IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN EQUITY

SUIT NO. E.W. 170 OF 1984

BETWEEN	WINDOWS LIMITED	PLAINTIFF
A N D	WIN-DOORS LIMITED	DEFENDANT

Norman Davis of Myers, Fletcher and Gordon, Manton and Hart for Plaintiff.

Miss Hilary Phillips and Mrs. Denise Kitson of Perkins, Tomlinson, Grant, Stewart and Company for Defendant.

23rd June, 1988, 13th & 14th October, 1988 & 31st May, 1989

HARRISON,J.

This is an application by the defendant company, in limine, to strike out the plaintiff company's writ and statement of claim wherein the plaintiff company claims damages and an injunction for breach of statutory duty, on the ground that the plaintiff company has no locus standi to bring the action.

By the endorsement on the writ the plaintiff claims:-

"1. Damages for breach of statutory duty in neglecting and refusing to comply with the directive of the Registrar of Companies to change its name from Win-Doors Limited and has therefore resulted in loss and inconvenience to the plaintiff.

2. An injunction restraining the Defendant, its servant and agent from using the name Win-Doors Limited...."

The statement of claim filed recites, inter alia, that,

"3. The defendant provides to the public services similar to those provided by the plaintiff, namely, the manufacturing, importing and trading in of windows, window frames, doors, doors frames .... and like products....

4. The similarity in the names of both the plaintiff and the defendant has resulted in loss and inconvenience to the plaintiff.

5. On the 17th day of November 1983, the Registrar of Companies pursuant to Section 19(3) of the Companies Act directed the Defendant to change its name within six (6) weeks of the said date.

6. The Defendant has neglected and/or refused to comply with the directive of the Registrar of Companies.

7. The Plaintiff continues to suffer loss and inconvenience as a result of the continued confusion in the said trade and due to the Defendant's neglect and/or refusal to comply with the Registrar of Companies' said directive...."

Miss Phillips for the defendant company submitted that the Companies Act exists for the protection of the public and to regulate the incorporation of companies and a breach of section 19 of the said Act did not confer on the plaintiff company any right to bring the action; the pleadings do not disclose any legal right in the plaintiff company which is affected and should be protected - no injuria is alleged. It was further argued that, assuming

there was a breach committed, the plaintiff or the Registrar of Companies would be required to apply to the Attorney General who could bring a relator action, unless the plaintiff company fell within any of the exceptions to the rule governing relator actions, and could thereby bring the action without reference to the Attorney General. Miss Phillips concluded that the plaintiff company did not fall within any of the said categories, did not plead that it did, and therefore cannot claim that there was any interference with any private right or that section 19 is specifically for its protection. In the circumstances, she stated, that the plaintiff company had no locus standi to bring the action, that the action was misconceived and should be struck out. Counsel in support of her arguments relied principally on Gregory vs London Borough of Camden [1966] 2 AER 196, Gouriet vs. Union of Post Office Workers et al [1977] 3 All ER 70, Cutler vs. Wandsworth Stadium Ltd. [1949] L.R. A.D. 398, Atkinson vs. The Newcastle and Gateshead Waterworks Company (1877) 2 L.R. Ex. Div. 441, Horace Clinton Nunes et al vs. Williams et al (Supreme Court Civil Appeals Nos. 64 & 67 of 1984), and K.S.A.C. vs. Auburn Court et al (Supreme Court Civil Appeal Nos.67 of 1987), among others.

Mr. Davis for the plaintiff company argues that there were material facts sufficiently pleaded in the writ and statement of claim to establish, implicity the tort of passing off and it was unnecessary to describe it explicitly. He referred to the pleadings as to similarity of names and of business operations which resulted in loss and inconvenience giving rise to the cause of action.

