IN THE COURT OF APPEAL OF BELIZE, A.D. 2009

CIVIL APPEAL NO. 20 OF 2008

BETWEEN:

JEFFREY SERSLAND
SEFERINO PAZ JR
CAMDEN SECURITIES LIMITED **Appellants**

AND

ST MATTHEWS UNIVERSITY SCHOOL OF MEDICINE LIMITED
CITITURST INTERNATIONAL LIMITED (Trustee for M.A.H. Trust)
GALEN P SWARTZENDRUBER
SUSHKIL K ASTHANA
MICHAEL HARRIS
ST MATTHEWS UNIVERSITY (CAYMAN) LIMITED **Respondents**

Before:

The Hon. Mr. Justice Mottley	**-**	**President**
The Hon. Mr. Justice Sosa	**-**	**Justice of Appeal**
The Hon. Mr. Justice Carey	**-**	**Justice of Appeal**

Michael Young SC for the appellants.
Eamon Courtenay SC and Michel Chebat for the respondents.

20 March; 19 June 2009.

MOTTLEY P

[1] This appeal came before this Court against an order made by Muria J whereby he struck out the claim of the claimants, now the appellants before this court. In their grounds of appeal, the appellants alleged that in reaching his

judgment the judge failed to take into account that, prior to filing their Claim they had issued and served a Notice for Requisition of an Extraordinary General Meeting (hereinafter referred to as EGM) for St. Matthews University School of Medicine Limited (hereinafter referred to as SMUSML) to consider and pass resolutions for SMUSML to take all steps necessary for remedying the wrongs claimed by the appellants including Court action. In addition, it is alleged that the judge did not take into account that the appellants had issued and served a Notice of an EGM after the failure of the majority who were in control of the company to cause the requisitioned meeting to be held. Finally, it is said that the judge did not take into account that, on 16 November 2005 at a meeting of shareholders, the Resolutions were moved and the majority shareholders being in control exercised their voting powers to defeat the Resolution.

[2] In their second ground of appeal, it is stated that, having omitted to take these factors mentioned above into consideration, the judge ought to have considered whether, on the facts of the case, the application fell into one of the categories of the exceptions to the Rule in **Foss v Hartbottle**. In their third ground, the appellants contended that the judge was wrong to apply the provisions of Rule 22.3 of the Supreme Court (Civil Procedure) Rules 2005 as that Rule applies to directors or other authorized officers of a company who conducted proceeding or represent a company in proceedings in the Supreme Court.

[3] The respondents for their part contended that the judgment of Muria J should be affirmed based on the ruling set out in his judgment. Alternatively, they contended that the judgment should be affirmed in accordance with the provisions of sections 19(1) and (2) of the Court of Appeal Act. In any event, the respondents stated that, if the appeal is allowed, the matter should be returned to the judge for a determination of the respondent's application for security for costs.

[4] The appellants, in their Claim Form, sought a number of declarations and orders which are set out below:

> 1. A Declaration that the purported replacement of the First Defendant Company's Articles of Association by Special Resolution on the 20th of December 2001 or thereabouts is unlawful and void.
>
> 2. An Order setting aside the said purported replacement of the articles.
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> 3. A Declaration that the purported alteration of the First Defendant Company's Memorandum of Association on the 20th of December 2001 (including the confirmation thereby by Order of the Supreme Court on the 25th of January 2002) is unlawful and void.
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> 4. An Order setting aside the purported replacement Memorandum of Association including the Court Order.
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> 5. A Declaration that the purported increase of the share capital of the Defendant Company from (a) $50,000 comprised of 50,000 shares of $1.00 each to (b) $1,000,000 comprised of 1,000,000 shares of $1.00 each be set aside as unlawful and void.
>
> 6. An Order setting aside the said purported increase of the share capital.
>
> 7. A Declaration that the purported issuance and allotment of 949,050 shares to the Sixth Defendant St Matthews University (Cayman) Limited of Georgetown, Grand Cayman, Cayman Islands is unlawful and void.
>
> 8. An Order setting aside the said purported issuance and allotment of the 949,050 shares.
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> 9. An Order that the name "St. Matthews University (Cayman) Limited" be struck from the Register of Members and all documentation of the First defendant Company reflecting it as a shareholder or member of the Company.
>
> 10. A Declaration that the purported List of Directors of the First Defendant Company dated the 13th of June 2001 stating the Directors to be (a) Michael Harris M.D. (b) Seferino Paz Jr. and (c) Galen P. Swartzendruber is unlawful and void.

