IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

CIVIL DIVISION

CLAIM NO. 2009 HCV 01264

IN THE MATTER OF Lagoon Enterprise Limited

AND

IN THE MATTER OF Section 130 (2) of the Companies Act, 2004

BETWEEN	CECILE THAXTER	CLAIMANT
AND	PAULINE TROWERS	1ST DEFENDANT
AND	NEWTON TROWERS	2nd DEFENDANT

Mr. W. John Vassell, Q.C; and Ms. Terri-Ann Lawson instructed by Miss Roxanne Miller of DunnCox for the Claimant.

Mr. Thomas Ramsay, instructed by Ramsay Stimpson for the Defendants.

Companies Act, 2004 – Section 130 (2) – Removal of Directors- Application for Court to order meeting of a company- Interpretation of phrase "If for any reason it is impracticable to call a meeting of a company in any manner in which meetings of that company may be called...etc."

Heard: July 15 & 17, 2009

F. Williams, J (ag.)

Background

The parties to this action are all shareholders in and directors of a limited liability company known as "Lagoon Enterprise Limited" ("the company").

The claimant is the principal shareholder of the company. She holds 37,500 shares or 75% of the 50,000 issued shares, the nominal capital of the company. The defendants (husband and wife), each own 12,500 or 12.5% of

the shares in and capital of the company, they owning together 25% of the said shares.

The company was incorporated on July 6, 2000 under the Companies Act, 1965 as a private company limited by shares. Its registered office is situated at 13 Williams Street, Port Antonio, Portland.

The parties are the only shareholders of the said company; and, in addition to the defendants being husband and wife, the claimant and 1st defendant are sisters.

There has been a complete breakdown in the relationship between the claimant (who resides abroad), on the one hand, and the defendants (who reside locally and have been responsible for the day-to-day running of the business) on the other.

It appears that the main reason for this is that amounts totaling some eleven million dollars (J$11,000,000) have been removed from the accounts of the business by the 1st defendant (at least), without the claimant's knowledge or permission. In fact, copies of bank passbooks for the accounts at the Port Antonio branch of the Bank of Nova Scotia that were sent to the claimant did not disclose the removal of this sum. The claimant only learnt of it when she gained direct access to the account information through the bank's internet banking facility.

I might add that the 1st defendant, an employee at the time of the said bank and branch, was responsible for forwarding copies of the passbooks to the claimant.

When the claimant discovered the unauthorized removal of the funds, she, not unnaturally, made enquiries of the 1st defendant, who gave her a number of explanations. Among them was the report that a teller had used the company's accounts as collateral for a US$160,000 cheque that the 1st defendant had authorized. The claimant's investigations, however, showed this report to be false. The investigations further revealed (on the claimant's case) that for more than five (5) years, there had been numerous transactions that were never recorded in the passbooks that were in the 1st defendant's custody.

The 1st defendant's position on the withdrawal of the $11,000,000 may best be seen in an e-mail message sent by her to the claimant and dated December 7, 2008. It is exhibit "CT 6" to the Affidavit of Cecile Thaxter in Reply to Affidavit of Newton & Pauline Trowers. In that e-mail the 1st defendant says, inter alia: "I had given up a right I had to admitting to the withdrawals and seeking a resolution at that time." (paragraph 1). "I have said over and over again that I was sorry and asked for your forgiveness and that we could try to work it out." (paragraph 2). "There has been no fraud or misappropriation because I acknowledge the withdrawals and tried to make arrangements to repay which you did not accept". (paragraph 4).

It appears from exhibit "CT 8", however, that on November 11, 2008, the defendants, without the knowledge of the claimant, purported to hold a directors' meeting at which several resolutions are purported to have been passed. The most important one, for the purposes of this matter, is as follows:

> "That the cash amounts withdrawn from company by Pauline Trowers- Director/Secretary and Newton Trowers-Managing Director, as at May 2008, Amounting to Ten Million Two Hundred Fifty Thousand Six Hundred & Twenty-Seven Dollars ($10,250,627.00), be converted into Director's loan. The full amount is repayable over a period of seven (7) years, commencing November 30, 2008, at an interest rate of 2 per cent per annum.
> It was noted that the matter of the withdrawals was previously discussed with Shareholder/Director Cecile Thaxter".

It further appears from exhibit "CT 9" (letter dated November 13, 2008 from the defendants to the manager of the Port Antonio branch of the Bank of Nova Scotia), that the defendants purported to hold another directors' meeting on November 12, 2008. That letter gave to the bank manager to which it was addressed, information concerning a resolution passed at the said meeting and a consequential direction:

> "... with immediate effect the signing authority of the Company be changed to any two (2) Directors".

> "All cheques or other negotiable instruments presented after the 12th instant must be countersigned by two directors".
>
> "In the circumstance, no decision can be taken regarding the affairs of the Company, unless passed by an appropriate resolution".

