[2023] JMCC COMM 01

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN THE COMMERCIAL DIVISION

CLAIM NO. SU2021CD00060

IN THE MATTER OF RIVIERA INSURANCE AGENCY LIMITED

AND

IN THE MATTER OF S. 213A OF THE COMPANIES ACT

BETWEEN	**RICKIE DAVIS**	**1ST CLAIMANT**
AND	**DORMA DAVIS**	**2ND CLAIMANT**
AND	**WELLESLEY STOKES**	**1ST DEFENDANT**
AND	**KEROY MYERS**	**2ND DEFENDANT**
AND	**DALOU WONG**	**3RD DEFENDANT**
AND	**PRESCILLA STOKES**	**4TH DEFENDANT**
AND	**RIVIERA INSURANCE AGENCY LIMITED**	**5TH DEFENDANT**

TRIAL IN CHAMBERS

Mrs. Daniella Gentles-Silvera K.C. and Mr. Alexander Corrie instructed by Livingston, Alexander & Levy for and on behalf of the 1st Claimant

Ms. Dianne Edwards of Counsel for and on behalf of the 2nd Claimant

Mr. Stephen Shelton K.C. and Ms. Stephanie Ewbank instructed by Myers, Fletcher & Gordon for and on behalf of the Defendants

Civil Practice & Procedure – Company Law – Section 213A of the Companies Act – Conduct that is oppressive and/or unfairly prejudicial and/or unfairly disregards interest of shareholder, director or officer of the company – Reasonable expectation – Appropriate Remedy

Dates Heard: November 8 & 9, December 5, 6, 7 & 19, 2022 and June 16, 2023

PLAMER HAMILTON, J.

[1] I wish at the outset to note that at the time when this trial was heard Learned Counsel Mrs. Gentles-Silvera was appointed as King's Counsel, and therefore I have referred to her as such.

BACKGROUND

[2] The 1st Claimant by way of an Amended Fixed Date Claim Form filed on the 30th day of November, 2022 is seeking the following orders and declarations under section 213A of the Companies Act on the grounds that the business or affairs of the 5th Defendant Company have been carried on or conducted in a manner that is oppressive and/or unfairly prejudicial and/or unfairly disregards the interest of the 1st Claimant as a shareholder of the 5th Defendant Company and the powers of the directors of the 5th Defendant Company have been exercised in a manner that is oppressive and/or unfairly prejudicial and/or unfairly disregards the interest of the 1st Claimant as a shareholder of the 5th Defendant Company:

> *(a) A Declaration that the business or affairs of the Company have been carried on or conducted in a manner that is oppressive and/or unfairly prejudicial and/or unfairly disregards the interests of the 1st Claimant;*
>
> *(b) A Declaration that the powers of the directors have been exercised in a manner that is oppressive and/or unfairly prejudicial and/or unfairly disregards the interest of the 1st Claimant;*
>
> *(c) An Order to appoint the Claimant, Rickie Davis, a director of Riviera Insurance Agency Limited ("the Company") in addition to the current directors Wellesley Stokes, Dalou Wong and Keroy Myers;*
>
> *(d) An injunction to restrain the Defendants whether by themselves or by their servants or agents or otherwise howsoever from increasing the share capital of Riviera Insurance Agency Limited and issuing and allotting shares in the said Company until further order of this court;*

(e) An Order setting aside the increase in share capital of the Company on the 13th day of June, 2019 by 12,000;

(f) An Order setting aside the issue and allotment of shares to Wellesley Stokes, Keroy Myers and Prescilla Stokes made on the 11th October, 2019 and the 27th November, 2020 as reflected on the Return of Allotment dated 27th November, 2020;

(g) An Order that the Register of Members is rectified within two (2) days of the date hereof to reflect the names of the shareholders before the 27th November, 2020 and the amount of shares they hold;

(h) An Order that within thirty (30) days of the date hereof the Defendant shall produce to the Claimant, Audited Accounts of the Company for the last ten (10) years;

(i) Costs; and

(j) Such further and/or other relief as this Honourable Court deems fit.

