JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CIVIL APPEAL NO. 41/95

BEFORE: THE HON. MR. JUSTICE CAREY, J.A.
THE HON. MR. JUSTICE FORTE, J.A.
THE HON. MR. JUSTICE PATTERSON, J.A.

BETWEEN	DANIEL MELVILLE	
AND	CHUKKA COVE FARMS LIMITED	
AND	MELVILLE ENTERPRISES LIMITED	APPELLANTS
AND	YVONNE VERONICA MELVILLE	RESPONDENT

Dr. Lloyd Barnett and David Henry,
instructed by Miss Suzette Moss,
of Nunes, DeLeon, Scholefield & Co.,
for the appellants

R. B. Manderson-Jones and Patrick Foster,
instructed by Clinton Hart & Co.
for the respondent

February 19, 20, 22, 23 and March 25, 1996

PATTERSON, J.A.:

On the 23rd February, 1996, we allowed this appeal from the judgment of Reckord, J. whereby he granted the application of the respondent (the plaintiff) on an originating summons for certain declarations. We ordered that the judgment of the court below be set aside, and we dismissed the originating summons with cost both here and below to the appellants to be taxed if not agreed. We now give our reasons for so doing.

The essential issue argued at the hearing of this appeal was whether the proceedings were properly commenced by way of originating summons, having regard to the provisions of the Judicature (Civil Procedure Code) Law, (the CPC) and the issues raised and reliefs sought by the plaintiff. Counsel for the respondent (the defendant) contended that the issues raised and/or the reliefs sought all involved facts and issues in substantial dispute, and in any event, ought not to have been determined on originating summons as the same fell outside the scope permitted by sections 531 to 531D and section 532 of the CPC.

The originating summons which the court below heard is intituled "In the matter of the Construction and Interpretation of a MANAGEMENT AGREEMENT and a POWER OF ATTORNEY", and it sought:

> "**1.** A Declaration that the purported termination by the First and Second Defendants of the Plaintiff's employment as Managing Director of Chukka Cove Farm Limited is in breach of the Management Agreement and invalid;
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> **2.** A Declaration that the purported termination by the First and Third Defendants of the Power of Attorney granted to the Plaintiff in respect of a portion of the Third defendant's shares in Chukka Cove Farm Limited is invalid and of no effect;
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> **3.** A Declaration that the occupation by the Plaintiff of the Villa at Chukka Cove Farms Limited does not come within the terms and scope of the Management Agreement of 24th May, 1994, made between the Second Defendant and the Plaintiff and is not governed by the Management Agreement;

"**4.** A declaration that YVONNE VERONICA MELVILLE is and/or is entitled to remain:

(a) Managing Director of the Second Defendant CHUKKA COVE FARMS LIMITED under the terms of a Management Agreement dated 24th May, 1994 notwithstanding the purported termination of her employment by letter dated 20th February, 1995 from the Second Defendant to her which is invalid and of no effect for the purpose of terminating her employment as Managing Director under the said Management Agreement;

(b) in undisturbed occupation of the Second Defendant's Villa at Chukka Cove, Priory P.A., Saint Ann;

(c) in possession of the Power of Attorney dated 24th May, 1994, which was granted to her by the Third Defendant MELVILLE ENTERPRISES LIMITED notwithstanding the purported termination of the power by letter dated 20th February, 1995, from the Third Defendant to her consequent on the purported and invalid termination by the Second Defendant of her employment as Managing Director.

5. An Order that the First, Second and Third Defendants be and are hereby restrained by themselves their servants, agents or otherwise howsoever from interfering with the Plaintiff's occupation of the said Villa (No. 1) at Chukka Cove, Priory P.A. in the parish of Saint Ann and with the exercise by her of the said Power of Attorney granted to her on 24th May, 1994, by the Third Defendant MELVILLE ENTERPRISES LIMITED."

