IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

CIVIL DIVISION

CLAIM NO. HCV 2350 OF 2006

BETWEEN	**SURESH KHEMLANI**	**CLAIMANT**
AND	**RAJU KHEMLANI**	**1ST DEFENDANT**
AND	**TOPAZ INVESTMENTS LIMITED**	**2ND DEFENDANT**

.....

CLAIM NO. HCV 4473 OF 2007

BETWEEN	**SURESH KHEMLANI**	**CLAIMANT**
AND	**RAJU KHEMLANI**	**1ST DEFENDANT**
AND	**KAY MART LIMITED**	**2ND DEFENDANT**
AND	**PUBLIC SUPERMARKET LIMITED**	**3RD DEFENDANT**
AND	**LORD & LADY LIMITED**	**4TH DEFENDANT**

Application to Amend Statement of Case after Case Management Conference-Section 180 of the Companies Act- Whether Creates Civil Cause of Action or Whether Imposing Criminal Liability and Sanctions on Directors

Application to Consolidate Suits –Whether Appropriate where only Later Suit filed under C.P.R. Rules requiring Compulsory Mediation- Whether Appropriate where Earlier Suit already has fixed trial date months away- Whether Appropriate Where Application to consolidate filed in only one of the Suits

IN CHAMBERS

Ms. Hilary Phillips Q.C. and Mrs. Andrea Bickhoff-Benjamin instructed by Grant Stewart Phillips & Co. for Suresh Khemlani in both Suits.
Mr. Gordon Robinson and Ms. Sherry-Ann McGregor instructed by Nunes Scholefield De Leon & Co. for Raju Khemlani in both Suits.

Heard : 17th September and 4th November 2008.

Mangatal J :

1. These two claims do not yet have any court orders connecting them. I have dealt with them together because the files in relation to both were placed before me and the two applications involved were listed for hearing together. In Claim No. HCV 2350 of 2006 there is an application to Amend the Claim Form and the Particulars of Claim. In Claim No. HCV 4473 of 2007 there is an application filed seeking to have the claim consolidated with Claim No. HCV 2350 of 2006. I intend to deal with the application to amend first and after that I will deal with the application to consolidate.

CLAIM NO. HCV 2350 OF 2006-APPLICATION TO AMEND

2. Suresh Khemlani "Suresh" and Raju Khemlani "Raju" are brothers. The 2nd Defendant "Topaz Investments" is a limited liability company incorporated under the laws of Jamaica. The brothers are the sole registered shareholders of the shares of Topaz Investments, each holding 50% of the shares.

3. There are a number of claims for relief, but in the simplest of terms, this lawsuit as presently filed principally involves a claim by Suresh for breach of an oral contract with Raju whereby Raju agreed to transfer his shares in Topaz Investments to Suresh. It is Suresh's case that the transfer of Raju's shares was to be in exchange for Suresh taking over management of certain family concerns and insolvent companies, including Topaz Investments. Raju has, amongst other lines of defence, denied that he agreed to transfer his shares in Topaz

Investments to Suresh; he says that it was always understood by the Khemlani family that the family businesses are intended to benefit both Suresh's and Raju's children in the same way that the brothers both benefited from inheriting the businesses from their father. Raju also says that Suresh's claim that in 1997, he, Raju, orally agreed to transfer the shares is insincere, and of recent invention, and is being trumped up by Suresh for the first time in 2005 in response to Raju's application to wind up Topaz Investments.

4. The application to amend is set out in Notice filed on behalf of Suresh dated March 27 2008. The fulcrum of the entire amendment being sought is really an application under Section 180 of the Companies Act.

5. This is the amendment which Suresh's Attorneys seek to add towards the end of the Particulars of Claim:

> .....
>
> *26. On the 7th November 2006 the Claimant lodged a complaint against the 1st Defendant, Raju Khemlani, with the Registrar of Companies, pursuant to Section 180 of the Companies Act, requesting the Registrar to investigate the matters complained of as a preliminary step for an application to the Court to have the 1st Defendant disqualified as a Director of the 2nd Defendant.*
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> *27. On the 23rd January 2007, a hearing was held before the Registrar of Companies, at which the Claimant substantially ventilated the issues as set out in the Particulars of Claim herein.*
>
> *28. On the 8th February 2007, the Registrar of Companies issued Certificates of Leave to Proceed in relation to the 2nd Defendant Company, certifying that the learned Registrar is satisfied that there are sufficient grounds for a hearing by the*

Court of the matters alleged in the complaint against the 1st Defendant, Raju Khemlani, dated the 7th November 2006.

6. It is also sought to amend both the Claim Form and the Particulars of Claim to seek the following orders:

.....

6. A declaration that the 1st Defendant is unfit to be concerned in the management of the 2nd Defendant Company.

7. An order that the 1st Defendant may not be a director of the 2nd Defendant Company, or in any way, directly or indirectly, be concerned with the management of the 2nd Defendant Company.

7. I think it is useful to set out Section 180 of the Companies Act in its entirety:

180-(1) Where, pursuant to subsection (2), a complaint is made to the Registrar by-

(a) shareholders of a company;

(b) members of the board of directors of a company or creditors of a company, as the case may be; or

(c) the liquidator of the company, or the Trustee,

that person is unfit to be concerned in the management of a company, the Registrar shall act in accordance with subsection (3).

