IN THE SUPREME COURT OF BELIZE A.D. 2008

CLAIM NO. 617 OF 2007

BETWEEN:

HUSEIN OTHMAN **CLAIMANT/APPICANT**

AND:

MAHER SOUDAH **1ST DEFENDANT/RESPONDENT**

MALIK SOUDAH **2ND DEFENDANT/RESPONDENT**

AMERICAN GLOBAL UNIVERSITY

SCHOOL OF MEDICINE **3RD DEFENDANT/RESPONDENT**

Before: Hon Justice Sir John Muria

15 October 2008

Ms D. Vernon **for Claimant/Applicant**

Mr. Darrell Bradley **for Defendants/Respondents**

RULING

MURIA J: This is an application by the claimant for an order pursuant to section 110 (1)(b) of the *Companies Act* (Cap.250) ("the Act") to inspect the affairs of the 3rd defendant company. The grounds of the application are that the applicant is a shareholder in the 3rd respondent,

having 5,000 shares, about 50% of the 3rd respondent's share capital, and that the 1st and 2nd respondent have been wrongfully diverting the resources of the 3rd respondent. The applicant also alleges that the 3rd respondent has not accounted for all its proceeds and profits.

In support of his application, the applicant also relied on his affidavit sworn to and filed herein on 21/7/08. The respondents, although were given time to do so, did not file any affidavit in response to the applicant's affidavit. Mr. Darrell Bradley of Counsel for the respondents simply relied on his submission in response to that of Ms Darlene Vernon of Counsel for the applicant.

The bone of the applicant's case is that in view of the matters deposed to in the applicant's affidavit, in particular, paragraphs 22 – 31, the applicant has shown "*good reason*" for the Court to order investigation of the company's affairs under section 110(2) of the *Companies Act*. This, the applicant says, is because the 3rd respondent has never called annual general meetings despite request for doing so was made by the applicant. In addition, the 3rd respondent has not appointed an auditor to audit the books and dealings of the company. There are also allegations of dealings by the 1st and 2nd respondents with the 3rd respondent's assets without the knowledge of the applicant. Some of these dealings were for the personal benefits of the 1st and 2nd respondents. These, it is alleged, include the use of moneys belonging to the 3rd respondent to pay off a loan obtain from one Dr. Fordyce in exchange for 5% shares in the company; use of company moneys to pay for clinical rotation under Med. Serve International; causing one Peggy Allen a.k.a. Natalie Arneth who is said to have criminal records in Ohio, as Secretary/Accountant

of the 3rd respondent; and the exclusion of the applicant in the operation of the 3rd respondent. These and the other matters deposed to in the applicant's affidavit, are said to justify an order to investigate the affairs of the 3rd respondent company.

Mr. Bradley's submission, as I understand it, is on three fronts. First, Counsel submitted, that the application is premature as the applicant has other avenues to be utilized before seeking an order for investigation of the affairs of the company. Such avenues, says Counsel, are the procedures for calling meetings and requisitioning of annual general meetings to discuss the matters now complained of by the applicant. Thus the applicant, says Counsel, is not without remedies under the Act to be utilized first.

The second argument raised by Mr. Bradley is that the basis upon which the applicant relies to support his application is exactly the same as those set out in the Statement of Claim. They are not new or separate matters. Rather they were the same allegations pleaded in the Statement of Claim and responded to in the respondent's Defence. As such, submitted Counsel, they are matters to be dealt with at the substantive trial and not in an application such as this.

Third, Mr. Bradley contended, that in so far as the question of audit is concerned, the respondents have no objection to an audit to be done on the affairs of the 3rd respondent. There is therefore no need for an order for the audit to be done, since the respondents have agreed for it to be done.

In addition to section 110 of the Act, Ms. Vernon also relied on the Cuello Distillery Limited case, *Osvaldo Cuello –v- Froylan Cuello and Cuello Distillery Limited*, Action No. 56 of 1994 (unreported). The other case cited by Counsel is the Belize Telecommunications Limited Case in *Public Service Union of Belize et.al –v- Belize Telecommunications Limited* (3rd March 2005) Supreme Court Action No. 13 of 2005. The Court, in that case, also made references to two English cases, *Norwest Holst Ltd –v- The Department of Trade* [1978] 3 All E.R. 280 and *Wallersteiner –v- Moir* [1974] 3 All E.R. 217. Lord Denning's opinions in both cases are very instructive. Both *Cuello Distillery Limited* and *Belize Telecommunications Limited* dealt with the same provision with which we are concerned here, although in *Cuello Distillery Limited*, the section relied upon was section 108(1)(b) which is now section 110(1)(b) of the *Companies Ac*t.

