

**COMMONWEALTH OF THE BAHAMS**

**IN THE SUPREME COURT**

**Commercial Division**

**2012/GEN/FP 00041**

**B E T W E E N**

**VICTORIA ALLEN**

**AND**

**CHARLES FORBES**

**AND**

**EMILY ADDERLEY**

**AND**

**KARIA COOPER**

**AND**

**NANCY EVANS**

**AND**

**ANDREW MAJOR**

**AND**

**MALISSA SAUNDERS**

**AND**

**MAVIE GRANT**

**AND**

**IDELLA GRANT**

**AND**

**ANISHKA BARTLETT**

**Claimants**

(suing on behalf of themselves and all persons employed by Bahamas Supermarkets Limited on or after the 1<sup>st</sup> day of August, 2011 and persons entitled under the Retirement Plan on or after the said date except persons subject to any collective Industrial Agreement with the Bahamas Supermarkets Limited)

**AND**

**BAHAMAS SUPERMARKETS LIMITED**

**AND**

**MARK FINLAYSON**

**AND**

**GARET O. FINLAYSON**

**AND**

**PHILP KEMP (Trustee of the Retirement Plan of the Bahamas Supermarket Limited  
Employees)**

**AND**

**TRANS ISLAND TRADERS LIMITED**

**Defendants**

Before: The Honourable Madam Justice Camille Darville Gomez

Appearances: Mr. Rouschard Martin for the Claimant  
Mr. J. Kwasi Thompson for Mr. James R. Thompson the party the Claimant is  
seeking to add as a Defendant

Hearing Date: June 4, 2024

*Addition and Substitution of Parties – Civil Procedure Rules, 2022 Part 19.1- Whether or not leave required  
pursuant to Part 19.3(7) – preliminary objections to be considered prior to application – preliminary objections  
dismissed – substantive hearing to be set down*

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**Darville Gomez, J**

***Background/History***

- [1.] I gave my decision in relation to these preliminary objections on August 12, 2024 and promised to provide my reasons in writing later, I do so now.
- [2.] This action was commenced over ten years ago by the Claimants who were the former employees of the First Defendant which was majority owned by the Fifth Defendant. The First Defendant established the Bahamas Supermarkets Limited Profit Sharing Retirement Plan for the benefit of its employees who became participants of the Retirement Plan. The Claimants have brought this action seeking their severance pay when the First Defendant closed its business in 2012 and additionally they allege that they were not paid the allocated and unallocated funds due to them under the Retirement Plan.

- [3.] There are a miscellany of sub-issues relative to this action including inter alia, the change of trustees including the death of one and the sale of the sole asset of the Retirement Plan. However, the instant application by the Claimant is for the addition of Mr. James R. Thompson as a Defendant to the action by Summons filed on July 16, 2021 for the following relief:
- (i) That James Thompson shall be added as a Defendant to this action and shall comply with the following additional orders;
  - (ii) That James Thompson shall forthwith transfer all of the 70% shares in Trinity Limited to the Plaintiffs' accountant, Louis Butler, to be held on trust for the Beneficiaries/Participants of Bahamas Supermarkets Limited Profit Sharing Retirement Plan (Retirement Plan) constituting part of the Retirement Plan assets;
  - (iii) That James Thompson shall, in addition to previous orders herein, account for all monies collected, disbursed and expended since his last report up to the time he transfer the 70% shares to Louis Butler;
  - (iv) That Louis Butler shall primarily use such funds to pay the Beneficiaries/Participants of the Retirement Plan and to do all things necessary to maintain the Trinity Limited Plaza and satisfy professional debts of the Retirement Plan and its Beneficiaries/Participants and shall report to the Court quarterly on all such transactions until further ordered.

[4.] This action was commenced prior to the enactment of the Civil Procedure Rules, 2022 (the "CPR"), however, due to the transitional provisions it is now governed by them.

[5.] The sole asset of the retirement plan is a warehouse situate on East West Highway which is the subject of another action. The Trinity Building situate on West Bay Street was owned by the Trust and Mr. Thompson entered into an arrangement to obtain 70% of the shares. This has resulted in him collecting rent of \$14,000 - \$16,000 monthly. The Claimants allege that these funds are being collected by Mr. Thompson for his own personal use and benefit.