(2) A complaint referred to in subsection (1) shall be in writing and shall state the grounds on which it is made.

(3) Upon receipt of such a complaint the Registrar shall-

(a) investigate the matter and afford to the complainants an opportunity to be heard; and

(b) if satisfied that there are sufficient grounds for a hearing of the matter by the Court, issue a certificate to that effect to the shareholders, liquidator, Trustee, members or creditors, as the case

may be, who shall, subject to subsection (7), have the right to make an application to the Court on the matter.

(4) Any shareholder, member or creditor, as the case may be, who is aggrieved by a refusal of the Registrar to issue a certificate referred to in subsection (3) (b) , may appeal against that decision to the Master in Chambers.

(5) Where the Registrar is satisfied that a person is unfit to be concerned in the management of a company, the Registrar may make an application to the Court on the matter.

(6) Where, on an application made pursuant to subsection(3) (b) or (5), it is made to appear to the Court that a person is unfit to be concerned in the management of a company, the Court may order that, without the prior leave of the Court, that person may not be a director of the company, or in any way, directly or indirectly, be concerned with the management of the company for such period as may be specified in the order-

(a) beginning with the date of the order or, if the person is serving, or is to serve, a term of imprisonment and the Court so directs, beginning with the date on which he completes that term of imprisonment or is otherwise released from prison; and

(b) not exceeding five years.

(7) In determining whether or not to make an order under subsection (6) the Court shall have regard to the following-

(a) any misfeasance or breach of any fiduciary or other duty by the director in relation to the company;

(b) any misapplications or retention by the director of, or any conduct by the director giving rise to an obligation to account for, any money or other property of the company;

(c) the extent of the director's responsibility for any failure by the company to comply with the provisions of this Act in relation to the keeping and maintenance of accounting records;

(d) whether the director has knowingly been party to carrying on the business of the company in a manner for which he may be liable (whether he has been convicted or not) under section 322;

(e) such other circumstances as may be prescribed.

(8) Before making an application under this section in relation to any person, the Registrar or any other person intending to apply shall give to the person concerned not less than ten days' notice of the intention to make the application.

(9) On the hearing of an application made under this section or, as the case may be, an application for leave as mentioned in subsection (6), any person concerned with the application may appear and call attention to any matters that are relevant, and may give evidence, call witnesses and be represented by an attorney-at-Law.

8. Mr. Robinson submitted that this section of the Companies Act does not concern any cause of action known to the civil law. The application which is to be made is an original application and is not an application to be made to the civil courts. He further submitted that the section provides penalties; it is intended to penalize errant directors and nowhere in this section is the court empowered to order a civil remedy, for example, damages to be paid by one party to the other. The matter is intended to be decided upon proof beyond a reasonable doubt, it is not meant to be dealt with on a balance of probabilities. Additionally, it was submitted that the word "apply" does not ordinarily apply to a law suit, and that the Notice of Intention to Apply to the Court for Amendment was not the type of Notice contemplated in sub- section 180(8) of the Companies Act. That in any event, the Defendant had only been served with the Certificate of the Registrar the day before this hearing.

9. This fundamental objection was Mr. Robinson's principal line of attack. However, Counsel had an arsenal of other ammunition aimed at the amendment application. He submitted that even if there was a civil

cause of action, the sort of issue to be aired is completely separate from the issues thus far raised in the 2006 Suit. This cause of action, if found, has nothing to do with breach of contract and cannot appropriately be dealt with in what is in effect a breach of contract action.

10. Another submission was that the subject matter raised deals with disputed facts and that any proper interpretation of sub-sections(1) to (3) of section 180 would indicate that the section is intended to deal with complaints that do not involve factual disputes, and in respect of which the Registrar can safely make a decision in the absence of the accused director.

11. The fourth objection was that the application for amendment was being made after the Case Management Conference. Although the current C.P.R. Rules on amendment are less harsh than the original Rules were, this, it was submitted, does not mean that all applications for amendment must be allowed. There must be a reason why permission of the court is required, especially so when what the amendment is doing is raising a brand new "cause" of action and at a time when the previous cause of action has already been through a Case Management Conference, the stages of discovery and witness statements, and other aspects. The trial date is imminent, it has been fixed for February 4th and 5th 2009. Based upon the timing of the application, to allow the amendment at this stage would not be in accordance with the mandate of the court to further the overriding objective and would prejudice the Defendant in such a way that he could not be compensated in costs. If the court finds that there is a civil cause of action, then a separate claim form can be filed on behalf of Suresh.

12. It was also argued on behalf of Raju that it is not permissible for the Affidavit in Support of the Application to Amend to be sworn to by an Attorney-at-Law for the party. The lay party must swear to the Affidavit and must give an explanation as to why the amendment is necessary at this time.

13. In Claim No. HCV 04473 of 2007, as Suresh was entitled to do without permission since that claim has not yet reached the case management conference stage, an amendment in the same terms as those being sought in the 2006 claim, has been made to the Particulars of Claim. Mr. Robinson refers to Rule 20.2 of the C.P.R. and argues that the court can still disallow the amendment where it is permissible for it to be made without the Court's permission. It should be disallowed if it is inappropriate or otherwise incorrectly or inconveniently added to an existing claim and shows no proper connection to the original claim.

