

SUPREME CT.

COLD STORES V. MAC'S KITCHEN

[1988–90 Gib LR 237]

**GIBRALTAR COLD STORES LIMITED v. MAC'S
KITCHEN LIMITED**

SUPREME COURT (Kneller, C.J.): May 14th, 1990

Trade and Industry—business names—registration—court has discretion to grant relief from unenforceability of contract prescribed by Business Names Registration Ordinance, s.10(1) if contract made following failure to register change in business name—court may allow enforcement of contract if “just and equitable”—factors include defendant’s knowledge of identity of persons with whom dealing and unwillingness to contract with person failing to register

The plaintiff brought an action to recover money owed to it by the defendant.

The plaintiff, which had been trading as “The Ice Box,” purchased some of A.C. Savignon Ltd.’s agencies, and the right to trade as Savignons for five years from May 1988, but did not register the change in the name of the business, as required by the Business Names Registration Ordinance; the plaintiff traded with the defendant as both The Ice Box Ltd. and Savignons. In November 1988, The Ice Box Ltd. was incorporated, and used as a management company; the management of the companies planned for The Ice Box Ltd. to take over the plaintiff’s trading activities and for the plaintiff to become a property holding company. The plaintiff brought the present proceedings to recover money owed to it by the defendant. In its defence, it stated that it owed the money not to the plaintiff, but to The Ice Box Ltd. and A.C. Savignon Ltd., and that the plaintiff’s failure to register the change in its business name rendered the contracts unenforceable under s.10(1) of the Business Names Registration Ordinance, which required such changes to be registered. The plaintiff applied for relief from the requirements of s.10(1) of the Business Names Registration Ordinance.

The plaintiff submitted that (a) the defendant had at all times known with whom it was dealing, as the management of both The Ice Box Ltd. and Gibraltar Cold Stores was the same; and (b) the court had a discretion under s.10(1)(a) of the Ordinance to grant relief from the consequences (*i.e.* unenforceability of the contract) of failing to register a change in a business name under s.10(1) of the Ordinance where, as in the present case, it was “just and equitable” for it to do so.

The defendant submitted in reply that (a) the companies’ management had acted recklessly in selecting the wrong plaintiff for the action; and (b)

it was not “just and equitable” for the court to make the order sought, nor had the plaintiff shown any other reason for granting relief.

Held, granting the application:

The court had a discretion to grant relief from the consequences of unenforceability prescribed in these circumstances by s.10(1) of the Ordinance. The defendant had not shown that it would not have entered into the relevant contracts had the requirements of the Ordinance been complied with; indeed, it was clear that it at all times knew with whom it was dealing. While the confusion was due to the default of the plaintiff, this would be reflected in the order for costs; it was clearly just and equitable to grant the plaintiff’s application for relief (paras. 9–11).

Cases cited:

- (1) *Hawkins v. Duché*, [1921] 3 K.B. 226; (1921), 90 L.J.K.B. 913; [1921] B. & C.R. 173; [1921] All E.R. Rep. 673; 125 L.T. 671, applied.
- (2) *Weller v. Denton*, [1921] 3 K.B. 103; (1921), 90 L.J.K.B. 889; 65 Sol. Jo. 473; 125 L.T. 569, *dictum* of Lush, J. applied.

Legislation construed:

Business Names Registration Ordinance (1984 Edition), s.8: The relevant terms of this section are set out at para. 1.

s.10(1): The relevant terms of this sub-section are set out at para. 2.

s.10(1)(a): The relevant terms of this paragraph are set out at para. 3.

A.A. *Vasquez* for the plaintiff;

C.A. *Gomez* for the defendant.

1 **KNELLER, C.J.:** Section 8 of the Business Names Registration Ordinance provides that—

“whenever a change is made or occurs in any of the particulars registered in respect of any firm or person such firm or person shall, within fourteen days of such a change, or such longer period as the Governor may, on application . . . allow, . . . [notify] the Registrar . . . of the change . . .”