[3] I wish to note that order (h) was complied with and is no longer being pursued by the 1st Claimant. The 1st Claimant makes this Claim in his capacity as shareholder of the 5th Defendant Company, hereinafter referred to as 'the Company', and is made pursuant to section 213(A) of the Companies Act. By way of an Order of the Court, the 2nd Claimant was added as party to the proceedings pursuant to Part 19 of the Civil Procedure Rules. The 2nd Claimant in her affidavit is seeking the following Orders:

(a) A Declaration that the business affairs of the 5th Defendant have been carried on or conducted in a manner that is oppressive and/or unfairly prejudicial and/or disregards the interest of the Claimant;

(b) A Declaration that the powers of the Directors of the 5th Defendant have been exercised in a manner that is oppressive and/or unfairly disregards the interest of the Claimant;

(c) An order that I be appointed a director of the 5th Defendant;

(d) An Order setting aside the increase in share capital of the 5th Defendant on the 13th day of June, 2019;

(e) An Oder that the Defendants produce to the Claimant the Audited Accounts of the 5th Defendant for the last ten (10) years; and

(f) An Order that the Register of Members is rectified to reflect the names of the shareholders before the 27th day of November, 2020.

[4] It is not in dispute that the Company is a private limited liability company that was incorporated in 1986. Mr. Keith Davis, the father of the Claimants, was the primary founding shareholder and a director of the Company until his death in 2005. The 1st Defendant joined the Company in 1992 as the Financial Controller and Insurance Advisor. In 1994 he became a director and a shareholder. The shareholders of the Company were primarily members of Mr. Keith Davis' family.

[5] In 1999 the 1st Claimant was appointed as a director of the Company and remained a director until 2017, where he was not reappointed at a shareholders meeting. The 2nd Claimant was also a director in the Company but that ceased in 1997. The current directors of the Company are the 1st, 2nd, 3rd and 4th Defendants. The 1st Claimant and his father, along with the 2nd Claimant and the 1st Defendant were all shareholders in the Company. Mr. Keith Davis held majority of the shares until 2019.

[6] On the 13th day of June, 2019, the share capital of the Company was increased from 8,000,000 to 12,000,000 at an Extraordinary General Meeting. These shares were subsequently issued and allotted to the 1st, 2nd and 4th Defendant. The 1st Defendant is now the majority shareholder of the Company as he now has 51.01% of the issued shares of the Company. The 2nd Defendant holds 10.50% of the issued shares and 4th Defendant holds 5% of the issued shares. With the issuing and allotment of these shares, the Claimants' and their father's percentage in the Company has been reduced. Mr. Keith Davis' shareholding equates to 24.95%, the 1st Claimant's shareholding equates to 3.51% and the 2nd Claimant's shareholding equates to 0.38%. This is one of the actions which the Claimants are seeking to rectify. Their shares in the Company has been diluted and the new shares were never offered to the existing shareholders of the Company. The Claimants did not receive notice of the meeting nor for the issue and allotment of any shares in the Company.

[7] The 1st Defendant in his response to the Claim as set out by the 1st Claimant, contended that he along with Mr. Keith Davis had agreed to purchase two

properties in May Pen to be used by the Company. It was shortly after this that Mr. Keith Davis became ill and passed away. The 1st Defendant was appointed Chief Executive Officer of the Company in the same year that Mr. Keith Davis died. The purchase of these properties did not take place until after Mr. Keith Davis' death. The 1st Defendant contended that he used his personal money to purchase the properties as the Mr. Keith Davis' estate had no money to proceed with the purchase. The increase and allotment of the shares was therefore done as the Company was unable to reimburse him in cash for this purchase.

ISSUES

[8] The issues for my determination are:

(a) Whether pursuant to section 213A of the Companies Act, the actions of the actions of the Defendants are oppressive, unfairly prejudicial and/or unfairly disregards the interests of the Claimants; and

(b) If this is so, what, if any, remedy is available to the Claimants.

SUBMISSIONS

[9] I wish at this time to thank all Counsel involved in this matter for their very helpful written submissions which provided invaluable assistance to the Court in deciding the issues raised in this claim. I also wish to make it known that I carefully considered all the submissions and authorities before me whether they have been referred to or not.

