BARBADOS

IN THE SUPREME COURT OF JUDICATURE

COURT OF APPEAL

CIVIL JURISDICTION

CIVIL APPEAL No. 6 of 2010
ON APPEAL from HIGH COURT CLAIM No. 1805 of 1998

BETWEEN

MARJORIE ILMA KNOX	**APPELLANT**
AND	
JOHN VERE EVELYN DEANE	**FIRST RESPONDENT**
ERIC ASHBY BENTHAM DEANE	**SECOND RESPONDENT**
OWEN BASIL KEITH DEANE	**THIRD RESPONDENT**
ELIZABETH TESS ROHMANN	**FOURTH RESPONDENT**
LYNETTE RACHEL DEANE	**FIFTH RESPONDENT**
MURIEL EILEEN DEANE	**SIXTH RESPONDENT**
OWEN GORDON FINDLAY DEANE	**SEVENTH RESPONDENT**
ERIC IAIN STEWART DEANE	**EIGHTH RESPONDENT**
KINGSLAND ESTATES LIMITED	**NINTH RESPONDENT**
CLASSIC INVESTMENT LIMITED	**TENTH RESPONDENT**
PHILIP VERNON NICHOLLS	**ELEVENTH RESPONDENT**

Before the Honourable Sir Marston C.D. Gibson K.A., Chief Justice; the Honourable Madam Justice Sandra P. Mason and the Honourable Mr. Justice Andrew D. Burgess, Justices of Appeal

2016: February 16; May 11 and 25; July 4
2020: June 26

Mr. Alair Shepherd Q.C. and Mr. Philip McWatt for the Appellant
Mr. Leslie Haynes for the Ninth Respondent;
Mr. G. Clyde Turney QC and Doria Moore for the Second and Tenth Respondent

DECISION

GIBSON CJ:

Introduction

[1] This is an appeal against the order of a judge of the High Court made on 12 August 2010 in CV No. 1805 of 1998, to garnish the dividends of the Appellant for the financial year 2009/2010. For the reasons which follow, the judge's decision on the main grounds of garnishment and set-off are affirmed. However, the decision on the issue of interest is modified as I indicate below.

Factual and Procedural Background

[2] This case has a long sordid history, described by this court in a prior journey of this very appeal, No. 6 of 2010, as "the saga of the **Knox v Deane** litigation which runs way back to the 1980s," a long-running internecine, intra-family battle between the Knox-Deane family over the Kingsland Estate and control of Kingsland Estates Limited ("KEL"). In 1998, Marjorie Ilma Knox ("Mrs. Knox" or "the appellant"; now deceased) brought a minority shareholder's oppression action against KEL and others seeking an order permitting her to buy out the remaining shares in KEL. The directors had accepted an offer from Classic Investments Ltd ("CIL"). Mrs Knox contended that, based on the construction of one of the articles of association of KEL, she had, as a shareholder, a right of pre-emption under clause 1(a) of the articles.

[3] The action failed in the local Barbados courts. The High Court dismissed the action on the ground that, upon the true construction of the articles, the other shareholders were entitled to transfer their shares to CIL without first having to offer them to Mrs. Knox. In other words, she had no right of pre-emption. This Court affirmed the decision of the High Court decision, and the Judicial Committee of the Privy Council ("the Privy Council") affirmed this Court's decision.

[4] In delivering the advice of the Privy Council to Her Majesty, **Lord Hoffman** held, construing the articles as a whole and without reference to either the context or the circumstances surrounding the drafting of the articles, (*cf*, *per* **Lord Hoffman** in **Investors Compensation Scheme Ltd v West Bromwich Building Society [1998] 1 WLR 896**), that Mrs. Knox had no right of pre-emption and that the directors possessed the discretion to select a person, in this case CIL, to purchase the outstanding KEL shares (see, paras [12] and [19] to [22] of (2005) 66 WIR 104, [2005] UKPC 25). His Lordship observed at para [12], that "their Lordships do not think that this is a case in which the context and surrounding circumstances provides clear guidance as to the purpose which the draftsmen intended to achieve. *It can only be gathered from the language which he used.*" (Emphasis added). And there was another additional clause, Clause 1(b) in the articles which conferred on the directors the discretion to sell to either "a

shareholder of the Company or to any person selected by the Directors." (see, paras 6, 22])

[5] In the absence of a shareholder's right of pre-emption, **Lord Hoffman** concluded at para [22], that "[i]t must therefore follow that the rights of the selected person are not subordinate but alternative to the rights of the shareholders. And the choice of alternatives is left to the discretion of the directors under subclause (b)."