The originating summons was supported by the requisite affidavit. The defendants entered a conditional appearance and filed a summons supported by affidavits to strike out the

originating summons on the ground that it was "frivolous, vexatious and/or an abuse of the process of the court in that same seeks orders outside the scope permitted by section 531 or section 532 of the Judicature (Civil Procedure Code) Law and/or involves facts and matters in substantial dispute." That summons was dismissed by Smith, J. on the 21st March, 1995, and leave was granted to the defendants to appeal. The plaintiff lost no time in setting down the originating summons for hearing, and when it came up on the 24th April, 1995, the defendants applied for an adjournment pending the hearing of the appeal from the judgment of Smith, J. The application was refused, and the hearing commenced. The defendants then took a preliminary objection to the hearing, on the ground that the proceedings were misconceived and improperly commenced by way of originating summons, having regard to the contested issues and the provisions of section 531 and section 532 of the CPC. The learned judge overruled the objection and proceeded to hear the matter. The hearing lasted for eight days, and judgment was handed down on 12th May, 1995. It is from that judgment that this appeal arose, the principal complaint being the suitability of an originating summons for commencing the proceedings.

As a general rule a civil proceeding is commenced in the Supreme Court by writ and is called an action (s. 4 CPC). But proceedings may also be commenced in the Supreme Court by originating summons, originating motion or petition. An originating summons is defined as "every summons other than a summons in a pending cause or matter" (s. 2 CPC). But

proceedings may be begun otherwise than by writ only where the CPC or some other Act or rule so authorises.

An action for a declaratory judgment or order may be begun by writ as well as by an originating summons. Section 239 of the CPC provides as follows:

> "**239.** No action or proceeding shall be open to objection on the ground that a merely declaratory judgment or order is sought thereby, and the court may make binding declarations of right whether any consequential relief is or could be claimed, or not."

These provisions clearly enable a plaintiff who is seeking a declaratory judgment to commence the proceedings by a writ. But it is sections 531 to 531D which give the power to proceed by way of originating summons and provide for the procedure for the conduct of such proceedings when a declaration of right is sought <u>on a question of construction of written instruments and statutes</u>. The provisions are as follows:

> "**531.** Any person claiming to be interested under a deed, will, or other written instrument, may apply by originating summons for the determination of any question of construction arising under the instrument, and for a declaration of the rights of the persons interested.
>
> **531A.** Any person claiming any legal or equitable right in a case where the determination of the question whether he is entitled to the rights depends upon a question of construction of a Law or an instrument made under a Law, may apply by originating summons for the determination of such question of construction, and for a declaration as to the right claimed.

> **"531B.** The Court or a Judge may direct such persons to be served with the summons as they or he may think fit.
>
> **531C.** The application shall be supported by such evidence as the Court or a Judge may require.
>
> **531D.** The Court or a Judge shall not be bound to determine any such question of construction if in their or his opinion it ought not to be determined on originating summons."

These provisions confine the court to deciding questions of construction of instruments in writing and to declare the rights of the persons interested under such instruments. They do not enable the court to grant any relief whatsoever. The declaration of the rights of persons interested under the instrument must follow on the determination of the question of construction. Where there is no question of construction the procedure by originating summons is inappropriate. As Warrington, J. pointed out in ***Lewis v. Green*** [1905] 2 Ch. 340 at 344, when considering an order in pari materia to section 531:

> "It is only intended to enable the court to decide questions of construction where the decision of those questions, whichever way it may go, will settle the litigation between the parties. It is not intended that questions of construction which, if they were decided in one way only will settle the dispute between the parties, should come up for decision on an originating summons. It would be most inconvenient to resort to the order in a case where it is quite uncertain what may be the ultimate decision on the point of construction, and where if the decision is in one way it involved further litigation."

The jurisdiction of the court below to make a declaration on originating summons is undoubtedly discretionary (s. 531D supra) and, generally speaking, is in effect only limited by its own judicial discretion. This court, therefore, will be very slow to interfere with the exercise of such discretion unless sufficiently strong grounds are shown. One such ground is where, by reason of the nature of the declaration sought, the procedure adopted for the commencement of the proceedings is inappropriate because it does not fall within the scope of section 531.

