IN THE COURT OF APPEAL OF THE CAYMAN ISLANDS
HOLDEN AT GEORGE TOWN, GRAND CAYMAN

CIVIL APPEAL NOS. 13 OF 1998 & M 21 OF 1998
GRAND COURT CAUSE NO. 62 OF 1996

- Ysed
- J; C

BETWEEN: **PAGET-BROWN & COMPANY LIMITED** APPELLANT

AND: **OMNI SECURITIES LIMITED (IN LIQUIDATION)** RESPONDENT

BEFORE: RT. HON. EDWARD ZACCA, PRESIDENT
HON. MR. JUSTICE JAMES KERR, J.A.
HON. MR. JUSTICE GERALD COLLETT , J.A.

Robin Potts Q.C., Raymond Alberga Q.C. and Roger Nelson instructed by Messrs. Nelson & Company for the Appellant.
Alan Turner instructed by Messrs. W.S. Walker & Company for the Respondent.

Heard on the 7th and 8th days of December 1998. Decision delivered on the 15th day of April 1999.

JUDGMENT

ZACCA, P.

This is an appeal by Paget-Brown & Co Ltd. from a Judgment of the Grand Court whereby that Court dismissed their application that the action against it should be struck out. We also heard an application for leave to appeal against a decision by the Grand Court whereby the Court granted an application by the Respondent for leave to re-re-amend its writ.

The appellants' application was based on the ground that the claims against it disclosed no reasonable cause of action.

The respondent was a wholly owned subsidiary of Omni Holding A.G. and is a Cayman Island company incorporated and registered on 22nd December 1986. It was placed in voluntary liquidation on 7th November 1991.

The appellant is a Cayman Islands Company offering services to companies wishing to establish themselves in the Cayman Islands. The second defendant, Mr. Coleman is a director and employee of the appellant company. In its claim, the respondent alleged that there was an agreement with the appellant for them to provide a registered office, for them to act as a company secretary and to make available Mr. Coleman to be appointed a director of the respondent company. For these services the appellant was paid $1,800.00 per annum.

On the 10th August 1988 Mr. Coleman was elected as a director of the respondent company by the board. He was re-elected by the shareholders at the annual general meeting of the respondent on 21st August 1989 and again re-elected at a subsequent annual general meeting on 22nd May 1990. Prior to the next annual general meeting Mr. Coleman resigned as a director on 12th March 1991.

The writ was issued on 13th February 1996 and amended and re-dated 13th April 1996. It claimed damages in respect of transactions of the respondent alleged to have occurred between 16th February 1990 and March 1991. It alleged a breach of duty on the part of Mr. Coleman. The statement of claim was not issued until 26th November 1996.

As against the appellant, the writ in paragraph 2 claimed:

> 2(a) "Damages for the breach of the second defendant's duty of care and/or fiduciary duty committed in the course of the second defendant employment with the third defendant, or, in the alternative, that the third defendant was negligent in so appointing the second defendant to fulfill its contractual obligations to the plaintiff.
>
> 2(b) Damages for breach of its duty of care and/or fiduciary duty as company secretary to the plaintiff."

It was the respondent's case that the appellant was vicariously liable for Mr. Coleman's alleged breaches of duty to the plaintiff. Also alleged in paragraph 2(a) was a claim that the appellant acted in breach of its alleged contract with the respondent in nominating Mr. Coleman to act as a director of the respondent. It was, however, conceded by the respondent, at the hearing of the application to strike out, that this alternative claim was statute barred. The claim in paragraph 2(b) of the writ was also abandoned.

When the statement of claim was issued on the 26th November 1996, it purported to add against the appellant additional causes of action not contained in the writ. The causes of action which continued to exist at the hearing of the application may be summarised as follows:

"(1) a cause of action in contract based on an alleged obligation to monitor on a regular basis the performance by Mr. Coleman of his duties as a director of the plaintiff in order to ensure that he was properly performing his duties.

(2) a cause of action in tort for negligently failing to exercise reasonable skill and care in monitoring on a regular basis the performance of Mr. Coleman so as to ensure that such person was properly performing his duties as a director."

