[2023] JMCC COMM. 22

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN THE COMMERCIAL DIVISON

CLAIM NO. SU2022CD00480

IN THE MATTER OF THE COMPANIES ACT
AND

IN THE MATTER OF AN APPLICATION FOR PERMISSION TO COMMENCE DERIVATIVE ACTION

AND

IN THE MATTER OF SECTIONS 174A AND 212 OF THE COMPANIES ACT

BETWEEN	**AIKATERINI CHANDIRAMANI**	**1ST APPLICANT**
AND	**NAVIN CHANDIRAMANI**	**2ND APPLICANT**
AND	**COAST & LAND HOSPITALITY EXPERT LIMITED**	**1ST RESPONDENT**
AND	**MAURICE ANTHONY GRANNUM**	**2ND RESPONDENT**

Mr. Monroe Wisdom and Mr. Nathan Dawkins, Attorneys-at-law instructed by Nunes, Scholefield, Deleon & Co. Attorneys-at-law for the Applicants.

Mr. Nigel Jones and Ms. Kashina Moore, Attorneys-at-law instructed by Nigel Jones & Co. for the 2nd Respondent

IN CHAMBERS

Heard: 30th March and 25th May 2023

Preliminary Point- Application to commence derivative action – Company Law - sections 174A and 212 of the Companies Act – Whether application to bring

derivative action can be commenced by way of Notice of Application for Court Orders- Whether a company director should be a named Respondent

STEPHANE JACKSON-HAISLEY J.

INTRODUCTION

[1] The 1st and 2nd Applicants, Mrs Aikaterini Chandiramani and Mr Navin Chandiramani filed a Notice of Application for Court Orders on November 2, 2022, seeking leave of the Court to allow them to bring a derivative action in the name of and on behalf of the 1st Respondent Coast and Land Hospitality Expert Limited (hereafter "CLHE") for the purpose of commencing litigation against the 2nd Respondent, Mr. Maurice Anthony Grannum in his capacity as a director of CLHE pursuant to section 212 of the Companies Act. The Notice of Application for Court Orders is supported by the Affidavit of Aikaterini Paligianni Chandiramani also filed on November 2, 2022.

[2] Mr Chandiramani and Mrs Chandiramani are husband and wife and each hold 12,500 shares in CLHE. Mr Grannum holds 22,500 shares and his brother Harold Williams holds the remaining 2,500 share in CLHE. Mrs Chandiramani and Mr Grannum are the sole directors of CLHE.

[3] The Notice of Application was set for hearing on March 30, 2023, but prior to the commencement of the hearing counsel for the 2nd Respondent Mr. Nigel Jones took a preliminary point. It is therefore not necessary for me to delve into the facts of the case at this stage. The substance of the preliminary point was that the Applicants should not be allowed to proceed by way of a Notice of Application for Court Orders because the Applicants have employed the wrong procedure in seeking leave from the Court. Mr. Jones submitted that the nature of the application is itself a substantive hearing which when heard disposes of the matter. He contended that if the Court were to grant permission to the Applicants to bring a derivative action, a separate suit would have to be filed and if the court refuses permission, the matter is at an end, as such, the Applicants cannot seek to obtain

a substantive remedy using a procedure reserved for interlocutory orders. He contended that the proper procedure to be adopted where a complainant wishes to bring an application pursuant to section 212 is settled by Brooks JA (as he then was) in **Chas E Ramson Limited v Sally Ann Fulton** [2021] JMCA Civ 54.

[4] Counsel pointed out that paragraph 81 of **Chas E Ramson Limited** provides the correct procedure going forward:

> *[81] This case, thus far, has employed a significant amount of judicial time that has been caused largely, by the novelty of the issue. The lessons learned should not be wasted. Without being compendious, and recognising that each case will depend on its own circumstances, the following guidance may be considered for future cases:*
>
> *a) Applications for leave pursuant to Section 212 of the Act should be made by fixed date claim form;*
>
> *b) The named respondent should be the company which is the subject of the alleged abuse;*
>
> *c) The claim should be supported by affidavit evidence which addresses all elements of section 212;*
>
> *d) As best practice, although not a requirement, a proposed particulars of claim for the derivative action sought, should be exhibited;*
>
> *e) The hearing of the application is intended to be a summary procedure to permit the chamber judge to quickly determine whether a complainant may institute a derivative claim;*
>
> *f) There is unlikely to be significant cross-examination at the hearing although there may be affidavit evidence from both the applicant and the company;*
>
> *g) The hearing is not a trial; it is aimed at determining whether the applicant should be given leave to initiate the derivative action, not deciding on the merits of the applicant's complaint;*
>
> *h) In determining whether the provisions of section 212(2) have been satisfied, the chamber judge should be guided by:*
>
> *I. the ordinary civil standard;*