14. Section 8.3 of the C.P.R. states as follows:

> *8.3. A claimant may use a single claim form to include all, or any, other claims which can be conveniently disposed of in the same proceedings.*

15. The Attorneys-at-Law for the parties have not cited any local decisions, or for that matter, any other decisions with regard to proceedings for disqualification of directors under Section 180 of the Companies Act. Mr. Robinson did, however, refer me to the 3rd Edition of **Farrar's** work **Company Law**, 348-359, in particular page 349. I have looked at this work as well as at some authorities, some of which are referred to in **Farrar's Company Law.**

16. At page 349, under the heading " Disqualification" it is stated:

> ***Disqualification***
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> *One of the major concerns of Parliament in passing the Insolvency Act 1985 was to curb the activities of directors who shelter behind the corporate form and limited liability and who, having put a company into insolvent liquidation, promptly set up in business immediately thereafter and start the whole cycle again. The Companies Act 1985 already provided for disqualification on certain grounds but it was decided to strengthen and extend those provisions. This was done in the Insolvency Act 1985 and the provisions were*

subsequently consolidated and re-enacted as the Company Directors Disqualification Act 1986. It should be noted that many of the provisions of that Act are not limited to directors but they remain the primary group at risk of disqualification.

GROUNDS FOR DISQUALIFICATION

There are several grounds for disqualification. They are:

(a) being convicted of an indictable offence;

(b) persistent default;

(c) fraud;

(d) disqualification when made personally liable;

(e) undischarged bankrupts;

(f) unfit directors of insolvent companies;

(g) disqualification after investigation.

Each will now be considered in turn.

(a) CONVICTED OF AN INDICTABLE OFFENCE

Section 2 provides that where a person is convicted of an indictable offence (whether on indictment or summarily) in connection with the promotion, formation, management or liquidation of a company, or with the receivership or management of a company's property, then the court may make a disqualification order against that person....

17. One assertion made by Mr. Robinson with which I certainly agree, is that section 180 of the Companies Act has to be very carefully scrutinized. It seems to me that in the United Kingdom, the legislative provisions as to disqualification of directors, are principally if not exclusively concerned with directors of an insolvent company, and to a lesser extent, directors convicted of fraud generally, or found guilty of persistent default in respect of duties under the Companies Act. However, section 180 of the Companies Act does not seem to

have any such focus in particular. In my view, the procedure set out in the English legislation and the structure of the proceedings, is established the way it is because it is concerned with directors who are involved in activities of a company already established to be insolvent or where some kind of "wrongdoing" on the part of the director has already been determined.

18. I disagree with Mr. Robinson, though I must say only marginally, that the standard of proof is the criminal standard of proof beyond a reasonable doubt. In my judgment the standard of proof is more analogous to the standard employed in respect of disciplinary tribunal hearings, where, although it has in the past been a moot point, the standard is now generally accepted to be the civil standard of proof. However, since the allegations are serious and can have serious effects on the individual director's activities and pursuits, the more cogent must be the evidence which proves these allegations. I think that the point is well elucidated in the 15th Edition of **Phipson , The Law of Evidence**, paragraph 4-36 to 4-37, pages 81 to 82:

> *....(2) Serious or criminal allegations*
>
> *4-36 . Where a serious allegation is made in a civil case, such as an allegation of criminal conduct, the standard of proof remains the civil standard. Otherwise, where there was a claim for fraudulent misrepresentation and breach of warranty the court might hold that the warranty claim was proven and the fraud claim was not proven on the same facts. However, the more serious the allegation the more cogent the evidence required to overcome the unlikelihood of what is alleged and thus to prove it. Courts have for some time sought to grapple with the logical difficulty of requiring more cogent evidence to prove fraud but still holding that the allegation*

must be proved on a balance of probabilities. The matter was explained by Lord Nicholls in ***Re H(minors)*** *[1996] A.C. 563,*

" The balance of probability standard means that a court is satisfied an event occurred if the court considers that, on the evidence, the occurrence of the event was more likely than not. When assessing the probabilities the court will have in mind the factor, to whatever extent is appropriate in the particular case, that the more serious the allegation the less likely it is that the event occurred and hence, the stronger should be the evidence before the court concludes that the allegation is established on a balance of probability..... Built into the preponderance of probability standard is a generous degree of flexibility in respect of the seriousness of the allegation.

Although the result is much the same, this does not mean that where a serious allegation is in issue, the standard of proof required is higher. It means only that the inherent probability or improbability of an event is itself a matter to be taken into account when weighing the probabilities and deciding whether, on balance, the event occurred. The more improbable the event, the stronger must be the evidence that it did occur before, on the balance of probability, its occurrence will be established."

.....