As a result of this the respondent sought the leave of the Court to re-re-amend its writ. Mr. Coleman now became the first defendant and the appellant the second defendant. Also paragraph 2 of the writ was amended to read:

"2. Against the second defendant (Paget-Brown)

(a) Damages for Breach of the first defendant's duty of care and/or fiduciary duty committed in the course of the first defendant's employment with the second defendant or, in the alternative, that the second defendant was negligent in failing to monitor the performance of the first defendant as a director of the plaintiff and thereby failed to fulfill its contractual obligations to the plaintiff pursuant to a contract between the plaintiff and the second defendant entered into in or about December 1986.

> (b) Further and/or alternatively damages for breach of its duty of care to monitor the performance of the first defendant as a director of the plaintiff from or about 10th August, 1988 to the first defendant's resignation on or about 6th May, 1991.
>
> (c) Further or alternatively a declaration that the second defendant is vicariously liable for the negligence of the first defendant."

The respondent's claim was now based on a claim in Contract and in Tort in relation to the monitoring of Mr. Coleman's performance. There was also a claim that the appellant was vicariously liable for the alleged breaches of Mr. Coleman.

For the appellant, Mr. Robin Potts Q.C. submitted that in so far as the claim in Contract was concerned, no facts were pleaded, from which it could be said either that there was an express or implied agreement to monitor the performance of Mr. Coleman. Indeed he argued that there was no such duty on the part of the respondent.

In so far as the claim in Tort that the respondent was vicariously liable for any breaches of Mr. Coleman, he submitted that the appellant, in making available Mr. Coleman to act as a director of the respondent, is not liable for the acts or omissions of the director because the acts or omissions of a director of a company, are acts or omissions in his individual capacity as a director of the relevant company. They are not acts or omissions by him as an employee of the appellant and an employer can only be vicariously liable in law for acts or omissions of an employee performed in his capacity, i.e. in the course of his employment by the employment, as such employee.

Mr. Potts relied on the case of ***Kuwait Asia Bank E.C. v National Mutual Life Nominees Ltd. 1991 1 A.C. 187.*** In his judgment the Learned Chief Justice in the Grand Court held that the Kuwait case could be distinguished from the instant case. Mr. Alan Turner for the respondent submitted that the present case is to be distinguished from the Kuwait case. That it was not determinative of the issue in the present case, which is whether or not a management company such as the appellant can owe a duty of care under Cayman Law as alleged in the statement of claim. He, however, conceded that if the Kuwait case is authority for Mr. Pott's proposals then the appellant would be entitled to succeed.

In his submissions Mr. Turner argued that the appellant is vicariously liable for the negligence of Mr. Coleman since Mr. Coleman was acting as a director of the respondent in the course of his employment by the appellant. At all material times he acted within the course of his employment by the appellant. This, he argued, distinguishes the present case from the Kuwait case. He also submitted that in the Kuwait case, it was a shareholder, who nominated the director and that the appellant provided a local director for a fee.

In its claim in contract Mr. Turner submitted that it was an express term of the agreement that the appellant would monitor the performance of Mr. Coleman.

Was there an express or implied term in the agreement for the appellant to monitor the performance of Mr. Coleman? We think not. No facts have been pleaded from which such an express or implied term can be discerned. The agreement as pleaded was to provide a company's secretary, a registered office and to nominate a person as a director. Mr. Coleman was appointed a director by shareholders of the respondent. There is no evidence that the appellant either gave instruction to Mr. Coleman or interfered with the performance of his duties. The fee paid by the respondent was a nominal fee. Surely if the appellant was to monitor and be vicariously liable for the acts or omissions of Mr. Coleman, one would have expected a much larger fee.

The writ was issued in February 1996 and the statement of claim in November 1996. The acts or omissions of Mr. Coleman were alleged to have taken place between 1988 and 1991. Certainly, enough time to allege facts from which an express or implied term could be ascertained.

In our opinion the statement of claim does not allege any facts from which an express or implied term to monitor Mr. Coleman can be inferred from the agreement as pleaded.

