applicable are not in doubt. It was accepted on all hands that the order can be made if it appears that a decision on the question may render it unnecessary to try the question of fact. Lord Denning MR in **Carl Zeiss Stiftung v Herbert Smith & Co** [1968] 3 WLR 281 at p. 285 said this:

" The true rule was stated by Romer, L.J. in **Everett v. Ribbands** [1952] 1 KB 112; [1951] 2 TLR 829; [1951] 2 All ER 818; [1952] 2 QB 198,206; [1952] 1 TLR 933; [1952] 1 All ER 823:

' Where you have a point of law which, if decided in one way, is going to be decisive of litigation, then advantage ought to be taken of the facilities afforded by the Rules of Court to have it disposed of at the close of pleadings, or very shortly after the close of pleadings.'

I have always understood such to be the practice."...

In **Polskie Towarzystwo Handlu Zagranicznego Dla Elektrotechniki "Elektrim" v Electric Furnace Co Ltd** [1956] 1 WLR 562 the rule is conveniently set out in the headnote :

*"Per curiam.* Without laying down any general rule which might fetter judicial discretion the kind of case in which an order of this kind could usefully be made was one in which the matter directed to be tried first would, when decided one way or the other, be likely to dispose of the case."

Mr. Goffe Q.C. in order to demonstrate that the present case contained no special circumstances justifying the making of the order, submitted that there were questions of relevant fact to be decided before the question of law could be determined as an affirmative answer would be largely hypothetical. He identified those questions of fact requiring determination as:

- (i) what were the circumstances of sale between Frank Hall and Village Resorts Ltd. or;
- (ii) under what Article did Hall conduct the sale of his shares?

Finally, he contended that a negative answer to the question would not dispose of the case because that answer would still require proof of the conspiracy or fraudulently procuring a breach of contract.

Mr. Mahfood, Q.C. argued that the critical issue of law raised on the pleadings was whether the plaintiff under the Articles of Association has preemptive rights with respect to the 60,000 shares which were sold by Frank Hall to Middle East Ventures Ltd. This was the critical issue in the case the determination of which would be decisive in the suit. That would result in a saving of costs and court time. If it were decided in the plaintiff's favour he would be entitled to judgment on the alternative claim set out in the endorsement to the writ. There were no issues of fact which required adjudication. The factual elements needed in that regard are not in dispute and are:

- i. identification of the Articles of Association as being the relevant contract

- ii. that the plaintiff as well as the transferer and transferee are all members of the Company

The first requirement to satisfy the rule is whether a point of law is raised on the pleadings. Both the plaintiff and the first defendant agree that the critical question is whether the plaintiff enjoys a right of pre-emption under the Articles of Association. I did not understand Mr. Goffe, QC to be suggesting that not to be the case, but was denying at one and the same time that the question however answered, would be decisive of the case. The existence of that right hinges entirely on a construction of Articles 26 and 27. That is the point of law raised on the pleadings. A reference at this point to the pleadings is useful.

The statement of claim makes the following averments:

"9. Article 26 of the said Articles permits transfers of shares from one member of the company to another otherwise than pursuant to a sale.

10. Article 27 of the said Articles stipulates inter alia that

'a share shall not be transferred otherwise than as provided in Article 26 unless it first be offered to the members at a fair value to be fixed by the company's auditors. Any member desiring to sell a share (hereinafter referred to as a 'retiring member') shall give notice thereof in writing to the Company (hereinafter referred to as a 'sale notice') constituting the Company his agent for the purpose of such sale. No sale notice shall be withdrawn without the Directors' sanction. The Directors shall offer any share comprised in a sale notice to the existing members, and if within twenty-eight (28) days after the sale notice has been given, a purchasing

member is found, such purchasing member shall be bound to complete the purchase within seven days. Notice of the finding of the purchasing member shall be given to the retiring member, who shall be bound on payment of the fair value to transfer the share to the purchasing member.' "

The defence of the first defendant is in the following form:

"7. The First Defendant denies paragraph 9 of the Amended Statement of Claim and says that article 26 of the Articles of Association of VRL is in the following terms:

'Subject as in these Articles provided, any share may be transferred to any member of the company, and any share may be transferred by a member to his or her father or mother, or to any lineal descendant of his or her father or mother, or to his or her wife or husband, any share of a deceased member may be transferred to the widow or widower or any other such relative as aforesaid of such deceased member or may be transferred to or placed in the names of his or her executors or trustees; and in any such circumstances (but subject as aforesaid) Article 3 shall not apply save to ensure that the member or members shall not exceed the prescribed limit or to prevent a transfer of shares on which the company has a lien.'

