IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN THE COMMERCIAL DIVISION

CLAIM NO. CD00146/2014

BETWEEN	**IVAN SMITH (Administrator of Estate Kathleen Elfreda Chambers Smith)**	**CLAIMANT**
AND	**CDF SCAFFOLDING & BUILDING EQUIPMENT LTD.**	**1st DEFENDANT**
	OWEN CHAMBERS	**2nd DEFENDANT**
	ANDRE JOHNSON	**3RD DEFENDANT**

Company Law – Majority shareholder deceased – minority shareholders vote to increase shares – locus standi of legal personal representative – Irregularities in accounts – whether notice of meeting called to increase shares and/or offer of new shares should be served on legal personal representative- Section 213A Companies Act-Section 212 Companies Act-Rectification of Register of Shares-Whether Damages applicable.

Ms. Sandra Johnson for the Claimant

Ms. Carol Davis for the Defendant

Heard :12th, 13th, 14th & 15th May 2015; 1st June; 2015; 5th, 6th 7th , 8th & 9th October 2015; 25th, 26th, 27th, 28th & 29th January 2016; 19th, 20th, 21st April 2016; 17th June 2016, & 19th September 2016.

BATTS J.

[1] The Claimant is the legal personal representative for the estate of his

deceased wife .He is entitled legally and beneficially to the shares his wife owned in the 1st Defendant Company. His complaint is that since the death of his wife he has been excluded from and/or not allowed to exercise control of the 1st Defendant Company. A company in which his wife during her lifetime had majority control. He blames the 2nd and 3rd Defendants for that and alleges further that they have committed fraud and/or negligence in the operation of the affairs of the 1st Defendant company. He has, rather curiously, named the company as the 1st Defendant in this action.

[2] Save that it is admitted that the Claimant is beneficially entitled to the shares of his deceased wife (para 2(d)Defendants' submissions filed on the 2nd June 2016},the Defendants deny the Claimant's allegations. The 2nd and 3rd Defendants say that they are in fact the majority shareholders. Further that they are lawfully appointed directors and were appointed by the Claimant's wife during her lifetime. They say the Claimant has never taken steps to be appointed a shareholder or a director. They also say they have acted in the best interest of the 1st Defendant at all material times. In any event, they say, the claim is misconceived because the Claimant has no *locus standi*. The claim ought properly to have been brought by relator action on behalf of the Company and not by this Claimant. The Defendants counterclaimed and allege that the deceased fraudulently allotted shares to herself and, that in breach of her fiduciary duty, she used the 1st Defendant's resources to purchase premises in her name and then leased those premises to the 1st Defendant and used the 1st Defendant's resources to improve her premises.

[3] This trial has lasted many days. There has been much evidence, documentary and otherwise. Its conduct I must say has been characterised by confusion and intransigence. It is clear that Ms. Sandra Johnson in particular, did not at all times display that aloofness expected of Counsel. In the course of the trial, there were some surprising events. For example, Ms. Johnson objected to two letters

written by her, and to which no privilege applied, being tendered in evidence [See Exhibits 34 and 35]. Ms. Johnson also admitted that her decision not to file and serve a particular witness statement was deliberate because,

> "If we open too much of our hands they are in control, can produce and backdate those documents to fit the circumstances. That is a real issue in this case.'

That intended witness be it noted was not allowed to give evidence. On the 2nd June 2016, Ms. Johnson endeavoured to lead the evidence of an expert witness who had not prepared a report in the required format and without having obtained the permission of the court at case management to call the expert. In the interest of justice, I granted an adjournment to allow matters to be put right but Counsel was ordered to pay the costs personally. Although the parties managed to agree a Bundle of Documents, admitted as Exhibit 1, the exhibits eventually totalled 59 in all.

[4] The Claimant gave oral evidence and called in support: Mr. Andrew Edwards Ms. Inger Hainsley Bennett, Ms. Rosemarie Salkey, Ms Rosemarie Gilbourne and Mr. Joshua Haye. The 2nd and 3rd Defendants both gave oral evidence and their witnesses were: Andrew Andrews and Davin Nairne.

[5] I do not intend to repeat the evidence of each witness or the submissions of the parties. I will reference only so much of the evidence or submissions, as I consider necessary to explain the reasons for my decision.

[6] Each party relied on the written report and oral evidence of an expert chartered accountant. The experts had contrasting views about aspects of the 1st Defendant's (the Company's) accounts. Mr. Joshua Haye for the Claimant impressed me with his professionalism. Mr. Davin Nairne for the Defendant impressed me with his candour but appeared unfamiliar with detailed aspects of his own report. It became apparent that he had delegated much of the fact

finding relative to the report to others. He at times found it difficult to explain aspects of the company's accounts, for example:

> "Q: what amount went to add to payable
>
> A: cannot say how much
>
> Q: tell us who were those creditors
>
> A: This figure of $40 million was transferred from payable to long term loan account say is book entry
>
> Q: Meaning
>
> A: [Pause] it is an entry which is made for the records
>
> Q: Does it mean nobody really is owed $40 million
>
> A: I don't know, he (the accountant) says is a book entry and he does not recollect."