THE CLAIM IN TORT

Mr. Turner seeks to distinguish the Kuwait case from the present case. He points out that the Kuwait's case was concerned with allegations against the Bank as a shareholder and that the entire reasoning of the Privy Council concentrates upon the bank's position as a shareholder. In the present case the appellant is a corporate management company, whose duty to provide a director is entirely different from the duty of a shareholder.

The issue therefore is whether the appellant can be held to be vicariously liable for the alleged acts or omissions of Mr. Coleman. As stated above Mr. Potts relies on the Kuwait case in his submissions that the appellant cannot be held vicariously liable by reason of his nomination of Mr. Coleman as a director.

It is necessary to look at the decision and reasons of the Privy Council in the Kuwait case. In that case a foreign bank was beneficially interested in a New Zealand company ("AICS") which carried on business as a money broker. AICS had five directors, two of which were employees of the bank and nominated by it to the board. It was alleged that the default of those directors led to the losses suffered by the AICS depositors. The trustees of the AICS depositors alleged that the bank was vicariously liable for the breaches of duty of those directors whom it had nominated.

It was held that in the absence of fraud or bad faith, a shareholder or other persons who controlled the appointment of a director, owed no duty to a company's creditors to ensure that the director discharged his duties with diligence and competence, that the directors appointed by the bank became the agents of the company and if they had committed any breach of the duty they owed to the plaintiff under the trust deed, they were acting in an individual capacity and as directors were bound to ignore the interests and wishes of their employer, that accordingly, the bank, against which no impropriety was alleged, could not be liable for the acts of the two directors either as employer or as principal.

The judgment of their Lordships was delivered by Lord Lowry. Mr. Turner was unable in his research to refer us to any case which dealt with the position of a management company who nominates a director. Mr. Potts on the other hand relies heavily on the Kuwait case as being supportive of his submissions. Mr. Turner seeks to distinguish the Kuwait case from the present case but concedes that if he cannot distinguish it then the appellant is bound to succeed. We therefore find it necessary to quote extensively from the judgment.

Lord Lowry at page 220 said:

"There is no doubt that the plaintiff, by its statement of claim, has established an arguable case against House and August arising out the fact that the quarterly certificates were furnished on behalf of all directors of A.I.C.S.

As against the bank, the statement of claim pleaded that the bank was liable to contribute to the loss suffered by the plaintiff in settling the claims of the depositors against the plaintiff for all or any of the following reasons:

(1) House and August were appointed to the board of directors of A.I.C.S. by the bank, were employed by the bank and carried out their duties as directors in the course of their employment by the bank. (2) House and August were, as directors of A.I.C.S., the agents of the bank which was the principal."

At page 221:

" In the absence of fraud or bad faith (which are not alleged here), a shareholder or other person who controls the appointment of a director owes no duty to creditors of the company to take reasonable care to see that directors so appointed discharge their duties as directors with due diligence and competence."

" The liability of a shareholder would be unlimited if he were accountable to a creditor for the exercise of his power to appoint a director and for the conduct of the director so appointed. It is in the interest of a shareholder to see that directors are wise and that the actions of the company are not foolish; but this concern of the shareholder stems from self-interest, and not from duty. The House of Lords, in the recent case of ***J.H. Rayner (Mincing Lane) Ltd. v. Department of Trade and Industry [1990]*** 2 A.C. 418 (the International Tin Council case), reiterated that a corporation is a legal person, that no one can sue on a contract save the parties to the contract, and that therefore the members of a corporation are not liable as members for the debts of the corporation. It does not make any difference if the directors appointed by a shareholder are employed by the shareholder and are allowed to carry out their duties as directors while in the shareholders' employment. House and August owed

> three separate duties. They owed in the first place to A.I.C.S. the duty to perform their duties as directors without gross negligence; the liability of a director to his company is set forth in the judgment of Romer J. in **In *re City Equitable Fire Insurance Co. Ltd.*** [1925] Ch. 407. They owed a duty to the plaintiff to use reasonable care to see that the certificates complied with the requirements of the trust deed. Finally, they owed a duty to their employer, the bank, to exercise reasonable diligence and skill in the performance of their duties as directors of A.I.C.S."