[6] The Board awarded costs against Mrs. Knox in the sum of £247,500.00. Those costs were certified and registered as an order of the Barbados courts on 31 May 2006 and 20 June 2007. It may be noted, interstitially, that there have been several other decisions in the courts involving this litigation, including one which went all the way up to the Caribbean Court of Justice ("CCJ") on the issue of security for costs against a respondent (in that case, Mrs. Knox; see ***Knox v Deane*, [2012] CCJ 4 [AJ]**.

[7] On 29 June 2010, KEL declared a dividend. Mrs. Knox owned 28,570 shares in KEL and the dividend on those shares amounted to Bds. $749,692.50 after tax. The Respondents commenced garnishee proceedings on 2 July 2010 against Mrs. Knox's share of the KEL dividend. By a series of assignments the only persons with subsisting interests as garnishors in the dividend of Mrs. Knox subject to the garnishee order were Eric Deane (the Second Respondent), KEL and CIL, which

had effected the takeover of KEL in 2005, as was described by **Lord Hoffman** (see para [22], 66 WIR 104, [2005] UKPC 25).

The Garnishee Proceedings

[8] The trial judge heard argument on the garnishee proceedings and delivered his judgment on 12 August 2010. He ordered that the following sums be deducted by the garnishee, KEL, from the dividend due to Mrs. Knox: (1) Bds. $228,266.76 to be paid to Eric Deane (2) Bds. $173,452.70 to be paid to CIL; and (3) Bds. $284,061.75 with interest at the rate of 8 per cent per annum from April 2006 to be paid to KEL, representing its costs in the Privy Council appeal. The trial judge also ordered that Mrs. Knox pay the costs of the applicants for the garnishee order. The order of the trial judge was as follows:

'It is ordered that:

i. the Ninth Respondent/Garnishee do pay the Second Respondent/First Judgment Creditor from the dividend payable for the financial year 2009/2010 to the Applicant/Judgment Debtor so much as is due in the sum of $228,266.76 as being due by the Ninth Respondent/Garnishee to the Applicant/Judgment Debtor;

ii. the Ninth Respondent/Garnishee do pay to the Tenth Respondent/Second Judgment Creditor the sum of $173,452.70 to be

deducted from the dividend payable for the financial year 2009/2010 by the Ninth Respondent/Garnishee to the Applicant/Judgment Debtor;

iii. the Ninth Respondent/Garnishee is entitled to set off the sum of $284,016.75 with interest at the rate of 8% from the 3rd of April 2006 and that that sum be debited by way of set off by the Ninth Respondent/Garnishee from the Applicant/Judgment Debtor's share of such dividend for the financial year 2009/2010 together with costs;

iv. there be costs awarded in favour of the Second Respondent/First Judgment Creditor and the Tenth Respondent/Second Judgment Creditor to be agreed or taxed for two counsel and to be paid by the applicant/Judgment Creditor; and

v. there be costs awarded in favour of the Ninth Respondent/Garnishee to be paid by the Applicant Judgment/Debtor certified fit for two counsel to be agreed or taxed.

[9] On 13 September 2010 after her application seeking leave to appeal was granted by this Court, Mrs. Knox filed an appeal against the order of the trial judge. On 4 February 2013, she also filed an Application dated 30 January 2013 for leave to (i) amend the Notice of Appeal and (ii) adduce additional evidence in the form of an affidavit by John Knox. In a judgement dated 19 June 2015, this Court

granted Mrs. Knox leave to amend the Notice of Appeal but dismissed the application to adduce additional evidence.

[10] On 14 July 2015 an Amended Notice of Appeal was filed. On 16 February 2016, the matter came on for case management ("CMC") before me since it had become clear that there were several pending proceedings and at least one appeal, this current one, which remained outstanding. At the CMC, counsel for the respondents made an application to enter into evidence an affidavit that had not been filed in the High Court matter so as to place Kingsland's Articles of Association before this Court. They undertook to make the application in writing if the Appellant did not consent to it.

The Instant Appeal

The Case for the Appellant, Mrs. Knox

[11] The following issues were raised by Mrs. Knox against the trial judge's garnishment order:

i. That the learned trial judge failed to observe the principles of natural justice and protect the constitutional right of a litigant to a fair trial when he (a) dismissed the application for leave to serve Kathleen Davis, Jane Goddard, John Knox and Peter Allard; (b) failed to give counsel for Mrs. Knox an opportunity to make full submissions on the question of whether the garnishee

order should be made absolute; and (c) failed to give Mrs. Knox an opportunity to respond to the Second Affidavit of Eric Deane;

ii. That the learned trial judge erred in law when he dismissed the application for Kathleen Davis, John Knox and Peter Allard to be added as intervenors in the matter;

iii. That the learned trial judge erred in law when he treated the garnishee proceedings as an application for a set-off in relation to the Ninth Garnishee;

iv. That the learned trial judge erred in law in holding Mrs. Knox was the owner of the shares in KEL in her individual capacity; and

v. The award of interest at the rate of 8% wrong in law and/or unreasonable.