Each case must be considered under its own circumstances. In *Cuello Distillery Case*, there was clearly evidence to support the serious allegations which were sought to be investigated. In basic term, the allegations raised by the applicant in that case were not denied. All that the respondents did was to attempt to explain away their actions.

In *Belize Telecommunications Limited*, the Board of Directors of the company conceded the need for investigation of the company's affairs and the main issue was as to the terms of the investigation. A schedule of the matters to be investigated was included with the application.

The affidavit evidence filed by the applicant together with the concession of the Board of Directors clearly gave "*good reason*" for the order to investigate the affairs of the company.

The present case, in my view, can easily be distinguished from the two cases cited by the applicant. In the present case the matters deposed to in the applicant's affidavit are a repetition of the pleadings averred in the Statement of Claim. I have gone through the affidavit of the applicant and clearly it contains the same matters pleaded in the Statement of Claim. For example, if one looks at the paragraphs stressed by the applicant, namely paragraphs 22-31 of the applicant's affidavit, they show the parallel between the affidavit and the Statement of Claim as follows:

Affidavit	*Statement of Claim*
Paras. 22	Paras. 25
23	para. 26
24	para. 27
25	para. 28
26	para. 29
27	para. 30
28	para. 31
29	para. 32
30	para. 33
31	para. 34

In fact when one reads the Statement of Claim filed by the applicant, save for paragraphs 6, 43 and 44 thereof, the entire pleadings in the Statement of Claim are repeated in the applicant's affidavit in support of the application. Unfortunately for the applicant, those pleadings are not evidence for the purpose of showing "*good reason*" for ordering an investigation as required under section 110(2) of the Act which provides that the application shall be supported by evidence showing "good reason" for the investigation to be ordered.

It must be pointed out that allegations in the pleadings are not evidence. They are mere averments and evidence must be adduced to prove the allegations contained in those averments at the trial. See *Hans Bhojwani v Suraj Baxani* (21 January 2008) Supreme Court Action No. 539/2001. See also *Belize Telemedia Limited v Lois Young (d.b.a. Lois M Young Barrow & Co.)* (15 July 2008) Supreme Court Claim No. 334/2008. See also *Federal Capital Development Authority v Alhaji Musa Naibi* (18 May 1990) Supreme Court of Nigeria Suit No. 190/ 1989. If the allegations averred in the pleadings and repeated in the applicant's affidavit are to be relied upon in the present application, then evidence to sustain those allegations must be adduced. To simply transpose those same pleaded allegations and repeat them in an affidavit does not confer on those pleaded matters any evidential status. In other words, they cannot be converted into evidence. The applicant would have to support those allegations with positive evidence before they can have any effect on the case that he is building against the respondents in the application.

Since the matters deposed to in the affidavit of the applicant are repetition of the pleaded averments contained in the Statement of Claim, and as such they are not evidence, the applicant's application cannot be said to be supported by evidence. There is therefore nothing to show "*good reason*" for the Court to exercise its discretion to order investigation of the 3rd respondent's affairs at this state.

In the circumstances of this case, it would not be appropriate to order investigation as sought by the applicant in the present application.

With regard to an auditing of the 3rd respondent's account, no request has been made to the Court for appointment of an auditor in this case. The applicant's application is for an order to investigate the affairs of the 3rd respondent. The procedure for appointing an auditor is provided for in Section 113 of the Companies Act. Should the parties require an auditor to be appointed, it should not present any difficulty since the respondents have indicated that they have no objection to an audit of the accounts of the 3rd respondent being done. The Court has discretion to appoint, under Section 113(2) but only if no appointment is made at an annual general meeting of the company. We are, however, not about appointment of auditors in this application.

I do not need to deal with the suggestion by Counsel for the respondents that the application is premature, since in the light of what I have said above, this application cannot succeed in its present form. If I have to deal with the issue of prematurity of application, I need only say that the point is a weak one on its own. I say this, because where those in control of the company

have absolute and unaccountable control of the company there is virtually little left for the other shareholders to fall back on, other than to seek the Court's assistance. I shall leave it at that.

In this case, and in the circumstances of this present application, the only conclusion that the Court can come to is that the applicant's application for an order to investigate the affairs of the 3rd respondent cannot be sustained. It must therefore be refused with costs.

Sir John Muria