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[2015] JMSC Civ. 252

**IN THE SUPREME COURT OF JUDICATURE OF JAMAICA**

**CLAIM NO. 2006HCV04358**

<b>BETWEEN</b>	<b>ADMINISTRATOR GENERAL OF JAMAICA</b>	<b>CLAIMANT</b>
<b>AND</b>	<b>THE ATTORNEY GENERAL OF JAMAICA</b>	<b>1<sup>ST</sup> DEFENDANT</b>
<b>AND</b>	<b>THE VILLAGE GREEN MANAGEMENT COMPANY LIMITED</b>	<b>2<sup>ND</sup> DEFENDANT</b>

Mr. Stuart L. Stimpson and Mr. Hadrian Christie instructed by Hart Muirhead Fatta for the Claimant.

Ms. Monique Harrison and Ms. Vanessa Blair Instructed by the Director of State Proceedings for the First Defendant

Heard: 27<sup>th</sup> and 28<sup>th</sup> July and 18<sup>th</sup> December, 2015

**Negligence – Breach of statutory duty – Agency – Whether management company servant or agent of Crown – Crown Property (Vesting) Act ss.4 and 7. Registration (Strata Titles) Act. ss.2 and 10.**

**EVAN BROWN, J**

**BACKGROUND**

[1] The Village Green was conceptualized and developed by Osprey Developers Company Limited (Osprey), which was incorporated on the 16<sup>th</sup> October, 1990 as a private limited liability company with share capital of one thousand dollars, divided into one thousand shares of \$1.00 each. It was said to be jointly owned by LAH Investment Limited and the National Insurance Fund (hereinafter called 'the NIF). However, the Annual Returns for 1999 and 2000 listed the shareholdings as follows: the Accountant

General 999 and Shirley Tyndall, Financial-Secretary 1. So, certainly by 1999, Osprey was wholly owned by the Government of Jamaica.

[2] The NIF was established pursuant to the provisions of the ***National Insurance Act*** and falls under the Ministry of Labour and Social Security. As the name suggests, it is a fund, not a company. It has no legal personality and cannot own land. It is funded by contributions made by Jamaican employers and employees and it is the source from which pensions and other benefits are paid. The fund is managed by the National Insurance Board and while funds from the NIF can be invested, all investments are required to be approved by the Minister of Finance. To this end there is an advisory board which examines and approves the investment proposals before they are sent to the Minister of Finance.

[3] Osprey was the registered proprietor of the lands upon which The Village Green was being developed and on the 2<sup>nd</sup> March, 1993 it executed a mortgage over the same lands in favour of the Accountant General in the sum of \$64,000,000.00, the amount was said to be a loan from the NIF. The loan appears to have been in furtherance of the objects under its Memorandum of Association to purchase and develop land. Part of the development was the creation of common areas to include gardens, swimming pools and a clubhouse. The lots, when developed, were to be sold and the respective homeowners were then required to pay maintenance fees towards the management of the common areas. At least one agreement for sale of a lot, between Osprey and two ladies, was exhibited. Before the developed units were sold, Osprey paid the maintenance fee for the common areas to the second defendant, the Village Green

Management Company. As the units were sold, each homeowner assumed the responsibility to pay the maintenance fees to the second defendant.

[4] The NIF kept abreast of Osprey's management of its affairs through a number of mechanisms. One way was requiring Osprey to send regular financial reports to the NIF. Additionally, members of the NIF's advisory board sat on Osprey's committees and four of the five directors listed in Osprey's Annual Return dated 31<sup>st</sup> December, 2000 were employees of the NIF and sat on the NIF's board. They were Carol Thorburn, Alvin McIntosh (also the Permanent Secretary in the Ministry of Labour and Social Security) and Fred Winston Cuthbert. The fourth employee was Kevin Richards, Deputy Investment Manager.

[5] Osprey caused the second defendant to be incorporated on the 20<sup>th</sup> February, 1995. It was described as a private limited liability company in its Articles of Association, with a share capital of one thousand dollars, divided into one thousand shares of \$1.00 each. One share each was taken by its two subscribers, Throna Smith and Hyacinth Vincent, legal secretaries. The two subscribers remained the only two shareholders up to the year 2000.