***The instant application***

[6.] The power to add a party to an action is contained in Part 19.1 of the CPR. A Claimant may add a new defendant without permission at any time before the case management conference and the Court may add a new party to the proceedings without an application in certain circumstances pursuant to Part 19.2(3). Additionally, the Court may add a party at the case management conference, however, after the case management conference the Claimant must satisfy the Court that the addition is necessary because of some change in circumstances which became known after the case management conference.

***The Preliminary Objections***

[7.] Mr. James R. Thompson has made three preliminary objections to the instant application which the Court must consider before hearing the said application. I set out below verbatim the objections which he has made and the response of Mr. Martin for ease of reference.

Mr Thompson - Ground No. 1

It is submitted that the applications of Mr. Rouschard Martin is (are) on behalf of persons who are not Plaintiff and have been excluded by Court Order from being Plaintiff.

#### ARGUMENTS

This Action originally began solely on behalf of the ten (10) named Plaintiffs but became a Representative Action pursuant to Rule 15 of the Supreme Court on the 6<sup>th</sup> and 13<sup>th</sup> June, 2012 by Orders of the Supreme Court.

By these Orders it was ordered that “The Plaintiff (10 persons) were “suing on behalf of themselves and all person employed by Bahamas Supermarkets Limited on or after the 1<sup>st</sup> day of August 2011 and persons entitled under the Retirement Plan or after the said date except persons subject to any collective industrial agreement with the Bahamas Supermarket Limited.

The Order specifically Ordered that persons subject to collective Industrial Agreement with the Bahamas Supermarket Limited are EXCEPTED, that is to say cannot the Plaintiffs.

Representative Actions are cautiously permitted by the Rules of Court so that one person may appear in Court for another who though not appearing became subject to Courts jurisdiction which otherwise he would not be subject to the Courts jurisdiction.

The Rules themselves specifically does not allow (ever by Court Order) a person to represent others where his rights or interests are different from the other persons represented in the Action (Order 15:12)

Thus the rights and interests of person arising in a Union Contract are substantially different and in some respect contradictory to the rights of persons employed under the common law.

In breach of the said Order and in contempt of this Honourable Court Mr Rouschard Martin represents and today continue to represent to this Honourable Court that he represented Union members as Plaintiff in his Applications and by previous applications before the Court.

It is submitted that any Consent Order cannot make these persons Plaintiff even if the parties so wish. By reason of the Rules themselves and the said Court Order such persons cannot be Plaintiff.

It is therefore submitted that the previous proceedings before the Registrar was a nullity and that Mr Martin acted in contempt of this court.

#### CAUSES OF ACTION STATUTE - BARRED

Before Mr Martin parties in December 2014 made attempts with the Court for the Union Members to be represented before the Court holding documents accordingly, but Mr Martin refused to complete the matters with the results that they never became Plaintiff with the consequences that because of Mr Martin, the severance (over one million dollars) and other Action due to them may now be statute barred (enclosed Court transcript and copies of documents held by the Court for the Union to be join as Plaintiff).

DOCUMENTS referred to.

1. Affidavit of James R. Thompson filed the 5<sup>th</sup> July 2022
2. Order 15 Rules of the Supreme Court

3. Amended Writ
4. Collective Industrial Agreement
5. Supreme Court Transcript of January 2012 (JRT affidavit of the 5<sup>th</sup> July 2022 tab 14)
6. Documents to join Union as Plaintiff

Mr Martin's response:

- (16) In August of 2015, former Chief Justice Sir Hartman Longley decided that Rouschard Martin represents the Plaintiffs after reviewing the evidence and upholding the Notice of Change of Attorney filed by Martin, Martin & Co. James Thomson was present along with Rouschard Martin and the Chief Justice heard both counsel and decided that Rouschard Martin represents all Plaintiffs and that there can only be one counsel for the Plaintiffs.
- (18) James Thomson made the point on the 23<sup>rd</sup> September, 2016 that he represented some Plaintiffs but again this argument was rebuffed with the former Chief Justice saying all Plaintiffs must bring their concerns to Mr Martin. There were no Plaintiffs or individuals who brought concerns about Mr Martin's representation. This matter has been decided and was never appealed.
- (19) It is only right that James Thompson be made a party to this action, given his statement that he wishes to appeal (if necessary) his continued filing of summonses and affidavits in this matter and his submissions to the jurisdiction of this court by being cross-examined and filing court ordered reports on the Trinity Limited building and rent in this action.

