



IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN THE COMMERCIAL DIVISION

CLAIM NO. SU2024CD00197

**IN THE MATTER OF Sections 213A of
the Companies Act 2004**

AND

**IN THE MATTER OF an Application by
DENNIS WILLIAMS, a Director and
Shareholder in respect to conduct
which is oppressive and unfairly
prejudicial to creditors, directors,
officers, and shareholders of the
Company INDUSTRIAL & TECHNICAL
SUPPLIES LIMITED**

BETWEEN	DENNIS WILLIAMS	CLAIMANT
AND	DELROY MCDONALD	1st DEFENDANT
	INDUSTRIAL & TECHNICAL SUPPLIES LIMITED (Sued and joined as Nominal Defendant)	2nd DEFENDANT

***Application for interim relief - Application to Strike Out Claim – CPR Rule 26.3(1) –
Companies Act Section 213A – Derivative Action – Breach of fiduciary duties***

**Abraham Dabdoub & Karen Dabdoub instructed by Dabdoub, Dabdoub & Co. for
the Claimant**

**Mark-Paul Cowan & Reeshema Kanhai Britton instructed by Cowell Khani Britton
& Co. for the 1st Defendant**

No appearance for the 2nd Defendant who is sued and joined as Nominal Defendant

Heard: 20th and 24th May 2024

IN CHAMBERS (VIA VIDEOCONFERENCE)

Cor: Batts, J.

- [1] On the 24th May 2024, having heard submissions, I made the following orders:
- a. The Claim and Particulars of Claim filed on the 29th April 2024 are struck out.
 - b. No order as to costs.
 - c. Permission to appeal is granted to all parties.

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

- [2] On the 20th May 2024 an application, for interim relief by way of an injunction, came on for hearing. The Defendant had filed an application to strike out the claim but the notice of application to strike out, filed on the 16th May 2024, had not been served on the Claimant. Counsel for the Defendant submitted that the application to strike out should be heard before the application for injunctive relief. I decided to hear both applications together allowing each Counsel 30 minutes for oral submissions. There was no application to adjourn.

- [3] This matter commenced by Claim Form on the 29th April 2024. The Claimant is a director and fifty percent shareholder of the nominal 2nd Defendant Industrial and Technical Supplies Limited. The claim is against the 1st Defendant who is a director and the other 50% shareholder of the nominal 2nd Defendant. Remedies claimed include orders for payment of the 2nd Defendant's creditors as well as for compensation of the Claimant and for the appointment of an independent director. The interim relief sought related to the payment of credit cards and the appointment of an independent director.

- [4] The Claimant and 1st Defendant are both jointly responsible for the overall management of the 2nd Defendant company. The banking arrangements with Bank of Nova Scotia Jamaica Limited and JN Bank, including the online banking facility, requires the approval of both the Claimant and 1st Defendant.
- [5] The Claimant alleged that the 1st Defendant failed, neglected and/or refused to approve online payments to the foreign and local creditors for the supply of goods and services to the 2nd Defendant. Furthermore, it was alleged that the 1st Defendant had failed, neglected and refused to pay monies that were paid, by way of credit card, to creditors and suppliers of goods and services and there was a balance due and owing to the bank. This it is submitted was oppressive and unfairly prejudicial to the Claimant in whose name the said credit card was issued.
- [6] Among other allegations, to sum it all up, the Claimant alleges that the 1st Defendant acted in breach of his fiduciary duties, in a manner which was oppressive and unfairly prejudicial to the creditors of the company and to the Claimant as a director and 50% shareholder.
- [7] Counsel for the 1st Defendant submitted that the claim is seeking relief which is wholly in relation to the interests and governance of the 2nd Defendant company and there had been no pleaded remedy for the Claimant. This would be in contravention of section 213A of the Companies Act, upon which the claim form is based. That section is reserved for complaints of direct injury to a party, personally, and ought not to be utilized for issues primarily related to injury to the company. Section 213A of the Companies Act is as follows:

“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) The Court may, in connection with an application under this section make any interim or final order it thinks fit, including an order-

- a. restraining the conduct complained of;*
- b. appointing a receiver or receiver-manager;*
- c. to regulate a company's affairs by amending its articles or by-laws, or creating or amending a unanimous shareholder agreement;*
- d. directing an issue or exchange of shares or debentures;*
- e. appointing directors in place of, or in addition to, all or any of the directors then in office;*
- f. directing a company, subject to subsection (4), or any other person to purchase the shares or debentures of a holder thereof;*

g. directing a company, subject to subsection (4), or any other person to pay to a shareholder or debenture holder any part of the moneys paid by him for his shares or debentures;

h. varying or setting aside a transaction or contract to which a company is a party, and compensating the company or any other party to the transaction or contract;

i. requiring a company, within the time specified by the Court, to produce to the Court or an interested person, financial statements or an accounting in such forms as the Court may determine;

j. compensating an aggrieved person;

k. directing rectification of the registers or other records of the company;

l. liquidating and dissolving the company;

m. directing an investigation to be made; or

n. requiring the trial of any issue.

(4) A company shall not make a payment to a shareholder under paragraph (f) or (g) of subsection (3) if there are reasonable grounds for believing that—

a. the company is unable or would, after that payment, be unable to pay its liabilities as they become due; or

b. the realizable value of the company's assets would thereby be less than the aggregate of its liabilities.”

[8] It is helpful to lay out all the remedies sought by the Claimant in order to fully appreciate whether the application to strike out is valid. They are listed below:

“1. A Declaration that the creditors to whom the 2nd Defendant is indebted for the supply of goods bought and delivered to the 2nd Defendant are entitled to be paid such sums as are legally due to them for goods and/or services supplied and delivered to the 2nd Defendant.