8. On its proper construction, Article 26 therefore permits transfers from one member to another whether by sale, gift or otherwise and such transfers are not subject to the procedures prescribed by Article 27."

These references make it abundantly clear that a construction of the relevant articles, which is a point of law, is raised on these pleadings as indeed on those of the second defendant which I therefore forbear to rehearse.

The next question is - will an answer either way be determinative of the suit. The plaintiff's case is founded wholly on his claim that he has a right of pre-emption. The defendants do not deny that there was a sale of shares by Frank Hall to Middle East Ventures Ltd, another member of the company but aver that the Article 27 is inapplicable, in other words, the plaintiff has not the right he claims. If then the court construes the relevant articles so as to invest the plaintiff with a right of pre-emption, it is as clear as can be that the plaintiff will be entitled to a judgment on the claim for wrongfully depriving the plaintiff of an opportunity to exercise his rights. The extra claim for damages for conspiracy will not entitle the plaintiff to any further award of damages. Moreover, if the court were to find that the plaintiff has not the right he claims, that also disposes of the suit in the defendants' favour.

No basis can therefore exist for the argument that there are facts which need to be determined before the question of law can be decided. The transfer of shares by Frank Hall to Middle East Ventures Ltd. was by virtue of a sale. If the right of pre-emption exists, then the only fact to be established is that there was a sale. No one however, disputes the fact of a sale. Then it was said by learned Queen's counsel for the plaintiff that evidence was required to show under which of the Articles 26 or 27, the sale took place. Mr. Mahfood is, in my opinion, right, when he pointed out that Articles 26 and 27 deal with restrictions on a member's right to transfer his shares. It is to be noted that shares being

personal property are freely transferable. That is a normal incident of the right of absolute ownership. But restrictions can be attached by the Articles of Association and Articles 26 and 27 are examples of restrictions on the absolute right to transfer.

I would add further that no issue of fact can arise on the pleadings in this regard because it was admitted by the first defendant that no sale notice within the meaning of Article 27 was given to Village Resorts Ltd. by Frank Hall and it was averred that Article 27 did not apply. That was a clear admission that the provisions set out in Article 27 were not complied with (Paragraph 17 (b) (i) of the defence of the first defendant) The question then is, was the Article applicable to the circumstances of the transfer. That, I venture to think, depends on an interpretation of the Articles, which is a question of law and does not depend on any resolution of conflicting facts.

I come to the conclusion that there are no questions of fact which need to be determined and that the point of law when decided one way or the other is likely to dispose of the case. For completeness, it should be said in respect of the second defendant that the same critical question of law falls to be determined. The company was not joined originally as a respondent in this appeal, but sought leave to be joined and leave was duly granted.

The learned judge therefore came to the right decision and I would affirm his order and dismiss the appeal with costs to the respondents to be taxed if not agreed.



**GORDON JA**

On 26th May 1995 Edwards J. on the application of the respondent John Issa the first defendant in this action, made the following orders:

1. "The following question or issue of law raised by the pleading as in this action be tried as a preliminary issue before the trial of the action, namely:

whether, on its proper construction, Article 26 of the Articles of Association of Village Resorts Limited, the company mentioned in the Endorsement to the Writ, the Amended Statement of Claim and the Defence of the First defendant permits transfer of shares from one member to the another(sic) whether by sale, gift or otherwise without such transfers being subject to the rights and procedures set out in Article 27 of the said Articles.

2. Until the determination of the said preliminary issue all further proceedings in the action are stayed."

These orders were made under the provisions of section 323 of the Judicature (Civil Procedure Code) Law.

The appellant sought on appeal the reversal of these orders contending that consideration of the issue requires examination of mixed law and facts which is not consonant with the provisions of section 323, which requires a determination of questions of pure law.

