[2022] JMCC Comm 28

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN THE COMMERCIAL DIVISION

CLAIM NO. SU2022CD00028

BETWEEN	**CHAS. E. RAMSON LIMITED**	**CLAIMANT**
AND	**JOHN RAMSON**	**1ST DEFENDANT**
	SUSAN ELIZABETH SILVERA	**2ND DEFENDANT**
	CHRISTOPHER RAMSON	**3RD DEFENDANT**
	PHILLIP RAMSON	**4TH DEFENDANT**
	NOEL RAYMOND SILVERA	**5TH DEFENDANT**
	KATHERINE SILVERA	**6TH DEFENDANT**

Company Law - Derivative action – Application to have company pay costs of derivative action - Application to strike out or stay derivative action – Whether matter of costs discretionary - Whether fair and just - Whether court having granted permission to bring claim an application for summary judgment is maintainable - Whether company articles permit an indemnity to directors - Whether section 201 of Companies Act prohibits indemnity.

Mr. Michael Hylton QC, Ms. Stephanie Ewbank and Mr. Bruce Levy instructed by Levy/Cheeks for Claimant.

Mr. Ransford Braham QC and Ms.Ann Marie Layne instructed by Braham Legal for 1st and 6th Defendants.

Mrs. Georgia Gibson-Henlin QC and Mrs.Stephanie Williams instructed by Henlin Gibson Henlin for the 2nd to 5th Defendants.

Heard: 30th June, 2022 and 8th July 2022.

In Chambers By Zoom

BATTS, J.

[1] On the 8th July 2022 I made the orders at paragraph 26 below. I promised then to put my reasons in writing and this judgment fulfils that undertaking.

[2] There were three applications listed for hearing. The first was the Claimant's, filed on the 19th April 2022, to have the legal fees and costs incurred by Mrs. Sally Ann Fulton paid by the Claimant company. The second was an Amended Notice of Application, filed by the 1st and 6th Defendants on the 18th May 2022, seeking summary judgment, striking out, an indemnity and/or, a stay of the claim. The third was a Notice of Application, filed on behalf of the 2nd to 5th Defendants on the 19th May 2022, also seeking summary judgment striking out and/or a stay of this action. The applications were heard together.

[3] At the commencement of the hearing queen's counsel Mr. Ransford Braham, who appeared for the 1st and 6th Defendants, applied to defer his application for an indemnity to another date. The application was not opposed and that matter was deferred. All parties filed written submissions and authorities. The time for oral submissions was restricted and each counsel helpfully kept within their allotted time. This was in large measure because during oral submissions counsel, for the respective Defendants, divided the argument among themselves with specific points allotted to each. I will therefore at times reference "the Defendants arguments" without distinguishing which counsel urged which points. I am grateful for the able assistance provided. If I do not reference all the authorities, or repeat all the submissions, it is not for want of appreciation of their efforts but merely an endeavour to not extend this judgment unduly.

[4] These parties have a rather extended history of litigation. The dispute has meandered through the Supreme Court and the Court of Appeal. Another aspect now comes before me. Its long history, and the several affidavits filed with

voluminous exhibits, notwithstanding I think it is possible to state shortly the facts material to these applications.

[5] Chas. E. Ramson Ltd. (the Claimant) is a company whose principal was Mr. Lauritz Ramson. The business commenced in 1922 but the company was formed in 1934 and has traded with great success. It is a private family owned venture. Mr. Ramson died in 2011 and his second wife in the year 2014. Mrs. Sally Ann Fulton is his daughter. The 1st to 6th Defendants are her siblings and in laws. They are all directors and shareholders of the Claimant. Mrs. Fulton takes issue with the way the company has been run. She says that its assets have been used to unfairly benefit the other directors and shareholders to her disadvantage and to the disadvantage of the Claimant. Mrs. Fulton therefore resorted to the court for relief pursuant to Section 213A of the Companies Act. Popularly called the "oppression" remedy, that claim was filed on the 7th June 2018, see ***Sally Fulton v John Ramson et al 2018CD00342*** [See pages 173 and 188 of Judge's Bundle]. It is fixed for trial on the 3rd to 13th October 2022 [see paragraph 4 written submissions of 2nd to 5th Defendants filed 27th June 2022]. On the 3rd October 2018 Mrs. Fulton made an application for permission to commence a derivative action. This was claim No. ***2018CD00567*****.** It concerned wrongful payments allegedly made to Mrs. Mary Ramson. The application was dismissed (by me) and the dismissal upheld, by the Court of Appeal, on the 10th June, 2022, [see Tab J of Claimants Bundle of Authorities filed on the 28th June 2022].

