IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN THE COMMERCIAL DIVISION

CLAIM NO. SU2020CD00413

BETWEEN	**MICHAEL DRAKULICH**	**1ST CLAIMANT**
	MAX PATCHEN	**2ND CLAIMANT**
	MILVERTON REYNOLDS	**3RD CLAIMANT**
	NORMA CLARKE	**4TH CLAIMANT**
	JOHN DALTON	**5TH CLAIMANT**
AND	**KARIBUKAI LIMITED**	**1ST DEFENDANT**
	RAINFOREST ADVENTURES (HOLDINGS) LIMITED	**2ND DEFENDANT**
	MYSTIC MOUNTAIN LIMITED	**3RD DEFENDANT**

Company Law – Application for Interlocutory Injunction – Sections 213A (2) (a), (b) and (c) of the Companies Act – Appointment of directors-Appointment of managing director- Whether power of shareholder owning 100% of the shares is to be restrained-Negotiations ongoing with bond holders-Whether appointments unfair or prejudicial-Whether issue for trial-Whether damages adequate remedy-Whether just in all the circumstances.

Georgia Gibson Henlin QC and Nicola Richards instructed by Henlin Gibson Henlin for the Claimants

Sandra Minott-Phillips QC, Simone Bowie-Jones, Stephanie Eubank and Shaniel Mayne instructed by Myers Fletcher & Gordon for the 1st and 2nd Defendants.

Janet Morrison instructed by Hart Muirhead & Fatta for the 3rd Defendant

Heard: **9th & 15th October, 2020 and 6th November, 2020.**

IN CHAMBERS: **By Zoom**

Coram: **Batts J**

[1] This judgment contains the reasons for a decision I made on the 6th November 2020.

[2] On the first morning of hearing, and without objection, the 2nd, 3rd, 4th and 5th Claimants were added as parties to this claim. An order was also made without objection, on the application of the 1st and 2nd Defendants, that a shareholder's subscription agreement dated the 12th September 2006 be referred to without it being put on affidavit. That document was put in evidence as Exhibit J.P. 22.

[3] The Claimants, by a Further Amended Notice of Application filed on the 7th October 2020, seek several injunctive orders against the 1st and 2nd Defendants. The 3rd Defendant supports the application. In essence, the Claimants seek to prevent the 1st and 2nd Defendants implementing certain resolutions, which interfere with the operations and/or change the governance structure of the 3rd Defendant, until the trial of this action. The 1st and 2nd Defendants oppose the application on the basis, among other things, that their power as shareholders gives them the right to do so.

[4] It is necessary at this juncture to identify each party and explain their relations one with the other. The Third Defendant is a private company with limited liability. It was formed on 11th March 2003 to operate the now popular tourist attraction which bears its name. The Third Defendant was described by Mrs. Henlin, Queens Counsel, as a "partnership" between the 1st, 4th and 5th Claimants and the 2nd Defendant (paragraph 35 written submissions filed 8th October 2020, and orally). The 1st Claimant is the chairman, Chief Executive Officer and, a director of the third Defendant. The 2nd, 3rd, 4th and 5th Claimants are all directors of the 3rd Defendant. The 1st, 4th and 5th Claimants are also shareholders in the 1st Defendant. The 1st

Defendant is the sole shareholder in the 3rd Defendant and is a registered private company domiciled in St. Lucia. The 2nd Defendant, owns the majority of shares (being 54.87%) in the 1st Defendant and, is a private limited liability company domiciled in the British Virgin Islands, see paragraph 5 of the affidavit of Josef Preschel filed on the 2nd October 2020 and paragraph 4 of the 3rd affidavit of the 1st Claimant filed 7th October 2020.

[5] The legal structures apart, the Claimants assert that, it was at all material times understood and agreed that they would have independence in the management and operation of the 3rd Defendant. The 1st Defendant, they say, was merely the vehicle to manage the relationship between the beneficial owners of the business. The 1st and 2nd Defendants point to the terms of the shareholder's agreement, Exhibit JP22, and deny the existence of any such agreement or understanding. It is in this context that, upon the 1st Defendant taking steps to increase the number of directors, to appoint a new chairman and CEO, and to otherwise interfere with the operation of the 3rd Defendant, the Claimants approached this Court for relief.

