Heard 1-12-69
Judgt 5-12-69

THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN THE HIGH COURT OF JUSTICE

COMMON LAW — In Chambers

SUIT NO. C.L. 538 of 1969

BETWEEN	ALBERT O. McCULLOCH	PLAINTIFF
AND	STEWART GREGG	DEFENDANT

Mr. Bruce Barker of Livingston, Alexander & Levy for Plaintiff.
Mr. R.N.A. Henriques instructed by A.E. Brandon & Co. for Defendant.

BEFORE MR. JUSTICE RENE (ag)

JUDGMENT

By a specially endorsed Writ, the Plaintiff claims from the Defendant the sum of £1,266.3.8 with interest at 6% thereon being the amount owing by the Defendant to the Plaintiff on a Promissory Note dated 14th July, 1967 for $2,800 (Bahamian) which said Note was dishonoured by non-payment. The Defendant entered Appearance and filed defence on the 3rd October, 1969 and on the 11th October the Plaintiff took out a Summons for Summary Judgment supported by an Affidavit in which he deponed that he verily believed that there is no defence to the action. The Defendant filed an Affidavit in reply to the Summons. It is settled law that an application can be made under Order XIV for Summary Judgment after Defence has been filed and the parties did not seek to argue to the contrary before me.

When the Summons came on for hearing Mr. Barker for the Plaintiff submitted that even if the Court accepted the Defendant's account that he signed the Promissory Note as Agent for a Company the Defendant would in the instant circumstances be liable on the Promissory Note as he did not write the Company's name on the Promissory Note in accordance with the provisions of Section 107(4) of the Companies Act 1965.

Mr. Barker conceded however, that if the only point in the case was the contention of the Plaintiff on the one hand that the loan was made to the Defendant on his representation that he wanted the money for his own personal affairs and the contention of the Defendant on the other hand that the money was advanced by the Plaintiff for the purchase and subsequent sale of Motor cars for a Company S.G. Motor Sales & Service Ltd., then clearly there would be a triable issue and he would not press for Judgment. As, however,

in his submission Section 107 (4) of the Companies Act applied to the instant case the Plaintiff would be bound to succeed in any event.

Section 107 (4) b of the Companies Act, Act 7/65 provides as under:-

> "If an officer of a company or any person on its behalf issues or authorises the issue of any business letter of the Company or any notice or other official publication of the Company, or signs or authorises to be signed on behalf of the Company any bill of exchange, promissory note, indorsed cheque or order for money or goods, wherein its name is not mentioned in manner aforesaid;
>
> he shall be liable to a fine not exceeding fifty pounds and shall further be personally liable to the holder of the bill of exchange, promissory note, cheque or order for money or goods for the amount thereof unless it is duly paid by the Company."

Section 107 (1) of this Act provides for the manner in which the name of a Company ought to be affixed on its business address, its Seal, and its written documents.

The allegation in the pleadings is that the Promissory Note has been dishonoured and I draw the inference from this that the Company known as S.G. Motor Sales & Service Ltd. has not paid the amount of the Note.

The Plaintiff submitted that the Law of Bahamas was to be presumed to be the same as the Law of Jamaica unless the contrary was shown. Mr. Henriques eventually said that he was satisfied as to this point and the Court was not further troubled with that question.

In reply Mr. Henriques on behalf of the Defence argued that Section 107 (4) of the Companies Act 1965 was inapplicable to the facts of this case. Mr. Henriques relied on the facts set out in the Defendant's Affidavit in which the Defendant stated that the Plaintiff was the President and the Defendant the Vice President of a Company known as the S.G. Motor Sales & Service Ltd. and that there was an oral agreement between the Plaintiff and the Defendant

that the Plaintiff should advance the sum of $2,800 (Bahamian) to the said Company for the purpose of purchasing second-hand cars for sale by the Company. Thereafter the Plaintiff advanced the said sum of money to the Defendant on behalf of the Company and with the money the Defendant bought 5 motor cars as property of the Company. The Defendant further said that he received no benefit whatever from the purchase of the cars and that the money from the Promissory Note was used to purchase the cars on behalf of the Company as the Plaintiff well knew. The Defendant was later dismissed by the Plaintiff from his post with the Company.

Mr. Henriques submitted that on the facts disclosed in the Affidavit there is a triable issue and that the Plaintiff's Summons summaries should be (dismissed discussed.) It was his submission that Section 107 (4) of the Companies Act 1965 Act 7/65 is inapplicable to the facts of this case.

Mr. Henriques submitted that that Section was only applicable where an officer, or a servant or agent of a Company treated with an outsider and then attempted to avoid his obligations by saying afterwards that the liability is not his, it is the Company's. He submitted that in the instant case the situation was inter partes i.e. between the President and Vice President of the same Company. The Plaintiff as President of the Company would know in what capacity the Defendant signed the Promissory Note and the Plaintiff could not therefore be misled. He further submitted that the object of Section 107 (4) of the Companies Act was that officers and persons acting on behalf of the Company should be compelled to make it clear to "third parties" that they were dealing with limited Companies and so disabuse their minds of any belief that they were dealing with persons whose liability was unlimited. Mr. Henriques submitted that the Plaintiff as President of the Company had actual knowledge of the capacity in which the Defendant signed the Promissory Note and that Section 107 (4) could have no applicability whatever as the Plaintiff dared not say that he was misled.