11. An Order setting aside the said purported List of Directors.

12. An Order that an account be given by (a) the Sixth Defendant St. Matthews University (Cayman) Limited (b) the Fifth Defendant Michael Harris (c) the Second Defendant Cititrust International Ltd. [as trustee for the MAH Trust] (d) the Third Defendant Galen Swartzendruber (e) the Fourth Defendant Sushil K. Asthana (f) the First Defendant Company of all assets of the First Defendant Company existing as at the 1st of January 2001 and/or acquired thereafter. For the purposes of the Order the word "assets" shall include any monies on bank accounts in Belize or United States or the Cayman Islands or in any country, any securities, chattels, choses in action. Medical or teaching equipment, tools, medical specimens and aids, library books, video machines and equipment, photographic slides, administrative and school teaching records, furniture, computer and printing equipment, office equipment or any personal or real property of the Company whatsoever (including its goodwill).

13. An Order that the said account include (without limitation) specifically all and any assets transferred to the Cayman Islands to or to the use of St. Matthews University (Cayman) Limited or to any person, entity or agent or on its behalf and any proceeds or benefits from the use of those assets.

14. An Order that the said account include further specifically (a) the revenues received from the continuation of students at the Cayman campus who had been conducting studies at the campus of the Company at San Pedro, Ambergris Caye, Belize (b) the revenues received from the enrolment of new students at the Cayman Campus of St. Matthews University (Cayman) Limited.

15. An Order that the First Defendant Company recover any and all assets found to be due to the First Defendant Company on the account.

16. A Declaration that the Fifth Defendant Michael Harris was in breach of his fiduciary duties to the First Defendant Company by failing to ensure that the First Defendant Company continue to make payments to Holiday Lands and complete the purchase of the land.

17. Damages for breach of fiduciary duties owed by Michael Harris to the First Defendant Company.

18. Damages for the wrongs done to the First Defendant Company and the Claimants.

BACKGROUND

[5] SMUSML was incorporated on 21 January 1999 under the Companies Act Cap 250. SMUSML had an issued share capital of 50,000 shares of $1.00 each. At the end of December 1997,the shareholders were:

		No. of Shares
(a)	Seferino Paz Jr.	11,167
(b)	Jeffrey Sarsland, MD	10,666
(c)	Michael D. Harris, MD	2,666
(d)	Galen P. Swartzendruber, MD	2,500
(e)	Sushil K. Asthana, MD	4,000

It carried on the business of a medical school in San Pedro, Ambergris Caye.

[6] By 31 December 2000, the shareholders changed and were now noted as follows:

		No. of Shares
(a)	Seferino Paz Jr.	7,145
(b)	Oaskland Securities Limited	4,022
(b)	Jeffrey Sarsland, MD	10,166
(d)	Cameden Securities	500
(e)	Cititrust International Limited	21,666
(f)	Galen P. Swartzendruber, MD	5000
(g)	Sushil K. Asthana, MD	1,500

As of 31 December 2000 the Directors at that date were:

i) Michael D. Harris, MD

ii) Seferino Paz Jr.

iii) Jeffrey S. Sarsland, MD

iv) Galen P. Swartzendruber, MD

[7] It is alleged by the appellants and Oakland Securities Limited (hereinafter referred to as OSL) that on 13 June 2001 a list of directors was filed in the Companies Registry showing that the directors were Michael Harris, Seferino Paz Jr. and Galen P. Swartzendruber.

[8] The Memorandum of Association of the SMUSML and the Articles of Association of SMUSML were both changed on 27 November 2001 pursuant to a special resolution at an EGM which was held at 4 11 Avenue, Shalimar Florida in the United States of America and confirmed at a further EGM held on 20 December 2001 at 37 Regent Street Belize, Belize City.