The person to whom this letter was directed was the same person to whom the claimant had written by letter dated November 3, 2008, (CT 5) requesting a formal investigation into what she regarded as the irregularities surrounding the withdrawals from the company's accounts of which she had no knowledge and for which she gave no authorization.

In another e-mail message sent to the claimant by the 1st defendant and dated January 2, 2009 (CT 14), the 1st defendants states, inter alia: "The business has not been struggling, we have every intention to pay back the money. After speaking with lawyers and accountants, I realize that I had no need to lie to any one of you. Most of what I told you were all stories because I didn't want it to look so bad. I am sorry about it like I have said over and over again..." (paragraph 3). "It is now a loan on the books, and we will pay it off one way or another". (paragraph 6).

There is other correspondence in which the claimant speaks to the defendants of "...giving you both shares". (paragraph 2 of CT 6 – e-mail dated December 4, 2008). Correspondingly, there is also an e-mail message from the 1st defendant to the claimant in which she speaks of the claimant: "Yes, you gave us shares. But wasn't this an idea that we helped to bring into action". (paragraph 11, exhibit CT 6).

As will be readily appreciated, this and other matters led to a total breakdown of the trust and confidence that existed between the claimant and the defendants. The claimant, therefore, wished to have them removed as directors of the company. Here, however, lay the rub for the claimant.

She filed with the Companies Office a Form 23 – purporting to remove the defendants as directors. This she contends she did pursuant to discussions and an agreement between herself and the defendants.

Additionally, the claimant made two attempts to have a meeting of the company called, at which she intended to have the defendants replaced as directors and another director substituted. First, she attempted to requisition a shareholders' meeting in December, 2008. This she did by depositing (through one Mr. Orville Cocking) a written requisition dated December 18, 2008 at the company's registered office. On her evidence, her attorneys-at-law also sent copies of the requisition and other supporting documents to the defendants by e-mail and registered post. There is no contention that they were not received.

The defendants failed to hold such a meeting in accordance with this requisition.

Second, the claimant executed several notices, seeking to call an extraordinary general meeting of the company to be held on February 13, 2009 at 10:00 a.m. These were sent to the defendants via e-mail and registered post, and other supporting documents by courier. There is no contention that they were not received.

The defendants failed to attend this meeting in accordance with the notice(s).

The gravamen of the claimant's complaint and the essence of her application may be seen at paragraphs 18 and 19 of her affidavit sworn to on the 10th day of March, 2009. They are set out in full:

> "19. That in light of the First and Second Defendants' failure to convene the meeting which I requisitioned in December 2008 and their further failure to attend the extraordinary general meeting called by me in February 2009, I believe that they will continue to deliberately absent themselves from any general meeting convened and thereby continue to frustrate the Company's right to pass any ordinary or special resolution including one that removes either or both of them as directors.
>
> 19. In the circumstances it is essential in order to enable the Company to properly function that a meeting be held under a direction that one member of the Company present in person or by proxy shall be deemed to

constitute a meeting".

The Claim

By way of a claim form dated the 10th March, 2009, the claimant seeks the following orders:-

> "1. That an Extraordinary General Meeting of Lagoon Enterprise Limited ("the company") may be convened pursuant to section 130 of the Companies Act, 2004 for the purpose of considering and if thought fit passing the following Ordinary Resolutions:
> a. That Pauline Trowers be removed from office as a director of the Company.
> b. That Newton Trowers be removed from office as a director of the Company.
> c. That Pauline Trowers be removed from the office of the secretary of the Company.
>
> 2. That the Court may give directions as to the manner in which the said Meeting is to be called, held and conducted and all such ancillary and consequential directions as it may think expedient including a direction that one member of the Company present in person or by proxy shall be deemed to constitute a meeting.
>
> 3. Costs"

The Relevant Provisions

The main obstacle to the claimant's removing the defendants as directors of the company is to be found in Article 9 of the company's articles of association, vis-à-vis the fact that there are three shareholders and directors of the company.

Article 9 reads as follows:

> "No business shall be transacted at any General Meeting unless a quorum of members is present at the time when the meeting proceeds to business; save as herein otherwise provided

> two members present in person or by proxy shall be a quorum".

The problem that this poses is that the claimant, though being the majority in terms of the number of and percentage shares that she holds (75%); by being one of three directors and shareholders, finds herself in the minority when it comes to the business of the company and must normally have another shareholder present for there to be a quorum for a general meeting.