[6] The Claim is brought pursuant to section 213A (2) (a)(b) and (c) of the Companies Act of Jamaica. That is the section which provides for the, commonly called, "oppression" remedies. Subsections (2) and (3) of Section 213A give the court power to grant any "interim or final order" to restrain conduct, of the company its affiliates or directors or the exercise of powers, which is "*oppressive or unfairly prejudicial*" to "*any shareholder*, *or debenture holder*, *creditor*, *director*, *or officer of the company*". It is common ground, between the parties, that similar principles apply as with any other application for an interlocutory injunction. Queens Counsel, for the 1st and 2nd Defendants relied on ***Went and others v Cable & Wireless (Barbados) Ltd (2018) 91 WIR 86.*** In that case Scott J(Ag) regarded the applicable test as one of two stages. First he says, is the question whether there a serious question to be tried and secondly, where does the justice of the case and/or the balance of convenience lie. In considering the balance of convenience the question of adequacy of damages looms large. I respectfully disagree. The better view is there are actually three stages to the test although

the result, in any particular case, is very likely to be the same whichever approach is adopted.

[7] The three stage test is firstly, to examine whether the case raises a serious issue for trial. Secondly, to assess the adequacy of damages as a remedy available to each party and thirdly, if there is doubt as to the adequacy of damages, to examine the overall justice of the case (sometimes called the balance of convenience).This three stage approach is supported by: **American Cyanamid v Ethicon Ltd. [1975] 1 All ER 504, National Commercial Bank Jamaica Ltd. v Olint Corporation Ltd. [2009] UKPC16 and, British Caribbean Bank Ltd. v A-G for Belize [2013] CCJ 4 (AJ) at paragraph 34, (2013) 82 WIR 63, [2014] 2 LRC 11** (a decision of the Caribbean Court of Justice)**.** It is also the approach approved by our own Court of Appeal see, **Tara Estates Ltd v Milton Arthurs SCCA 121/2016,[2019] JMCA Civ (unreported judgment dated 12th April 2019 paragraph 21)** and, **J. Wray & Nephew Limited v Aljix Jamaica Limited SCCA No.15 of 2016** upholding **Algix v J. Wray & Nephew Ltd. [2016] JMCC COMM. 2.** It is important, whichever approach is adopted, to heed Lord Hoffman's caution in the **National Commercial Bank v Olint** case (referred to above) that a "*box ticking"* approach is to be eschewed.

[8] In the matter at bar I am satisfied that there is no serious issue for trial. In arriving at this determination I bear in mind that at this interlocutory stage I am required to make no findings of fact. There has as yet been no opportunity to test witnesses and therefore the determination of issues of fact is reserved for a trial. Bare assertions, unsupported by credible evidence and contradicted by undisputed documentation, may not however suffice to create a triable factual issue.

[9] In this case the Claimants oppose the implementation of certain resolutions which appoint new directors to, and remove the 1st Claimant as Chairman from, the Board of the 3rd Defendant. The resolutions will also directly impact the governance of the 3rd Defendant in many other ways. It is said that the parties had a pre-existing

arrangement that this would not be done. The position is articulated at Para 35 of the Claimants' written submissions:

> *"35. The 1st, 4th and 5th Claimants have deponed that as beneficial owners of shares in the 3rd Defendant, they have an interest in the management of the Company. There is also a partnership or arrangement which, it was agreed that they would be primarily responsible for the management of the 3rd Defendant. The 1st Claimant has been at the company as CEO and director, from inception. He is a co-founder. In 2020 he took over as chairman of the board after his founding partner Horace Clarke died. The 2nd Defendant joined the venture as partners. The amusement park operated by the 3rd Claimant was opened in 2008 and the 2nd Defendant was formed in 2015 as a special purpose vehicle to formalise the "partnership" and create tax efficient means of maximising their returns."*