[7] The generally unsatisfactory nature of the company's accounting practices is not surprising given that this was a private family owned business venture. Furthermore, the person responsible for the accounts for a significant part of the time, and the one sent by the accounting firm to give evidence on its behalf, was Mr. Andrew Andrews. He was not a professionally qualified accountant.

[8] The Claimant is not a particularly well read individual. He is a carpenter by profession. Until the death of his wife, he took no great interest in the affairs of the company. It is his evidence at paragraph 4 of his witness statement that,

> "Further, she alone was the sole signatory on all company accounts prior to her death and had full control of all administrative and financial affairs."

In the course of cross-examination the following exchange occurred,

> "Q: You agree prior to marriage, you were not involved in Company

A: No, I was not involved in it

Q: While your wife was alive, you were not a director of the company

A: No

Q: Nor a shareholder

A: no

Q: or Was [there] any reason why she did not make you a director shareholder

A: Couldn't tell you I don't know of anything

Q: You agreed you were never on the payroll of the company

A: At the end of every month, my wife gave me a meagre salary and say, that's your pocket money. So I would not say that."

[9] After the death of his wife, the Claimant continued for a while to receive monthly cheques from the company. He formed the view that the 2nd and 3rd Defendants were unlawfully attempting to take control of the company after his wife's death. He also at some stage adopted the position that he would attend no meeting of the company without his lawyer's presence.

"Q: there was a director's meeting in August 2008 recall that

A: not really

Q: remember at director's meeting you asked Mr Chambers if he invited Ms. Johnson to meeting

A: I told Mr. Chambers I would like Ms. Johnson to be at the meeting and he refused.

Q: you say you would have nothing to do with meeting except Ms. Johnson [[present].

A: I told them without my attorney at law I would not go to any meeting because my life was put on block. They tek me to half way tree court and sey I threaten

the life of Mr. Chambers. I am afraid of people like these."

The Claimant was therefore generally unaware of the operations of the company, of decisions taken, or of the keeping of records both before and after the death of his wife. He was however a generally truthful witness.

[10] The 2nd and 3rd Defendants were the brother and nephew respectively, of the Claimant's deceased wife. While alive, it is clear she was the dominant party in the business. Her brother and nephew were minority shareholders but were not signatories on the company's account and played no great role in its day-to-day operation. They both worked on a part time or limited basis in the company. Her brother (the 2nd defendant) is a trained scaffolder. I accept his evidence that he also, in the early days at least, injected some capital into the business. This was most probably by, way of investment not loan, and no supporting documentation was provided. Similarly, I accept that both the 2nd and 3rd Defendants sometimes worked without pay in order to assist the company. I accept the evidence that the 2nd and 3rd Defendants were directors of the company prior to the death of Kathleen Chambers, the majority shareholder.

[11] It is not surprising that upon his sister's death intestate, the 2nd Defendant viewed with some alarm the prospect of the Claimant becoming majority shareholder by way of inheritance. Certainly, it may have seemed to him, that the informal manner in which the company's affairs had hitherto been conducted might no longer be possible. I find that the conduct of the 2nd and 3rd Defendants in, voting themselves additional shares and in forming a new company to provide services to the 1st Defendant Company, were motivated by a desire to protect themselves from the anticipated consequence of the Claimant becoming the majority shareholder. In this regard, there were two important bits of evidence during the cross-examination of the 2nd Defendant:

"Q: So what do you now say

A: I say when the increase shares was found out it was discussed with Mr. Smith attorney Ms. Johnson and my attorney then I told Mr. Smikle and we all agreed that for the purpose of a family business having regard to the death and respect to my sister we would not bring about any exposure of any dishonesty in public and so when the increase in shares that was done by the Company the share certificates were issued and in truth and in fact back dated to January 1994. All this was in an effort not to show anything on my dead sister.

Q: by you

A: my signature appears on it

Q: At that meeting, you did not disclose that It was backdated.

A: Yes. This document was not disclosed at the meeting. The decision was made not to disclose the error that my sister did.

Q: that was a meeting organised to settle the matter

A: it took place at 77 Church Street

Q: Was it to settle matter so it don't need court

A; No, the matter of that meeting, to settle what matter. The meeting with Mr. Smikle you offered to buy us out the minor shareholders and Mr. Smith told you that he disagreed with it, because the company is ours. A family company. It was agreed he will not have any part."

And later,

Q: you did not have to form CDF Scaffolding and Building Equipment 2010 Ltd. based on CDF Scaffolding and Building Equipment Ltd's. memorandum.