[6] According to its Annual Return for the year ending 31<sup>st</sup> December, 1999 two of its three directors were Audrey Deer-Williams and Dave Orlando Dyer, both of whom also sat on the NIF Board. The composition of its directorate was unchanged for the following year. By its Memorandum of Association, its object was, among other things, to "carry on business as managers of a first class tourism resort complex known as The Village Green". It was therefore incorporated to provide the vehicle through which the

common areas of The Village Green were to be maintained, preserved and mutually enjoyed by the lot owners.

[7] On the 30<sup>th</sup> December, 2000 at about 2.30 pm, Mr. Marcel Peters, along with his wife Yvonia, their five year old daughter, his female cousin and her son Kevin, as well as a friend of his cousin arrived at The Village Green in St. Ann. They planned to stay there for the New Year's weekend. Upon their arrival, they walked the property and noticed several tourists who were also staying there. Also coming to their notice was a swimming pool which had a sign at one end marked, "swimming at own risk".

[8] The following morning, Mr. Peters, who was a very good swimmer, left his room with his daughter for the swimming pool. Kevin left soon after to join them. About half hour after leaving for the pool. Kevin returned to the room and enquired if anyone knew CPR (cardiopulmonary resuscitation). Kevin reported that he had taken Mr. Peters from the bottom of the pool and that he was neither breathing nor moving and was apparently frothing from the mouth and nostrils.

[9] Mrs. Peters raised an alarm and two doctors, guests at the property, responded. An ambulance was summoned and Mr. Peters was taken to the St. Ann's Bay Hospital where he was pronounced dead. A postmortem examination which was conducted on the 3<sup>rd</sup> January, 2001 revealed that Mr. Peters' cause of death as drowning. He died intestate, not having made a will.

[10] On the 29<sup>th</sup> January, 2002 Letters of Administration were granted to the Administrator General of Jamaica, as administratrix of Mr. Peters' estates. In that representative capacity, the Administrator General filed a claim against the defendants to recover damages for negligence and or, breaches of statutory duties for the benefit of

the estate of Mr. Peters pursuant to the *Law Reform (Miscellaneous Provisions) Act*. It was alleged that there were breaches of the *Occupier's Liability Act* and the *Public Health (Swimming Pools) Regulations 2000*.

[11] The second defendant was not a party to the trial, final judgment having been entered against it on the 3<sup>rd</sup> October, 2014 with damages to be assessed pursuant to the Civil Procedure Rule 2002, r. 26.5. Judgment was entered on account of the second defendant's failure to comply with case management orders. In its pleadings and at the trial, the claimant asserted that the second defendant was the servant and or agent of the Crown and on that basis, the first defendant has been joined as a party pursuant to the **Crown Proceedings Act**. In consequence, the first issue, which if answered in the negative, will be dispositive of the claim against the first defendant, is whether the second defendant was the agent and or servant of the Crown at the relevant time to make the first defendant liable to the claimant in the claim for damages for the alleged negligence and or breaches of statutory duties.

### **THE CLAIMANT'S CASE**

[12] It was the claimant's contention that the NIF and the second defendant jointly or severally owned, occupied, managed, possessed, controlled and or were responsible for the complex known as The Village Green, in particular, the swimming pool in which Mr. Peters drowned. It was also contended that the interest of the NIF in the complex was vested in the Commissioner of Lands. Though this latter assertion is a matter which the Court regards as easily proved by documentary evidence, no such evidence was provided by the claimant.

[13] It was Mrs. Peters' evidence that at the time of her husband's death, there were several completed units at The Village Green but that it had not attained the minimum requirements to obtain a Jamaica Tourist Board accommodations licence. It was also her evidence that at the material time there was no sign at The Village Green which prohibited swimming; no indication given that any part of the pool was dangerous; no sign at or near the pool stating the location of the nearest telephone or emergency numbers; no first aid, emergency or other safety procedure in place; nor staff trained in first aid or other emergency procedures in the vicinity of the pool. She admitted however, that there was a sign at the pool marked "swimming at your own risk" and markings on each side of the pool indicating the depth.

