[2018] JMCC Comm 29

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

CLAIM NO. 2017 CD00594

BETWEEN	**ERIC JASON ABRAHAMS**	**APPLICANT**
AND	**CABLE & WIRELESS JAMAICA LIMITED**	**RESPONDENT**

Company Law- Application for permission to bring a derivative action outside the jurisdiction- Preliminary point as to jurisdiction - Whether S. 212 of Companies Act applies only to actions in Jamaica – Whether application ought to be by Fixed Date Claim.

Conrad George and Andre Sheckleford instructed by Hart Muirhead and Fatta for Applicant

Denise Kitson QC, Kevin Williams and Anna Kay Bryan instructed by Grant Stewart Phillips & Co. for Respondent

Heard: **30th July 2018; 31st July 2018, 2nd August 2018, 6th September 2018 & 3rd October, 2018**

In Chambers

Batts J.

[1] On the first morning of the hearing learned Queen's Counsel indicated there were two preliminary points she wished to advance. The first related to whether the application ought to have been by way of a Fixed Date Claim rather than by Notice of Application. In this regard counsel adverted to the decision of Mangatal J, in **Earle Lewis et al v Valley Slurry Seal Company et al [2013] JMSC Comm 21 (unreported 27th December 2013) , (**a case cited by the Applicant's counsel)**,** and conceded that the matter may be allowed to continue as if commenced by Claim.

The second preliminary point, and the one on which several days of argument were spent, relates to jurisdiction. I decided to hear and decide these preliminary issues.

[2] The application in question is for permission to bring a derivative action against the directors and shadow directors of the Respondent . It is alleged that the directors and shadow directors breached their fiduciary duties to the Respondent. The Respondent not surprisingly, as it is controlled by those directors, opposes the application. It is unnecessary to go any further into these assertions because this judgment is only in relation to the preliminary points taken.

[3] The problem, from the Respondent's point of view, is that the Applicant wishes to bring the Claim in the United States of America. He does not wish to sue the director and shadow directors in Jamaica's courts. He urges this court to give permission for legal action to be commenced in the United States of America, in the name of the Respondent company, against its directors,` former directors and shadow directors.

[4] The Respondent's Counsel says that this Court has no jurisdiction to grant such permission. It is submitted that, as the relevant sections of the Companies Act contemplate a continuing supervisory jurisdiction over any derivative action and as a Jamaican Court can have no control over an action brought outside Jamaica, the law clearly does not contemplate permission to bring an action outside of Jamaica. In the course of submissions, which were methodical and well structured, learned Queen's Counsel relied primarily on the case of ***Top Jet Enterprises Limited v Sino Jet Holdings Limited et al*** (unreported 19th January 2018) a judgment at first instance of Segal J. The Respondent also relied on rules of statutory construction and in particular the presumption against extraterritorial application.

[5] The Applicant's counsel submitted that this was not a case of extraterritorial application of a statute. It is a matter of giving power, to a minority shareholder of a Jamaican company, to bring a claim in the name of that company overseas.

It was no different he submitted than a worldwide Mareva Injunction. It binds or applies to no one except parties to the action in Jamaica. The Applicant's counsel also cited several authorities, however, he relied mainly on ***Novatrust Ltd. v Kea Investments Ltd and others [2014] EWHC 4061,*** and **Microsoft *Corporation v Vadem Ltd et al BVI HC (COM) 2012/0048*** a judgment of Bannister J (Ag),a case emanating from the British Virgin Islands.

[6] The above summary of the contending positions does not do justice to the depth and quality of the respective submissions. Each side provided written submissions and bundles of authorities as well as written responses to the submissions of the others. Oral argument buttressed the written presentations. The matter was adjourned on two occasions for further submissions on new cases provided. Although very grateful for the assistance, I shall indicate my decision and the reasons therefor without restating the details of the arguments presented.

[7] It seems to me that there is nothing, in the Companies Act or the principles stated in the authorities, to preclude permission being granted by a Jamaican court for commencement of a claim outside the jurisdiction. Section 212 (1) and (2) of the Companies Act state:

> *212(1) Subject to subsection 2 a complainant may, for the purpose of prosecuting, defending or discontinuing an action on behalf of a company apply to the court for leave to bring a derivative action in the name and on behalf of the company or any of its subsidiaries, or intervene in an action to which any such company or any of its subsidiaries is a party.*
>
> *(2) No action may be brought*, and no intervention in an action may be made under subsection (1) unless the Court is satisfied that –
>
> a. *the complainant has given reasonable notice to the directors of the company or its subsidiary of his intention to apply to the court under subsection (1) if the directors of the company or its subsidiary do not bring,*

diligently or defend, or discontinue the action.

b. the complainant is acting in good faith, and

c. it appears to be in the interests of the company or its subsidiary that the action be brought, prosecuted, defended or discontinued.

[8] Section 212 (2) lists the conditions precedent to the grant of permission. It does not say, as well as it might have, that the claim to which permission is requested ought to be a claim commenced in Jamaica.

[9] Section 213 says the court "may", in connection with a claim to which Section 212 applies, give certain directions and orders. These relate to :

a). authorising the complainant, the Registrar or "some other person," to control conduct of the action.

b). directions for the conduct of the action

c). directing that any amount "adjudged payable by a defendant in the action" be paid in whole or in part to former or present shareholders or debenture holders of the company rather than to the company.

d). requiring the company to pay reasonable legal fees incurred by the complainant in relation to the action.