II. *the principles governing hearings which are not trials; and*

III. *non-elevated cogency for the standard of proof;*

i) *"[t]he granting of leave is not automatic, but requires the court to exercise a judicial discretion. In deciding whether to grant leave, the court must balance the clear policy of the section to protect the legitimate interests on persons who fit within the definition of 'complainant' and the at least equal interest in avoiding undue interference with corporate management that is being conducted in good faith, as well as the need to avoid a multiplicity of actions" (paragraph 949 of Canadian Encyclopaedia Digest, Business Corporations (Ontario) X-Shareholders 8 Derivative Actions}: and*

j) *A distinction must be drawn between the entitlement to commence a derivative action, which is for the benefit of the company, and an oppression action, which supports an individual shareholder interest, but the two are not mutually exclusive and the simultaneous pursuit of both is not necessarily an abuse of the process of the court (paragraph 956 and 957 of Canadian Encyclopaedic Digest, Business Corporations (Ontario) X-Shareholders 8-Dirivative Actions).*

[5] Mr. Jones also highlighted that the dicta of Brooks JA stipulated that the 2nd Respondent should not be a party to the proceedings as the named Respondent should be the company which is the subject of the alleged abuse. He stressed that this should not be viewed merely as a procedural error that can be corrected as was seen in the case of **Earle Lewis & Carol Lewis v Valley Slurry Seal Company and Ors** [2013] JMSC Comm 21 where the Court in a similar situation relied on rule 26.9(3) to rectify what it considered to be a procedural error. He contended that the provisions of rule 26.9(3) do not avail the Applicants as the potential prejudice to the 2nd Respondent is greater than any prejudice to be occasioned by the Applicants. He emphasized that as the 2nd Respondent is not a proper party the Court should dismiss the application against him with costs to him.

[6] Counsel for the Applicants Mr Wisdom responded by indicating that the dicta in **Chas E Ramson Limited** is purely for guidance and that the Court's jurisdiction is

not ousted. Counsel relied heavily on the dicta of Mangatal J in the **Earle Lewis** case in support of his arguments. He drew the Court's attention to paragraphs 15 and 16 which provide that:

> *"[15] As I indicated to Mr. Braham whilst hearing this matter, it seems to me that this application should perhaps have been brought by way of an originating proceedings, in particular a Fixed Date Claim Form, supported by an Affidavit and the only Respondent to the application would be the company Valley Slurry Seal Caribbean Limited. The Canadian authorities cited suggest that if leave is granted, a new and separate action has to be filed, against the relevant parties, in this case the 1st and 2nd Respondents. However, the point is far from clear, and our Companies Act does not specify the procedure to be adopted, unlike certain other legislation in other countries……."*
>
> *[16] In our jurisdiction, petitions have been reserved mainly, when dealing with company matters, for winding up proceedings. Other applications to do with companies which require a summary proceeding, used to be made by originating summons, and under the CPR 2002, by way of Fixed Date Claim Form. I do not think this is a point that creates a great difficulty, and the Court has power, in particular under Rule 26.9 (3) of the CPR, where there has been a procedural error, to make an order to put things right. This application can therefore be ordered to proceed as if begun by Fixed Date Claim Form. I so order."*

[7] Mr. Wisdom also submitted that the dicta in **Chas E Ramson Limited** further provides that each case depends on its own circumstances and that it would be in the interest of justice and the overriding objective to make an order to allow the matter to proceed. In any event, in that case the issue regarding whether the matter should commence by way of a Notice of Application was not a ground of appeal unlike in the **Earle Lewis** case.