[14] It was further contended by the claimant that Osprey Ltd. had not handed over direct management of the second defendant to homeowners until 30<sup>th</sup> November, 2004, four years after Mr. Peters' demise. Mrs. Peters asserted that Osprey Ltd. was a wholly owned subsidiary of the NIF. Curiously, Osprey Ltd. was not named as a party to the claim.

### THE 1<sup>ST</sup> DEFENDANT'S CASE

[15] In defence of the claim against it, the first defendant contended The Village Green was a private entity and owned by private individuals and that the second defendant was not the servant and or agent of the Crown or the first defendant. The first defendant also denied that the interest of the NIF in The Village Green was vested in the Commissioner of Lands as contended by the claimant.

[16] Mr. Ludlow Bowie, Property Director of the NIF testified on behalf of the first defendant. He stated that Osprey Ltd. had transferred ownership interest to all new lot

owners at The Village Green and that it was those owners who became the members of the Village Green Management Company, the second defendant. The management company was in operation at the time of Mr. Peters' demise. It was also his evidence that the management company's income came from the maintenance fees paid by the lot owners and that those funds were used to defray expenses for services such as security and landscaping.

[17] Mr. Bowie's evidence was that his involvement with The Village Green commenced in 2003 and it was to see to the disposal of the remaining lots owned by Osprey Ltd. In so far as the Village Green Management Company was concerned, he was to see that the management of the common areas was carried out. The decisions he took in that regard were not made on his own. The Board of the NIF would make some decisions in relation to the management of the common areas. It is to be noted that Mr. Bowie's involvement with the Village Green commenced some years after Mr. Peters' death

### **ANALYSIS**

[18] In order for the claimant to succeed, it must be establish on a balance of probabilities, that the second defendant was the servant or agent of the Crown at the material time to make the first defendant liable. Section 3 (1) of the ***Crown Proceedings Act*** provides:

"(1) Subject to the provisions of this Act, the Crown shall be subject

to all those liabilities in tort to which, if it were a private person of full age and capacity, it would be subject-

- (a) in respect of torts committed by its servants or agents;
- (b) in respect of any breach of those duties which a person owes to his servants or agents at common law by reason of being their employer; and
- (c) in respect of any breach of the duties attaching at common law to the ownership, occupation, possession or control of property:

Provided that no proceedings shall lie against the Crown by virtue of paragraph (a) in respect of any act or omission of a servant or agent of the Crown unless the act or omission would, apart from the provisions of this Act, have given rise to a cause of action in tort against that servant or agent or his estate.”

[19] In essence, learned counsel for the claimant submitted that the Village Green Management Company Limited was the servant and or agent of the NIF. The first premise of that contention was the incorporation of Osprey by the NIF to develop The Village Green. The second premise of the submission was the fact of incorporation of the Village Green Management Company Limited to manage the facility on behalf of the lot owners.

[20] So, in fine, the argument seems to be, since the NIF created Osprey to develop The Village Green and then Osprey, caused the incorporation of the Village Green Management Company Limited to manage the common areas of the property so developed, the NIF was really the entity managing the property through the management company. Put another way, the NIF was the master puppeteer, manipulating the puppets, Osprey and the management company. In this submission,

the management company did not stand on its own but was a mere instrument of the NIF.

[21] The claimant relied on *Brady & Chen Limited v Devon House Development Limited* [2010] JMCA Civ 33 (*Brady & Chen Limited*), a Jamaican Court of Appeal decision, in support of its position that the second defendant was an agent and or servant of the Crown. That case was an appeal from the lower court's refusal to grant an injunction restraining the respondent from re-taking possession of leased property. On appeal, issue was raised, among other things, with the correctness of the lower court's finding that the respondent was acting in its personal capacity when it granted the lease. The decision of the Court of Appeal turned on who was in fact the lessor, a point raised by the respondent in its cross appeal.

[22] The respondent contended that the Crown and not it, was the lessor and that the Crown should have been made a party to the claim. It was further contended that by virtue of section 16 of the *Crown Proceedings Act*, injunctive relief was not available against the Crown. In upholding that submission, the Court of Appeal held that the leased property belonged to the government. That holding appeared to rest on three bases.