[10] There is very little, in the way of evidence, to support the statement. The evidence, such as it is, goes the other way. So that Exhibit JP22, the shareholder's subscription agreement dated 12th September 2006, sets out the basis on which the third Defendant would be operated. It is an agreement between the 1st Claimant, Horace A Clarke OJ (now deceased), the 2nd Defendant and the 3rd Defendant. The agreement states that the 3rd Defendant would be their *"joint venture vehicle for developing and operating Mystic Mountain Park".* The agreement has the following provisions:

> "9*.6 This agreement constitutes the entire agreement between the parties hereto and save as otherwise expressly provided no modification, amendment or waiver of any of the provisions of this Agreement shall be effective unless made in*

> *writing specifically referring to this Agreement and duly signed by the parties hereto.*
>
> *"9.9 Nothing in this Agreement shall be deemed to constitute a partnership between the parties hereto nor constitute any party the agent of any other party for any purpose."*

Even more importantly the agreement, contemplates that the 1st Claimant will be among the first set of directors but, does not say he shall be CEO or Chairman or even that he shall remain a director :

> *"2.2 The Sponsors shall be entitled to appoint up to Two (2) directors of the company at any time and to remove any director so appointed. For this purpose, Michael N. Drakulich and Horace A. Clarke shall be deemed to be appointed as initial directors by the Company pursuant to the provisions of this Clause 2.2.*
>
> *"2.3 Rainforest shall be entitled to appoint up to three (3) directors of the company at any time and to remove any directors so appointed. For this purpose, Josef Preschel, Eugenia Solano and Herena Coo shall be deemed to have been appointed as initial directors by Rainforest pursuant to the provisions of this Clause 2.3"*

[11] It would be odd indeed, and highly incredible, for these parties to agree to have a permanent CEO who could in no event be removed as CEO. It would be even more incredible that such a fundamental agreement, between these experienced business partners, would not be put in writing. Also it cannot be ignored that the 1st Claimant in particular, and the Claimants generally, made no objection when the 1st Defendant added 6 new directors in 2019. The 1st Defendant owns 100%

of the shares in the 3rd Defendant. The majority of shares in the 1st Defendant are owned by the 2nd Defendant (54.87%). The rest of shares are distributed among the 1st ,4th and 5th Claimants. Indeed, far from objecting to the new directors, the 1st Claimant appeared to welcome them, see Exhibit JP4 "Minutes of Board of Directors Meeting for Mystic Mountain Limited" held Thursday August 29, 2019 at paragraph 3 (ii):

> *"Mr. Drakulitch stated that it was decided to amend Article 82 of the Company's Articles of Incorporation, to increase the number of directors from five to eleven. He said that resignations of the representative shareholders of Rain Forest Adventures (RFA) resulted in a board that was not fully constituted in Jamaica. Mr. Drakulich said that there would be an addition of six directors which would be supplied by RFA and he believed that in so doing, RFA was protecting their rights. Mr. Dalton inquired who the six directors to be appointed were. He also suggested that the directors who were being considered should have, at least, some familiarity with the business of the company."*

[12] One would be pardoned for thinking that, had there been an agreement that the 1st, 4th and 5th Claimant would be "primarily" responsible for the management of the 3rd Defendant, that the minutes would have reflected a concern about the proposed shift in majority appointments. There was no protest when the appointments were made. In fact the documentation, at the Registrar of Companies, showed filings reflecting the changes, exhibits JP7 and JP14. It demonstrates that, as at the 26th November 2019, the majority of directors were the 1st Defendant's appointees.

[13] Given the overwhelming evidence, on one hand, and the virtual absence of evidence on the other, there is no real Issue. There is no basis for an equity or a legitimate expectation, or fraudulent misrepresentation or collateral agreement, to prevent the 1st Defendant exercising its rights to appoint directors to, or to remove the 1st Claimant as Managing Director /CEO and Chairman of, the Board.