(3) Disciplinary and other tribunals

It has often been a moot point as to whether regulatory and similar disciplinary tribunals, which can be said to be applying quasi-criminal sanctions, should apply the criminal or civil standard of proof. In the past different tribunals have applied different standards of proof. In part, this will always turn on construction of their disciplinary rules but it is

suggested that in light of ***Re H*** *in future the balance of probabilities will be applied in the absence of express rules providing a criminal standard.*

19. In **Re Lo-Line Electric Motors Ltd.** [1988] 2 All E.R. 692, an authority repeatedly cited in **Farrar**'s work on **Company Law**, Sir Nicolas Browne-Wilkinson V-C, sitting in the English Chancery Division, laid down a number of important principles and guidelines as to the court's correct approach to the subject of disqualification of directors. The application was by the Official Receiver who applied by way of "summons" (which I understand to refer to an originating summons), for an order under sections 295 and 300 of the Companies Act 1985 for an order of disqualification against a director. In that case the two specific charges made against the director were that he had failed to pay over certain Crown debts, including taxes, and the failure to lodge annual returns and accounts. The companies in respect of which the Respondent was a director were all found to be insolvent when they were wound up by the order of the court, some time before the summons for disqualification was issued. At pages 696 h-j, and 697 d-f, Vice-Chancellor Browne-Wilkinson provides the following useful guidance:

696 h-j

The general approach

What is the proper approach to deciding whether someone is unfit to be a director? The approach adopted in all the cases to which I have been referred is broadly the same. The primary purpose of the section is not to punish the individual but to protect the public against the future conduct of companies by persons whose past records as directors of insolvent companies have shown them to be a danger to creditors and others. Therefore, the power is not fundamentally penal. But, if the power to disqualify is exercised, disqualification does

involve a substantial interference with the freedom of the individual. It follows that the rights of the individual must be fully protected. Ordinary commercial misjudgment is in itself not sufficient to justify disqualification. In the normal case, the conduct complained of must display a lack of commercial probity, although I have no doubt that in an extreme case of gross negligence or total incompetence disqualification could be appropriate.

.....

697 d

Natural justice plainly requires that a director facing disqualification should know the charges he has to meet. I am far from suggesting that this requirement should lead to the technicalities associated with criminal charges but prior notice of such a fundamental shift in the Official Receiver's case should have been given so that (the director) *could direct evidence to the point. ...*

697 g

Conflicts of evidence

In the present case there are many factual issues on which the evidence given by (the director) *in his Affidavits directly contradicts allegations made against him by the Official Receiver. Yet he has not been cross-examined. In my judgment proceedings for disqualification are no different from any other court proceedings: it is not possible for the court to disbelieve evidence given on oath in the absence of cross-examination of the witness....*(my emphasis).

20. In my view, **Re Lo-Line Ltd** supports the position that the proceedings are civil and not criminal proceedings. Sub-section 180 (6) of the Companies Act states :

> *180-(6) Where, on an application made pursuant to subsection (3) (b) or (5), it is made to appear to the Court that a person is unfit to be concerned in the management of a company, the Court may order that, without the prior leave of the Court, that person may not be a director of the company, or in any way, directly or indirectly, be concerned with the management of the company for such period as may be specified in the order-*
>
> *(a) beginning with the date of the order or, if the person is serving, or is to serve, a term of imprisonment and the Court so directs, beginning with the date on which he completes that term of imprisonment or is otherwise released from prison; and*
>
> *(b) not exceeding five years. (my emphasis)*

21. In my judgment, the words " and the Court so directs" refer to the Court directing that the period for which the director is disqualified is to begin with the date of the director's completion of the term of imprisonment, or with the date of his release otherwise from prison, and do not refer to , or suggest, that the Court hearing the disqualification application under section 180 is empowered by virtue of that section, to impose a sentence of imprisonment. What the Court is empowered to do is to impose a disqualification period, not a prison sentence. I readily admit however, that the case law in this area is quite confusing and I can well understand why Mr. Robinson made his submission that the section deals with criminal law matters. Indeed, in **Farrar**, at pages 353 -354 the learned author states "It is frequently asserted by the courts that disqualification is not intended as a punitive measure although the courts recognize that removing the privilege of trading through a limited liability company may significantly constrain the freedom of that individual to carry on

business and as such has a result which can be described as penal". This is followed by the footnote 13 ".....See....Also Dine (1988) 9 Co Law 213 who discusses this judicial confusion as to the nature of disqualification proceedings and explores its significance". For example, in **In re Seven Oaks Stationers(Retail) Ltd.** [1990] 3 W.L.R. 1165, also referred to in **Farrar**, Dillon L.J. sitting in the English Court of Appeal, speaks of the disqualification period "imposed" and describes the process as involving "sentencing" . At page 1172 A-D, in discussing Counsel's arguments, Dillon L.J. states:

> *Mr. Charles submits for the official receiver that even if in making out his case for disqualification the official receiver can only rely on the allegations made in his report and/or affidavit, yet when the court comes to fix the length of the period of disqualification the court can take into account any other shortcomings in the director's conduct as a director of the companies in question. In other words, the director can be sentenced not only on the charges on which he has been convicted, but also on charges which were never made against him, if they happen to be made out in the evidence given. I emphatically disagree. It is inconsistent with the whole conception of giving notice of the charges the director has to meet, and could in many cases stultify the rule 3(3) which I have quoted, if in fixing the period of disqualification other matters could be alleged of which no notice had been given. Matters of mitigation can of course be taken into account in favour of the director in fixing the period of disqualification; but otherwise the period should be fixed by reference only to the matters properly alleged against him which have been found to be established and to make him unfit to be concerned in the management of a company.*(emphasis mine).