Section 323 of the Civil Procedure Code provides as follows:

"if it appear to the Court or a Judge, that there is, in any cause or matter a question of law, which it would be convenient to have

decided before any evidence is given or any question or issue of fact is tried, or before any reference is made to an arbitrator, the Court or Judge may make an order accordingly, and may direct such question of law to be raised for the opinion of the Court, either by special case, or in such other manner as the Court or Judge may deem expedient, and all such further proceedings as the decision of such question of law may render unnecessary may thereupon be stayed.”(emphasis supplied)

The respondent contends that the correct principle of law is that where a point of law is raised on the pleadings the determination of which is going to be decisive of the litigation, the procedure for the trial of that point of law as a preliminary issue should be adopted. Further that where costs can be saved by a point of law, which requires serious arguments and consideration, being disposed of before trial and that point of law is precisely raised on the pleadings, there is a proper case for an order for trial on that point of law as a preliminary issue.

The plaintiff's claim in damages alleges a denial of pre-emptive rights afforded to him as a member of Village Resorts Limited by the provisions of Article 27 of the Articles of Association of the said company. The plaintiff alleges that sixty thousand (60,000) shares in the said company were sold by one member of the company to another member and his pre-emptive rights given by Article 27 were not observed in the sale. The defence admits the sale transaction but challenges the interpretation placed on Article 27 whereby the Plaintiff claims pre-emptive rights. The plaintiff therefore has the threshold responsibility to establish that he has pre-emptive rights which he claims under Article 27. This is the central issue.

If the plaintiff fails to establish that he has these rights then his action fails and the defendants are entitled to judgment. If the plaintiff succeeds he is entitled to judgment on the alternate claim and he can proceed to assessment of damages where evidence of the facts will be given.

The contentions of the respondents I find are correct and they are amply supported by the cases they prayed in aid viz. **Summer v Henderson & Sons** [1963] 2 All ER 713 **Carl Zeiss Stiftung v Herbert Smith & Co.** [1968] 3 All ER 281 **Bentley Stevens v Jones** [1974] 1 WLR 638 inter alia In **Everett v Ribbands Ribbands** [1953] 1 All ER. 827 Romer L.J. observed

“..where there is a point of Law which if decided in one way, is going to be decisive of litigation, advantage ought to be taken of the facilities afforded by the rules of Court to have it disposed of at the close of pleadings or very shortly afterwards.”

I accept this statement as correct. The Order of Edwards J. requires the resolution of a matter of Law the determination of which is going to be decisive of litigation if decided in the defendants' favour. I agree the Appeal should be dismissed with costs to the respondent to be taxed if not agreed.

**PATTERSON, J.A.:**

This is an appeal by Anthony Ferrari ("the plaintiff") against an interlocutory order made by Edwards, J. whereby it was ordered that a question or issue of law raised by the pleadings in this action should be decided before the action proceeded further. The order, which was made in terms of a summons filed by John Issa ("the first defendant") under the provisions of section 323 of the Judicature (Civil Procedure Code) Law, was couched in the following form:

"1. The following question or issue of law raised by the pleadings in this action be tried as a preliminary issue before the trial of the action, namely:

whether, on its proper construction, Article 26 of the Articles of Association of Village Resorts Limited, the company mentioned in the Endorsement to the Writ, the Amended Statement of Claim and the Defence of the First Defendant permits transfer of shares from one member to the another (sic) whether by sale, gift or otherwise without such transfers being subject to the rights and procedures set out in Article 27 of the said Articles.

2. Until the determination of the said preliminary issue all further proceedings in the action are stayed."

The plaintiff brought this action against the first defendant and Middle East Ventures Limited ("the second defendant") claiming damages for conspiracy to procure a breach of contract between the plaintiff and a company,

Village Resorts Limited ("VRL"); and damages for wrongfully and fraudulently procuring the said breach of contract. The terms of the contract are contained in the Articles of Association of VRL and the breach is said to be in relation to pre-emptive rights under the terms of Article 27. There is an alternative claim for damages against the first defendant as a director of VRL for wrongfully depriving the plaintiff of an opportunity to exercise his pre-emptive rights in relation to the sale of shares of one Frank Hall, and wrongfully and/or fraudulently procuring a transfer of the said shares to the second defendant.