[14] There is a further reason why the Claimants have demonstrated no issue fit for trial. The articles of the 3rd Claimant make it clear that no one aged 70 years is to be appointed to the Board of Directors, see exhibit JP3 Article 100.

> *"100. No person shall be appointed or re-appointed a director if at the time of his proposed appointment or re-appointment he has attained the age of seventy years."*

The 1st Claimant will be 70 years of age in December 2020 see exhibit JP21. It means that by the time of trial he will be over 70 years of age. A court is unlikely to make an order which coerces a breach of the Articles of a Company. A permanent injunction restraining his removal is therefore most unlikely to be issued.

[15] Having found that there is no real issue pertaining to the injunctive relief sought, which requires or is fit for trial, my judgment could end here. However, in the event another court sees it otherwise, I will consider the matter as if there is a triable issue. I therefore go on to consider the adequacy of damages and, if damages do not provide an adequate remedy, the overall justice of the case.

[16] Queen's counsel, representing the Claimants, asserts in written submissions filed on the 8th October 2020 that:

> *"59. The violations are unfairly prejudicial in that the conduct complained of has the potential to effect consequences detrimental to the interest of the*

Claimants as directors, and/or guarantor and/or beneficial owner of the 3rd Defendant. As Chief Executive Officer, the removal and policy changes will cause not only a loss of position and standing in the 3rd Defendant but reputational damage among existing business partners established and nurtured by the Claimants especially the 1st Claimant.

60. The 1st Claimant is the face of the 3rd Defendant and the increased and sudden involvement of Mr. Josef Preschel at the direction of the 2nd Defendant has the potential to cause significant damage to the Claimant's business reputation in light of Mr. Preschel's connection to the convicted criminal Harald Joachim Von der Goltz.

61. For reasons expressed above, the Claimants will also be prejudiced in terms of his investment and beneficial ownership in the 3rd Defendant if the 3rd Defendant is denied the benefit of the Claimant's knowledge and years of experience at a time when Jamaica's economic climate is far from stable or predictable. The right to participate in the management of her affairs of the 3rd Defendant by virtue of the partnership will also be prejudiced."

[17] It is contended that Josef Preschel has a "*tainted reputation*" among the 3rd Defendant's existing business partners (paragraph 55 of Claimant's written submissions filed on the 8th October 2020). This because of his association with the founder of the 2nd Defendant Harald Joachim von der Goltz who has been convicted of fraud and money laundering, see paragraph 23 of the 3rd affidavit of the 1st Claimant filed 7th October 2020.The Claimants say that the new directors

are also unsuitable, see paragraphs 15 and 16 of the 3rd affidavit of the 1st Claimant filed on the 7th October 2020. All these violations, the Claimants say, will cause irreparable harm to themselves and to the 3rd Defendant. They will result in injury to the 1st Claimant's dignity, integrity and professional reputation and the goodwill and stability of the 3rd Defendant, see Para 71 of the Claimant's written submissions. Damages therefore would not be an adequate remedy.

[18] It is true that, assuming that the appointments to the board and the removal of the 1st Claimant as CEO will have the effects alleged, damages would be difficult to assess. It will for example be impossible to quantify a loss of reputation or to know how many opportunities, which otherwise may have been offered, were lost because of the new composition of the Board. Damages as a remedy will not suffice if the Claimants are ultimately successful at trial. It will be therefore necessary to consider whether it is just in all the circumstances to grant an interim injunction.

[19] In this regard the assessment, on this matter of damages, goes two ways. What if any is the impact on the 3rd Defendant if the 1st and 2nd Defendants are restrained from making the appointments. The stated reason, for making the changes, has to do with concerns about information withheld from them by the 1st Claimant. They say too that given the parlous economic circumstance, and the issues involving the bond holders, they wish to have a greater say. If restrained until trial the Defendants will have been prevented from giving effect to changes now which they wish to make now. On the assumption that at trial it is found an injunction ought not to have been granted how will damages be computed for the purpose of compensation under the undertaking as to damages? No one can say how better run or not, the 3rd Defendant might have been, had the appointments been allowed to proceed. A situation made more poignant given the pending bondholders' negotiations. In short the question, of adequacy of damages if the injunction is refused and adequacy of compensation if it is not, is equally balanced.