[6] Mrs. Fulton had earlier commenced claim ***2015CD00107*** seeking permission, pursuant to Section 212 of the Companies Act, to bring a derivative action in the name of the company. This permission was granted by Sykes J (as he then was) on the 27th May 2016, [see page 11 Judge's Bundle]. That decision was appealed, and the appeal was unsuccessful, see ***Chas. E. Ramson Limited v Sally Ann Fulton [2021] JMCA Civ 54*** decided 20th December 2021, [see page 360 of Judge's Bundle]. An effort to have the matter considered by the Judicial Committee of the Privy Council was unsuccessful. This derivative claim is the one now before

me. It was filed on the 19th January 2022 consequent on the permission granted by Sykes J.

[7] The claim relates specifically to two properties owned by the Claimant (hereinafter referred to as the Sharrow Drive and Coconuts properties respectively). It is contended that the Defendants wrongfully and/or negligently and/or in breach of fiduciary duty used the properties to the Claimant's detriment. The claim is for damages and/or an order for the properties to be sold and the proceeds divided among the shareholders. The Defendants argue that there is no real prospect of this claim succeeding. Further that the issues in this claim are already conveniently dealt with in the above referenced Claim Notice 2018CD00342 which is listed for trial in October of this year. In response to my suggestion, that by granting permission to bring the derivative claim the court already decided that it had a real prospect of success, Mr. Braham QC asserted that the court was not made aware of the point he wished to urge. In effect he suggested those decisions were per incuriam. It was open to me he said to reopen the matter and find that the claim had no real prospect of success. He urged also that as the court had not named the 6th Defendant when granting permission she was wrongly named as a defendant to the claim. Specific permission, he submitted, was required before she could be sued in this derivative claim.

[8] The new point of law, which the Defendants say make the derivative claim unsustainable, is that the articles and memorandum of the company give to each director an indemnity against a claim of this nature. It was submitted that as this claim was not for fraud or dishonesty, which are the only exceptions to the indemnity, the claim ought to be dismissed. On a true construction of section 201 the Companies Act, unlike the earlier Act of 1965, does not prohibit such an indemnity. The claim therefore has no real prospect of success or is not in the company's interest. To permit a claim by the company against the directors for matters against which they are to be indemnified by the company would be pointless.

[9] In the alternative the Defendants have urged that the derivative claim should be struck out and/or stayed to abide the outcome of the oppression claim. Reference was made to the respective pleadings in an attempt to demonstrate that the issue, of whether there was a breach of duty in relation to the Sharrow Drive and Coconuts properties, falls for decision in both claims. It was submitted that when the court gave permission for this derivative claim the oppression claim had not yet commenced. Whereas that court may have considered a hypothetical this court can now consider the actual oppression claim and say whether indeed it is fair just and reasonable, and/or in the company's interest, to have the oppression claim proceed.

[10] The Defendants opposed the Claimant's application that it be permitted to pay the costs of the derivative action. It was submitted that section 213(d) was retrospective and only costs, already incurred, could be reimbursed. Also that ***Wallersteiner v Moir (No.2), Moir v Wallersteiner and others (No.2) [1975] QB 373*** decided that, the issue of who should pay such costs, was a discretionary matter for the court. In response to my suggestion that the position was inconsistent, given that the Defendants themselves have a pending application to have their own costs paid by the company, the following points were made. Firstly, the Claimant had not particularised the costs it was seeking to have paid, secondly the claim, unlike in Wallenstein, was recently filed and not "far advanced" thirdly, as the derivative claim was not a particularly strong one, the issue of costs should not be decided at this early stage.