The Case for CIL, the Ninth Respondent

[12] The following issues in rebuttal were raised by the Ninth Respondent:

The hearing of the application for the Garnishee order was fair as:

i. Mrs. Knox is one of the shareholders of record of KEL, and not Kathleen Davis, Jane Goddard or John Knox;

ii. The certificates for the taxation of costs in the Privy Council were filed in the Supreme Court of Barbados on 2nd December 2005 and 3rd April 2006, some 4 years prior to the commencement of the garnishee proceedings. The affidavit of John Knox filed 22nd July 2010 on behalf

of Mrs. Knox admitted that the costs of the Privy Council had been awarded against her and taxed.

iii. The documents filed failed to support the application to serve Peter Allard, Kathleen Davis, Jane Goddard or Iain Deane, or to join them as parties to the action. Those documents included the alleged Barbados Trust; the alleged Florida Trust; the Stock Pledge Agreement dated 23rd February 2010 between the alleged Florida Trust and Peter Allard; and the Order of the Circuit Court for Miami Dade County, Florida in Case No. 10-0638CP4 dated 29th April 2010.

Issues raised in the Application

[13] From the foregoing, there are really only three substantive issues which are at stake in this case. The first issue which is phrased by Mrs. Knox as a violation of her right to a fair hearing devolves into the issue whether the judge correctly exercised his discretion in refusing to permit the addition of Kathleen Davis, Jane Goddard, John Knox and Peter Allard ("the four alleged additional parties") as parties to the proceeding. That takes us into a discussion of the trial judge's discretion contained in **Part 19** of the **Supreme Court (Civil Procedure Rules) 2008** ("the **CPR**") to add, remove or substitute parties to proceedings.

[14] The second issue is whether the learned trial judge erred in law when he treated the garnishee proceedings as an application for a set-off in relation to the Ninth

Respondent, and whether he failed to give Mrs. Knox an opportunity to argue against the garnishee order *nisi* being made absolute. And the third and final issue is whether the award of interest at the rate of 8% was wrong in law and/or unreasonable would be referred to as the award of interest issue.

Joinder of Parties

[15] The appellant contends that the learned trial judge failed to observe the principles of natural justice and protect the constitutional right of a litigant to a fair trial in refusing to permit the four additional parties to be served with process. **CPR Part 19.3(1)** provides that "[t]he court *may* add, substitute or remove a party on or without application." (Emphasis added). It is clear that **Part 19.3(1)** confers an unfettered discretion upon the trial judge to control the number of parties in an action before him or her. Although the issue is postured as one involving whether they should have been served, clearly they could not have been served if they were not proper parties. The question then, is, were they proper parties?

[16] The approach by this Court to the exercise of discretion by a judge in the High Court is well-settled. In the now seminal decision of this Court in **Toojays Ltd v Westhaven Ltd (Civ. App. No. 8 of 2010),** this Court cited in support, among others, **Phonographic Performance Ltd v AEI Rediffusion Music Ltd (1999) I WLR 1507, 1523-D**, where *Lord Woolf CJ* stated that "[b]efore the [appellate] Court can interfere, it must be shown that the judge has either erred in principle

or has left out of account or has taken into account some feature which he should or should not have considered, or that his decision was wholly wrong because the Court is forced to the conclusion that he has not balanced the various factors fairly in the scale." In **Jetpak Services Ltd v BWIA International Airways Ltd (1995) 55 WIR 562, 568**, also cited with approval in **Toojays,** *de la Bastide CJ*, as he then was, opined that "it is only in the circumstances where the exercise of the judge's discretion is based on a misunderstanding or misapplication of either the law or the evidence that an appellate court is entitled to set aside the exercise of the judge's discretion and exercise an independent discretion of its own."

[17] The question then must be whether there was an error in the trial judge's exercise of discretion in refusing to add the four persons as parties to be proceeding. I answer that question in the negative. It is necessary to understand the factual matrix surrounding this particular proceeding. The action by Mrs. Knox was commenced almost 22 years ago in 1998 seeking an order that she was entitled to a right of pre-emption. She lost in all three Courts. In the Privy Council costs were awarded and were taxed and a certificate issued in 2005 and 2006.