Contrary to the submission of the Respondent I see nothing inconsistent between Section 213 and permission to bring an action outside Jamaica. In the first place the section uses the discretionary "may." This suggests that orders or directions would only be made if appropriate in the circumstances, as stated by Judge Pelling QC in the ***Nova Trust*** case referenced above. An applicant, for permission to

bring an action outside the jurisdiction, knows that this statutory provision can give the Jamaican court no power over the foreign court which is to hear the matter. It may however be a relevant consideration, when deciding whether or not to grant permission, that the foreign court has power to make such or similar orders. In the second place the Section 213 directions are not all inconsistent with commencement of a claim overseas. So for example, authorising the complainant the Registrar or any other person to control conduct of the action pursuant to Section 213 (1) (a), is not inconsistent with that action being brought overseas. It means giving instructions and overseeing the conduct of the action. This is necessary in any action local or foreign.

[10] Finally, as regards this aspect, I am persuaded by and accept the purposive approach adopted by the courts which considered the legislation in the British Virgin Islands. Jamaica is an island and a small one. Our business interests and connections extend in many instances outwards. Our people sometimes own assets and shares locally and abroad. Persons who live abroad and are not Jamaican own shares and interests in Jamaica. It is not difficult to imagine the circumstances, including migration, which may render it convenient appropriate and/or reasonable for a derivative action to be brought or defended in a jurisdiction outside Jamaica.

[11] Mrs Kitson QC sought to distinguish the legislative provisions between Jamaica and the British Virgin Islands (BVI). I agree they are not identical. However in the important respects their effect is the same. The Jamaican statute says “No action may be brought” (Section 212(2) whereas the BVI statute says, “Except as provided for…a member is not entitled to bring” (section 184C (6). The words are different but the effect is the same .Permission is a condition precedent to the ability to bring the claim. Section 184E of the BVI statute also gives the court power to make orders in relation to the conduct of the action not dissimilar to those provided for in section 213 of the Jamaican statute. I am not persuaded that the

differences between the statutes impact the applicability of the authorities relied on by the Applicant.

[12] Section 212 applies to the commencement, defence or continuation of an action. If the Respondent is correct it means that, if a company has a claim issued against it in a foreign jurisdiction, and its majority directors for inappropriate reasons decide not to defend the claim, there will be no avenue by which the right thinking minority could defend the claim.

[13] Jamaica is a sovereign state and Mrs. Kitson Q.C. sought support in the provisions of the Judicature Supreme Court Act. That Act she says limits the court's jurisdiction to Jamaica. I agree and so it does. However, in giving permission for an action to be commenced overseas, the Supreme Court is exercising jurisdiction in Jamaica over person's resident here. The consequential action those persons bring or defend may be outside Jamaica but the source of their authority to do it will remain here. The Jamaican court will be able to exercise its coercive power, over the applicant for permission and the company, in the event its order is not obeyed; an unlikely eventuality because the order in question is permissive in nature. I see no inconsistency between the provisions of the Judicature Supreme Court Act and the grant of permission to bring or defend an action in a foreign jurisdiction

[14] The provisions of the Companies Act were clearly intended to displace the old common law rules relating to derivative actions. Such actions were, at common law, permitted in Jamaica as well as overseas. However the pre-conditions imposed by the common law made derivative actions, whether local or overseas, by minority shareholders almost impossible. Section 213 (2) therefore expressly did away with the preconditions imposed by the common law:

> 213 (2) "An action brought or intervened in under Section 212 shall not be stayed or dismissed by reason only that it is shown that an alleged breach of a right or duty owed by the company or its subsidiary has been or may be approved by

> the shareholders but evidence of approval by the shareholders may be taken into account by the court in making an order under that section."

The removal of that common law restriction, whilst leaving untouched the possibility recognised at common law of actions being brought derivatively overseas, further supports the continued existence of a power to give permission to bring an action in a foreign jurisdiction.

[15] Given these considerations, can it reasonably be contemplated that the legislature would want or intend to limit the applicability of Section 212 to claims within Jamaica. I think not. The clear words of the statute do not compel such a construction and, to my mind, are so widely phrased as to suggest quite the opposite. In the final analysis therefore, I hold that this court has jurisdiction to give permission to bring a derivative action in the name and on behalf of the company in a jurisdiction other than Jamaica.

[16] As regards the question whether the application ought to be by Fixed Date Claim, there is no guidance in the Act or in the rules. I note, and accept as correct, the pronouncement by Mangatal J at paragraph 16 of her judgment in the ***Earle Lewis*** case (cited above),

> ***"In our jurisdictions, petitions have been reserved mainly, when dealing with Company matters, for winding up operations. Other applications to do with companies which require a Summary Proceeding, used to be made by Originating Summons and under the CPR 2002, by way of Fixed Date Claim Form. I do not think this is a point that creates a great difficulty, and the Court has power , in particular under Rule 26.9(3) of the CPR, where there has been a procedural error, to make an order to put things right. This application can therefore be ordered to proceed as if begun by Fixed Date Claim Form. I so order."***

I say further that, in the absence of an express provision as to the mode or method of application, the litigant is entitled in any way possible to approach the court.

Nevertheless, and in deference to Mangatal J, I will accede to the Applicants oral application and Order that the matter continue as if commenced by Fixed Date Claim.

[17] The Respondent's preliminary point as to jurisdiction is dismissed, with costs to the Applicant. I will now, in consultation with the parties and the registrar, fix a date for the hearing of the substantive application.

David Batts
Puisne Judge