THE 1ST CLAIMANT'S SUBMISSIONS

[10] Learned Counsel for the 1st Claimant relied on the case of **Sharma Persad Lalla v Trinidad Cement Limited and TCL Holdings Limited and Andy J. Bhajan** (unreported decision H.C.A No. Cv. S-852/98 delivered 30th November, 1998 which dealt with oppression. It was submitted that the affairs of the Company and the exercise of the powers of the directors of the Company were carried out in a

manner that was oppressive and/or unfairly prejudiced and/or unfairly disregarded the interest of the 1st Claimant. Based on the authorities submitted by Learned Counsel for the 1st Claimant outlined the principles as it relates to establishing a case of oppression as follows:

> *(a) The test to determine if an action is or is not oppressive depends on the facts;*
>
> *(b) To determine whether or not there has been oppression, the Court must determine what was the reasonable expectation of the parties;*
>
> *(c) For there to be oppression the conduct must fall within the concepts of "oppressions," "unfair prejudice," or "unfair disregard." Oppressive conduct connotes burdensome, harsh and wrongful conduct; a wrong of a most serious tort; departure from the standards of fair dealing; lack of probity on the part of those conducting the company's affairs and affecting the claimant in his capacity as a member. Unfairly prejudicial conduct is conduct which causes prejudice or harm to the interest of the claimant. It is less offensive than oppression. It falls short of harsh and abusive conduct. The conduct in question is unfair. In deciding what is fair and unfair, rather than use the reasonable company watcher, one of the factors to consider is whether or not the conduct complained of is in accordance with the articles of association. The conduct must be both unfair and prejudicial. To "unfairly disregard" is to, unjustly or without cause, pay no attention to ignore or treat as if it is of no importance, the interest of the stakeholder. This is the least serious of the three (3) wrongs;*
>
> *(d) Fair treatment is essentially the theory running through the cases on oppression and it is fundamentally what a shareholder is entitled to "reasonably expect";*
>
> *(e) The concept of fairness may include not only the legal rights conferred by the articles of association but also in certain circumstances where other expectations may arise from agreements or understandings between members, that is, considerations of a personal character between individuals such as where the association is formed out of a personal relationship, including restrictions on a member's interest being disposed of or transferred or on a member being removed from management'*
>
> *(f) The directors must exercise their fiduciary powers for the benefit of the company as a whole and for a proper purpose. If the directors act for an ulterior purpose, they step outside the bargain between shareholders and the company;*
>
> *(g) Generally, a director will be deemed to have acted for an improper purpose where there is evidence of self-interest or where a private*

benefit or advantage is secured. The burden of proof is on the director to show his actions were proper; and

(h) It is not necessary for there to be evidence of bad faith to satisfy the test for oppression.

[11] Learned Counsel for the 1st Claimant contended that as a shareholder, it was reasonable for him to expect that any increase in share capital and allotment of shares would be done in accordance with the Articles of Association of the Company. The 1st Claimant had a reasonable expectation of being notified of such a meeting to increase the share capital of the Company and receiving a notice for him to decide if he wanted to take up the new shares which were being issued and allotted. The Court was directed to Articles 3, 4, 5, and 6 of the Articles of Association. The Articles provide that any original shares for the time being unissued and not allotted and any new shares from time to time to be created must first be offered to existing members of the Company before they are issued in proportion as nearly as may be to the number of shares held by them unless the Company determines otherwise in a general meeting.

[12] Additionally, the Court was directed to Articles 137 and 140 of Table A of the Companies Act which was incorporated into the Company's Articles of Association and expressly provides that notice of general meetings must be given to all shareholders along with the manner of the notice. The 1st Claimant, nor any other shareholder, did not receive any notice of the meeting in which the share capital was increased and the shares issued and allotted, nor were the shares offered to the existing shareholders before they were issued and allotted. The 1st Defendant's reason, for not giving notice was that he was merely implementing an agreement which he had with Mr. Keith Davis to reimburse himself with shares in the Company for the purchase of the May Pen properties. It was contended that the acts of the 1st Defendant are even more egregious as he admits that by increasing the share capital and allotting the shares to himself, the 2nd Defendant and the 3rd Defendant, he was aware that this would reduce The 1st Claimant's percentage shareholding in the Company and the only other person who attended the meeting of shareholders was the 3rd Defendant, who personally benefitted himself.