Lord Lowry at page 222 stated:

> "If House and August did not exercise reasonable care to see that the quarterly certificates were accurate, they committed a breach of the duty they owed to the plaintiff and may have committed a breach of the duty they owed to A.I.C.S. and a breach of the duty they owed to the bank to exercise reasonable diligence and skill. But these duties were separate and distinct and different in scope and nature. The bank was not responsible for a breach of the duties owed by House and August to A.I.C.S. or to the plaintiff any more than A.I.C.S or the plaintiff were responsible for a breach of duty by House and August. If House and August committed a breach of the duty which was imposed on them and the other directors of A.I.C.S. and was owed to the plaintiff under and by virtue of the trust deed they did so as individuals and as directors of A.I.C.S. and not as employees of the bank; House and August were not parties to the trust deed, nor was the bank. House and August were allowed by the bank to perform their duties to A.I.C.S. in the bank's time and at the bank's expense. It was in the interest of the bank that House and August should discharge with diligence and skill the duties which they owed to A.I.C.S., but these facts do not render the bank liable for breach by House and August of the duty imposed on them by the trust deed. In the performance of their duties as directors and in the performance of their duties imposed by the trust deed, House and August were bound to ignore the interests and wishes of their employer, the bank. They could not plead any instruction from the bank as an excuse for breach of their duties to A.I.C.S. and the plaintiff. Of course, if the bank exploited its position as employers of House and August to

obtain an improper advantage for the bank or to cause harm to the plaintiff then the bank would be liable for its own misconduct. But there is no suggestion that the bank behaved with impropriety. Its duty to refrain from exploiting its influence over its employees is no different in principle from the duty of a father not to exploit his influence over a son who is a director or the duty of a businessman not to exploit his influence over a business associate who is a director. The employment of House and August could have given the bank the opportunity to injure A.I.C.S. and the plaintiff but it did not make the bank responsible for negligence of House and August in the discharge of their duties under the trust deed.

(2) Then it is said that House and August were the agents of the bank. But, as directors of A.I.C.S., they were the agents of A.I.C.S. and not of the bank. As directors of A.I.C.S., House and August were agents for A.I.C.S. for the purposes of the trust deed and, by the express terms of the trust deed, responsibility for the accuracy of the quarterly certificates was assumed by the directors of A.I.C.S. House and August accepted responsibility for the quarterly certificates as directors of A.I.C.S. and not as agents or employees of the bank.

(3) Next it was said that the bank owed a personal duty of care to the plaintiff. For the protection of the depositors the plaintiff stipulated for and obtained by the trust deed a duty of care in the preparation of the quarterly certificates by the directors of A.I.C.S. The plaintiff may or may not have known that two of the directors of A.I.C.S. were employed by the bank and that the bank would allow those two directors to carry out their duties as directors while in the employment of the bank. Any of these circumstances, even if known, could change at any time. The plaintiff may or may not have known that the bank was beneficially interested in 40 per cent. of the shares of A.I.C.S. That circumstance also could change at any time. The plaintiff did not rely on any of these circumstances. By the terms of the trust deed or by agreement supplemental to the trust deed the

> plaintiff might have attempted to impose a duty of care on third parties such as the bank, but the plaintiff neither intended nor attempted expressly or by implication to impose on employers, shareholders or any other third parties liability for the acts or omissions of the only persons who by the trust deed were charged with the duty to see that the quarterly certificates were accurate. An employer who is also a shareholder who nominates a director owes no duty to the company unless the employer interferes with the affairs of the company. A duty does not arise because the employee may be dismissed from his employment by the employer or from his directorship by the shareholder or because the employer does not provide sufficient time or facilities to enable the director to carry out his duties. It will be in the interests of the employer to see that the director discharges his duty to the company but this again stems from self-interest and not from duty on the part of the employer. The plaintiff's counsel referred to ***Ryde Holdings Ltd. v Sorenson*** [1988] 2 N.Z.L.R 157, but in that case the employer interfered with the affairs of the company by instructing the director to sell the assets of the company to a subsidiary company of the employer at an undervalue. None of the other authorities cited, New Zealand, English or Australian supported the submission that the bank is vicariously liable to the plaintiff either as employer or as principal or personally liable for its own negligence. In two authorities, **John Shaw & Sons (Salford) Ltd. v. Shaw [1935] 2 K.B. 113 and Scott v. Scott [1943] 1 All E.R. 582** it was held that majority shareholders are not liable to creditors of a company; management is vested in the directors who are liable to the company for gross negligence."