22. In the article by Janet Dine referred to in Footnote 13 of the Farrar, Dr Dine discusses "The Disqualification of Company Directors". Mr. Robinson clearly has company, because in that article Miss Dine points to cases where she argues that the courts have approached the procedure as being akin to criminals sanctions, and also identifies cases which seem to have been decided on the civil standard of proof, on a balance of probabilities. At page 213 of the Article, which is at Comp. Law 1988, 9(10), 213-218, Dr. Dine opens:

> *The Nature of Disqualification*
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> *It is clear that there are two alternative classifications for this remedy. Disqualification may be a criminal or quasi-criminal procedure or it may be an administrative structure designed to protect the public from directors who are incompetent, dishonest, or both. It is vital that the classification is made and made correctly since if the criminal classification is the correct one it may be strongly argued that directors ought to be entitled to protection equivalent to that provided by criminal law to defendants, a feature markedly absent from the system as it currently operates.*

23. I have also looked at the English Civil Procedure Rules in order to see if there is anything within that could provide guidance, or at any rate, a basis for reasoning by analogy. Interestingly, the English Civil Procedure Rules 2007, contain a Section B which consists of "Practice Directions and Practice Statements". One such Practice Direction, is headed "Practice Direction- Directors Disqualification Proceedings". This Direction is set out and discussed at pages 2239-2267, paragraphs B1-001A-B1-036. We do not in Jamaica have any practice directions relating to Directors Disqualification Proceedings. However, for the purposes of determining the nature of our own Section 180 proceedings, especially

since there do not appear to be any previous local decisions in relation to this section, or at any rate none have been cited to me, I think it is useful to look at the position in England, particularly since our Legislators often look to that jurisdiction when drafting our Jamaican Law. Under this Practice Direction Director Disqualification Proceedings are to be brought by Part 8 Procedure under the English C.P.R. This means that the proceedings are to be brought by way of Fixed Date Claim Form and seemingly, the proceedings are generally considered summary in nature. I found the Editorial Note at paragraph B1-001A and the Commentary at B1-004.1 useful and because of the dearth of local authorities, and for clearer overall comprehension, I have cited greater portions of these paragraphs than I otherwise would have :

> *Editorial Note*
>
> *B1-001A*
>
> ***Purposes of the Company Directors Disqualification Act 1986 ("the Act")***
>
> *The Directors Disqualification Proceedings Practice Direction (" the Practice Direction") needs to be interpreted and applied in the context of the underlying legislation. The Act was introduced as part of the substantial re-casting of the insolvency legislation in the mid 1980's, and came into force on December 29, 1986. Its main provisions were originally introduced under the Insolvency Act 1985, which was brought into force on April 28, 1986. Although earlier insolvency legislation also made provision for disqualification of directors in certain circumstances, the 1986 changes were such that earlier case law is largely (though not entirely) redundant. The court's approach to Parliament's intention in introducing the Act is summarized in the judgment of Henry L.J. in* ***Re Grayan Building Services Ltd.*** *[1995] Ch. 241, at 257:*

"The concept of limited liability and the sophistication of our corporate law offers great privileges and great opportunities for those who wish to trade under that regime. But the corporate environment carries with it the discipline that those who avail themselves of those privileges must accept the standards laid down and abide by the regulatory rules and disciplines to protect creditors and shareholders....The parliamentary intention to improve managerial safeguards and standards for the long term good of employees, creditors and investors is clear."

.....

On a closely related point, it has frequently been said that the primary purpose of the Act is to protect the public. This phrase is used in both a narrow and a wide sense. Even where the director no longer needs to be kept " off the road" , the "wider interests of protecting the public" in making a disqualification order include a deterrent element in relation to both the director himself and as far as other directors concerned: see the comments of Lord Woolf M.R. in ***Re Westmid Packing Services ltd.*** *[1998] 2 All E.R. 124, at 131-2.*

The court has also made clear that the disqualification jurisdiction is intended to be a summary jurisdiction, and has deprecated over-elaboration in the preparation and hearing of cases, and a technical approach to admissibility of evidence. "What is required and what the court should confine the parties to is sufficient evidence to enable the court to adopt a broad brush approach, see Lord Woolf in ***Westmid*** *at 134-5. That is consistent with the "jury question" at the heart of most cases under s.6 of the Act (under which the vast majority of applications for disqualification orders are made), namely whether the person concerned is "unfit to be concerned in the*

management of a company" (s.6(1)(b) of the Act). Nevertheless, the summary approach is tempered by the fact that the court also recognizes that in practice a disqualification order can represent " a serious interference with the freedom of an individual"(see Sir Donald Nicholls V.-C. in ***Re Rex Williams Leisure plc.*** *[1994] Ch. 1, at 14.....*

