[2021] JMCC Comm 41

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN THE COMMERCIAL COURT

CLAIM NO. SU2020CD00450

BETWEEN	**COURTNEY WILKINSON**	**1st CLAIMANT**
	JOHN LEVY	**2ND CLAIMANT**
AND	**GERALD CHARLES CHAMBERS**	**1ST DEFENDANT**
	WEST INDIES PETROLEUM LIMITED	**2ND DEFENDANT**
	GORDON SHIRLEY	**3RD DEFENDANT**
	TARIK FELIX	**4TH DEFENDANT**
	WEST INDIES PETROLEUM (SAINT LUCIA) LIMITED	**5TH DEFENDANT**

Company Law-Application to Strike Out Claim – Allegations related primarily to corporate governance- Whether a claim pursuant to section 212 (derivative) or section 213A (oppression) is appropriate.

Simone Mayhew QC, Ashley Mair instructed by Mayhew Law for 1st and 2nd Claimants.

Ransford Braham QC, Carissa Mears instructed by Brahamlegal for 1st Defendant

Georgia Gibson-Henlin QC, Shavaniese Arnold, Peta-Shea Dawkins instructed by Henlin, Gibson Henlin for 2nd Defendant.

Seyon Hanson instructed by Beecher Bravo Hanson & Associates for 3rd and 4th Defendants.

Annaliesa Lindsay instructed by Lindsay Law Chambers for 5th Defendant.

Heard: 20th July 2021,

In Chambers: By Zoom

Cor : Batts, J

[1] On the 20th July 2021, having heard submissions and having considered the affidavit evidence filed, I made the following orders:

a) The Further Amended Claim and Amended Particulars of Claim are struck out.
b) Costs to the 1st to 5th Defendants of the Claim and costs thrown away and, costs to the 1st Defendant of the Application.
c) Permission to Appeal is granted
d) 1st Defendants attorney at law to prepare file and serve formal order.

I promised at that time to put my reasons in writing at a later date. This judgment fulfils that promise.

[2] There were two applications listed before me. One was an application, to strike out the Claim, brought by the 1st Defendant which was supported by all other Defendants. The other was an application by the Claimants for certain interim relief being an injunction and for appointment of directors. It was agreed that the application to strike out the Claim would be heard first.

[3] Mr. Braham Queen's Counsel, for the 1st Defendant, submitted that the claim disclosed no cause of action. He examined the Claimant's statement of case and demonstrated that the complaints were about mismanagement by the 1st

Defendant of the 2nd Defendant. A perusal of the Amended Particulars of Claim reveals that counsel is correct. Indeed, the reliefs claimed, being declarations and orders to remove and replace directors, are really protective of the interests of the 2nd Defendant (a company). The Claimants seek no relief by way of damages or other compensation for themselves and, on the state of the pleading, could it seems hardly do so. Mr. Braham Q.C. submitted also that, if the Claimants wish remedies for a company they did not control, the appropriate thing to do was to seek permission to bring a derivative action. His submissions were adopted by counsel for the other defendants.

[4] In her reply Mrs. Mayhew Queen's Counsel, for the Claimants, submitted that there was considerable overlap between derivative actions and complaints by shareholders about unfair disregard for their interests. She submitted that courts treat differently with small closely controlled companies as against large public corporations. She asserted that each case should be looked at and decided on its own facts. In this case, she said, there were only six shareholders. The 5th Defendant is a majority shareholder which is owned by the other shareholders equally. In this case the mismanagement/abuse of power by the Defendants has affected the Claimants' personally in their capacity as shareholders. Each is a 1/5th owner of the 2nd Defendant company and therefore directly affected.

[5] Each counsel cited several authorities in support of their respective positions. I will not discuss them all, save to say that, in arriving at my decision I had regard to the following:

a) Section 213A (1) of the Companies Act (pursuant to which the claim is brought) reads:

> " *213A (1) A complainant may apply to the Court for an order under this section.*
>
> *(2) If upon an application under subsection (1) ,the Court is satisfied that in*

respect of a company or of any of its affiliates-

(a) any act or omission of the company or any of its affiliates effects a result;

(b) the business or affairs of the company or any of its affiliates are or have been carried on or conducted in a manner;

(c) the powers of the directors of the company or any of its affiliates are or have been exercised in a manner,

that is oppressive or unfairly prejudicial to, any shareholder or debenture holder ,creditor,director or officer of the company,the Court may make an order to rectify the matters complained of.