And at page 223 Lord Lowry said:

> "The only rights and remedies of the plaintiff were against A.I.C.S. for breach of contract and against

the directors of A.I.C.S. who owed a duty to the plaintiff. By the trust deed, the quarterly certificates were rendered on behalf of the directors and nobody else. Even if the plaintiff knew that House and August had been appointed by the bank, that the bank controlled a substantial shareholding in A.I.C.S. and that House and August were bound to perform their duties as directors of A.I.C.S. while employed by the bank, the plaintiff by the trust deed was only entitled to be furnished with quarterly certificates on behalf of the directors. House and August were directors but the bank was not a director. The bank never accepted or assumed any duty of care towards the plaintiff. In the absence of fraud or bad faith on the part of the bank, no liability attached to the bank in favour of the plaintiff for any instructions or advice given by the bank to House and August. Of course, it was in the interests of the bank to give good advice and to see that House and August conscientiously and competently performed their duties both under the trust deed and as directors of A.I.C.S. But such advice is not attributable to any duty owed by the bank to the plaintiff, which was only entitled to the protection which the trust deed provided, namely quarterly certificates furnished on behalf of all directors of A.I.C.S. By the trust deed the directors of A.I.C.S. accepted and assumed responsibility for the quarterly certificates, and the directors did not include the bank. The Companies Act 1955 cannot alter the construction of the trust deed or impose on the bank a duty assumed by House and August but never assumed by the bank.

Thus the statement of claim does not disclose any cause of action against the bank. The pleading would therefore be fit to be struck out on the application of the defendant bank. It complies, in their Lordship's opinion with the test enunciated in ***Takaro Properties Ltd. v. Rowling*** [1978] 2 N.Z.L.R. 314, 316-17, namely, that the cases pleaded as causes of action are so clearly untenable that they cannot possibly succeed. The fact that applications to strike out may raise difficult

> questions of law requiring extensive argument does not exclude the jurisdiction to do so."

We can see no reason for distinguishing the Kuwait case from the present one. Mr. Coleman was nominated by the appellant. He was appointed a director by the shareholders of the respondent. He could have been removed by the shareholders. He was answerable to the respondent and its shareholders. There was no control by the appellant over the performance of Mr. Coleman. The respondent has not pleaded bad faith or fraud on the part of the appellant. The pleadings do not disclose that any instructions or directions were given to Mr. Coleman by the appellant in the performance of his duties. No interference with the activities of Mr. Coleman is pleaded. The appellant would owe no duty of care to the respondent unless it interfered with the affairs of the respondent.

The acts or omissions of Mr. Coleman are acts or omissions in his individual capacity as a director of the respondent. They are not acts or omissions by him as an employee of the appellant.

It is our view that the appellant in the circumstances of the present case owed no duty of care to the respondent. The appellant cannot therefore be held to be vicariously liable to the respondent. The fact that the appellant is a Management Company offering services does not in our opinion affect the legal principle as enunciated in the Kuwait case.

There is no personal duty of care owed by the appellant to the respondent, to monitor the alleged conduct of Mr. Coleman as director of the respondent. We find that there were no implied contractual terms, as alleged, to monitor the alleged conduct of Mr. Coleman as a director of the respondent.

We therefore hold that on the pleadings, there is no arguable case with respect to any claim in contract or in tort and the learned Chief Justice ought to have ruled that the action be struck out as disclosing no reasonable cause of action.

If he had so found, then it would have been wrong for the Chief Justice to grant leave to amend the writ.

In the circumstances the appeal is allowed and the application for leave to appeal is granted.

It was agreed that the hearing of the application should be treated as the hearing of the appeal and the appeal against the order to amend the writ is allowed.

The orders of the Chief Justice in respect of both appeals are vacated and an order that the action brought by the respondent be struck out is substituted.

Costs of Appeal here and below to be the appellant's to be agreed or taxed.

<u>KERR,J.A.</u>

I agree.

<u>COLLETT, J.A.</u>

I agree.