A: There is also, I could have or not is [a] choice. I took because of certain situations that prevailed with the Claimant. The animosity restrictions over equipment of CDF.

> I have to call the police. Somebody defecate in my office. Push out obeah women, wheel and turn. Mr. Smith come with turban and thing.
>
> Q: Suggest on page 5 Para 16 and 17 [Exhibit 1]. Do you agree this paragraph also give company the ability to do what CDF2010 [does].
>
> A: The ability comes from expertise. You could have stayed in CDF and still remunerated. This is not in direct competition. Best interest of the company. Mr. Smith has not responded to not one of my letters."

[12] I was generally impressed with the evidence of Mr. Chambers, the 2nd Defendant, as between himself and the Claimant, he was far more intimately involved with the operation of the company. It is however evident, as I indicated above, that much to do with the affairs of the 1st Defendant were not dealt with in the ways they ought to have been.

[13] It is important to note that when cross-examined, the Claimant's expert Mr. Joshua Haye conceded that, pursuant to the contract entered into with the 1st Defendant, money was still due and owing to the 2nd Defendant. It is also important to note that on the 6th October 2015 Defendant's counsel for the first time produced a corrected financial statement for the period ending January 2009. This was referred to as the office copy of FC Swaby's financial statement (Exhibit 29).In re-examination Mr. Haye, whose evidence on this point I accept, had this to say:

> "My report says it took place in January 2009. The original report had no $15 million. So this amended office copy must be looked at with suspicion given the years that have passed. The figures don't agree in this new statement."

[14] My findings of fact are as follows:

a. The First Defendant Company was formed in or about the year 1992.

b. The 3 contributors were Kathleen Smith (the deceased), Owen Chambers the 2nd Defendant and Andre Johnson (the 3rd Defendant).

c. At the time of its incorporation, all 3 were independently employed elsewhere.

d. Shares were eventually issued or transferred to all 3 of them and as of November 1993 they were all Directors and shareholders of the 1st Defendant Company. (See Exhibit 1 pages 1 and 23, Exhibit 12 and Exhibit 63).

e. The allotment at the time of Kathleen's death was: Kathleen 186 shares, Owen Chambers 2 and Andre Johnson 2. (See Exhibit 44 Annual Return for 2001 and evidence of Inger Hainsley Bennett)

f. The premises at 2 Verbena Avenue were acquired on the 18th May 1995 with the resources of the 1st Defendant. Kathleen Chambers was the sole owner of the premises (Exhibit 1 p. 3]. The acquisition was done with the knowledge, consent and acquiescence of the 2nd and 3rd Defendants. In 1996, she rented those premises to the 1st Defendant (Exhibit 1 page 7). This also was done with the knowledge, consent and acquiescence of the 2nd and 3rd Defendants. Kathleen Chambers did not take a salary and it was at all material times understood and agreed that this was to be one method of remuneration.

g. Prior to Kathleen Chambers' death the 1st Defendant spent $4,922,123 on the premises at 22 Verbena Avenue (witness Statement Para 7 Andrew Andrews). Note however that this was in keeping with the Lessees obligation under the lease [Exhibit 1 page 7].

h. The Claimant married Kathleen in 1999. The Claimant was never brought into the business nor did he participate in the affairs of the company.

i. Prior to Kathleen Chamber's death the Claimant worked for the company doing odd jobs such as deliveries with the truck and

cleaning iron. He was not formally on its pay roll but received a stipend (see cross-examination and entries in the Analysis Book Exhibit 8 Pages 1,2,3,9,12,14,15,27,50,53,63 and 64)).

j. By letters dated 2nd August 1998 and 10 May 2002 (Exhibits 20 & 21) Kathleen Chambers represented to the Ministry of Welfare & Sports that the 2nd and 3rd Defendants were directors of the Company but that neither was paid a salary. I accept those statements as truthful.

k. The allotment of shares by Kathleen Chambers in Exhibit 1 page 22 was done with the knowledge and consent of the 2nd and 3rd Defendants who were directors and shareholders at the time. They, in any event, clearly acquiesced with it see evidence quoted at Para 11 of this Judgment.

l. Kathleen died intestate on the 8th December 2007. She had no children. The Claimant was granted Letters of Administration of her real and personnel estate on the 10th March 2008 (Exhibit 5).

m. In or about December 2007 the 2nd and 3rd Defendants held a Director's meeting and appointed themselves signatories to the Company's bank account. They relied on a letter written by the deceased in 2002 (Exhibit 2 page 6.)The 2nd Defendant was appointed Managing Director. [2nd Defendant's Witness Statement Para 19 and 20, and Exhibit 1 page 18].