(3) ……..”

b) Section 212 of the Companies Act provides:

“ 212 (1) Subject to subsection (2) a complainant may, for the purpose of prosecuting,defending or discontinuing an action on behalf of a company,apply to the Court for leave to bring a derivative action in the name and on behalf of the company or any of its subsidiaries,or intervene in an action to which any such companies or any of its subsidiaries is a party.

(2) No action may be brought, and no intervention in an action may be made under subsection (1) unless the court is satisfied that -

(a) the complainant has given reasonable notice to the directors of the company or its subsidiary of his intention to apply to the Court under subsection

(1) if the directors of the company or its subsidiary do not bring, diligently prosecute or defend , or discontinue, the action;

(b) the complainant is acting in good faith; and

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

(3) In this section and sections 213 and 213A, "complainant" means-

(a) a shareholder or former shareholder of a company or an affiliated company;

(b) a debenture holder or former debenture holder of a company or affiliated company;

(c) a director or officer or former director or officer of a company or an affiliated company. "

c) In ***Sally Ann Fulton v Chas E Ramson Limited [2016] JMSC Comm 14*** Sykes J (as he then was) acknowledged that there could be a degree of overlap between the derivative action under Section 212 and the oppression of minority remedies under Section 213A. In his words:

> *"10. From this passage, it is the case that the derivative action is designed for wrongs done to the 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 action (sic) may give rise to both actions."

d) The permission of the court is required before a derivative action can be brought and certain preconditions satisfied, Section 212

e) No permission is required to bring an oppression claim pursuant to Section 213A.

f) The issue for my determination is whether the claim is one where there are reasonable grounds disclosed in the statement of case for bringing the action. Essentially therefore the question is whether it is arguable on the facts presented that the business of the company has been conducted, and/or that the powers of the directors have been exercised, in a manner and/or, that any act or omission of the company has effected a result which, is *"oppressive or unfairly prejudicial"* to the Claimant as shareholder, director or, officer of the company.

g) The conduct alleged must injure the Claimant personally and not the shareholders as a whole, see: ***Natale Rea, Rea Holdings Inc. and Edward Sorbara v. Robert Wildeboer et al [2015] ONCA 373 (heard 9th January 2015)*** a decision of the Ontario Court of Appeal and***, Ho Yew Kong v Sakae Holdings Ltd and other appeals and other matters [2018] SGCA 33*** *(*a decision of the Court of Appeal of the Republic of Singapore). In the latter case Sundaresh Menon Chief Justice, who delivered the judgment of the court, stated:

" 85. We further emphasised that S. 216 [the equivalent to Jamaica's 213A] *should not be*

> *used to "vindicate essentially corporate wrongs" (at [64]) for two broad reasons. First an overly permissive interpretation of S.216 allowing it to be invoked to vindicate wrongs to a company would be contrary to the legislative scheme, which provided for the commencement of a statutory derivative action on behalf of the company (subject to its own built-in safeguards) under Section 216A* [the equivalent to Jamaica's S. 212] *to remedy such wrongs. Second, permitting an essentially corporate wrong to be pursued by way of an oppression action under S216 would be an abuse of process as it improperly circumvented the proper plaintiff rule, and might result in the aggrieved shareholder who brought a S. 216 action recovering damages at the expense of other similarly affected shareholders, who could otherwise have benefitted too if the action had properly been brought on behalf of the company under S. 216 A (at 63-65)."*

The learned Chief Justice thereafter conducted an exhaustive analysis of authorities from other jurisdictions. He concluded that wherever there was overlap between the oppression remedy and the derivative claim the question, whether or not there is an abuse of process, is answered by considering the injury alleged and the remedies claimed. If the essential remedy sought can only be obtained by the oppression remedy it strongly suggests there is not

abuse of process, see paragraphs 116 to 121 of his judgment.