He argued, that in the alternative, assuming that the cause of action is deemed not implicit, the plaintiff company falls to be considered under the two exceptions to the general rule, in that, although the Companies Act is designed for the benefit of the public - section 19 of the said Act is for the protection of a particular class of persons, namely, companies already incorporated and which may suffer damage to its de facto monopoly of trade under a particular name by virtue of the registration of another company under a similar name. This said section, he said, has conferred a right on the plaintiff company over and above that vested in others - a right in rem - which allows it to sue without reference to the Attorney General. In the further alternative, he argued that the Court should consider that the plaintiff company has, suffered damage to its goodwill and reputation by virtue of the breach of statutory duty committed by the defendant company under section 19 of the said Act and that it was unnecessary to allege that the action of the defendant company was "calculated to deceive." Consel, in support of his submissions relied on Manchester Brewery Company Limited vs. North Cheshire and Manchester Brewery Company Limited [1898] A.C. 83, Ewing vs. Buttercup Margarine Company Limited [1917] 2 Ch.1, Exxon Corp. et al vs. Exxon Ins. Consultants Int. Limited. [1981] 2 All ER 495, Crown Continental Merchant Bank vs. Registrar of Companies [1972] 12 J.L.R. 942, and Lonrho Limited et al vs. Shell Petroleum Company Limited et al [1981] 2 All ER 456, among others.

The plaintiff company bases its claim as arising from a breach of a statutory duty imposed on the defendant company under section 19 of the Companies Act, which breach caused "loss and inconvenience" to the plaintiff company.

The breach which the plaintiff complains of is the non-compliance with the Registrar's order.

Section 19 of the Companies Act reads,

> "(1) No company shall be registered by a name which is the opinion of the Registrar is undesirable.
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> (2) If, through inadvertence or otherwise, a company on its first registration or on its registration by a new name is registered by a name which in the opinion of the Registrar too closely resembles the name by which a company in existemce is previously registered, the first mentioned company may, with the sanction of the Registrar, change its name, and shall, if the Registrar so directs within six months of its being registered by that name, change its name within six weeks of the date of such direction or within such longer period as the Registrar may think fit to allow.
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> (3) If at any time after a company has been registered it appears to the Registrar that the name under which it is registered is undesirable, the Registrar may notify the company accordingly and may in such notification direct the company to change its name within six weeks of such direction unless within that time it shall have lodged an appeal to the court against such direction. The Court shall thereupon either cancel or confirm such direction and its decision shall be final and conclusive. If the direction shall be confirmed the company shall change its name within six weeks of such confirmation.
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> (5) If a company makes default in complying with a direction under subsection (2) or except where an appeal under the subsection has not been disposed of, subsection (3), it shall be liable to a fine not exceeding ten dollars for every day during which the default continues.
> ....."

The said section therefore imposes a penal sanction for a breach of the statutory provisions, namely, non-compliance with the Registrar's order to effect the change of name. However this would not preclude the plaintiff from instituting civil proceedings if the section, in its intent, provides to the plaintiff a cause of action, in addition to its criminal sanction, as a consequence of the refusal of the defendant to comply with the said order.

In the case of Lonrho et al vs. Shell Petroleum Company Limited et al [1981] 2 All ER 456, the plaintiff complained that the defendant had committed a breach of a statutory duty causing damage and loss to the plaintiff and thereby gave to the plaintiff a cause of action in tort. On the facts, the plaintiff operated a crude oil pipeline from a seaport and supplied oil to an oil refinery in Southern Rhodesia. The refinery was owned by a Rhodesian company, the shares in which were owned by the defendant and other companies. When the government of Southern Rhodesia announced a unilateral declaration of independence, the United Kingdom imposed a sanctions order, prohibiting anyone from supplying crude oil or other petroleum products to Southern Rhodesia under pain of a penalty of a fine or imprisonment. The plaintiff therefore, ceased the operation of the pipeline and suffered loss as no oil was shipped by this means. However, the defendant provided petroleum products to the refinery by other means, in breach of the sanctions order. The plaintiff brought the action against the defendant company complaining that prior to the declaration the defendant had assured the government of Southern Rhodesia of a continuing supply of oil to its refinery thereby influencing the illegal declaration and thereafter

supplied crude oil to the refinery in breach of the sanctions order. The case was referred to arbitration, where it was held that the plaintiff had no cause of action. On appeal to the House of Lords from the Court of Appeal, Lord Diplock said, at page 461,