n. By letters 20th December 2007 and 7th January 2008 written on his behalf by his attorney at law, the Claimant made demand for rent from the 1st Defendant's tenant (V. Sewell) and for a cash payment from the 1st Defendant's Customer (Jamaica Insulation &Duct Work (1977) Ltd. (See Exhibits 34 & 35).

o. The Claimant did not actively demonstrate much interest in the affairs of the company and I accept as stated in Paragraph 18 of the Witness Statement of the 2nd Defendant, that his actions and words conveyed that impression to the 2nd and 3rd Defendants.

p. On or about the 21st April of 2008 the 2nd and 3rd Defendants increased the 1st Defendants share capital. The 2nd Defendant

thereby purported to obtain 70,000 and the 3rd Defendant 30,000 shares (Exhibit 37 and the 2nd Defendant's witness statement Para 31). Their purpose and intent was to take control of the 1st Defendant.

q. Neither a notice of the meeting to make that decision nor an offer of additional shares were delivered to the Claimant.

r. The Claimant was unaware of the increase in share capital which occurred after Kathleen's death. The Claimant consulted an attorney two days after his wife's death. It is unlikely, that he would have received a notice of intent to increase allotment or an offer of shares and not brought either to the attention of his attorneys.

s. The Claimant was, pursuant to an Order of the Court made on 15th July 2008, appointed a Director of the Company in his capacity as the legal personal representative of the estate Kathleen Chambers. He was not added to the company's bank account as a signatory until October 2010 (Exhibit 1 page 33).

t. The Claimant received monthly cheques from the 1st Defendant in the period 2008 to 2015 (Claimant's evidence in Cross examination and Exhibit 14 Bundle of 37 cheques).

u. The Claimant has also been paid cheques by the 1st Defendant for rental of Verbena Close (Exhibit 15) This continued for the period 2009 – 2014.

v. In August 2008 a disagreement arose between the Claimant and the 2nd Defendant because the Claimant's son Michael was not paid. This lead to allegations of a threat and the matter was reported to the police.

w. In the period August 2008 to present the Claimant has been invited to several Director's meetings but declined to attend because the other Directors refused to allow his attorney to attend. This was admitted by the Claimant in Cross Examination.

x. Flowers Unlimited whose proprietor was a Mr. Sewell was subtenant of the 1st Defendant. The 1st Defendant was therefore entitled to collect rent from him of $50,000 monthly (See Exhibit 18 receipt and Claimants answers in cross-examination).

y. The Claimant collected rent from Mr Sewell from 2008 to 2010 each month. His explanation that he rented Mr. Sewell additional space upstairs is of no moment since the 1st Defendant was the tenant in possession and Flowers Unlimited was already its sub-tenant.

z. The 2nd Defendant was professionally qualified to erect scaffolding. The 1st Defendant, while the 2nd Defendant was away used expert personnel from other companies to erect scaffolding.

aa. The 2nd and 3rd Defendants subsequent to Kathleen Chambers' death entered into contracts with the 1st Defendant outlining their remuneration. This was approved by the Board of Directors (Exhibit 38).

bb. In 2010 the 2nd Defendant formed a company known as CDF Scaffolding 2010 Ltd in order to employ his services as a scaffolder. This was approved by the 1st Defendant's Board of Directors(Exhibits 42 &51).

cc. After the year 2010 contracts with the 1st Defendant's customers were performed by CDF Scaffolding 2010 Ltd. which rented scaffolding from the 1st Defendant. This arrangement was approved by the Board of Directors of the 1st Defendant (Exhibits 45,50 & 51).

dd. The Claimant retained in his possession the keys to a truck owned by the 1st Defendant. He did this to prevent the sale of the truck. (See his evidence in cross-examination).

ee. The accounting methods and systems of the 1st Defendant contained various irregularities for which there was no adequate or no explanation. In relation to the Company's account I find that:

i. There was a failure to depreciate the leasehold as a part of Fixed assets (Report Joshua Haye Exhibit 28, and Report Davin Nairne Exhibit 59)

ii. Earned interest was not recorded in the financial statements on sums recorded as being held on Investment (Report. J. Haye Exhibit 28 Pages 4-5, and report of Davin Nairne Exhibit 59 page 6).

iii. The reduction in the provision for Director's loan from $8,714,783.00 as at December 2008 to $1,614,783.00 as at 31 January 2009 [p. 5 J. Haye report Exhibit 28] was consequent on disbursements to the 2nd and 3rd Defendants(page 7 Davin Nairne Report Exhibit 59).

iv. In 2000 to 2007 directors loan was $8.7 million. This was owed to the Managing Director at the time, Kathleen Chambers (Exhibit 28).

v. The amount held on Investment as at the 31st December 2008 was $13,566,214.00. however as at the 31st January 2009 this had been reduced to $1,875,545.00. The Defendants say, and I accept, that this money was used to pay off the Directors loan [See report of Nairne & Co. Exhibit 59 page 7]. The repayment was not however made to the estate Kathleen Chambers but to the 2nd and 3rd Defendants.