Mr. Thompson - Ground No. 2

By Order filed 17 December, 2013 this Action was ordered permanently stayed. The Applications for in respect by Mr. Martin are in breach of that Order.

Order enclosed

Mr. Martin response:

- (21) This action is not stayed. The proposition that the action is stayed which has been advanced by James Thompson is totally illogical and misleading to the court.
- (22) There is no order in effect causing the action to be stayed, especially since the parties have been filing documents and participating in hearings over many years to present.
- (23) The parties agreed to a consent order for an assessment to be conducted by the Court, such order being filed on the 23<sup>rd</sup> September, 2016. This assessment has been substantively completed by the court and James Thompson has participated in the process by having been cross-examined and filing documents (including affidavits, reports and skeleton arguments).
- (24) The assessment was frustrated due to the Trustees' unauthorized attempt to settle the East West highway property to AML Foods Limited without the court, beneficiaries or their legal representatives knowing. AML Foods Limited encountered a title issue with such property and now there is a full scale ongoing litigation that has hampered the progress of this action.

Mr Thompson - Ground No. 3

That the true Plaintiffs settled this cause of action in December, 2012. Trinity Building was transferred to satisfy the terms of this Agreement to James R. Thompson & Co. The Agreement was approved by the Court (see Transcript January 2012).

The agreement is enclosed and Transcript of Court proceeds are enclosed.

The Court should aware that the Trinity Building was conveyed solely to pay the costs as was ordered.

Payment for all benefit were settled by the Trustee before the transfer of shares. (see attached 2015 affidavit)

The conveyance was made subject to the payment of annuities to some beneficiaries to bridge them over until the warehouse was sold. There was no trust and any issue affecting the arrangement would now give rise to the question of settlement of the costs as Ordered.

Mr. Martin's response:

- (26) This matter has not been settled. It is clear and obvious that the Plaintiffs are clamoring for help to resolve the live and kicking issues which emanate from the consent order of the 23<sup>rd</sup> September, 2016. The parties have settled on liability and have decided to have an assessment done to settle the issue of severance and pension.
- (27) There is a separate order made by former Chief Justice Hartman Longley which requires an assessment to be conducted by the court to settle the severance issues. That severance order was filed on the 4<sup>th</sup> November, 2016.
- (28) Having regard to the above orders, the cause of action has not been settled, especially considering the fact that none of the assessment have been completed.

***Discussion/disposition***

- [8.] The file is of some vintage and is contained in several volumes. However, this action had been transferred to me in my capacity as Deputy Registrar sometime in or around September 2016 for an assessment.
- [9.] Then Chief Justice the Honourable Sir Hartman Longley ordered by consent of Mr Rouschard C. Martin of Counsel for the Claimants; Mr. Desmond F. Edwards of Counsel for the 2<sup>nd</sup> and 4<sup>th</sup> Defendants; and Mr. Roger Minnis of Counsel for Rosalie McKenzie and Dennis G. Williams (as Current Trustees of the Retirement Plan of the Bahamas Supermarkets Limited Participants) as follows:-
  - (i) That pursuant to the Rules of the Supreme Court, there shall be an assessment and/or accounting (hereinafter referred to as an "assessment order") by one of the Registrars of the Supreme Court at Ansbacher House, Nassau, The Bahamas relating to the Bahamas Supermarkets Limited Profit Sharing Retirement Plan (the Pension Plan) and Bahamas Supermarkets Limited former employees, namely:-