[18] A search of the record of those proceedings does not reveal any mention being made of either of the four alleged additional parties. The first intimation of any involvement of the four additional parties was in the Deed of Charge by way of

Legal Mortgage between Mrs. Knox and Peter Allard dated 14th May 2002, four years after Mrs. Knox alone commenced the right of pre-emption action, and the subsequent up-stampings of the mortgage. But there are several other reasons which prompt me to agree with CIL that the deed of charge was invalid. **Section 179(4)** of the **Companies Act Cap 308** of the Laws of Barbados provides that the beneficial ownership of shares or debentures in a company passes to a transferee on: (a) delivery to him of the instrument of transfer signed by the transferor and of the transferor's share certificate; or (b) delivery to him (transferee) of an instrument of transfer signed by the transferor that has been certified by or on behalf of the company. There was no evidence of a charge or a transfer to Allard of either the beneficial interest either as an assignee or as the holder of charge since the only evidence recognised in Barbadian law was the signature of the transferor to the transferee.

[19] Moreover, the deed of charge was never filed with the Companies Registry of Barbados. But, simply put, at the time of commencement of the litigation in 1998, there was no evidence of any beneficial owner of the shares other than Mrs. Knox, and the Privy Council advice to Her Majesty by Lord Hoffman does not mention any claimant to the right of pre-emption other than Mrs. Knox. For this reason alone, in my view, the trial judge properly exercised his discretion in not permitting Mr. Allard to be involved in the litigation regarding costs.

[20] The argument regarding the Barbados Trust fares no better. As noted above, it was clear, and I agree with CIL, that there was no transfer of Mrs. Knox's shares, either on trust or otherwise, which was presented to the Registrar of Corporate Affairs within 30 days in accordance with **section 179** of the **Companies Act CAP 308,** or presented to the company, KEL, with the original share certificate for Mrs. Knox's shares. Accordingly, the purported beneficiaries Jane Goddard and John Knox had no interest either legal or equitable in the shares.

[21] The same conclusion holds true for the alleged Florida Trust which is governed by the laws of Florida in the United States of America (USA). The Stock Power dated 5th March 2007 contained in the said trust purports to transfer the appellant's shares to Kathleen Davis as trustee. However, apart from the failure to comply with **section 179 of the Companies Act** by registering the transfer in any registry in Barbados, there was no evidence of approval by the Exchange Control Authority of Barbados (the Central Bank) for the Stock Power or for the transfer of shares from the Mrs. Knox to Kathleen Davis, as trustee, considering that Kathleen Davis was a resident of the USA and Mrs. Knox herself was, on the face of the said document, resident in Florida at the time of its execution.

[22] The global conclusion is that there was no evidence that the legal or beneficial ownership in the shares ever passed from Mrs. Knox to anyone or that her ownership was in any way encumbered by a charge, and consequently, the

entitlement to the dividend declared by KEL on Mrs. Knox's shares resided solely in Mrs. Knox.

[23] For these reasons, I hold that the refusal to permit service on the alleged four parties was a proper exercise of discretion by the trial judge and this argument therefore fails. As to the reply affidavit of Mrs. Knox, it is not clear what additional evidence would have been adduced for the consideration of the learned trial judge, other than an admission that the costs were due and owing to CIL

Ninth Garnishee's Right of Set Off

[24] In the instant case, Mrs. Knox was a shareholder of record in KEL. On 29 June 2010, KEL declared a dividend. On that same date, Mr. Eric A. Deane (now deceased; "Mr. Deane") and CIL, the Second and the Tenth Respondents, applied for an order to garnish a portion of the dividend payable to Mrs. Knox for sums due to them being the costs awarded to them in the High Court Case, 1805 of 1998, "M. I. Knox v Eric AB Deane".

[25] On 2 July 2010, the High Court made an *ex parte* garnishee order *nisi*.

[26] On 13 July 2010, KEL, the Ninth Respondent, applied by affidavit for an order that KEL set off the sum of $284,016.75 with interest at the rate of 8% from 3 April 2006 and that the Appellant's share of the 2010 dividend should be debited by that said sum. On 12 August 2010, the *inter partes* hearing for the garnishee

order absolute was heard by the trial judge who made the order set out at para [8] above.