vi. Cheque #5012687 dated 7 January 2009 for $2 million was paid by the 1st Defendant to the National Commercial Bank and lodged to the account of the 2nd Defendant. He then lodged $2 million in the 1st Defendant's investment account. (See Report of Davin Nairne Exhibit 59 page 8)

vii. For the period ended 30th April 2012 Directors loan balance stood at $10,343,450 and the notes explain it as follows:

Salary	$8,664,000
Accommodation	$6,108.000
Motor Vehicle Allowance	$3,900,000
Less Payments of	$8,308,550
Balance	$10,343,450

This followed on the contractual arrangements entered into with the 1st Defendant by the 2nd and 3rd Defendant in February 2008 (p 11 Davin Nairne Report Exhibit 59)

viii. Receivables increased dramatically subsequent to Kathleen Chamber's death. For period ending December 2006 it stood at 21% of Sales but by the end of December 2008 it was 63% of gross sales. In one month in December 2009 Receivables increased by $11,859,259.00. Save for the suggestion that this was due to over-invoicing in previous years there was no adequate explanation given.(Exhibit 59 page 18).

ix. The company CDF Scaffolding 2010 appears on the other hand to have retained fairly high bank balances since its formation (See Exhibit 28 Report of J Haye pages 11 to 13 and Exhibit 59 Report of Davin Nairne pages 22 and 25).

x. The 2nd and 3rd Defendants were no longer concerned, after the year 2010, to advance the interests of the 1st Defendant. The disparity in earnings of the one company in relation to the other was a reflection of that. The 2nd Defendant utilised CDF Scaffolding 2010 in a manner which conflicted with the best interest of CDF Scaffolding Ltd. (the 1st Defendant).

xi. There were unusually large payments to Shawna Miller and Owen Chambers however, these reflected remuneration for subcontractors. The Defendants would draw one cheque and encash it and make cash payments [Exhibit 59 pages 33, 38 and 40 and

2nd Defendants evidence in Cross-examination].

xii. As at 31 August 2010 the balance on payables and accruals had reduced by approximately $40million and a long term loan in the same amount established. The explanation by the Defendants is that this was a "book entry", [See Exhibit 59 Report of Nairne & Co. p. 19] . The financials have no note as to how, when, where or to whom it was owed.

[15] These being my findings of facts and my comments on the evidence the resolution of the issues joined will follow. In this regard it is clear that the Claimant has overreached himself in this claim. He is here in the shoe of a deceased shareholder. However much of what he complains about relates to alleged fraud or breach of fiduciary duty to the company i.e. the 1st Defendant. It is unnecessary to remind counsel of the legal distinction between a company and its shareholders. A distinction that remains relevant even in modern times and, in the context of this case, reinforced by the distinction between Section 212 and Section 213A of the Companies Act. In this regard I need only rely on the words of Sykes J ***in Fulton v Chas E Ramson Ltd [2012] JMSC 14*** unreported judgment delivered on the 27th May 2016:

> "10. ***From this passage, it is the case that the derivative action is designed for wrongs done to the company and not to the individual shareholder. The oppression remedy is directed at wrongs done to the individual. It is a personal claim. However the passage recognises that in some instances the remedies overlap because the same conduct may give rise to both actions."***

[16] The 1st Defendant was not independently represented at trial. Arrangements for this could have been made at the case management or pre-trial review stages. I recall raising it when the matter first came on for trial on the 7th January 2015. This would have necessitated an extended delay and both Counsel it seems

were at the time more interested in having the trial commence. This is understandable as pending litigation of this nature inevitably affects the ability of the company to do business normally, and the matter was long standing. On that date further disclosure orders were made and the trial adjourned to the 12th May 2015.

[17] Properly before me is a claim by a shareholder that he has not been allowed to exercise his rights as a majority shareholder. I hold that the Claimant as legal personal representative of the deceased shareholder has *locus standi* in that regard. It is manifest, on the facts as I have found them that the minority shareholders sought to wrest control of the Company from the estate of the deceased majority shareholder. Their motives may have been to ensure that the 1st Defendant Company remained in the family. They may have been well intentioned. However it was wrong for the 2nd and 3rd Defendants to attempt to vote themselves majority shares at a time when the majority shareholder was deceased and without giving notice to the duly appointed representative of her estate. This breached the pre-emption rights of the majority shareholder as well as the shareholder's right to participate in the decision to have a share increase, as per the Articles and Memorandum of Association of the 1st Defendant(Exhibit 1 pages 39&44). I am cognisant of the observation made by my brother Sykes J in **Joni Kamille Torres et al v Ervin Moo Young et al** (**Consolidated**)[**2016**] **JMSC CIV 17**(**unreported Judgment 5th February 2016**),at paragraph 24:

> *"The company cannot make an offer to a non-existent person. Until Joni was appointed there was no person to whom article 47 could apply and thus there was no breach of the article in this regard. If no one steps forward to take up the administration of the estate the company cannot sit idly by. It is a going concern and decisions have to be made."*

That point of view, and I say this respectfully, pays insufficient regard to the shareholder's rights of property. The chose in action which the right to pre-emption represents, is no different to other contractual stipulations. In the

absence of a specific provision to the contrary, death does not automatically put an end to contractual obligations .An estate continues to bear the burdens and enjoy the benefits of contracts entered into by the deceased. If there is no legal personal representative it may be incumbent on those with obligations to discharge to have the court appoint an administrator for the purpose. In the matter before me the facts differ from those considered by Justice Sykes, because as at the date when the resolution was passed, a legal personal representative had already been appointed for the deceased shareholder [see paragraph 14 (l) and (p) above] .

[18] It is the Defendants' case, that the Claimant never took steps to properly appoint himself a director or shareholder of the 1st Defendant and that he therefore has no *locus standi* to bring a S. 213A Claim. Paradoxically the Defendants also allege that notice to increase shares and an offer of such increased shareholding were served on the Claimant. It would be odd indeed if the Claimant had standing for the purpose of being served but none to bring this action.

[19] I hold that the Claimant, as at the 10th March 2008 when he was appointed the administrator of the estate Kathleen Chambers, had the authority to act for and on behalf of the deceased majority shareholder see Section 23(1)(b) of the Companies Act, per Sykes J at para 19 of his judgment in **Torres v Moo Young** (cited above). The 1st, 2nd and 3rd Defendants never served the Claimant with the Notice of Intention to vote additional shares, nor did they offer him the estate's proportional share of the increase. The Claimant consulted an attorney shortly after his wife's death and as early as December of 2007 that attorney had written letters pertaining to the estate and the company on his behalf. It would be rather strange if he received the notice and the offer in early 2008 and had not brought it to his attorney's attention. I am satisfied on a balance of probabilities that the Claimant was not served.

[20] The Claimant obtained an order of the Court on the 15th July 2008 by which the 2nd and 3rd Defendants were to, and did, appoint him a director of the 1st Defendant. By order of the 16 September 2010 he was to be added as a signatory to the 1st Defendants bank accounts. This notwithstanding, the Claimant failed to attend board meetings when invited and also it appears failed to take any real part in the operation of the Company. The reason being that his attorney was not also invited to the meetings.

[21] This failure to exercise his right to attend meetings complicates somewhat my decision. The Defendants can credibly maintain that as directors, regardless of whether they were majority shareholders, their decisions remain valid and that there is no evidence, such as counter argument at meetings for example, to indicate the Claimant would have taken any other view on the matters discussed. The decision, for example, to enter into signed contracts of employment with the 2nd and 3rd Defendants was one the directors could lawfully make. Secondly, the decision to permit the formation of CDF Scaffolding 2010 Ltd may also be within their power. If, as seems to be the case, the 2nd Defendant no longer wished to offer his services as a scaffolder directly to the 1st Defendant, then it is arguably a prudent Board of Directors which would seek to retain access to his skill set by entry into a contract with his new company. It seems also that, inasmuch as the 2nd Defendant would be paid for those services anyway, it may have been a sound business decision. The point I make is that these are decisions a reasonable Board of Directors could make. The alleged or any loss to the Claimant is not apparent. The Claimant placed himself at a disadvantage by not attending the meetings of the board at the time and articulating his objections. It is true, on the other hand, that the formation of CDF Scaffolding (2010) Ltd creates an apparent conflict of interest for the 2nd Defendant who was Managing Director of both companies . These may therefore be complaints better made by the 1st Defendant either directly or by relator action (section 212 of the Companies Act).

[22] The Claim filed on the 18th June 2008 is as follows:

> *"The Claimant Ivan Smith Businessman of lot 160 Andrea Crescent Edgewater Bridgeport P.O. in the parish of St. Catherine, beneficial owner of the majority shares in the 1st Defendant Company, claims against the Defendants for an injunction restraining the 2nd and 3rd Defendants from continuing their unlawful and ultra vires acts and breaches of the Articles of Association of the 1st Defendant's Company... and for Declaratory Judgments touching and concerning the 2nd and 3rd Defendants status as shareholders and Directors of the 1st Defendant's Company and for Damages for conversion and breaches as well as for a Declaration concerning the Claimant's equitable interest in shares of the 1st Defendant's Company and against the 1st Defendant for rent, for use and occupation of Verbena Avenue Kingston 11 by the 1st Defendant company.*
>
> *That as a consequence of breaches and unlawful actions and ultra vires conduct of the 2nd and 3rd Defendants the Claimant has suffered loss and damage and have (sic) incurred expenses and unless the 2nd and 3rd Defendants are restrained, the financial resources of the company are at risk of being depleted and/or completely flitted away."*

In his Further Amended Particulars of Claim filed on the 31st March 2015 the Claimant makes no express reference to Section 213A of the Companies Act. However his Counsel, in her written and oral submissions, certainly did and one might say that section 213A was the fulcrum of her argument. Counsel for the Defence urged the Court to say that the action was not brought pursuant to Section 213A.