[11] The Claimant's response to each of these issues may be shortly, if inadequately given the full breadth of the submission, stated. Firstly, that permission to commence the derivative claim implies that the claim has a real prospect of success. The Defendants ought not, in this summary judgment application, to raise an issue that ought to have been raised before. The Claimant company's articles of association were before the court, at the application for leave, so the point could and ought to have been raised. Secondly, that there is no right to an indemnity as, on a true construction, section 201 has the opposite effect to that

which the Defendants contend and thirdly, that in any event the pleading in the derivative action relies on dishonesty so the question of an indemnity is moot. As regards the position of the 6th Defendant the Claimant asserts that, because the breach is a continuing one, any director for the time being will be caught by the order granting permission to bring a derivative claim. The application, to strike out or stay, was opposed on the ground that when giving permission to commence a derivative action the court already considered the possibility of an oppression claim. Furthermore, in the claim brought for oppression no complaint is made about the two properties which are the subject of this claim. It is submitted also that, and as the Court of Appeal decided, the oppression claim is for the benefit of the director/shareholders whilst the derivative claim is for the benefit of the company. The Claimant has not sought a buyout of Mrs Fulton's shares, in the oppression claim, it is the Defendants in a counterclaim who ask for that. Furthermore, to stay the derivative claim until after the oppression claim is heard will only further delay resolution of the issue in relation to the two properties.

[12] On the matter of costs Mr. Hylton, QC submitted that **Wallenstein** (cited above) was accepted as good law by the Defendants and he referenced Paras 7 – 11 of the 1st and 6th Defendant's submissions filed on the 27th June 2022. In ***Turner et al v Mailhot et al 50 OR (2d) 561*** it was said that the applicant has a "*prima facie"* right to have the costs paid by the company once permission to bring the derivative claim was granted. There was, submitted Mr. Hylton, no need to prove an inability to afford. In this case there is no question that the Claimant company can afford to fund the litigation. Furthermore the litigation, in relation to the derivative claim, is already eight years old. Insofar as a pre-estimate is concerned the Claimant says that it is likely to be inaccurate given the unpredictability of this sort of litigation. The suggestion was made that the order be for "fair and reasonable" costs as was done in ***Wood v Links Golf Tasmania Pty Ltd [2010] FCA 570*** and that I limit the number of counsel to two queen's counsel. The suggestion that taxation be required was rebutted on the basis that it would only invite further litigation and expense. The claim Mr. Hylton submitted is, as decided by the Court of Appeal, in the interest of the company and for its benefit.

[13] Having considered the authorities cited, and the written and oral submissions, I have no doubt as to the appropriate orders. I will commence this statement of reasons with some general observations and an explanation or two.

[14] On the matter of providing for the costs of the derivative litigation it is manifest that, although always discretionary, the usual order should be for the company to bear the costs. The request for leave is the methodology by which it is established that the claim is in the interest of the company. The benefits if any will go to the company. An interested party who has borne the costs, related to a successful application for leave, should not except in some unusual circumstance be also asked to pay the costs of the action. I find support for this approach in the words of Lord Justices Buckley and Scarman, spoken in relation to a minority shareholders action but, which apply to a derivative claim for which permission has been granted: per Lord Justice Buckley:

> *"Nevertheless, where a shareholder has in good faith and on reasonable grounds sued as plaintiff in a minority shareholder's action, the benefit of which, if successful, will accrue to the company and only indirectly to the plaintiff as a member of the company, and which it would have been reasonable for an independent board of directors to bring in the company's name, it would, I think, clearly be a proper exercise of judicial discretion to order the company to pay the plaintiff's costs. This would extend to the plaintiff's costs down to judgment, if it would have been reasonable for an independent board exercising the standard of care which a prudent businessman would exercise in his own affairs to continue the action to judgment."*

per Lord Justice Scarman:

> *"I agree that it is open to the court in a stockholder's derivative action to order that the company indemnify the plaintiff against the costs incurred in the action……The indemnity is a right distinct from the right of a successful litigant to his costs at the discretion of the trial judge, it is a right which springs from a combination of factors- the interest of the company and its shareholders , the relationship between the shareholder and the company, and the court's sanction (a better word would be "permission") for the action to be brought at the company's expense.."*
>
> see, ***Wallersteiner v Moir(No.2) Moir v Wallersteiner and others (No.2) [1975] QB 373 at 403 and 407*.**

There are no circumstances in this case that would motivate me to exercise my discretion any other way.

[15] On the matter of summary judgment, I also find favour with the Claimant. The Court of Appeal, upholding a decision of the Supreme Court, has found that it is in the company's interest to bring this claim. It would require rather extraordinary circumstances for that claim, which such an august body had approved, to be thereafter struck out because it had no real prospect of success. I did not preclude the argument being raised as it is an issue of law which was not considered by the other courts when granting leave. Further, as the purpose of the summary application is to save costs and time and, given the overriding objective and, because this court must have in mind the interest of the company, I considered this new point of law. It certainly would not be in the company's interest to allow the derivative claim to proceed knowing that it was bound to fail and it had no real prospect of success.

[16] I do not however accept the Defendant's construction of section 201 of the Companies Act. I agree with Mr. Hylton's position that it has precisely the opposite meaning. Sections 201 provides:

> *"201.-(1)Except in respect of an action by or on behalf of a company or body corporate to obtain a judgment in its favour, a company may indemnify-*
>
> *(a) a director or officer of the company or any person employed by the company as an auditor;*
>
> *(b) a former director,officer or auditor of the company; or*
>
> *(c) a person who acts or acted at the company's request as a director or officer of a body corporate of which the company is or was a shareholder or creditor, and his legal representatives, against all costs, charges and expenses (including an amount paid to settle an action or satisfy a judgment) reasonably incurred by him in respect of any civil, criminal or administrative action or proceeding to which he is made a party by reason of being, or having been, a director or officer of that company or body corporate, or any person employed by a company or body corporate as an auditor*
>
> *(2) Subsection (1) does not apply unless the director or officer to be so indemnified-*
>
> *(a) acted honestly and in good faith with a view to the best interests of the company; and*
>
> *(b) in the case of a criminal or administrative action or proceeding that is enforced by a monetary penalty, had reasonable grounds for believing that his conduct was lawful.*

> *(3) The provisions of subsection (2) shall apply to any person employed to the company as an auditor if the act or omission for which he is to be indemnified did not arise due to a breach of duty on his part."*

Manifestly, an indemnity can only be given if the person acted "*honestly and in good faith" (not "or")*. This is underscored by the provision that in a derivative claim indemnity is possible only with the "*approval"* of the court, see section 202.

[17] Even if I am wrong on that the company's articles only allow for an indemnity if "*actual dishonesty or fraud*" is not involved, see Article 145 [page 159 Judge's Bundle] -

> *"The Company shall indemnify every Director and other officer and servant of the Company against all losses, costs and expenses (including travelling expenses) in any way incurred by him in the proper discharge of his duties and the Directors shall pay or retain the same out of funds of the Company. If any Director or other officer of the Company is guilty of actual fraud or dishonesty whereby the Company incurs any loss or damage, such Director or other officer shall be liable to recoup the same to the Company. Except as aforesaid, no officer of the Company shall be liable to the Company for any loss, damage costs or expenses that may happen to or be incurred by the Company in consequence of any act, omission or default by such officer while purporting to act as such."*

I agree with Mr. Hylton that dishonest conduct not amounting to fraud is caught by that exception. I agree also that the pleadings in this derivative action suffice to capture conduct coming within the exception, see paragraphs 10,12, 16, 17,19 and, 21 of the Particulars of Claim [page 305 Judge's Bundle]. If the Claimant successfully proves these allegations the Defendants will have dishonestly enriched themselves at the expense of the Company. It cannot be said, at this

stage, that the Defendants are entitled to an indemnity under the Articles of Association and that the claim therefore has no real prospect of success.