[9] The appellants alleged that none of the minority shareholders ever received Notice of the Resolution which was intended to replace the existing Articles of Association prior to the passing of the resolution.

[10] The Supreme Court confirmed the alteration of the Memorandum of Association on 25 January 2002.

[11] The appellants and OSL stated that they were not aware of the application to the Supreme Court to confirm the Change of Memorandum of Association nor the order made thereon. In addition, they further stated that they were not aware of the purported increase of the share capital from $50,000 to $1,000,000.

[12] In March 2002, SMUSML issued 949,050 shares all of which were allotted to St. Matthews University (Cayman) Limited (hereinafter referred to a SMUCL) of Cayman Islands. The appellants and OSL stated that they were not aware of this nor did they receive any notice of any Resolution to this effect. In addition, the appellants and OSL asserted, that if the increase was valid, they were not offered a portion of the new shares in accordance with Regulation 42 of Table A of the Companies Act which was adopted by Article 18 of the Original Articles or

Article 43 of the new Articles. The appellants and OSL, in any event stated that the allotment of 949,050 shares to SMUCL was unlawful as no consideration has been paid for these shares.

[13] Following the acquisition of the majority shareholdings in SMUSML, SMUCL closed down the operation in San Pedro and moved to Cayman Islands. It is pleaded that, in the process of closing down the business in Belize, the respondents including Michael Harris and SMUCL disposed of all the assets of SMUSML. In other words, it is being said that SMUSML was liquidated by the respondents without any lawful process for that liquidation.

[14] It is alleged by the appellants that the conduct of the respondents amounted to a fraud and constituted wrongs against SMUSML.

[15] In paragraph 24 of their statement of claim the appellants pleaded that:

(a) the appellants did not have a majority of shares and voting rights in SMUSML;

(b) they had taken the preliminary steps of requisitioning an EGM of SMUSML pursuant to section 68 of the Companies Act;

(c) "Resolutions which would have corrected the wrongs complained of" were proposed and could not be passed as Cititrust International Limited as trustee for M.A.H. Trust holds shares and voting powers to block and prevent the passing of the Resolutions.

[16] A notice dated 4 October 2005 requisitioning an EGM was issued and served by the appellants. The meeting was not called. However a new notice was served for a EGM to be held on 11 November 2005.

[17] In his affidavit, Michael Harris deposed that he is the Chief Executive Officer of SMUSML. He stated that he is a graduate of Louisiana State University in New Orleans (1979). He received his residency training in obstetrics and gynecology from University of Florida in 1983. He became a

director and shareholder of SMUSML which is based in Belize but has its corporate offices in Niceville, Florida. SMUSML was what is known as an offshore medical school. Although they are not allowed to practice until they became Board certified in the United States of America.

[18] These proceedings were engendered by the amendments to the Memorandum and Articles of Association. In his affidavit filed in support of the application, Michael Harris said that the original Memorandum of Association contained three objections clauses but made no provisions authorizing the commercial operations of the SMUSML. The new documents increased the authorized share capital from BZD$50,000 to BZD$1,000,000.00 in order to raise capital to pay for various properties and to deal with the running costs of the business. Harris explained the procedure adopted for the holding of the EGM on 27 November 2001 to amend the Memorandum and Articles of Association and the EGM held on 20 December 2001 to confirm the Resolutions passed on 27 November 2001.

[19] On January 2002, an order confirming the alteration of the Memorandum of Association. As regards the allotment of new shares Harris stated that "the appropriate corporate procedures, notices offering shareholders the opportunity to take up new share, were sent out to all shareholders except Sarsland and Paz". Harris stated that both he and

APPLICATION

[20] On 17 February 2006 an application was made by the respondents to strike out the claim filed on behalf of the appellant and OSL. The application was amended pursuant to an order dated 11 June 2007. The application sought orders that:

(i) the claim against SMUSML be struck out or discharged with costs or alternatively summary judgment be granted to SMUSML;

(ii) that the claim against the second to sixth defendants/now respondents be struck out or discharged with costs or alternatively that summary judgment be entered in their favour.