[23] Having perused the respective statements of case, I am satisfied that the issues were adequately raised so as to alert the Defence that the case was one for relief pursuant to Section 213A. Paragraph 16 of the Further Amended Particulars of Claim filed on the 31 March 2015 states:

> "*That the 2nd and 3rd Defendant's conduct is oppressive ultra vires and is an improper exercise of power and authority. Such conduct is harsh, wrongful, unfair and prejudicial to the interest of the Claimant and to his interest in the shares to which he is entitled and is tainted with fraud and illegality. That the 2nd and 3rd Defendants conduct is also in breach of the Articles of Association of the 1st Defendant company in that the 2nd and 3rd Defendants are guilty of the following breaches.*
>
> a) *Unilaterally and ultra vires the articles in appointing themselves shareholders.*
>
> b) *Unilaterally and ultra vires the articles in appointing themselves Directors of the Company.*
>
> c) *Unilaterally and ultra vires the articles in appointing the 2nd Defendant Managing Director.*
>
> d) *Operating the Company to the exclusion of the lawful Administrator of the estate of Kathleen Elfreda Chambers Smith deceased, who holds the beneficial interest in the majority of the shares in the said company.*
>
> e) *Deliberately and intentionally allotting the 2nd and 3rd Defendants shares without regard to the rights of the Claimant in an effort to continue the wrongful control [of] the 1st Defendant Company.*

f) Converting the Company's profits to their own use and benefit.

g) Using the Company's Seal and letterhead and approval.

h) Converting and removing the Company's money from the company's bank accounts from funds derived from customers to their own personal use and profit.

i) Unlawfully and without authority removing and/or causing the company's Books of Accounts to be removed from the company's offices.

j) Unlawfully and without authority removing and/or causing to be removed customers financial records, accounts, names and addresses.

k) The 2nd and 3rd Defendants threaten unless restrained along with their servants and/or agents to deplete or otherwise flit away the financial resources of the company or otherwise disguise the said resources rendering them untraceable."

The remedies claimed, which includes rectification of the share registry are indicative of a Section 213A application.

[24] I hold that the Claimant has *locus standi* to bring a Section 213A application. He is a complainant as defined in Section 212(3) of the Act. The complainant is the legal personal representative of the deceased majority shareholder and therefore is entitled to exercise the legal rights and authority vested in the owner of the shares. This includes bringing a Section 213A Claim. The Claim is sufficiently worded and the statement of case sufficiently particularised to give rise to a Section 213A Claim.

[25] Section 213A allows the court to grant certain relief if satisfied that there has been oppression or unfair prejudice to any "shareholder ,debenture holder, creditor, director or officer of the company" as a result of:

> a. *Any act or omission of the company or any of its affiliates ,*
> b. *The manner in which the business or affairs of the company or any of its affiliates are or have been carried on or conducted*
> c. *The manner in which the power of the directors of the company or any of its affiliates are, or have been exercised ,*
>
> The oppression or unfair prejudice, be it noted, must be toward the complainant. This section does not enable a claim for losses or breach of duty or damage to the company. The remedies in Section 213A(3) are granted with a view to putting right the harm suffered by the complainant as a result of the oppression or unfair prejudice. Some claims by the Claimant related to alleged breaches of fiduciary duty and/or fraud on the 1st Defendant.

[26] There is no doubt in my mind that, when the 2nd and 3rd Defendants without giving notice to the Claimant decided to vote themselves additional shares in order to become majority shareholders, they acted in a manner that was oppressive and prejudicial to the Claimant. Rectification of the share register pursuant to Section 213A (3) (k) is the appropriate relief. Is the Claimant to be otherwise compensated pursuant to Section 213A(3)(j). If so how is that to be assessed. The Claimant has been deprived of his right to act as the majority shareholder. This is a private company. It has never paid dividends and so no question of loss of dividends otherwise payable arises. The Claimant has lost the opportunity of appointing directors of his choosing. However, when regard is had to the matters mentioned in paragraph 21 above, can it be said that damage

consequent on his inability to appoint directors has been proved. The Claimant for example complains about the decision to approve the 2nd Defendant's dealings with CDF Scaffolding 2010 Ltd. and their erstwhile clients. The evidence is that the 2nd Defendant is the only person at the 1st Defendant company who is a trained scaffolder. The 2nd Defendant cannot compel the 1st Defendant to give his skill freely nor dictate the fees he should charge. There is no evidence that the fees charged were unreasonable having regard to any industry norms and standards. The 1st Defendant cannot lawfully prevent the 2nd Defendant forming another company for the purpose of providing that service. There is no evidence of a change in the rate of remuneration in consequence of the formation of the new company. Given these realities I see no basis for an award of general damages.