Additionally, and as it is the foundation of the claimant's application, section 130 (2) of the Companies Act also is set out in full:-

> "(2) If for any reason it is impracticable to call a meeting of a company in any manner in which meetings of that company may be called, or to conduct the meeting of the company in a manner prescribed in the Company's articles the Court may, either of its own motion or on the application of any director of the company or of any member of the company who would be entitled to vote at the meeting, order a meeting of the company to be called, held and conducted in such manner as the Court thinks fit, and where any such order is made may give such ancillary or consequential directions as it thinks expedient, and any meeting called, held or conducted in accordance with any such order shall for all purposes be deemed to be a meeting of the company duly called, held and conducted".

The Cases

This provision (or, more accurately, its equivalent in earlier Companies Acts), has received judicial consideration in several cases, two of which were cited to the court by learned Queen's Counsel for the claimant. They are: (i) **In re El Sombrero Ltd**. [1958] 1 Ch. 900. This case dealt with s. 135 (1) of the English Companies Act, 1948. That section is in pari materia with the local s. 130 (2). (ii) **In re Opera Photographic Ltd**. [1989] 1 W.L.R. 634. This case dealt with s. 371 (1) and (2) of the English Companies Act, 1985. Again, the wording of these two subsections is in all material particulars the same as that of our local s. 130 (2).

In the **El Sombrero** case, the applicant was the holder of 900 of 1,000 shares of £1 each. The two respondents (the only directors of the company), each held 50 shares. They had failed ever to hold a general meeting of the company or to file annual returns. As in this case, the quorum for general meetings was two. The applicant asked the court to order the convening of a meeting under s. 135 (1) of the Act, and the respondents opposed the application. In giving the judgment of the court, Wynn-Parry, J held that: (i) "impracticable" meant whether in the particular circumstances of the case, the desired meeting could, as a practical matter, be conducted; (ii) that the court was free to intervene pursuant to s. 135, even where the application was being opposed; and (iii) the case before the court was eminently one in which the court should intervene, otherwise the applicant would be deprived of his statutory right to remove the respondents as directors pursuant to s. 184 (1).

Wynn-Parry, J further said at p. 904:

> "It is to be observed that the section opens with the words "If for any reason", and therefore it follows that the section is intended to have, and, indeed, has by reason of its language, a necessarily wide scope. The next words are: "...it is impracticable to call a meeting of a company..." The question then arises, what is the scope of the word "impracticable"? It is conceded that the word "impracticable' is not synonymous with the word "impossible"; and it appears to me that the question necessarily raised by the introduction of that word "impracticable" is merely this: examine the circumstances of the particular case and answer the question whether, as a practical matter, the desired meeting of the company can be conducted, there being no doubt, of course, that it can be convened and held."
> "...I can find no good reason in the arguments which have been addressed to me... for qualifying in any way the force of that word "impracticable"..."

In that case, the court also ordered that one member of the company present in person or by proxy should be deemed to constitute a quorum and that the meeting should be held at the offices of the applicant's solicitors.

In the **In re Opera Photographic** case, of the 100 issued shares of the company, 51 had been issued to the applicant and 49 to the respondent, the only other director. The quorum for a shareholders' or directors' meeting was two. The parties fell out. The applicant requisitioned a meeting at which he wished to propose a resolution for the removal of the respondent as director, but the respondent failed to attend. The respondent also failed to attend a subsequent meeting convened by the applicant, with the result that there was no quorum and so no business could be conducted. The applicant applied to the court for an order that a meeting be held and that one member attending be held to constitute a quorum. It was held (granting the application) that: (i) the applicant, being the majority shareholder of the company, had a statutory right to remove the other director; (ii) if no order was made, the deadlock position would remain; and (iii) the provision relating to a quorum could not be regarded as giving the respondent a power of veto.

Submissions

Relying on these cases, Mr. Vassell, Q.C., for the claimant, in summary submitted that: in this case a minority was frustrating the power of a majority to remove appointees to the board of directors. He further submitted that the filing of a Form 23, purporting to remove the defendants as directors could not be relied on by the defendants as a defence: the notice was filed based on the claimant's contention that there was an agreement to do so (which is not challenged); and the defendants are saying that they are still directors. The defence which alleges a breach of s. 130 (4) of the Act is of doubtful sincerity and merit. The claimant was being frustrated by the defendants' failure to call one meeting and attend another. This was a strong case for the court to say it is impracticable for a meeting to be called in a manner specified by the articles – with a quorum of two. If the defendants' proposed removal is deemed to be unfair, that and other matters can be discussed at the meeting which the claimant seeks. There really is no defence to the application.

For the defendants, Mr. Ramsay, submitted in summary that: the claimant had not come with clean hands to seek equity. She proceeded to file a false

document (the Form 23) without any letter of resignation or consent of the defendants. By asking the court to remove the defendants as directors, the claimant was asking the court to ratify an illegal act. She must be prevented from attempting to use the court to rectify what is wrong. She had done an act that is not in accordance with the Companies Act; and (referring to s. 183 (1) and (5) and s. 213A (2) (c)), the defendants are entitled to seek redress. The defendants did not attend the meeting, as, by the claimant's actions, they were not directors. The whole process of the application is frivolous and vexatious and an abuse of the process of the court.