- (a) To determine the assets or missing assets of the Pension Plan as of May 30, 2016;
  - (b) To determine the income, expenditure and the present financial status of the Pension Plan from January 2006 to May 30<sup>th</sup>, 2016;
  - (c) To determine the sums owed to the Pension Plan which have not been paid into the Plan so as to be allocated to each participant;
  - (d) To determine the allocated and unallocated sums owed to each participant of the Pension Plan as of May 30<sup>th</sup>, 2016;
  - (e) To determine what the Pension Plan consists of as of May 30<sup>th</sup>, 2016;
  - (f) To determine the costs due to the Plaintiffs, participants as a result of litigating this action and which of the Defendants shall pay such costs.
- (ii) That the amounts so determined be paid forthwith.
  - (iii) That to facilitate the assessment and/or accounting, the parties are to provide upon request to the Registrar, all materials that the Registrar deems necessary to assist with a proper assessment of the Pension Plan.
  - (v) That the Parties shall have liberty to apply.

[10.] For a variety of reasons, the assessment was not completed. However, in my capacity as Registrar, hearings were held from 2016 until about 2018 in which several persons were examined including Mr. Dennis Williams (now deceased) in his capacity as a current Trustee, Louis Butler, John Bain, Sydney Saunders and Mr. Thompson (who was then represented by Mr. Harvey Tynes, QC) so as to facilitate the assessment order.

[11.] I summarize the preliminary objections of Mr Thompson as follows: (i) that the persons on whose behalf Mr. Martin is acting have been excluded by Court Order from being Plaintiff; (ii) this action was ordered permanently stayed by Court Order filed December 17, 2013; and (iii) that the true Plaintiffs settled this cause of action in December, 2012.

[12.] The Order paragraph of the Order being relied upon by Mr Thompson refers:

“Save for the enforcement of the terms of this Order, upon fulfilment of the terms and conditions as set out above and the payment of the taxed costs, the present Trustees and former Trustees of the Bahamas Supermarket Limited PROFIT SHARING RETIREMENT PLAN will be discharged from all further liability in respect of the Plaintiffs’ claims in this action AND all further proceedings in respect thereof in this action as against the present Trustees and former Trustees of the Bahamas Supermarket Limited PROFIT SHARING RETIREMENT PLAN will be permanently stayed.”

[my emphasis added]

[13.] The three preliminary objections of Mr. Thompson are difficult to reconcile given what has transpired in the action over the years in particular, since 2016.

- [14.] The court filings show that even prior to the assessment order in 2016, these Plaintiffs have (i) been represented by Mr. Martin and have continued to date to be represented by him; (ii) that given the assessment order in 2016, the action has been not been permanently stayed since 2013; and (iii) the Plaintiffs continue to vigorously assert their rights to obtain their severance and pension benefits from the Defendants per the assessment order and therefore, the action is not settled. Also, it is unclear to whom Mr. Thompson refers as the “true Plaintiffs” who caused this action to be settled in 2012. However, and in any event, it is difficult to reconcile this given the assessment order which occurred several years after the settlement referred to by Mr. Thompson.
- [15.] I was not provided any authorities in support of or against the preliminary objections. References were made to transcripts and documents filed prior to 2016, therefore, while of some assistance, they do not provide the full or complete picture of the action which was commenced from 2012. The preliminary objections would cause the Court to only pay regard to orders made prior to 2016 without reference to the hearings and filings made thereafter which were not set aside or appealed by any of the parties and which contradict the assertions made by Mr. Thompson.
- [16.] I am mindful of the overriding objectives in the Civil Procedure Rules, 2022 and in particular Part 1.1(c)(ii)(iii)(iv) which addresses the need to ensure that cases are dealt with in ways which are proportionate to the importance of the case, the complexity of the issues and the financial position of each party. The Claimants in the action, some of whom have died since the action has been commenced have been trying over the years to obtain their entitlement to their pension and severance from the Defendant. It would be premature of the Court given all that has transpired as set out above to find in favour of Mr. Thompson at this stage without a full hearing of the application to add him as a party.
- [17.] Accordingly, for all of the above reasons, I dismiss the preliminary objections made by Mr. Thompson and I make no order for costs. The application to add Mr. James Thompson as a party will be set down for hearing at a date convenient to both parties.

Dated this 18<sup>th</sup> day of September 2024

  
Camille Darville Gomez

Justice