2 Section 10(1) of the same Ordinance provides that if a firm or person required to notify the Registrar of such changes defaults in doing so—

“the rights of that defaulter under or arising out of any contract made or entered into by or on behalf of such defaulter in relation to the business in respect to the carrying on of which particulars were required to be furnished at any time while he is in default shall not be enforceable by action or other legal proceeding either in the business name or otherwise.”

SUPREME CT. COLD STORES V. MAC'S KITCHEN (Kneller, C.J.)

3 By s.10(1)(a) of the Ordinance, the defaulting firm or person—

“may apply to the court for relief against that disability imposed by this section and the court, on being satisfied that the default was accidental, or due to inadvertence, or some other sufficient cause, or that on other grounds it is just and equitable to grant relief, may grant such relief either generally, or as respects any particular contracts, on the condition of the costs of the application being paid by the defaulter, unless the court otherwise orders, and on such other conditions (if any) as the court may impose, but such relief shall not be granted except on such service and such publication of the notice of the application as the court may order, nor shall relief be given in respect of any contract if any party to the contract proves to the satisfaction of the court that, if this Ordinance had been complied with, he would not have entered into the contract.”

4 Gibraltar Cold Stores Ltd., the plaintiff, issued a writ indorsed with its statement of claim for £18,933.06 on March 16th, 1990 against Mac's Kitchen Ltd., the defendant, which, in its defence of April 3rd, denied that it owed the plaintiff that or any sum, and on the same date delivered a request for further and better particulars.

5 The plaintiff took out a summons on April 6th applying for final judgment in the action against the defendant under the Rules of the Supreme Court, O.14, which has not been heard but which the defendant is opposing. One of its defences is that the debt is not owed by the defendant to the plaintiff, but to two companies known as The Ice Box Ltd. and A.C. Savignon Ltd.

6 The plaintiff has never applied by summons on notice for relief under the Business Names Registration Ordinance, s.10. Affidavits in support reveal that The Ice Box Ltd. was registered as a business name in 1967. Its goodwill was transferred to the plaintiff in the same year, and the plaintiff traded as The Ice Box Ltd. Then, in November 1988, The Ice Box Ltd. was incorporated and was used as a management company, but it will in due course take over all the plaintiff's trading activities and the plaintiff will be a simple property holding company.

7 Earlier in 1988, in February, the plaintiff purchased some of A.C. Savignon Ltd.'s agencies and, from May 1988, the right to trade as Savignons for five years. These changes were not registered within time—or at all—due to an oversight. The plaintiff has been trading with the defendant as The Ice Box Ltd. and as Savignons.

8 The defendant robustly opposes the application on the ground that the plaintiff's promoters by its “recklessness” have selected the wrong plaintiff(s) for its action and should not be permitted to escape the consequences,

namely, withdrawing the action and paying the defendant its costs thrown away.

9 The defendant does not, I believe, suggest—at this stage, at any rate—that it would not have entered into the contract with the plaintiff, even though it is a £100 company. It proclaims its intention to pay the sum found due to the creditors who are The Ice Box Ltd. and Savignons according to the defendant’s evidence, which is supported by the correspondence and invoices. But, in the end, there is no suggestion that the defendant did not know with whom it was dealing, namely Mrs. Benson and her son Mr. Andrew Benson, who are the plaintiff’s chairman and principal shareholder and managing director respectively. It may be true that they and/or their legal advisers have caused this confusion, but that will be reflected in the order for the costs of the application.

10 The Ordinance, like the Registration of Business Names Act 1916, gives to the court the widest possible powers of granting relief to firms and persons in default. As Lush, J. said in *Weller v. Denton* (2) ([1921] 3 K.B. at 109), it “provides that the Court on being satisfied that the default was accidental, or due to inadvertence, or some other sufficient cause, or that ‘on other grounds it is just and equitable to grant relief’ may grant such relief.” This court has power to grant such relief after the action is begun as well as before a writ is issued: *Hawkins v. Duché* (1).

11 It would be most unjust and inequitable here to hold that the plaintiff’s action is not maintainable. I find that it is just and equitable to grant the plaintiff’s application for relief. It must pay the costs of the application.

Application granted.