[8] He submitted that the Court should take into account the likely prejudice to either party, the issue of costs and ensuring that the matter is dealt with expeditiously. He made the point that there is no question whether the Applicants are complainants under section 212 of the Companies Act and the fundamental question is whether they can seek the substantive remedy. If the Court were to

strike out the Application this would lead to a disproportionate use of the court's time as it would result in multiple applications, delay, increased litigation and costs and there is really no significant advantage to be gained in re-starting the proceedings. On the other hand, he emphasised that the Respondents would suffer no prejudice.

ISSUES

[9] The issues raised on this preliminary point are whether the application should have been commenced by way of Fixed Date Claim Form as opposed to by way of a Notice of Application for Court Orders and also whether the 2nd Respondent is a proper party at this stage of the proceedings.

DISCUSSION

[10] An application for permission to bring a derivative action is governed by section 212 Companies Act, 2004 (hereafter "the Act"). Section 212(1) and (2) of the Act provides that:

> *(1) "Subject to the 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 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 interest of the company or its subsidiary that the action be brought, prosecuted, defended or discontinued.*

[11] Pursuant to Section 212(3) and 213A of the Act a "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] There is no provision made in the Companies Act for the procedure to be followed in cases to commence derivative actions. There are several cases within this jurisdiction as well as in other jurisdictions that address the point regarding commencement. The decision of Brooks JA in **Chas E Ramson** cited by both parties is one of those cases. It was delivered in 2021 and since that time the cases before the Court for the most part have followed the guidelines so thoughtfully laid down. The first guideline is that applications for leave pursuant to section 212 should be made by Fixed Date Claim Form. The second is that the named respondent should be the company which is the subject of the alleged abuse.

[13] This guidelines provided by Brooks JA were accepted as the way going forward by McDonald-Bishop JA **in Sally Fulton v Chas E Ramson** [2022] JMCA Civ 21 where at paragraph 18 she stated "… Even though in the instant case, the fixed date claim form was not filed to commence a claim, strictly speaking, but rather as an application for leave to bring a claim, nevertheless, the filing of a fixed date claim form is in keeping with the general practice and procedure of the courts as reaffirmed by this court in **Chas E Ramson v Sally Ann Fulton**. At paras. [81] and [82] of that judgment, Brooks JA (as he then was) laid down the procedure to be employed when dealing with applications for leave to bring derivative actions". McDonald Bishop JA reiterated at paragraph 21 of the judgment that 'the process used by the appellant is the accepted procedure in this jurisdiction for commencing an application for leave to bring a derivative action.

[14] It stands to reason that the proper mode of commencement should be by way of a Fixed Date Claim Form, one of the methods of commencement provided for under the Civil Procedure Rules. Although the application for leave to bring a derivative

action is a precursor to the action, it is not viewed as being an interlocutory proceeding but rather as an action in itself and the relief being sought is deemed a final one. If leave is granted the Applicants would have to file a fresh action against the relevant parties.

[15] Even in the **Earle Lewis** case decided approximately a decade ago Mangatal J acknowledged the fact that the action should have been commenced by way of a Fixed Date Claim Form and referred to the filing of a Notice of Application for Court Orders as a procedural error. She thereafter exercised her discretion to rectify that error. At the time Mangatal J exercised her discretion the guidelines were not then issued and so she would not have been constrained by them.

[16] It is to be noted that Brooks JA's guidelines appear under the heading "The procedure going forward" and commenced with a statement about the case having employed a significant amount of judicial time caused by the novelty of the issue followed by a caution that the lessons learned should not be wasted. This suggested that in future cases, there should be no time wasted in trying to determine how to proceed hence the guidelines are offered in an attempt to save judicial time. The Applicants herein seemed to have been well aware of Brooks JA's guidance as well as Mangatal J's step in rectifying what she classified as a procedural error. This begs the question why chose to make a procedural error for the court to correct? Why not follow the procedure set out in the guidelines? There has been no attempt at any explanation for this.