> "The sanctions order thus creates a statutory prohibition on the doing of certain classes of acts and provides the means of enforcing the prohibition by prosecution for a criminal offence which is subject to heavy penalties including imprisonment. So one starts with the presumption laid down originally by Lord Tenterden C.J. in Doe d Bishop of Rochester vs. Bridges (1831) 1 B & Act 847 at 849, [1824 - 34] All ER Rep. 167 at 170, where he spoke of the general rule that 'where an Act creates an obligation, and enforces the performance in a specified manner .... that performance cannot be enforced in any other manner; a statement that has frequently been cited with approval ever since, including on several occasions in speeches in this house. Where the only manner of enforcing performance for which the Act provides is prosecution for the criminal offence of failure to perform that statutory obligation or for contravening the statutory prohibition which the act creates, there are two classes of exception to this general rule.
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> The first is where on the true construction of the Act it is apparent that the obligation or prohibition was imposed for the benefit or protection of a particular class of individuals, as in the Factories Acts and similar legislation. As Lord Kinnear put it in Black v. Fife Coal Company Limited [1912] A.C. 149 at 165, in the case of a such a statute:
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> > 'There is no reasonable ground for maintaining that a proceeding by way of penalty is the only remedy allowed by the statute .... We are to consider the scope and purpose of the statute and in particular for whose benefit it was intended....'
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> The second exception is where the statute creates a public right (i.e. a right to be enjoyed by all those of Her Majesty's subjects who wish to avail themselves of it) and a particular member of the public suffers .... '... particular, direct

> and substantial' damage 'other and different from that which was common to all the rest of the public'..... It is in relation to that class of statute only that .... a plaintiff, without joining the Attorney General, could himself sue in private law for interference with that public right must be understood."

It was held that the sanctions order was imposed to stop the supply of oil, and therefore was not construed as a right imposed for the benefit or protection of a particular class nor did it create a right to be enjoyed by the members of the public. The apellants, owners of the pipe-line therefore had no right to recover in ktort for any contravention of the sanctions order.

In Richless et al vs. United Artist Corporation et al [1987] 1 All E.R. the provisions of Section 2 of the Dramatic and Musical Performers' Protection Act 1958, which imposed a criminal sanction for the use of a "dramatic or musical work without the consent in writing of the performers" was examined. The Court of Appeal, following the reasoning in the Lonrho case, held that the statute had to be considered as a whole and "on its true construction" it imposed an obligation or prohibition for the benefit of a particular class of individuals, namely performers ...."

The class of individuals, namely performers, was expressly referred to in the Act, but this is not necessarily the deciding factor in determining for whose benefit the provision in an Act was made. It is therefore worthy of note that in the case of Cutler vs. Wandsworth Stadium [1949] A.C. 398, a provision in the Betting And Gaming Act which required the occupier of a dog track on which a totalisator is in operation, to provide bookmakers with "...space on the track where he can lawfully carry on bookmaking was construed as not imposing any protection nor conferring any benefit on the plaintiff, a bookmaker,

and was held to be enforceable by criminal proceedings only.

In the Jamaica case of Lunes et al vs. Williams et al Civil Appeals nos. 64/84 and 67/84 dated 13th June 1985, the Court of Appeal, in allowing the appeal, held that the plaintiff respondent had no locus standi to enforce a provision of the Land Development and Utilization Act being an Act conferring a public right. Carey, J.A., in his judgment said, at page 5,

> "A fair reading of that Act shows that it is concerned with our national well-being as respects matters agricutural...."

and at page 6,

> "...the responsibility for effecting the purposes of this lies with the Commissioner and ultimately the Minister of Agriculture.... The proper person to take action under the Act would, it would appear, be the Attorney General.... Gouriet vs. Union of Post Office Workers [1977] 3 All E.R. 70."

In the instant case, the plaintiff's claim is based on section 19 of the Companies Act, 1965.

The intent and purpose of this Act is to regulate the incorporation of a company, to designate the method of its origin, its powers and functions and its ultimate demise. The Act is designed to create a persona conferring a corporate brain, limbs, blood and veins to an otherwise inanimate concept; e.g. designating its location, i.e. its registered office, its functionaries, i.e. its directors its capacity and worth, i.e. its share capital, what it is capable of doing, shown in its memorandum and articles, and its management and demise, among other things. Note also that the

provision giving the public the right to inspect the register, is to ensure that the public may then be made aware of the "persona" of the corporate entity. It seems therefore that the Act is designed principally for the public in general.