B1-004.1

Use of Pt 8 Procedure

The use of the Pt 8 procedure (and prior to 1999 the originating summons procedure under the R.S.C.) is in some respects not entirely satisfactory, particularly in cases where a substantial amount of the factual evidence is disputed (a point indirectly alluded to by Sir Donald Nicholls V.-C. in ***Re Rex Williams Leisure plc.*** *[1994] Ch. 1, at page 9). However, the use of Pt 7 procedure with statements of case would be even less satisfactory as the claimant's case (based on his conclusion that it is "expedient in the public interest that a disqualification order should be made") is not a cause of action which easily lends itself to being pleaded in the orthodox way (though the courts have recognized that the evidence in support of the application "has of necessity something of the character of a pleading" : ;Laddie J. in* ***Re Finelist*** *[2003] EWHC 1780 (Ch.) ; [2004] B.C.C. 877 at[14]. The intention is that all the evidence deemed relevant by the parties can be put before the court, normally without the need for disclosure, so that (in the case of ss. 6 to 9 of the Act) the court can decide the question of unfitness. Thus, although applications are occasionally made for an order that disqualification proceedings should proceed by way of*

statement of case, it is suggested that it will only be in the most exceptional circumstances that the court would consider it appropriate to make such an order.

24. It seems to me that even if the proceedings can be considered civil proceedings, the only proper basis upon which a broad brush approach to disqualification of directors, or a summary approach could take place would be where there was already some finding that the company with which the director is associated is insolvent, and against the backdrop of insolvency, some predetermination of wrongdoing, for example a director being convicted of fraud, or guilty of persistent default of some kind. Otherwise, I would agree with Mr. Robinson that there may well be constitutional issues as to the appropriateness of the Registrar being able to come to a conclusion or to be satisfied that there are sufficient grounds for the court to hear the matter, in the absence of, and without any input from, or right of audience at that stage in, the accused director. There can be no sound basis for drawing an analogy to other proceedings, where claims can be brought after leave is given to the applicant in the absence of the respondent, for example in proceedings for judicial review of administrative action. The justification for such a procedure in relation to judicial review of administrative action is that administration and governance would be severely humbugged if administrators were to be constantly brought before the courts to defend spurious attacks on their actions and activities. Thus a screening process by the courts is required. There is no such rationale in relation to directors disqualification per se, and in any event, the process that ensues after leave is granted in judicial review proceedings can hardly be described as summary.

25. At the end of the day, I agree with Mr. Robinson that proceedings under Section 180 of the Companies Act are not capable of being conveniently dealt with and disposed of in the same Law Suit

where to date the claim has essentially been mainly concerned with breach of contract. I do not consider it appropriate to grant the amendment sought in these circumstances in Claim No. HCV 2350 of 2006. I am not satisfied that this amendment is necessary to determine the real issues in controversy between the parties, it being really of a vastly different character than the claim as originally framed. I am also not satisfied that this amendment can be made without injustice to Raju, particularly having regard to the fact that the trial date is just a few months away in February 2009. The claim as originally formulated does not involve any of the novel considerations as to the nature of the proceedings, whether civil or criminal, or as to the circumstances in which an application may properly be made under section 180 of the Companies Act for disqualification of a Director. Although I have tried to have a general look at the nature of these proceedings, I am sure that any court hearing an application under section 180 will have a number of complex issues to deal with that would not arise in a claim between shareholders as to breach of contract. I accept Mr. Robinson's submission that to grant the amendment would not be in keeping with the court's duty to further the overriding objective as set out in Rule 25.1 (l) of giving directions to ensure that the trial of the case proceeds quickly and efficiently.

26. In looking at this case and the issues raised, I have been struck by the fact that the considerations which a court must embark on when considering whether to grant an amendment are not completely dissimilar from those involved when deciding whether to consolidate two existing claims. The court also has the power to decide whether some issues should be decided before, or separately from others. In **Claim No. 2006 HCV 3763, Financial Services Commission v. Olint and David Smith et al**, an unreported judgment of my brother Sykes J. delivered February 13 2007, the case

involved facts which were quite different from the facts of this case, and concerned an application for consolidation. The application was for consolidation of an appeal by Olint and David Smith under the Securities Act against the Financial Services Commission "F.S.C." in **Claim No. 2006 HCV 1365**, with a claim by the F.S.C. for certain declarations as to the activities of Olint and David Smith et al. Sykes J. refused the F.S.C.'s application for consolidation. Some of the fundamental principles underlying Justice Sykes refusal to order consolidation, i.e. the difference in the nature of the two sets of proceedings, and the stage where the first claim, the appeal had reached, are not dissimilar from the principles that I have looked at in respect of the amendment sought in the present case. At paragraph 19 the crux of the ratio of Sykes J.'s decision appears:

> *19. Having regard to the nature of an appeal and a claim, I am not convinced that both matters can be consolidated or even heard at the same time. The two procedures are quite different and serve different purposes.*