2. An order that the 1st Defendant forthwith without further delay approve all payments of monies due and owing to the foreign and local creditors for goods and services supplied and delivered to the 2nd Defendant.

3. An order, that pursuant to Section 213A (3) (e) of the Companies Act, this Honourable Court do appoint Mr. Ken Tomlinson a Director in addition to the two existing Directors.

4. An Order pursuant to Section 213A (3)(c) of the Companies Act, that this Honourable Court regulate the 2nd Defendant's affairs by amending its articles to provide that the Claimant be the Chairman of the Board of Directors and Managing Director until further order of the Court.

5. An Order pursuant to Section 213A (3)(k) directing the Directors to appoint a Company Secretary and to take all steps necessary to rectify the register of directors and company secretary, to file amended returns and or notices as may be necessary to give effect to such orders and declarations of This Honourable Court.

6. An Order that the 1st Defendant forthwith without further delay approve the payment of the sum of JA\$19,096,338.50, inclusive of interest, to Sagicor Bank Account No. being the balance due

and 100001424417286 owing on the 2nd Defendant's credit card No. 5474417295893301 issued by the said bank in the name of the Claimant and which was utilized in paying the creditors and suppliers of goods and services to the 2nd Defendant.

7. Account No. 100001424417286 being the balance due and owing on the 2nd Defendant's credit card No. 5474417295893301 issued by the said bank in the name of the Claimant and which was utilized in paying the creditors and suppliers of goods and services to the 2nd Defendant.

8. An Order that the 1st Defendant do compensate the Claimant pursuant to Section 213A (3) (j) in the form of damages to be assessed.

9. Interest on such damages at a commercial rate of interest for such period as this Honourable Court shall deem fit, such interest be awarded on a compound interest basis.

10. An order requiring the 2nd Defendant to pay the reasonable legal fees incurred by the Claimant in connection with this action.

11. An order that the 2nd Defendant do pay the reasonable legal fees incurred by the Claimant in responding to and defending the application by the 1st Defendant for leave to bring a derivative action in the name of Industrial & Technical Supplies Limited against the Claimant and debtors of the Company.

12. An Order that, where necessary, the Registrar of the Supreme Court of Jamaica shall be empowered to sign and or execute any and or all documents, notices, instruments, returns to carry into effect and conclude any and or all orders made herein.

13. Costs and Attorneys-at-Law costs to be paid by the 1st Defendant.

14. Such further and/or other relief as this Honourable Court shall deem fit and just.”

It is clear that, save for the claim related to the credit card, the abovementioned remedies sought are not personal to the Claimant. The remedies mostly relate to the governance of the company.

- [9] Counsel for the 1st Defendant cited several authorities. I had particular regard to the case of ***Courtney Wilkinson and another v Gerald Charles Chambers et al [2021] JMCC Comm 41***. At paragraph 9 of my judgment in that case I said:

“[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.”

- [10] It was further submitted that this is a case of governance issues, a disagreement between two directors. To that point, reference was made to the case of ***Khela v Phoenix Homes Limited 2015 BCCA 202***, which saw an appeal of the dismissal of an application for relief under the oppression remedy. The Court of Appeal of British Columbia at paragraph 58 found the chambers judge had properly

concluded that the oppression remedy ought not to be invoked to mediate a deadlock between two 50% shareholders. The Court found that this outcome aligns with the concept of reasonable expectations, as a shareholder, with a 50% stake in a company, cannot justifiably expect to take control and enforce their vision on the other 50% shareholder. I am in agreement with this position. The oppression remedy outlined under section 213A should not be invoked in order to resolve a dispute between two equal shareholders.

[11] It was argued that this case is a response to a separate pending application by the 1st Defendant to pursue a derivative claim. On the 20th February 2024, the 1st Defendant, by Fixed Date Claim Form, filed an Application for Leave to Bring a Derivative Action on behalf of and in the name of the 2nd Defendant against the Claimant, as well as any debtors of the company pursuant to section 212(1) of the Companies Act. For ease of reference, this section of the Act is as follows:

“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 company 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 section 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 an affiliated company;

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

[12] Counsel for the 1st Defendant argued that this case was an abuse of the process of the Court as the Claimant is seeking to circumvent the proper procedure mandated by section 212 of the Companies Act. I do not believe the institution of this claim to be a malicious abuse of process of the Court, because there is some degree of ambiguity in the understanding and application of those sections of the Act. In particular the Claimant points to the reference to “*creditors*” in section 213A (2) in support of his view that the Claimant ought to be allowed to proceed as it discloses a cause of action with a real prospect of success and a prima facie case. However, the modern cases adopt a more restrictive rather than an expansive view. If minority shareholders were allowed to complain about every management decision with which they take issue it could make the operation of small companies rather difficult. Such claims ought to be restricted to those which directly impact the minority shareholder. In this regard see observations of the Singaporean court in ***Ho Yew Kong v Sakae Holdings Ltd and other appeals and other matters***

[2018] SGCA 33. Complaints relative to the governance of the Company are best brought under section 212 where the permission of the court is required and hence only matters with a real prospect of success are allowed to proceed and if so with the necessary safeguards.

[13] The claim for the payment of the credit card, paragraph 7 of the Particulars of Claim, impacted the Claimant personally. However, Counsel advised that that aspect of the matter has in fact been settled. I think it would therefore be unwise to allow this claim to proceed.

[14] In regard to my decision to make no orders as to costs, it is crucial to note that the sum claimed in the amount of JA\$19,096,338.50 has now been paid and settled. This is the only one which formed an appropriate claim, as that is personal to the Claimant. As I alluded to in paragraph 13 above, I do not believe the Claimant acted unreasonably in bringing this claim. Therefore, in all the circumstances I think no order for costs ought to be made.

David Batts
Puisne Judge