It is common ground that Frank Hall, a member of VRL, decided to sell sixty thousand of his ordinary shares. The plaintiff in his statement of claim, alleges that Frank Hall was prepared to sell the shares at \$1 per share and that he notified his desire so to do to the first defendant. The fair value of each share was considerably more than \$1, and it is said that the defendants knew that to be so. Paragraph 15 of the statement of claim states:

"15. Armed with this knowledge, the Defendants and each of them wrongfully and with intent to injure the Plaintiff, conspired and agreed together to deprive the Plaintiff of any opportunity to exercise his pre-emption rights under Article 27 of VRL's Articles of Association and procured that the said sixty thousand (60,000.000) shares be transferred to the Second Defendant, without recourse to the provisions of the said article."

These averments are met with a flat denial.

The plaintiff avers further that "Article 26 of the said Articles permits transfers of shares from one member of the company to another otherwise than pursuant to a sale" (emphasis supplied). Both defendants deny that Article 26 is in those terms. The contention of the plaintiff seems to be that Article 26 forbids a member to sell his shares to another member, and that a member may only sell his shares to another member under the provisions of Article 27 which establishes a pre-emptive right in the plaintiff. Articles 26 and 27 are in the following terms:

"26. Subject as in these Articles provided, any share may be transferred to any member of the company, and any share may be transferred by a member to his or her father or mother, or to any lineal descendant of his or her father or mother, or to his or her wife or husband, any share of a deceased member may be transferred to the widow or widower or any other such relative as aforesaid of such deceased member or may be transferred to or placed in the names of his or her executors or trustees; and in any such circumstances (but subject as aforesaid) Article 3 shall not apply save to ensure that the member or members shall not exceed the prescribed limit or to prevent a transfer of shares on which the Company has a lien.

27. A share shall not be transferred otherwise than as provided in Article 26 unless it first be offered to the members at a fair value to be fixed by the Company's Auditors. Any member desiring to sell a share (hereinafter referred to as a 'retiring member') shall give notice thereof in writing to the Company (hereinafter referred to as a 'sale notice') constituting the Company his agent for the purpose of such sale. No sale notice shall be withdrawn without the Directors'

"sanction. The Directors shall offer any share comprised in a sale notice to the existing members, and if within twenty-eight days after the sale notice has been given, a purchasing member is found, such purchasing member shall be bound to complete the purchase within seven days. Notice of the finding of the purchasing member shall be given to the retiring member, who shall be bound on payment of the fair value to transfer the share to the purchasing member. If the retiring member fails to complete the transfer, the Directors may authorise some person to transfer the share to the purchasing member and may receive the purchase money and register the purchasing member as holder of the share, issuing him a certificate therefor. The retiring member shall deliver up his certificate and shall thereupon be paid the purchase money. If within twenty-eight days after the sale notice has been given the Directors shall not find a purchasing member for the share and give notice accordingly, or if through no default of the retiring member the purchase is not duly completed, the retiring member may at any time within six months after the sale notice was given but subject to Article 3 sell such share to any person at any price."

The alternative averment is in this fashion:

"22. Alternatively, if which is denied, there was no conspiracy between the first and second defendant (sic) as hereinbefore alleged, the plaintiff says that as a Director of VRL the first defendant was at all material times bound by VRL's Articles of Association and more specifically by Articles 26 and 27 thereof, the effect and terms of which are set forth in paragraphs 9 and 10 hereof.

23. As the first defendant well knew, the said Articles do not authorise a transfer of the shares of one member of the company to another member, pursuant to a sale, save as is

"provided by the provisions of Article 27."

This is how the first defendant answered the averments of the plaintiff in paragraphs 22 and 23 of the statement of claim quoted above:

"23. With respect to paragraph 22 of the Amended Statement of Claim, the First Defendant admits that as a director he was required to observe the provisions of VRL's Articles of Association, but says that paragraph 9 and 10 of the Amended Statement of Claim do not completely or accurately reflect the terms, meaning and effect of Articles 26 and 27.

24. The First Defendant repeats paragraphs 7, 8, 14, 15, 16, 17 (a)(b)(c), 21, 22, 23, 24 and 25 of his Defence and denies paragraph 23 of the Amended Statement of Claim."