[20] When considering the overall justice of the case or, as it is more quaintly put, the balance of convenience an important factor is that the 2nd Defendant as majority shareholder of the 1st Defendant (and therefore as indirect (or beneficial) majority owner of the 3rd Defendant) is exercising a power given by law. It is also relevant that the appointments were made since November 2019 with no objection. Disagreements emerged when, in the course of a meeting with bondholders, it was revealed that the 3rd Claimant had borrowed $1 million of which the directors, appointed by the 1st Defendant, were unaware, see paragraphs 16 and 17 of Josef Preschel's affidavit filed on the 2nd October 2020 and exhibits JP9 and JP10. The Defendants complain of the 1st Claimant's failure, in spite of requests for information, to give full disclosure and/or a timely or any response to such requests, see for example the series of emails at exhibit JP15. The 1st Claimant, at paragraph 51 of his affidavit filed on the 7th October 2020, provides details of this loan. He does not say that his fellow board members were advised of it but, in Para 52, states that he has over the years acted with "*some autonomy*." The concern expressed, about Mr Josef Prechel's "associations", must be viewed with some amount of scepticism given his longstanding involvement in the venture.

[21] The 1st Claimant's letter, of the 28th August, 2020 is relevant in the context of all that has been stated in the previous paragraph. It is unnecessary to quote it in full. However, the letter, addressed to Mr. Josef Preschel Chairman and CEO of the 2nd Defendant, has some revealing statements which I extract as follows:

> *"RFA already has appointed 5 faceless persons to the Board. I hesitate to call them 'directors' because none has any idea or understanding as to what is going on with the company designed, as their appointments obviously are, only to make up Board numbers for RFA…"*
>
> *"As Chairman, I can and will bring MML out of debt, unencumbered with RFA's representation on the MML*

Board and as the majority shareholder of Karibukai. It is in the best interest of MML that I take the approach without RFA as a partner, especially now in an uncertain future, where I can no longer provide personal guarantees or collateral to secure financing to sustain the business short term or grow it to pre-Covid levels over the longer term….

"To be clear, as Chairman of MML, I will not support any Board resolution to declare a dividend or make any further payments to RFA's Miami based entities for at least the next 3 – 4 years …. To secure that position, I will not agree to appoint you to the Board to put RFA in a position to pass such resolutions. MML is not now in need of another director. It is in urgent need of an equity infusion….

"RFA brings absolutely no value to Mystic Mountain. The unpleasant facts are that MML's reputation has been tarnished and it has been financially hamstrung by its affiliation with RFA. Your founder and Chairman Harold Joachim Von der Goltz is a USA federal felon, has pleaded guilty in the Panama Papers Scandal is the first and only American so far convicted of tax evasion and money laundering….

"MML and RFA have arrived at a crossroads. MML will require US$2.6m working capital over the next two years (see appendix). As a shareholder I personally secured US$1m to complete Reggae Ridge. Therefore, RFA must proportionally match that cash injection with an investment of US$2.566 m. RFA is

> *required to wire the US$.566m to MML's savings account at Sagicor Bank Ocho Rios within 5 working days from today. A similar equity call will be made on Norma Clarke and John Dalton in proportion to their existing shareholdings. If RFA fails to meet this deadline, RFA is to transfer its shares in Karibukai to me or cancel those shares in the capital of Karibukai, because in fact all shares in MML/Karibukai are underwater. As guarantor, I will continue to bear the debts of Mystic Mountain in exchange for RFA walking away. The sale of the assets of MML, will also not yield a distribution to shareholders of Karibukai given the amount of the MML debt.*
>
> *"RFA is further requested to retire the five persons it appointed to the MML Board. As Chairman/CEO, I and the other active members of the MML Board are fully prepared for any fall-out or reaction this letter instigates but are also prepared to discuss this amicably. The MML compass is set on a course to guide us though (sic) the starry seas ahead.*
>
> *We await your response."*