Section 19 of the Act gives to the Registrar the power in his sole discretion to direct a company registered by name which the Registrar deems undesirable, to change its name. Certainly, if the undesirable nature of the name is, that it refers to the Monarch, or the Government or a vulgar term - one could not envisage a member of the public enforcing a breach in such circumstances. The fact that the name "too closely resembles", the name of a previously registered company, in the opinion of the Registrar, permits the Registrar, on his own motion, to direct that the change of the name be effected. This presumably is to distinguish the respective corporate personae and avoid confusion to the public. It does not contemplate private rights. Section 14 of the repealed Companies Act - Revised Edition, Laws of Jamaica 1953, provided that,

> "No company shall be recorded under a name identical with that by which subsisting company is already registered or so nearly resembling the same as to be calculated to deceive..."

No provision was made for an order by the Deputy Keeper of the Records, currently the Registrar of Companies, to the company to effect the change of name, nor was there any machinery in the statute to compel the change or any sanction in default.

Section 19 on its enactment therefore, not only gave such a power to the Registrar for the first time but also imposed criminal sanctions for its refusal - a clear indication of a direction into the realm of public law. It is also noteworthy that the element "calculated to deceive"

is no longer a consideration under the section. This may well be a further indication that the intent of the offending company is not a consideration of the Registrar, acting under the section in his sole discretion - a shift away from the individual. In allegations of passing off or the tort of deceit, in the old law, a plaintiff had to allege in suing for the said torts, an act "calculated to deceive" - this is no longer so in modern law. Mr. Davis correctly argued, that the tort may be implicity alleged and pleaded in the writ and statement of claim without explicitly naming it. However, a plaintiff must plead all the material facts on which it relies.

In the instant case the plaintiff is alleging that the non-compliance with the Registrar's order is the breach of the staturory duty. Did the refusal of the defendant to comply with the Registrar's order give rise to a cause of action on the plaintiff's behalf by interfering with the plaintiff's private right? Is it that the plaintiff could have had no cause of action before the defendant refused to obey the Registrar's directive? This Court thinks not.

The tort of passing off could have arisen on registration of the defendant company and before the Registrar's direction. If the plaintiff is alleging that the tort of passing off has been committed he would need to plead that the defendant, by the use of its name and the conduct of its business was representing its, the defendant's business as that of the plaintiff's resulting in damage to the plaintiff. No passive "confusion" is contemplated in the tort, but a positive act in dealing with goods or in the conduct of a business to lead others to believe that it is goods and business of the plaintiff as a result of which

the plaintiff suffered damage. The plaintiff has fallen short of so alleging.

The author, John G. Hemming, in the Law of Torts, 4th Edition, 1971, at page 626 said,

> "Yet another form of misrepresentation concerning the plaintiff's business - unfair competition par excellence - is the tort of passing-off .... in pretending that one's own goods or services are the plaintiff's or associated with or sponsored by him.... From its inception it had some affinity with deceit .... This link has, however, completely severed when the requirement of fraud disappeared with the intervention of court of equity.... Neither actual deception nor actual resulting damage need be proved....
>
> (Footnote 5) Some occasional confusion without probable economic injury is not sufficient."

This Court therefore holds that section 19 of the Act does not create any new right for the protection of the plaintiff as a member of a particular class, nor did the plaintiff suffer any damage as a result of a breach of the statutory duty under the section. The Act is for the benefit of the public at large and the said section does not effect the emergence of any private right for the plaintiff's benefit. The enforcement of any breach thereunder has to be effected by the Registrar of Companies at the instance of the Attorney General. The plaintiff has no locus standi to bring this action.

I have given consideration to any probable amendment by the plaintiff of his writ and statement of claim and I am of the view that the claim is so firmly founded in the breach arising from the statutory duty under the said section, that any amendment would remove its base with no triable cause of action remaining.

The action is accordingly struck out with costs to the defendant.

Cases referred to
(1) Gregory v London Borough of Camden (1966) 2 All ER 96
(2) Gouriet v Union of Post Office Workers etal (1977) 3 All ER 70
(3) Cutler v Wandsworth Stadium Ltd (1949) LJR A D396
(4) Atkinson v The Newcastle and Gateshead Waterworks