[17] Although the dicta in **Chas E. Ramson Limited** is arguably merely for guidance, I am of the view that out of deference to the Court it should be followed and that a departure from such guidelines should be for good reason. This is despite the fact that Brooks JA emphasized that each case will depend on its own circumstances which mean that the guidelines are discretionary. Therefore depending on the circumstances a court could depart from them, however, I am of the opinion that there should be some reason provided for such a departure. I see no reason offered by the Applicants to depart from the guidelines set out by Brooks JA in

Chas E. Ramson. To depart from these guidelines without reasons smacks of a disregard for the processes of the Court. Counsel for the Applicants in his submissions pointed out that the issue was not a ground of appeal. Despite the fact that setting out the guidelines may be regarded as obiter to the case, this is no justification for a flagrant disregard for them. It is clear that guidelines do not have the force of rules or even Practice Directions, but I am of the view that guidelines from the Court especially the Court of Appeal, should be followed except in exceptional cases and where there are good reasons for not following same. A party cannot simply decide I am not prepared to follow this guide and expect that the Court should still grant the order requested. This is not a good precedent to set.

[18] My determination on this issue must take into account the overriding objective mandated by Rule 1.2 CPR and the requirement to do justice and ensure that matters are dealt with expeditiously. The Court is acutely aware that any decision for the Applicants to start the matter afresh would occasion some delay and incur some additional expense, however the Applicants' position was created by their failure to follow clear guidelines. This has to be balanced against the need to do justice to both sides and to ensure that guidelines provided by the Court are followed. Despite the fact that some time may be lost, I do not think this is a suitable case in which to exercise my discretion to depart from the guidelines set out by Brooks JA. The Applicants will not be allowed to proceed on the Notice of Application for Court Orders.

[19] The next issue raised preliminarily is whether the 2nd Respondent is a proper party to these proceedings. Based on the guidelines of Brooks JA, the named Respondent in an application for leave to bring a derivative action should be the company. If this guideline is to be followed, there would be no need to include Mr Grannum as a Respondent. Mangatal J in the **Earle Lewis** decision also endorsed this view. The very nature of the application makes it nugatory to name the 2nd Respondent as a party in the sense that the purpose of an application for derivative action is to get permission to bring the action in the name of the company and on

its behalf, bearing in mind that the company is a distinct person from its directors. Based on the provisions of section 212(2)(a) of the Companies Act all that is required regarding the directors is that reasonable notice be given to them.

[20] It may be viewed that the guidance of Brooks JA on the issue of the commencement of applications for leave should have the same considerations as the issue as to who should be the Respondent but there is a distinction between the two. If an applicant commences by way of Fixed Date Claim Form, he makes a choice not to commence by way of a Notice of Application for Court Orders as both could not be sustained at the same time. On the other hand, a party may decide that the named respondent should be the company but also choose to include another party and both those positions could be sustained without doing violence to the guidelines offered by Brooks JA.

[21] Based on the guidelines offered there would be no need to join the 2nd Respondent in these proceedings, but he should be given notice according to the provisions of the Companies Act. The 2nd Respondent is not a person who bears no relationship to the company but rather is a director of the company and so is intimately involved in its affairs and so joining him may allow him the opportunity to play an active part in the matter and even to make submissions. However, the joinder may prejudice him in causing him to incur expenses of having to engage counsel and bear all other costs associated with litigation. It may be that he could still have played some part in the application having been given notice in his capacity as a director. He should therefore not be forced with the burden of having to defend the matter at this stage and so this would be an appropriate case to order the Applicants to pay the 2nd Respondent's cost.

[22] Counsel Mr. Jones has asked me to dismiss the matter against the 2nd Respondent however I see no need to do that as I have already indicated that the Notice of Application for Court Orders cannot proceed. In the ordinary course of things, it is the Applicants' or Claimants' prerogative to decide who they wish to include as Respondent or Defendants. If the Applicants choose to include a party in the claim

who should not have been included, they do so at the risk of incurring costs, but it would not be proper for the Court to restrict them in what would be a future action, if they decide to proceed by way of Fixed Date Claim Form.

[23] The preliminary point taken by the 2nd Respondent succeeds to the extent that the application commenced by Notice of Application for Court Orders will not be allowed to proceed.

[24] My orders are as follows:

i. The Applicants are prohibited from proceeding by way of a Notice of Application for Court Orders.

ii. Costs are awarded to the 2nd Respondent to be taxed if not agreed.

Stephane Jackson Haisley
Pusine Judge