[23] First, the land which was the subject of the lease was Crown land as it was vested in the Commissioner of Lands "in trust for Her Majesty in the right of the Government of Jamaica". The land vested in the Commissioner of Lands by virtue of section 16 of the *Land Acquisition Act*. Under that section 16, land becomes vested in the Commissioner of Lands as soon as he enters into possession. The section requires

a notice to be published in the Gazette to that effect. Consequently, the respondent was neither the legal nor beneficial owner of the property. Secondly, Devon House had been declared a National Monument.

[24] Thirdly, the lease agreement stated that Devon House was the duly appointed agent of the Government of Jamaica. Its Memorandum of Association showed that its main object was to “maintain and develop the property known as Devon House”. The Court of Appeal, therefore, concluded that Devon House was “part of the government machinery in relation to the operation of the Devon House Complex”. Accordingly, Devon House was held, not to have been acting in its personal capacity, but as servant or agent of the Crown.

[25] Learned counsel for the claimant submitted that the important question for the Court is that posited by Duffus CJ in *LC McKenzie Construction Ltd. v The Minister of Housing and The Commissioner of Lands* Suit No. E 200/72 (unreported) dated 13<sup>th</sup> November, 1972 (*McKenzie Construction Ltd.*). In considering the status of the Minister of Housing, the learned Chief Justice considered the most important question to be whether the Minister functioned under the Housing Act “as an autonomous and completely independent body or performed his various functions as a servant or agent of Her Majesty”.

[26] *McKenzie Construction Ltd.* was a case in which the plaintiff sought to restrain the defendants from compulsorily acquiring lands which it had contracted to purchase from the previous government. The court felt itself unable to accept the fact of incorporation of the Minister as a corporation sole as obliterating the principal/agency relationship in respect of acts done by the Minister in the exercise of powers under the

Housing Act. The court, therefore, held that the Minister's functions were performed as a servant and agent of the Crown. Accordingly, an injunction did not lie.

[27] The first defendant submitted that the second defendant was never an agent or servant of the Crown to make the first defendant liable for any breaches of its common law or statutory duties. They relied on the case of *Tomlin v Hannaford* [1950] 1 KB 18 where the English Court of Appeal considered whether the British Transport Commission, a statutory body, was a servant or agent of the Crown for the purposes of determining whether the Rent Restriction Act (the Act) applied to it. The Crown and its agents were not bound by the Act, due to Crown Immunity. The Act would however apply to private persons.

[28] The court held that the body was not an agent of the Crown in spite of the corporation's tangible umbilical cord which attached to the Crown. As a statutory corporation it owned property, carried on business within the bounds set by parliament, had no shareholders, got its funding from the Treasury and financial assistance from the Consolidated Fund of the United Kingdom, made no profits or any to be distributed, the taxpayer was the universal guarantor of the corporation and the directors of the corporation were both appointed by the minister and answerable to him.

[29] The court reasoned that:

*"these are great powers but still we cannot regard the corporation as being his agent, any more than a company is the agent of the shareholders, or even of a sole shareholder. In the eye of the law, the corporation is its own master and is answerable as fully as any other person or corporation. It is not the Crown and has none of the immunities or privileges of the Crown. Its servants are not civil servants and its property is not the Crown property. It is, as much bound by Acts of*

*Parliament as any other subject of the King. It is of course, a public authority and its purposes, no doubt, are public purposes, but it is not a government department nor do its powers fall within the province of the government."*

[30] In the instant case, there was a paucity of evidence which would tend to show that The Village Green could properly be regarded as "Crown Land" in the sense contended for, or that the management of the development by the second defendant could properly be said to be part of the "government machinery" in relation to the management of such lands.

[31] Section 4(2) of the ***Crown Property (Vesting) Act*** states:

*"All lands acquired, by whatever means, ... for the use of the Government of this island, other than lands acquired by the Minister of Housing for the purposes of the Housing Act, shall be vested in the Commissioner for the time being...in trust for Her Majesty..",*

Unlike in ***Brady & Chen Limited*** where the Commissioner of Lands entered into possession of the lands in question and published a legal notice in the Jamaica Gazette, declaring that the land was vested in him in trust for her Majesty in right of the Government of Jamaica, The Village Green was never so vested. Neither was there any legal notice, nor any other documentary evidence, proving the same. It follows then, unlike Devon House in ***Brady & Chen Limited***, neither the development nor management of The Village Green could properly be said to be part of the "government machinery" in relation to the management of Crown lands.