[22] It is appropriate, at this juncture, to consider the Claimants' evidence that the new directors had been removed for failing to attend meetings, see paragraph 11 of the 4th affidavit of the 1st Claimant filed on the 15th October 2020.The removal is alleged to have occurred in September 2020. The assertion is unsupported by documentary evidence of the meetings at which they were absent, the notices given or the failure to attend such meetings. Furthermore, and perhaps more importantly, the directors and shareholders of the 1st and 2nd Defendants clearly reaffirmed the appointments, see paragraph 34 of the affidavit of Josef Preschel

filed on the 2nd October 2020 and exhibit JP 20 thereto. This was done subsequent to their alleged removal. At this interlocutory stage therefore, when considering the overall justice of the case, it is best to assume (without deciding) that the appointments are valid.

[23] The letter of the 28th August, 2020 provides an important clue as to what is happening. The 1st Claimant in writing that letter articulated an ultimatum. It is unclear why he felt entitled to demand an equal infusion of equity. This is because the US$1 million, referenced in the letter, was a loan to the 3rd Defendant. It was not equity input by the 1st Claimant. Suffice it to say this Claim is not premised on a demand for an equal infusion of equity.

[24] In considering the balance of convenience and/or the overall justice of the matter the Court can have regard to the relative strengths of each party's case. I have already expressed my view in that regard. The court should also face the reality of the situation, in that, there is disagreement between the "partners" as to the way forward. There is also some mistrust by the "partners" one with the other. In that situation, without more, is a court to prevent the exercise of voting rights and majority privilege. I think not. The 1st Defendant is, prima facie, entitled to appoint six directors and did so. It is similarly entitled, having done so, to utilise its majority directorship to appoint a Chairman of the Board and to abolish the duality of CEO and Chairman. All this after deliberation by the Board of Directors. The Claimants have, or will have, the opportunity to attend board meetings and have their positions mooted and considered. They can also do so at shareholder's meetings of the 1st Defendant. That too is their right. There is nothing placed before the court at this interlocutory stage to demonstrate either, that such changes would lead to disadvantages to the Claimants which amount to the oppression or unfair prejudice contemplated by the statute or, that the 3rd Claimant will necessarily be harmed. In this regard I make no findings one way or the other. However, as the Defendants are exercising rights given by the Articles of Association and by law, this court is reluctant to interfere with their exercise.

[25] The resolutions, sought to be injuncted, do not remove the Claimants as directors as happened in **Diliganti v RWMD Operations Kelowna Ltd. (Vancouver No. A761081, decided 15th September 1976)** a case relied on by the Claimants. The 1st Claimant, as he says, may feel embarrassed or may suffer a loss of face in the business world. That sometimes happens when there is an organisational restructuring. These factors do not come anywhere near to the '*series of actions*" which amounted to oppressive conduct in ***Pederson v Gold Beach Inn Hotel Ltd. et al (1972) 20 WIR 246.*** Parnell J's caveat, with highlight inserted below, may be of some relevance here:

> "*I am prepared to hold that as far as Jamaica is concerned, a managing director who is the petitioner may succeed under S. 196 of the Act where he shows that although the oppression and harassment complained of touch him primarily in his capacity as managing director, the effect is to prejudice his rights as shareholder or his freedom of action as such shareholder within the context of the Companies Act* ***unless he has contributed towards the curtailment of his rights by some wilful act or omission****."*

In the circumstances of this case, and on all the evidence placed before me at this interlocutory stage, it is neither just nor convenient for the Defendants to be restrained.

[26] In the result, and for the reasons stated, the application for an interlocutory Injunction is refused. Costs will go to the Defendants to be taxed or agreed.

David Batts
Puisne Judge.