In reply, Mr. Vassell, Q.C. submitted that s. 213A had nothing to do with the matter before the court. He also submitted that in respect of s.183, it was plain that the application was being made on the basis that the filing of the Form 23 was not effective to remove the defendants as directors.

Resolution

A decision in this matter turns on the court's view of the breadth and scope of the relevant provision – that is, s. 130 (2) of the Companies Act - in particular the words "if for any reason" and the word "impracticable".

As mentioned previously, the breadth, scope and application of these words have been considered in a number of English decisions, some of which were cited in the course of this matter (**In re El Sombrero** and **In re Opera Photographic**).

The facts of the instant case, in the court's view, bear a great similarity to the **In re Opera Photographic** case – both cases dealing with a situation where the quorum for a meeting is/was two.

Having read the e-mail of Mr. Orville Cocking dated November 3, 2008 (Exhibit CT 4), and all the other correspondence, I accept the submission of Mr. Vassell, Q.C., that the Form 23 was filed pursuant to discussions and an agreement among the parties. Even if that were not so, however, the court's view is that an irregular filing of such a document does not affect the central issue that falls to be determined in this case – which is whether the circumstances provide a sufficient reason for the court to regard the holding of a meeting as impracticable.

Having considered all the facts and circumstances of this case, I have formed the clear impression that there is now a total breakdown of the trust and confidence necessary for the continuation of the business relationship between the claimant, on the one hand, and the defendants, on the other, to the point, it seems to me, of deadlock. The personal relationship (which was the foundation for the business relationship), has gone completely sour, with feelings of betrayal, bitterness and spite looming large. The parties are now operating at cross purposes with the claimant anxious to secure the speedy ouster of the defendants as directors; and the defendants, on the other hand, attempting to dig in their heels, taking steps to further embed, entrench and install themselves as directors of the company and gain a firmer grip on the controls of the company. This, of course, is inimical to the interests of the business.

A reading of the correspondence conveys the impression that, after taking professional advice on the matter, the defendants' position has changed from one of contrition and accommodation, to one of resistance and a somewhat hard-line insistence on what might be regarded as the observation of mere form over substance – their admission to the perpetration of serious irregularities notwithstanding. Their aim is to frustrate the process - perhaps (among other things) out of spite and/or as a bargaining ploy. This can clearly be seen, for example, in exhibits CT 8 and CT 9.

In the court's view, (and the court so holds) all these matters sufficiently constitute the "reason" why it is "impracticable" to call or conduct a meeting in the usual or prescribed manner.

This court adheres to the view expressed by Brightman, J. in **In re H. R. Paul & Son Ltd.** (1974) 118 S. J. 166, that he:

> "did not accept that the quorum provisions should be regarded as a right vested in the minority to frustrate the wishes of the majority...".

The court accepts as correct the claimant's belief and contention that the defendants: "will continue to deliberately absent themselves from any general meeting convened and thereby continue to frustrate the Company's right to pass any ordinary or special resolution including one that removes

either or both of them as directors." (paragraph 18 of the claimant's affidavit).

Having considered all the circumstances of this case and having regard to the wide interpretation to be given to the relevant words of s. 130 (2), (as discussed by Wynn-Parry, J in **In re El Sombrero** in relation to what was the English equivalent of that section), I am persuaded by the submissions of learned Queen's Counsel, Mr. Vassell, that, in the instant case, there are adequate reasons for the court to find that it is impracticable to call a meeting of the company.

Were the court to find otherwise and refuse to make the order, that would be tantamount to the claimant being denied her statutory right to remove directors pursuant to s. 179 of the Act.

That being the case, the court makes the following orders and gives the following directions:-

1. The Claimant, the said Cecile Thaxter, is at liberty to convene a meeting of the company for the purpose of considering, and if thought fit, passing the following resolutions:

   (i) That Pauline Trowers be removed from office as a director of the Company.
   (ii) That Newton Trowers be removed from office as a director of the Company.
   (iii) That Jukie Chin be appointed a director of the Company in place of Pauline Trowers.
   (iv) that Pauline Trowers be removed from the office of the secretary of the Company.

2. Fourteen (14) days' notice of the said meeting be given to the members of the Company and a copy of any such notice to be sent to the Defendant's attorneys-at-law.
3. The said meeting to be held at 48 Duke Street, Kingston, 3rd Floor.
4. One member of the Company present in person or by proxy do constitute a quorum at such meeting.
5. The Claimant or her proxy to be chairperson of the meeting; and
6. Costs to the Claimant to be taxed, if not agreed.