[32] Section 7(2) of the ***Crown Property (Vesting) Act*** goes further to say that all property acquired, by whatever means, by or for the Government for its use other than that vested in the Commissioner of Lands, and property acquired by the Minister of

Housing for the purposes of the Housing Act, shall be vested in the Accountant-General.

[33] In the case at bar, Osprey was the registered proprietor of the land utilized for development of The Village Green. The Annual Tax Returns at the relevant time showed that the Accountant General held the vast majority of the shares. Those shares were therefore property held on behalf of the Government of Jamaica pursuant to section 7(2) of the *Crown Property (Vesting) Act*. This is so as shares are regarded in law as choses in action and fall within the meaning of "property" as defined in section 3 of the *Interpretation Act*. It is again to be mentioned that Osprey was not named as a defendant to these proceedings.

[34] As in *Brady & Chen Limited*, there was a one hundred percent government ownership of the shares in Osprey. That fact, I suspect, was what led the claimant to conclude that the land for which Osprey was the registered proprietor was vested in the Commissioner of Lands. However, a distinction must be made between land which vests in the Commissioner of Lands and land which vests in the Accountant-General. Land which vests in the Commissioner of Lands is land held "in trust for Her Majesty", while land which vests in the Accountant-General is land held "in trust for the Government of this Island". The former is Crown land, while the latter is simply government land.

[35] Once that distinction is made, it becomes clear that the land for which Osprey was the registered owner cannot properly be categorized as Crown land. Even if that distinction is not accepted, a further distinction in ownership has to be made. This claim does not concern the entire development, that is, all the land as it appeared in the

Certificate of Title. The claim concerns only such part of the land as formed common areas. In whom, then, was ownership of the common areas vested?

[36] Although these were not strata lots, "common area" is a concept which is synonymous to "common property" under the *Registration (Strata Titles) Act*. Section 2(1) of that Act defines "common property" as "so much of the land to which such plan relates as is for the time being not included in any strata lot contained in such plan". So, for present purposes, the "common areas" would be so much of the land which is not included in any of the lots in the resort.

[37] As under the *Registration (Strata Titles) Act*, section 10, the common areas are held by the proprietors of the lots as tenants in common. I would, therefore, venture to say that Osprey only remained owner of those parts of The Village Green which formed the common areas, to the extent that it retained proprietary interests in the unsold lots. That ownership would be in conjunction with the existing lot owners. This further distinction also makes it apparent that the area of the property from which this claim arose could in no sense be properly called Crown land.

[38] Even if the common areas could justifiably be said to be Crown land, how could the Village Green Management Company Limited, the entity charged with its management, be said to be the Crown's servant or agent? As was said above, its shareholders were private individuals; that is, they were neither a government entity nor government officials. There was no evidence that it was funded from the Consolidated Fund and or was the recipient of government guarantees. Apart from the composition of the Board of Directors, there was no evidence that its employees were civil servants. In sum, the second defendant lacked the characteristics of a department of government. In

addition, there was no evidence of an express appointment of the management company as an agent of the crown.

[39] The Village Green Management Company Limited was not shown to have any proprietary interest in the common areas which it managed. Having no proprietary interest therein, it could not be said that it was managing the common areas in its own behalf. Surely, the management company was not a trespasser. In carrying out the "business as managers of a first class tourism resort complex known as The Village Green", the management company executed a private function as the servant or agent of the lot owners, who collectively owned the common areas. Since the Crown did not number among the lot owners, the second defendant, in its management of the common areas, was neither servant nor agent of the Crown.

[40] In addition to the foregoing, as was reasoned by the Court in *Tomlin v Hannaford*, the corporation is its own master. It is not the agent of its shareholders and is answerable as any other person for its actions. Learned counsel for the claimant submitted that *Tomlin v Hannaford* was distinguishable on the basis that the commission in that case was a creature of statute.