[27] I deal first with the issue of garnishment. That remedy is dealt with in **Part 50** of the **CPR** which is entitled "Attachment of Debts." **Part 50.11 (1)** provides that the "rule has effect where the court is aware of information supplied by the garnishee or from any other source that someone other than the judgment debtor (a) is or claims to be entitled to the debt; or (b) has or claims to have a charge or lien over it." **Rule 50.11(4)** then provides for notice to be served on the garnishee and the judgment debtor. **Rule 50.12** then permits the judgment creditor to issue enforcement proceedings against a garnishee who fails to fulfil the terms of the attachment order.

[28] It is clear on this record that there was no basis for attacking the garnishment order of the trial judge. Notice was clearly served on KEL indicating that the dividend to which Mrs. Knox was entitled was liable to be attached by garnishment. There was no basis upon which it could be contended that the garnishment order *nisi* should not have been made absolute by the trial judge since all the procedural requirements of the rule were complied with.

[29] As far as concerns the set-off, Black's Law Dictionary (9th Edition, at p. 1496) defines set-off as a defendant's counter demand against the plaintiff, arising out

of a transaction independent of the plaintiff's claim. It is also defined as a debtor's right to reduce the amount of a debt by any sum the creditor owes the debtor.

[30] In ***Schierhout v Union Government*** 1926 AD 286, *Innes CJ* explained set-off in the following terms:

> The doctrine of set-off is not derived from statute and regulated by rule of court, as in England. It is a recognised principle of our common law. When two parties are mutually indebted to each other, both debts being liquidated and fully due, then the doctrine of compensation comes into operation. The one debt extinguishes the other *pro tanto* as effectually as if payment had been made. Should one of the creditors seek thereafter to enforce his claim, the defendant would have to set up the defence of compensation by bringing the facts to the notice of the Court as indeed the defence of payment would also have to be pleaded and proved. But, compensation once established, the claim would be regarded as extinguished from the moment the mutual debts were in existence together.'

[31] A set-off is a defence in an action for payment of a debt. See ***Stooke v Taylor (1880) 5 QBD 569 ('***[t]he plea can only be used in the way of defence to the plaintiff's action, as a shield, not as a sword.'). It must be noted that a set-off is not a method of enforcing a judgement and is unconnected to garnishee proceedings. Consequently, KEL, the Ninth Respondent, who applied by affidavit for an order that it could be permitted to set off the sum of $284,016.75 against the dividends which it owed to Mrs. Knox was entitled to a set-off. However, while Mr. Deane, the Second Respondent, and CIL, the Tenth Respondent both of whom applied for an order to garnish a portion of the dividend payable to the Appellant for sums due to them were entitled to the order

of garnishment, they were not entitled to a set-off since there was no evidence that either Eric Deane or CIL owed any money to Mrs. Knox. Hence, the trial judge erred in treating the garnishee proceedings brought by the Second and Tenth Respondents as an application to set-off.

The Award of Interest

[32] In the instant case, the trial judge ordered that the sums of money be deducted by the garnishee, KEL with interest at the rate of 8 per cent per annum from April 2006 to be paid to KEL, representing its costs in the Privy Council appeal. Mrs. Knox disputed the rate of interest. I find that she was right to do so.

[33] According to the **Rate of Interest Act** CAP 316, **section 4**,

> Subject to subsection (2), all sums of money due or payable under or by virtue of any judgment obtained by any person, other than an exempted person, after 8th October, 1973, shall carry interest at a rate not exceeding the prescribed rate from the time of entering up or of obtaining such judgment until the judgment is satisfied. Notwithstanding subsection (1), on any judgment obtained in the High Court by any person, other than an exempted person, on any bond, either with or without a warrant of attorney, the rate of interest payable on the amount due on such judgment shall be the rate, if any, expressed in such bond, and, if no rate is expressed therein, then such judgment shall carry interest at a rate not exceeding the prescribed rate.'

[34] Moreover, local judgment debts are subject to interest at the default statutory rate of 6% as provided by **Rule 65A.2** of the **Supreme Court (Civil Procedure) (Amendment) Rules, 2009 (SI 2009, No. 111)** which provides that the rate of interest may be imposed at a rate of 6 per centum per annum.

[35] In the circumstances, the portion of the judgment which set the rate of interest at 8% is set aside and, in its place, is substituted an order that the rate of interest shall be set at 6% as required by the amended CPR.

DISPOSAL

[36] The appeal against the garnishee order is dismissed.

[37] The appeal against the rate of interest is allowed.

[38] Costs of this application to be assessed if not agreed.

[39] I sincerely apologise for the length of time it has taken to deliver this judgment for which I am entirely responsible.

Marston D Gibson

CHIEF JUSTICE

I concur.

JUSTICE OF APPEAL

I concur.

JUSTICE OF APPEAL