The Rules of the Supreme Court in England provide for the continuation of proceedings begun by originating summons as if begun by writ in cases where it appears to the court at any stage of the proceedings that they should for any reason have been begun by writ. It is a very useful provision that was introduced in England for the first time in 1962. The CPC does not have such an express provision, but, by virtue of section 686, the procedure and practice that obtains in England is followed in the court below. Consequently, even where proceedings could not have been properly commenced by originating summons, the court below, in the exercise of its discretion, may order that the proceedings continue as if begun by writ instead of striking out the matter.

It was contended that in the instant case, the learned judge should have exercised his discretion either to strike out the originating summons or to order that the proceedings continue as if begun by writ. There is much merit in the

argument. As Dr. Barnett correctly pointed out, the originating summons of the plaintiff did not seek "the determination of any question of construction" arising under any instrument. The plaintiff's claim was in effect a case of wrongful dismissal, which the defendants strongly denied, and therefore it would be necessary for the court to resolve issues and facts that were in dispute, quite apart from the determination of any question of construction arising under any written instrument. Where the relief sought is not consequential to the determination of any question of construction under a written instrument, proceedings by originating summons will not be appropriate under the provisions of section 531 of the CPC. In the present case, the originating summons and the affidavits in support clearly disclosed that the declarations and reliefs sought placed the proceedings outside the procedure laid down by section 531 of the CPC, and accordingly, we concluded that the proceedings had not been properly commenced by originating summons.

The question then arose as to whether an order that the proceedings continue as if they had been begun by writ should be made, or whether the learned judge had wrongfully exercised his discretion in hearing the matter. We were referred to the opinion of their Lordships Board in ***Eldemire v. Eldemire*** [unreported] (P.C. Nos. 33 of 1989 and 13 of 1990 - delivered 23rd July, 1990), where Lord Templeman stated the "modern" practices obtaining to the use of originating summons. This is what his Lordship said:

> "As a general rule, an originating summons is not an appropriate

> "machinery for the resolution of disputed facts. The modern practice varies. Sometimes when disputed facts appear in an originating summons proceedings, the court will direct the deponents who have given conflicting evidence by affidavit to be examined and cross-examined orally and will then decide the disputed facts. Sometimes the court will direct that the originating summons proceedings be treated as if they were begun by writ and may direct that an affidavit by the applicant be treated as a statement of claim. Sometimes, in order to ensure that the issues are properly deployed, the court will dismiss the originating summons proceedings and leave the applicant to bring a fresh proceeding by writ. In general the modern practice is to save expense without taking technical objection, unless it is necessary to do so in order to produce fairness and clarification."

It is neither necessary nor desirable for us to recite the issues patent on the affidavits which the learned judge considered. The hearing occupied eight days of his time. The appellants were refused leave to cross-examine the plaintiff, which they considered was necessary in order to clarify issues arising on the plaintiff's affidavits. The hearing proceeded on affidavit evidence alone and a vast number of exhibits. The learned judge granted the declarations and orders sought in paragraphs 1 to 6 of the originating summons. His written judgment extends over 29 pages of the record, but the reason for the exercise of his discretion in overruling the preliminary objection to the hearing of the originating summons was not revealed. Therefore, the matter fell for our consideration. The issues raised were many and complex, and the facts in

serious dispute were contained in a multiplicity of affidavits. It would be inappropriate to order that the matter should continue as if begun by writ, and the affidavits as the pleadings. We concluded that this was a case in which the pleadings should be clearly stated. Had cross-examination of the plaintiff been allowed, even then the ends of justice may not have been served, having regard to the serious disputes of facts. Accordingly, the matter ought not to have been heard on an originating summons. We were not unmindful of the considerable costs that all the parties must have incurred so far, but nevertheless, we formed the view that in order to ensure that the issues were fairly placed before the court and for a just conclusion to be arrived at, the proper course to adopt was to dismiss the originating summons proceedings, leaving the plaintiff to proceed by writ.

Having regard to our conclusion on the principal point raised, we do not consider it necessary to state our conclusion on the other grounds that were argued.

CAREY, J.A.:

I entirely agree.

FORTE, J.A.:

I also entirely agree.