[41] It is true that in *Tomlinson v Hannaford* the English Court of Appeal, in coming to its decision, interpreted the Transport Act of 1947 but it appears general company law principles were also relied on. It appears to me that the decision rested on the following basis, that is, in the absence of clear provisions making the corporation the servant or agent of the Crown, general company law principles dictated the corporation to be its own master.

[42] If that is a correct statement of the principle behind the decision, then I am constrained to agree with the defendant's counsel in saying there is significance in the observation that the corporation is its own master. In addition, if a creature of statute, developed by parliament and carrying out significant public functions was not regarded as agent or servant of the Crown it should not be that a privately incorporated, limited liability company which carried on a private purpose namely, the management of a resort, should be so regarded.

[43] In the case of *In the Matter of Equipment Maintenance Limited and In the Matter of Sections 196 and 203 of the Companies Act Suit No E 505 of 2001 delivered October 16, 2008*, Sykes J enunciated, at page 23:

*"It is well known that companies are separate from the human beings that form them. Even in the context of wholly owned subsidiaries, the orthodox position is that subsidiaries are separate legal entities from their owners and can pursue their objectives without let or hindrance provided they act within their articles and memorandum of association. This right extends to the purchase or disposition of property. Each subsidiary has its own board of directors and these directors are always under an obligation to act in the best interest of the subsidiary. The legal position of subsidiary is not in doubt."*

[44] Section 4 (1) of the **Companies Act** further confirms the legal personality of companies. It states, "a company has the capacity, and, subject to this Act, the rights, powers and privileges of an individual". It is trite law therefore that companies, even "wholly owned subsidiaries" possess their own legal personality, separate from their owners or parent companies. They are at liberty to act in any manner they deem fit subject only to their articles and memorandum of association.

[45] Applying this principle to the present case, the Village Green Management Company, though incorporated by Osprey, possessed a separate legal personality in the same manner that Osprey was clothed with its own separate legal personality. The same principle would apply if the argument is mounted that Osprey Developers and Village Green Management Company formed a group.

[46] Sykes J echoed the words of Slade LJ in *Adams v Cape Industries* [1990] Ch 433, 532 and 536:

*“There is no general principle that all companies in a group of companies are to be regarded as one. On the contrary, the fundamental principle is that “each company in a group of companies (a relatively modern concept) is a separate legal entity possessed of separate legal rights and liabilities.*

*...[S]ave in cases which turn on the wording of particular statutes and contracts, the court is not free to disregard the principles of **Salomon v A. Salomon & Co. Ltd.** [1897] A.C. 22 merely because it considers that justice so requires. Our law, for better or worse, recognizes the creation of subsidiary companies, which though in one sense the creatures of their parent companies, will nevertheless under the general law fall to be treated as separate legal entities with all the rights and liabilities which would normally attach to separate legal entities”.*

[47] For completeness, the principle of *Salomon v A. Salomon & Co. Ltd.* is that:

*“where all the statutory requirements were fulfilled in the forming of a limited liability company, and all the statutory requirements for the constitution of the company were fulfilled, the court was not entitled to go behind the register and memorandum, and upon a speculative analysis of motives and the exorbitance of the price paid, to decide that the company*

*was not validly constituted on account of the non-fulfillment of conditions which were not found in the Companies Act”.*

[48] It follows then that unless there is clear evidence in the form of a written agreement that the first defendant would be held liable for the actions of second defendant, the court cannot simply disregard the obvious fact of its separate legal personality. Similarly, the fact that the Boards of both the second defendant and Osprey were comprised of members of the NIF is equally insufficient.

[49] When Osprey Developers, “rooted” funds through second defendant in order to maintain the resort, it did so in its capacity as co-owners of the common areas since it held unsold lots. This, too, is insufficient for the court to disregard the fact of incorporation.

### **CONCLUSION**

[50] For the reasons above, the claimant has not satisfied this court on a balance of probabilities that the second defendant company was an agent or servant of the Crown to make the first defendant liable for the negligence and/or breaches of statutory duties as claimed. Judgment is therefore given for the first defendant. Costs are awarded to the first defendant to be taxed, if not agreed.

Deborah Patrick - Gardner