It was claimed in the alternative that paragraph 28 and 32 of the statement of claim should be struck out. Under paragraph 28, the appellants as claimants, claimed damages in respect of loss and damages suffered. The particulars of damages indicate that they were claiming damages in respect of losses suffered to the value of their shareholding in SMUSML. Under paragraph 32, the appellant alleged a breach of fiduciary duty by Michael Harris and claimed damages on behalf of themselves, by virtue of their shareholding and SMUSML. In relation to the several prayers for relief the court was asked to strike out the prayers sought.

[21] The amended application contained the grounds upon which the application was based. These were:

i) that as shareholders in SMUSML, the appellants had no right or claim and are in law prohibited from suing the company for remedies due and belonging only to the company;

ii) that as a derivative claim the appellants require leave of the Court to proceed further after filing their respective claims which leave has not been obtained.

THE JUDGMENT

[22] In his judgment, Muria J regretted that neither counsel referred to Part 22 of the Supreme Court (Civil Procedure) Rules 2005. He stated that "Rule 22.3 does require authorization to bring proceedings on behalf of a body corporate and permission to represent a body corporate." The judgment stated at paragraph 23:

"… although the procedural mechanism for conducting derivative proceedings has not been spelt out under our Rules. It is, in my judgment, clear that derivative actions or claims can be brought by a director or shareholder who is "duly authorized" to do so under the exceptions to the rule in **Foss v. Harbottle**. The said "duly authorized person" also requires permission of the Court to represent the body corporate at any open Court hearing unless the body corporate is represented by a legal practitioner."

[23] After indicating that the general rule in **Foss v Harbottle** is still applicable in Belize, the judge held at paragraph 25:

"25…..Derivative action can only be brought by those "duly authorized to do so".

The judge indicated that:

"The first step to be taken is to secure the authority to bring the claim. The only body that has power to give the authorization is, of course, the company, through its shareholder meeting. Evidently, Rule 22.3(1) recognizes this and makes provision for that to be done. The purpose for such procedure as Knox J said in Smith v Craft (No. 2) [1988] Ch 114, 183 is the recognition that the proper body to confer authority on the minority to bring the case on behalf of the company is the shareholder meeting. Having then obtained that authorization, the claimant can then file the claim."

[24] The judge also pointed out that:

"the second stage is that envisaged in Rule 22.3(3) namely the permission of the Court is required for the claimants to represent the company at the hearing before the Court".

Unlike the English Rule 19 procedure where permission is required to continue the action, the permission under our Rule 22.3 is to represent the company, at the hearing of the claim before the Court.

[25] The judge held that as the nature of the claim is in the main to redress the wrongs done to the company, the authority from the company must first be obtained. The judge concluded that in his view no such authority had been obtained and as such that omission was fatal to the claimants' case.

APPEAL

[26] It is against this ruling that the appellants have appealed. Mr. Michael Young SC for the appellant indicated that as the grounds were inter-connected he would deal with them together. In relation to Rule 22.3, counsel submitted that the Rule does not apply to this case as the Rule relates to the "conduct" of proceedings and not to the bringing or the filing of a claim. He contended that the Rule addressed the issue of who may conduct proceedings at a hearing in court where a company is "acting in person" rather than by an attorney-at-law or legal practitioner. The person to whom permission is given in those circumstances is the "duly authorized" person.

[27] Mr. Young, in my view, is correct. Rule 22.3 applies to the representation of corporate bodies before the Court when the corporate body decides to "appear in person" and not by an attorney-at-law. Rule 22.3 states:

> "Permission to represent the body corporate at the trial should whenever practicable be sought at a case management conference or pre trial review."

That is made clear in paragraph (5) of Rule 22.3 which defines "duly authorized persons" in paragraphs (1) and (2) of Rule 22.3 as meaning authorized by the body corporate to conduct proceedings on its behalf. Such authority is given by way of a resolution.