The second defendant's answers are in similar terms to that of the first defendant. These are they:

"19. As to paragraph 22 of the Amended Statement of Claim, this Defendant admits that as a Director of VRL the First Defendant is bound by its Articles of Association but denies that paragraphs 9 and 10 of the Amended Statement of Claim sets out the effects and terms of Articles 26 and 27 of the said Articles and this Defendant repeats paragraph 4, 6, 8, 10, 12, 13, 14 and 17 hereof.

20. This Defendant denies paragraphs 23 and 24 of the Amended Statement of Claim and repeats paragraphs 4, 6, 8, 10, 12, 13, 14, 17 and 19 hereof."

These pleadings formed the basis for the first defendant's application under the provisions of section 323 of the Judicature (Civil Procedure Code) Law, which reads:

"323. If it appear to the Court or a Judge, that there is, in any cause or



"matter a question of law, which it would be convenient to have decided before any evidence is given or any question or issue of fact is tried, or before any reference is made to an arbitrator, the Court or Judge may make an order accordingly, and may direct such question of law to be raised for the opinion of the Court, either by special case, or in such other manner as the Court or Judge may deem expedient, and all such further proceedings as the decision of such question of law may render unnecessary may thereupon be stayed."

These provisions may be conveniently invoked where the action has not yet come on for trial, but a question of law is adequately raised on the indorsement to the writ or on the pleadings. In such a case, the Court or a judge has a discretion to order the question of law be tried as a preliminary issue, if it appears that the question may be conveniently decided at that stage of the proceedings and that the decision, one way or the other, would be likely to dispense with a trial or with the trial of some substantial issue in the action. No general rule can be laid down (and indeed it would not be desirable so to do) to determine the circumstances in which a judge should exercise his discretion in this regard. But since he may only exercise his discretion judicially, there must be sufficient grounds for its exercise.

Mr. Goffe, Q.C. contends that "the order sought should only be granted in extraordinary and exceptional cases and on special grounds, and these criteria were not met." He cited as authority for his contention, the case of *Bottomley*

**v. Hurst and Blackett, Limited and Houston** [1928] 44 T.L.R.

451. In that case, Scrutton L.J., in his judgment, said this (page 452):

"There was power in the Court, if it thought convenient to do so, to order one issue to be disposed of and the rest of the issues to be postponed until that one issue had been decided, but experience had taught the court that that power was only to be resorted to in very special cases when it was asked for by the plaintiff."

He contends further the question posed in the order of Edwards, J. will not have the effect of dispensing with the trial of this action. There are questions of fact which must be decided irrespective of the answer to the question posed, and in the absence of those facts being agreed or proved, any answer to the question posed must be purely hypothetical, and therefore the procedure adopted is objectionable on that score alone. In respect of the order for stay of proceedings, he argued that this will result in greatly delaying the trial of the true facts and the law involved in the action.

It seems quite clear to me that the real issue raised on the pleadings which could be conveniently decided at this stage of the proceedings is whether the plaintiff, a member of VRL, has pre-emptive rights to the sale of the shares of Frank Hall, another member of VRL. The determination of this issue rests squarely on the interpretation to be placed on Article 26 as a matter of law.

The plaintiff is claiming a breach of a legal right of pre-emption under the terms of a contract contained in the Articles of Association of VRL. It seems clear that he may only establish such a legal right on a proper construction of the relevant Articles. The pleadings have established that Frank Hall has transferred shares by sale to Middle East Ventures Limited, but the plaintiff's averment is that Article 26 "permits transfer of shares from one member of the company to another otherwise than pursuant to a sale" (emphasis supplied). It follows, therefore, that if the answer to the question posed by the court below is in the affirmative, then it is obvious that the plaintiff could not succeed in his claim to a pre-emptive right to the sale of those shares. If on the other hand, the answer is in the negative, then the plaintiff would be entitled to enter judgment on the claim, and proceed to an assessment of damages. A decision, whether in favour of or against the plaintiff, would be decisive of the paramount issue in this action. It seems unarguable that the question of law posed in the order of the judge can be conveniently decided at this stage with the result that much time and expense would be saved.

I am satisfied that the decision of the question of law will dictate the future course of the proceedings and in the circumstances, a stay of further proceedings pending the determination of the question of law is warranted and desirable.