[27] There is however, the decision by the 2nd and 3rd Defendants to "repay" themselves directors loans of $8,714,783.00 from the 1st Defendants investment account. Those were loans, as I have found, by the deceased Managing Director to the 1st Defendant. Repayment to the 2nd and 3rd Defendants was oppressive and prejudicial to the Claimant. The Claimant is to be compensated accordingly pursuant to Section 213A(3)(j).

[28] The Defendants counterclaimed against the estate Kathleen Chambers Smith, see Further Amended Defence and Counterclaim filed on the 12th January 2015. They allege that while alive she had unlawfully voted to increase her majority shareholding. This resulted in a shift in the balance of shareholding from one of 10 to 2 to one of 186 to 4. They also allege that she unlawfully used the company's assets to purchase the Verbena Drive premises in her own name and then leased the premises to the company. As indicated above I find on a balance of probabilities that the increase in shares by her was lawful. In any event, the 1st, 2nd and 3rd Defendants clearly acquiesced in and/or agreed with the increase in share capital and in the purchase and letting of the premises.

Shareholders can approve transactions which may on the face of it breach director's fiduciary duties, provided there has been full disclosure ***Regal (Hastings) Ltd v Gulliver [1967]2 AC 134 @150*** **.**The 1st Defendant has not counterclaimed for the rental wrongfully collected by the Claimant from its subtenant.

[29] The Defendants' counterclaim is therefore dismissed.

[30] In consequence of my factual findings and my decision as to the Claimant's *locus standi* as administrator of the estate Kathleen Chambers I grant the following relief:

a. It is declared that the Claimant is entitled to the legal and beneficial interest in all the shares of Kathleen Chambers Smith (deceased) in CDF Scaffolding and Building Equipment Ltd.

b. It is further declared that as at the date of her death the said Kathleen Chambers Smith deceased owned 196 of the 200 issued shares in the said company.

c. The attempt by the 2nd and 3rd Defendants to increase the shareholding of the 1st Defendant after the death of the said Kathleen Chambers Smith and to vote themselves additional shares was unlawful, null and void and is hereby set aside and the register of shares is to be adjusted accordingly.

d. It is declared that as at the date of her death the estate Kathleen Chambers was entitled to $8,714,783.00 in respect of Directors loan. The disbursement of that amount by the

2nd and 3rd Defendants to themselves from the account of the 1st Defendant was oppressive and prejudicial.

e. Judgment for the Claimant against the 2nd and 3rd Defendants in the amount of $8,714,783.00.

f. Interest will run at a rate of 6% per annum from the 1st January 2009 to the date of payment.

g. 50% Costs to the Claimant against the 2nd and 3rd Defendants to be taxed or agreed.

h. There is Liberty to Apply

[31] This case concerned a small family owned company and the insertion into the equation of the deceased's ex-husband was inevitably going to change the dynamics. I accept as truthful the 2nd Defendant's answer when asked in cross-examination with reference to exhibit 55 (letter dated 10th April 2008 Sandra Johnson & Co to 2nd Defendant):

> "Q: You indicated not ready for a meeting why you refused to have a meeting.
>
> A: I refuse to have a meeting because having seen the Grant of Letters of Administration, the invoice and Ms. Johnson constantly telling me that I can be arrested for intermeddling and I should not go to the bank and has got bank through attorney Rose Davis at RBTT bank Spanish Town, when they bounce the cheque and took it back nothing on record at the bank. I was told by Rose Davis that Ms. Johnson threaten them with legal action. I went personally to Church Street to Ms. Johnson who replied to me,
>
> > "I am a barrister at law cheques is nothing. I can stop funerals" ..

> and I walked out. I challenged the bank and they open back the account. That is before the ex parte injunction.
> I wanted a letter from Mr. Smith to First Defendant Company stating his interest and what he intended to do."

In the conduct of this case, much time has been spent addressing evidence which was irrelevant having regard to the *locus standi* of the Claimant. The 1st, 2nd and 3rd Defendants prevailed on certain issues as the 1st Defendant was not made a Claimant nor did it file a cross claim. This in large measure explains my Order for costs as outlined above. It is my fervent hope that the parties are able to now sit down and peaceably chart a course for the way forward. I trust that my factual findings will assist in that regard.

David Batts
Puisne Judge