[6] Viewed against that, highly persuasive and in my view correct, legal background the result in this matter is not difficult to discern. The Further Amended Claim filed on the 19th March 2021 seeks the following relief:

a) *" A declaration that the Defendants were acting and/or carrying on and/or conducting the business and/or affairs of WIPL and/or exercising their powers in a manner which was unfairly prejudicial and/or unfairly disregarded the interests of the Claimants.*

b) *A declaration that the 3rd and 4th Defendants breached their fiduciary duties to WIPL by permitting and/or authorizing the 1st Defendant to act and/or carry on and/or conduct the operations of WIPL in a manner that was unfairly prejudicial and/or unfairly disregarded the interests of the Claimants.*

c) *An order for the removal of Gerald Charles Chambers and Tarik Felix as a [sic] Directors of the Company.*

d) *An order that replacement directors be appointed instead of Gerald Charles Chambers and Tarik Felix.*

e) *The appointment of two independent directors of the company who are suitably qualified and experienced in the bunkering petroleum storage, transportation (land and sea) and marketing business.*

f) *An order for the creation of a shareholder's agreement*

g) *Such other relief is this court deems fit*

h) *Costs."*

It is significant, for the issue I have to determine, that none of the remedies sought is personal to the Claimants. The declaration at (a) being not so much a remedy as a statement of the jurisdictional requirement necessary for Section 213A relief. All the real remedies relate to the governance of the company. The remedies are

all also available in a section 212 claim. If granted the relief claimed will affect, not just the Claimants, but all shareholders as they concern the corporate governance of the company.

[7] An examination of the Amended Particulars of Claim (the allegations in which are supported by the affidavits of John Levy filed on 27th May 2021,28th June 2021 and 19th July 2021) reinforces the suggestion, gleaned from the Claim Form, that the real complaint concerns overall corporate governance and not personalised injury to the Claimants. So that complaints are made that:

(i) the CEO took unilateral action in many matters (para 12 (c) to (f))

(ii) The CEO is pursuing personal interests inimical to the Company's business (Para 13 (a) to (b))

(iii) The CEO's behaviour is inimical to reputation and goodwill of the Company (Para 14)

(iv) The CEO is not a fit and proper person to be CEO (Para 15)

(v) Notwithstanding proposals for "salary" increases for directors no decision was taken although the CEO was granted an increase (paragraphs 17-21)

(vi) The decision to pay director's fees rather than salary resulted in the CEO receiving more than the other directors (Para 22).

(vii) The "wrongful" removal of the Claimants as directors, and the appointment of two new board members, and that the removal was consequent on their call for accountability from the CEO (paragraphs 23 to 28).

[8] Save, for the alleged removal of the Claimants as directors, none of the facts asserted in the Amended Particulars of Claim relate to the Claimants personally.

It is significant that the Claimants do not seek any relief in the way of compensation for their removal. They do not even seek to have themselves reappointed. They seek the appointment of "*independent*" directors and the removal of both the CEO and Tarik Felix as directors. In other words, the focus of the complaint, in this action, is the corporate governance of the company. This, on the authorities, is not what an oppression action, under S. 213A, should be primarily about.

[9] Errors, neglect, fraud and, abuse of authority in the operation of a company will affect all debenture holders, officers directors and, shareholders. The statutory scheme provides a remedy for that in Section 212. It is a remedy which has preconditions to safeguard against frivolous claims by disgruntled debenture holders, directors or shareholders who may wrongfully use the court's process to interrupt or interfere with the running of the company. I am not at all suggesting that this is the Claimants' motive. The point, being made here, is that there is a very good reason for the statutory scheme. It is to ensure that the Section 213A oppression claim is reserved for complaints of direct injury to a Claimant personally in his capacity as debenture holder shareholder and/or director and/or officer (or a former holder of any of those positions), and not, for issues primarily related to injury to the company. This principled approach applies regardless of the size of the company involved.

[10] Typically, minority shareholders/directors who feel their interests are adversely affected complain about decisions taken which are adverse to them and their particular shareholding (its value or percentage). In such cases it is not unusual for an oppressed shareholder to seek orders to wind up the company or for the sale and purchase of shares or of course for damages for the injury caused. The absence of a claim to such relief, although not decisive, may be indicative of the real nature of the complaint. That is, it's really not about the injury to the Claimant as a shareholder or director but it is about the way the company is being run and/or the consequential wrong being done to the company. This will no doubt ultimately

affect the Claimant as shareholder or director hence the overlap, which sometimes occurs and, which the authorities cited above have addressed.

[11] In this case, having considered the affidavits and the pleadings filed, I have little doubt on which side of the line this "overlapping" matter falls. It is for this reason therefore that on the 20th July 2021, I made the orders noted in paragraph 1 of this judgment.

[12] Let me take this opportunity to express gratitude to all counsel involved for the industry displayed. The authorities so helpfully cited, and the clarity of the submissions, "*eased the passing"* of this judgment.

David Batts
Puisne Judge