[18] For the above stated reasons the application for summary judgement is refused. The matter of a striking out and/or a stay raises a different question and I daresay a more favourable result for the Defendants. With regard to the 6th Defendant I do not agree with the Claimant's submission. It would indeed make nonsense of an order, granting permission to bring a claim against the company's directors, if directors could defeat its effect by resigning. This may be why Sykes J named the directors to be sued. His order did not however go on to say "and any or all directors for the time being" or any such phrase. I therefore hold that the 6th Defendant is not properly a party to these derivative proceedings.

[19] When considering the best interest of the company, as well as the overriding objective of these civil procedural rules in the context of duplicated claims, the court must take a broad not a narrow view. The matter does not begin and end with, the identity of parties to a claim or, with the relief claimed as important as those are. An important question is whether the issues raised are the same. In this regard the Court of Appeal, in what was an observation which was not necessary for the ultimate decision, observed that parallel claims with similar issues do not offend the principle. The court used the analogy of civil and criminal claims, see paragraph 40 in the judgment of Mcdonald - Bishop JA, ***Sally Ann Fulton v Chas E Ramson Limited [2022]JMCA Civ 21*****,** Tab J of Claimant's submissions filed on the 28th June 2022. That, with respect, is an inaccurate analogy given that the civil and criminal courts have different burdens of proof and are jurisdictionally separate. There is little prospect of an embarrassment to the system of justice if a criminal court decides a matter one way whilst the civil court decides the same issue otherwise. This is not so in the civil jurisdiction where, save for allegations of fraud, the burden of proof is more or less the same in all matters. The court has always had the power to strike out or stay or have tried together claims, even sometimes involving different parties, where the substantive issue to be decided is the same. This is most often seen in motor vehicle accidents with multiple persons injured

and multiple defendants but where the ultimate question is who caused a particular accident.

[20] In the matter before me the parties are on the face of it different. So too are the remedies claimed. In the derivative action the company has sued its directors. In the oppression claim it is Mrs. Sally Ann Fulton who has sued the company and its directors. In the derivative claim the company seeks to have two properties sold. In the oppression claim Mrs. Fulton seeks an accounting to her for the wrongful conduct of the company and its directors in relation to several matters not including the two properties the subject of the derivative claim. However, the Defendants in the oppression claim have raised the matter of the two properties by way of counter claim. In that process they have also sought orders for a purchase of shares and an accounting in relation to Mrs. Sally Ann Fulton. Issue is joined by Mrs Fulton in her defence to that counterclaim and the matter of the two properties is raised. If the Defendants succeed on their counterclaim the court will be asked to decide the question whether the two properties were lawfully purchased or used by the Defendants. That is the same question in this derivative claim. The focus in both claims is the stewardship of the Defendants and whether they honoured their fiduciary and other duties to the company.

[21] Mr. Hylton QC suggested that there was a difference in the respective tests to be applied. I do not agree. One can hardly envision a situation in which a court finds there has been “oppression” by virtue of the purchase and use of these properties but not a breach of duty to the company necessary for success in the “derivative” claim. If both actions are allowed to proceed it will be potentially embarrassing as this court may hear the same evidence, as to the circumstances of purchase and the use of the properties, in separate proceedings with the possibility of factual findings diverging on that evidence. The potential embarrassment does not diminish merely because one claim is derivative and brought by the company and the other claim is an oppression claim brought by a disgruntled shareholder. The truth of the matter becomes even more apparent when we broaden the focus to

note that it is the same disgruntled shareholder who was instrumental in commencing both claims.