[28] But that, in my view, does not answer the question whether leave of the court is required to continue a derivative action. In Part IV of the Supreme Court of Judicature Act Cap. 91, section 18 provides as follows:

"18-(1) There shall be vested in the Court, and it shall have and exercise within Belize, all the jurisdictions, powers and authorities whatever possessed and vested in the High Court of Justice in England, including the jurisdictions, powers and authorities in relation to matrimonial causes and matters and in respect of suits to establish legitimacy and validity of marriages and the right to be deemed natural-born Belizean citizens as are, by the Supreme Court of Judicature (Consolidation) Act 1925 vested in the High Court of Justice in England."

"18.-(2) Subject to rules of court, the jurisdictions, powers and authorities hereby vested in the Court shall be exercised as nearly as possible in accordance with the law, practice and procedure for the time being in force in the High Court of Justice in England."

[29] Section 18(1) gives the Supreme Court in Belize "all the jurisdictions, powers and authorities whatever possessed and vested" in the High Court in England. Under section 18(2), such jurisdiction powers and authorities are to be exercised as nearly as possible in accordance with the law and practice and procedure as are in use in England at this time. This however is subject to any provisions contained in the Rules of Court of Belize.

[30] In Part VII of the Supreme Court of Judicature Act which deals with practice and procedure, section 60(a) provides as follows:

"60. The practice and procedure of the Court –

(a) in its general civil jurisdiction, shall be regulated by this or any other Act or by rules of Court and where no provision is made, by the practice and procedure in the High Court of Justice in England."

In my view, if the Rules of the Supreme Court in Belize are silent on any matter relating to the practice and procedure which is or ought to be adopted, then the practice and procedure in the High Court of Justice in England is to be adopted and followed.

[31] It follows therefore that the question which must first be asked is are there any provisions under the Supreme Court Civil Procedure Rules 2005 which govern the bringing of derivative action. It is common ground between the parties that there is no such rule. It is necessary therefore to look at the practice and procedure in England in respect of derivative actions.

[32] Rule 19.9 of the English Civil Procedure Rules deals with Derivative claims. The rule applies to a company where it is alleged that it is "entitled to claim a remedy and a claim is made by one or more" of its members for the company to be given a remedy. This is described as a "derivative claim" under the Rule (see 19.9.1).

[33] Rule 19.9(3) provides as follows:

> "3. After the claim form has been issued the claimant must apply to the Court for permission to continue the claim and may not take any other step in the proceedings except –
>
> (a) as provided by paragraph 5; or
>
> (b) where the Court gives permission."

Paragraph 5 states:

> "(5) The –
>
> (a) claim form;
>
> (b) application notice;
>
> (c) written evidence in support of the application
>
> must be served on the defendant within the period within which the claim form must be served and in any event, at least 14 days before the Court is to deal with the application.

[34] The claim brought by the appellants is set out above. It is clear that they were seeking remedies on behalf of SMUSML. The Supreme Court Civil Procedure Rules make no provision for the institution and continuation of derivative proceedings. It is necessary to resort to the provision of the Civil

Procedure Rules of England. (See sections 18 and 60(a) of the Supreme Court of Judicature Act).

[35] Order 19.9.5 required the appellants to apply to the Court for permission to continue the action. The application should have been made by the appellants as claimants, before taking any further steps in these proceedings. This was not done. In fact, no application was made to the Court pursuant to paragraph 5. Steps were taken by the appellants. In August 2006 the appellants applied for case management date to be set and for the hearing of a preliminary issue. In addition, the appellant also applied to have the affidavit sworn by Michael Harris struck out as being irrelevant, scandalous, vexatious, oppressive, prolix and an abuse of the process of the Court.

[36] The appellants ignored the provisions of Rule 19.9.5 and, in my view, this action cannot proceed as it is in breach of the provisions of Rule 19.9(3). It was for these reasons that the appeal was struck out and the Order of the court below affirmed. The appellants were ordered to pay the respondents' costs which were to be taxed if not agreed.

MOTTLEY P

SOSA JA

[37] On 20 March 2009 I was in agreement with the other members of the Court that the appeal should be dismissed and the order of the judge below affirmed and that the respondents should have their costs, to be taxed if not

agreed. I concur in the reasons for judgment given by Mottley P in his judgment, which I have since read in draft.

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SOSA JA

CAREY JA

[38] I entirely agree.

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CAREY JA