27. As regards the amendment made without permission in Claim No. HCV 4473 of 2007, ordinarily such amendments will only be struck out if they are scandalous, embarrassing or oppressive. Part 25 of the C.P.R. deals with the court's duty to actively manage cases. It seems to me that consistently with my decision to disallow the amendment in Claim No. HCV 2350 OF 2006, if the amendment to add the relief prayed under section 180 of the Companies Act were to remain, I should exercise the power under Rule 25.1 (d) to decide the order in which issues are to be resolved. To my mind, it is not convenient to deal with this section 180 application at the same time as the claim by Suresh against Raju for breach of an oral agreement. Indeed, to allow the amendment to remain may even prove oppressive to Raju, particularly having regard to the fact that there is also an

application to consolidate. The two claims are quite different in nature and serve quite different purposes. I note in passing that at paragraph 25 of the Particulars of Claim in the 2007 claim, it is pleaded that Raju has never been involved in the management and operations of Kay Mart Limited, and since the restructuring in 1997, has not been involved with the management and operations of Public Supermarket Limited and Lord and Lady Limited. In the 2006 claim it is pleaded that Raju has not been involved in the management and operations of Topaz Investments since the restructuring in 1997. However, the application under section 180 of the Companies Act is in respect of Raju's role as a Director in all four companies. In **Re Lo-Line** as pointed out previously, the court expressed the view that the primary purpose of such a section is not to punish the individual, but is to protect the public against the future conduct of companies by directors. The original claim and the new claim cannot be said to be clearly linked or connected. I am of the view that in all the circumstances, including the application for consolidation which I am about to deal with, the amendments to the Claim Form and Particulars of Claim, as underlined in the Statements of Case headed "Amended Claim Form" and " Amended Particulars of Claim" ought to be disallowed. The court is, I think, entitled to take a "bird's eye view" of the case's landscape, and need not view each application in isolation.

CLAIM NO. HCV 4473 OF 2007 -APPLICATION TO CONSOLIDATE WITH CLAIM NO. HCV 2350 OF 2006.

28. In making this application to consolidate, Queen's Counsel Miss Phillips referred me to a number of Rules of the C.P.R., including Part 26, Part 8.3, and Part 1, which deals with the overriding objective of dealing with cases justly.

29. Part 26.1(1) and Part 26.1 (2) (b) state:

26.1 (1) The list of powers in this rule is in addition to any powers given to the court by any other rule or practice direction or by any enactment.

26.1 (2) Except where these Rules provide otherwise, the court may-...

(b) consolidate proceedings;

30. As Miss Phillips Q.C. indicated, the Rules do not provide any specific guidance, basis, or criteria as to when it is appropriate for the court to order the consolidation of proceedings. Rule 8.3 , to which Miss Phillips also referred states:

Right to make a claim which includes two or more claims

8.3

A claimant may use a single claim form to include all, or any other claims which can be conveniently disposed of in the same proceedings.

31. Part 1 of the Rules, which provides that the C.P.R. Rules are a new procedural code with the overriding objective of dealing with cases justly, indicates that part of dealing with a case justly may involve saving expense, dealing with the case expeditiously, and allotting to cases appropriate resources, which I take to include saving judicial time.

32. Miss Phillips submitted that the two law suits deal with substantially the same relief and she submitted that it would be convenient to dispose of these claims together. The application is supported by the Affidavit of Andrea Bickhoff – Benjamin sworn to on the 10th day of September 2008. Mrs. Bickhoff-Benjamin is an Attorney-at-Law, instructed by Grant, Stewart, Phillips & Co., the Attorneys-at Law on the record for the Claimant in both Suits. Paragraphs 5 and 6 of the Affidavit state:

> *5. That the reliefs sought in both actions are substantially identical, in that the Claimant seeks orders to the effect that he is beneficially entitled to all the shares in the Defendant companies that are presently registered in the 1st Defendant's name, that the court make a declaration to that effect and order the 1st Defendant to transfer the said shares to the Claimant. .....*
>
> *6. That the Defendant companies were joined in the actions as any order of the court is likely to affect the said companies' shareholdership and directorship.*

33. Mr. Robinson has again mounted some formidable objections. He submits that each case has reached a completely different stage and the 2007 claim was filed under the C.P.R. as amended in September 2006 which requires automatic mediation, whereas the 2006 claim was not. Although some mediation has taken place in related Winding Up Petition proceedings, no mediation has taken place in relation to the 2006 suit. As Mr. Robinson claims, Suresh elected to file the 2006 claim against Topaz Investments then one and a half years later, at a time when a trial date has been fixed for early next year, he now decides to file against the other three companies in the 2007 Suit. Mr. Robinson submits that if the court makes the consolidation order, then it would have to make an order to dispense with mediation under Rule 74.4. However, according to Rule 74.4(1) (a), the court can only dispense with automatic mediation if it is satisfied that good faith efforts have been made to settle the case, and he states that no such efforts have occurred here.

34. Mr. Robinson expressed the view that in light of the blood relationship between the parties, as brothers, and members of a family with strong ties and family traditions, every opportunity to mediate should be explored. Indeed, Mr. Robinson says that in one of

the claims, (I can't recall which) by letter dated February 4 2008 Raju's Attorneys asked the Registrar of the Supreme Court to refer the matter to mediation. This opportunity should not be dispensed with.

35. Mr. Robinson also submitted that in any event, the application to consolidate ought not to be granted on the state of the documents filed since the application was only filed in the 2007 claim and not in the 2006 claim.