[22] The question therefore is what is to be done. It is not appropriate to strike out the derivative claim because permission to bring the claim has already been granted. A striking out may be appropriate where permission is being sought but is refused. In that case a court, in its discretion, is entitled to refuse to allow a second claim where the issues to be determined are already included in an existing claim. It is not in the company's interest to have it litigate the same question in separate proceedings. In this regard it is the real not the notional question that ought to be considered. Recovery by the company against its own directors in the derivative action is, in this case, no different from recovery by the oppressed minority in the oppression action. This is because ultimately where the directors/shareholders are the same there will be a set off and/or distribution taking into account the wrongful conduct or enrichment found. At the end of the day in each case, whether in the derivative or the oppression action, the assets will be ultimately allocated so that the disenfranchised shareholder or shareholders are compensated accordingly.

[23] There is a further reason why striking out is not appropriate. This is because the issue related to the wrongful acquisition or use of the two properties will only arise on the Defendants' counterclaim in the oppression action. Therefore, if the court decides to give judgment on the claim in the oppression action no accounting or determination in relation to the two properties may arise. I say "may" because in considering the evidence, and dependent on how the case is conducted, the trial judge may or may not make factual findings that impact the issue raised by the counterclaim in relation to the two properties. This uncertainty therefore would move me to refrain from the finality of an order to strike out the claim.

[24] Therefore, it is my view that this derivative claim should be stayed to abide the outcome of the oppression action. At the determination of the latter counsel will no doubt advise themselves whether an issue estoppel has arisen, whether the or

any relief obtained suffices to satisfy the company and/or the disgruntled shareholder and, whether such relief makes unnecessary any further pursuit of this claim.

[25] This court has a duty to protect companies from overly zealous shareholders and directors and sometimes their attorneys. Derivative claims have their place as do oppression remedies, see ***Courtney Wilkinson et al v Gerald Charles Chambers et al [2021] JMCC Comm 41*** **(unreported judgment dated 20th July 2021)** at paragraphs 5 and 9 and the authorities cited therein for a discussion. In small family owned companies the oppression remedy may be more likely to provide the most appropriate resolution for all concerned. Simply put when a company with a few shareholders sues its directors, who tend also to be its shareholders, the or any return to the company is subject to distribution. The disgruntled shareholder who initiates a derivative claim may be interested only in his share of that which was received and paid by the Defendants (his fellow directors/shareholders). This result may also be achieved in an oppression claim in which the court has the power to order direct compensation paid to the disadvantaged shareholder and also to reimburse the company, see section 213A (3)(h) and (j) of the Companies Act. The court may also order a valuation and purchase of shares, see section 213A (3) (f). In this regard Mr. Hylton QC made reference to a shareholder who was not a party to these proceedings. I fail to see the relevance as on any accounting, whether in the derivative claim or in the oppression claim, the court would be duty bound to take account of the entire shareholding and not only those shareholders present before it.

[26] In the final analysis therefore, and for all the reasons stated above, my orders are as follows:

(1) Time extended pursuant to Rule 26 of the CPR for service of the claim pursuant to the Order of Sykes J and the Claim as served will stand

(2) The Claimant shall pay the sum of $1,833,460.33 to Sally Ann Fulton being her legal fees (inclusive of disbursements and general consumption tax) incurred up to the 31st March 2022 in the pursuit of this derivative claim.

(3) The Claimant shall pay all fair and reasonable fees limited to one silk, his junior and an instructing attorney at law and including professional fees and disbursements incurred or to be incurred in the pursuit of this derivative claim.

(4) The Application for Summary Judgment against the Claimant is refused.

(5) Subject to Orders 2 and 7 a stay of this derivative claim is granted until the determination of Claim No.2018CD00342 Sally Ann Fulton v John Ramson et al or a further order of this court. The stay of proceedings does not apply to costs reasonably incurred between the 31st March 2022 and the date of this order.

(6) The 6th Defendant is removed as a Defendant to these proceedings.

(7) The question of the Defendants' indemnity for costs and the Claimant's and Defendants' respective applications in that regard are adjourned to the 22nd September 2022 at 2pm for 2 hours.

(8) The question of costs is reserved to the 22nd September 2022 at 2pm.

(9) Permission to appeal is granted to all parties

(10) Formal order is to be prepared filed and served by Claimant's attorneys at law.

David Batts
Puisne Judge.