In answer to these arguments Mr. Barker submitted that the

question of knowledge or no knowledge has nothing to do with the situation. Section 107 (4) was partly penal and partly remedial and was to be strictly construed and had always been so construed. He relied on a passage from the Second Edition of Modern Company Law by L.C.B. Gower, a noted authority on Company Law. At page 187 Professor Gower in dealing with Section 108 (4) of the 1948 Companies Act of the U.K. which is in terms similar to Section 107 (4) of the Jamaican Statute has this to say:-

> "Liability under this Section normally arises in connection with bills or cheques and officers have been held personally liable when the word "limited" was omitted and when the Company was described by a wrong name-------. It seems clear that it makes no difference that the third party concerned has not been misled by the misdescription".

The cases relied on by Professor Gower for his comment above are the same cases cited and relied upon before me by Mr. Barker. Mr Barker relied upon Penrose v. Matyr (1858) E.B.&E. at 499. In that case the word "limited" was omitted from the name of the Company and although the Defendant as Secretary of the Company, accepted the Bill as "Secretary to the said Company", the Court held that as the Defendant signed the acceptance purporting it to be an acceptance on behalf of the Company, and he was personally liable thereon because the Bill did not contain the full name of the Company.

Atkin v. Wardle (1889) 5 T.L.R. at p.734 decided by the Court of Appeal was to the same effect. There a Bill was drawn and intended to be drawn upon the Company and it was accepted by three Directors on behalf of the Company. The real name of the Company did not appear upon the Bill as the word "limited" was omitted. It was argued in that case that a misdescription must be a material one and that in that case there was no material misdescription. This contention was rejected by the Court and Lindley, L.J. remarked that the Sections 41 & 42 of the U.K. Act were two of the most important in the Act and the Court must take care not to relax them.

In the oft-cited case of Nassau Steam Press v. Tyler (1894) L.T. 376 in which both Penrose v. Matyr and Atkin v. Wardle were cited with approval, the Company's correct name was "The Bastille Syndicate Limited" but the Directors and Secretary of this Company accepted a Bill in the name of "Old Paris and Bastille Syndicate Ltd". The Defendants argued that the additional words were an immaterial misdescription. Matthew J. said:

> "The language of Sections 41 & 42 of the Companies Act 1862 is perfectly distinct. The sole question in this case is whether the name of the Company as inserted in the Bill of Exchange is the correct name of the Company. I have come to the conclusion that it was not."

Per Cave J. The only way in which the Defendants can get out of the difficulty is by saying that the name of the Company appears in the acceptances, but with the addition of something else. That is not what the Act requires:

It is true that in the cases cited the relationship between the parties was such that only the Defendants were officers, or servants or agents of the Companies. Mr. Henriques submits that this is a most significant point in the present case but he was ~~not~~ only able to point to the use of the expression "third parties" in the cases to support that if all the parties involved were officers of the Company, the expression "third parties" would not have been used.

The Defendant in this case has by his Affidavit stated that he was acting on behalf of the Company when he signed the Promissory Note. On an examination of Section 107 (4) b (1) of the Companies Act, there are no words of limitation on which Mr. Henriques can hang his submission. Accepting the Defendant's Affidavit that he signed the Promissory Note on behalf of the Company, then it would be for him to show how the exception as to "fellow officers" of the Company can be carved out of Section 107 (4). I can find nothing in the cases which support that such a distinction can be drawn and it does not seem on principle that any such exception can be allowed. I accept as a correct statement

o. the Law the comments of Professor Gower that this Section is applicable whether or not the Plaintiff is misled.

The position with regard to Promissory Notes signed on behalf of a Company seems to be that if the name of the Company is omitted from the Promissory Note, that Note cannot be relied on as against the Company.

It would be a strange result if the interpretation to be given to Section 107 (4)(b) of the Act was that transactions which involve only officers and the Company were excluded from the protection of the Section. Would a shareholder who is not an officer or agent of the Company be considered a "third party". If the distinction which Mr. Henriques seeks to draw was a valid one, I would expect to see some authority for the proposition.

It is clear beyond argument that the Section is both remedial and penal and that it has not been construed in any lax sense by the Courts. What the Court must do is to look at the words of the Statute and then see whether or not the transaction comes within the ambit thereof.

In Cow v. Casey (1949) Q.B. 474 at p.481 Lord Green made it clear that if the point of Law taken under a particular Statute is quite obviously an unarguable point, the Court has a duty to make sure that the point of Law is understood and if the Court is satisfied that the point is really unarguable the Court has the duty to apply Order XIV.

I have examined the Promissory Note in this case and I observe that it is prepared on ordinary stamped paper and that nowhere on that Promissory Note does the name of the Company S.G. Motor Sales & Service Ltd. or any part thereof appear. There is no indication whatever on the Promissory Note that the transaction was on behalf of the Company.

I hold, however, on the assumption that the facts contained in the Defendant's Affidavit are true that the Promissory Note was issued on behalf of the Company. I hold further that the distinction sought for by Mr. Henriques does not exist in Law and that the transaction is caught by Section 107 (4) (b) of the

Companies Act 1965.

Accordingly I grant leave that the Plaintiff be entitled to enter Summary Judgment with Costs of the Action generally and of this Summons.