36. In response to this last submission, the logic of which I think is well-neigh unassailable, Miss Phillips stated that the practice was for both files to be physically before the judge when considering the application for consolidation, not that an application needs to be filed in both suits. She points out that even if the fact that an application filed in one suit only may sometimes be fraught with procedural difficulties, there is really no problem created in this case since the case involves the same principal parties, the companies in both suits being in essence nominal defendants.

37. I think that Mr. Robinson is correct that the application to consolidate should really be filed in both claims. The importance of this point is usually more readily seen where there are other parties involved in one suit who are not involved in the other. I also agree with Mr. Robinson that, given the relationship between the parties, every effort should be made to mediate the issues between them, rather than having to have a court determine in its relatively less flexible way, which brother should succeed and which brother should fail in their respective claims.

38. It is well known that where originating proceedings are brought by way of the wrong procedure, when appropriate and where it will not cause injustice to any party incapable of being compensated for in costs, the court may make an order that the proceedings continue as if begun in the right way. For example, in proceedings which are commenced by way of Fixed Date Claim Form when they

should have been brought by Claim Form, the courts do, where appropriate, order that the proceedings continue as if begun by Claim Form, and make such consequential orders as considered necessary. Indeed, in Claim No. HCV 2350 of 2006, Sykes J. as part of his case management of that claim on the 1st March 2007 made that precise order, i.e. that the claim, which was commenced by way of Fixed Date Claim Form, be treated as if begun by Claim Form.

39. In general and express recognition of the court's inherent powers in appropriate circumstances to "fix things" , Rules 26.9(3) and (4)of the C.P.R. state that where there has been an error of procedure the court may make an order to put matters right and it may do so on or without an application by a party.

40. In my judgment these two claims HCV 4473 of 2007 and HCV 2350 of 2006 do involve substantially the same issues and in essence in each respective claim, the relief claimed by Suresh, and the defence mounted by Raju, are basically of the same nature. They can conveniently be disposed of together as one matter. There is no prejudice to any party because the claims really involve disputes between the two brothers Suresh and Raju and the other Defendants are simply nominal corporate defendants, in respect of which Suresh and Raju are the sole shareholders and directors. There has been an error in procedure in that an application to consolidate the two claims should have been filed not only in the 2007 claim but also in the 2006 claim. It is not sufficient for the two files simply to be put before the court hearing the consolidation application. However, in this case there really is no harm or prejudice caused to any party since the parties are in truth the same; each case involves in essence the same dramatis personae. In all the circumstances, I think that in dealing with this case and situation justly it is appropriate that I make an order to put things right. I therefore order that the Notice of Application for Court orders dated 10th September 2008 and the

Affidavit in Support be treated as if also filed in Claim No. HCV 2350 of 2006, with the reference in the Notice of Application to consolidate, being treated in the 2006 claim as a reference to consolidation with Claim No. HCV 04473 of 2007. Mr. Robinson argued in relation to the amendment application that the supporting Affidavit should be sworn to by the lay person, and not one of the Attorneys for the party. I agree, but in relation to the consolidation application as opposed to the application to amend, this is not of as great moment since it is ultimately more a matter for the court as part of its case management powers to discern, rather than having to be convinced by the applicant, whether the claims as filed are suitable for consolidation. Indeed, in assessing the appropriateness of consolidation, I had to look at and have regard to the Statements of Case, all of which as required by the Rules, bear a certificate of truth, signed by the lay parties and which signifies their verification of each Statement of Case.

41. To my mind, although this order for consolidation is being made only three months from the trial date, I do not think that practically there will be much inconvenience to the parties as any Witness Statements or Discovery or other process that will have to take place in relation to the 2007 claim should be capable of being prepared or performed with little delay, and without much further or extra effort by the parties. In addition, if it is one thing that the experienced and able Attorneys-at-Law representing Suresh and Raju respectively agree upon, it is that mediation remains a desirable option. I have no intention of making an order to dispense with the compulsory mediation process to which the 2007 claim is tied. Indeed, no matter how late in the day it is, I think it is potentially extremely useful and beneficial to weave the threads of the two claims together, so that the mediation appendage of the 2007 claim can also attach itself to the 2006 claim.

42. I therefore make the following orders:

In Claim No. HCV 2350 of 2006

(a) Notice of Application for Court orders dated March 27 2008 is dismissed.

(b) Costs to the 1st Defendant to be taxed if not agreed.

In Claim No. HCV 4473 of 2007

(c) The amendments to the Statements of Case filed by the Claimant and set out as underlined in the documents headed " Amended Claim Form" and "Amended Particulars of Claim" are disallowed and these Statements of Case stand as they were before the disallowed amendments.

In both Claims

(c) Claim No. HCV 04473 of 2007 is consolidated with Claim No. HCV 2350 of 2006.

(d) Both claims are to be referred for automatic mediation forthwith.

(e) Costs to the 1st Defendant to be taxed if not agreed.

43. I will now hear from the parties as to whether they think it is appropriate for me to make any further orders at this time in order to move the case forward. However, I observe that the pre-trial review is scheduled for November 11, 2008, just a week from today. Orders could perhaps be instead made then after a "breather", allowing for further reflection by all as to the requirements of the case.