[13] Learned Counsel for the 1st Claimant relied on the case of **Delores Scott-Carrington and Canute Sadler v Ideal Betting Gaming Company Limited and Donovan Lewis** [2017] JMSC Comm 40 which addressed the importance of giving notice especially those related to an increase in share capital of a company. The circumstances of that case is similar to the case at bar. The 1st Claimant was entitled to notice regardless of whether or not he expressed an interest in the Company and attended or called meetings. His interest in the day-to-day running of the Company, or alleged lack of such interest, is immaterial as it relates to his rights as a shareholder. The increase in share capital and allotment of shares is an important and potentially detrimental event, and as such all shareholders would have been entitled to receive notice of meetings at which such acts are intended to be carried out. Learned Counsel for the 1st Claimant submitted that even before considering the question of whether there is any legal basis or merit supporting the dilution of a member's shareholding, the failure to notify a member of the calling of a meeting at which his shareholding is diluted is itself prejudicial because that member would not have been given an opportunity to protect his percentage shareholding. Even though their position is that there was no substantive basis in law justifying the allotment and issuance of the shares to the 1st, 2nd and 4th Defendant, the failure to give notice of the allotments, which clearly operated to the detriment of the 1st Claimant, is not a mere procedural anomaly which can be overcome, but it renders the allotments wholly unfair and prejudicial.

[14] It was further submitted that in addition to the failure to give notice to the 1st Claimant, the increase in share capital and the issue and allotment of shares were carried out in contravention of the Companies Act and the Articles of Association. It is only if the existing shareholder does not accept the offer or declines to accept the offer that the directors may dispose of the shares in the manner most beneficial to the Company. The pre-emption rights in Article 6 are not discretionary and can only be varied if the Company determines otherwise at a general meeting. No meeting of the Company was held as required and no resolution passed to disapply the pre-emption rights. There was no proper justification for increasing

the share capital and allotting the shares without notice to the existing shareholders in breach of the Articles of Association and it was an improper exercise of the powers of the directors.

[15] Learned Counsel for the 1st Claimant accepted that in certain circumstances, the pre-emption rights set out in the Articles of Association may be circumvented, there are certain conditions which must be fulfilled. They submitted that no special resolution was passed to circumvent the pre-emption rights by the other shareholders and no evidence to suggest that a transparent and informed valuation of the shares issued was ever obtained. There is no evidence to suggest that the Company made an election to continue to retain shares with a nominal or par value which is prohibited pursuant to sections 36 and 37 of the Companies Act. There is also no evidence to suggest that the directors attempted to arrive at a fair and informed valuation for the shares issued and which would be in breach of their fiduciary duty (**Lowry v Consolidated African Selection Trust Limited** [1940] AC 648).

[16] It is for the Court to determine whether the reason given by the 1st Defendant for the increase of share capital of the Company and the issue and allotment of the shares to himself, the 2nd Defendant and the 4th Defendant without first offering these shares to the existing shareholders is true, and whether the exercise of this power by The 1st Defendant as a director was done for a proper purpose in accordance with the fiduciary duties which he owed the Company. The burden to prove that a director has acted for an improper purpose is not on the applicant challenger but on the director to show that their actions were proper (**Joni Kamille Young-Torres v Ervin Moo-Young and Others** [2019] JMCA Civ 23). Learned Counsel for the 1st Claimant contended that there is no evidence of the terms of the agreement, there is no supporting contemporaneous documentary evidence of the payment for the properties being made by the 1st Defendant.

[17] The 1st Defendant's conduct is clear evidence of his duty to the Company conflicting with his own personal interests. Although the 1st Defendant denied that

he put his interest above the interest of the interest of the Davis family shareholders, Learned Counsel for the 1st Claimant reminded that Court that that there is no need to show that the person has deliberately acted in bad faith with a conscious intent to treat the shareholder unfairly.

[18] Learned Counsel for the 1st Claimant submitted that their client was improperly removed as a director of the Company in 2017 without notice and in circumstances where he had been a director from 1997 and he did not agree to step down as a director. A director of a Company can be removed by ordinary resolution, see section 179 of the Companies Act, however, the 1st Claimant should have been given notice of such a resolution which was never done. It is for those reasons which Learned Counsel for the 1st Claimant urged the Court to grant the Orders and Declarations sought.

[19] The following cases were also relied on: **Ervin Moo Young v Debbian Dewar, Marshenee Cheddisingh and ZIP (103) FM Limited** [2016] JMSC Comm 16; **Scottish Cooperative Wholesale Society Limited v Meyer** [1959] AC 324; **Re Saul D Harrison & Sons Plc** [1994] B.C.C. 475; **Girvan Janis Fisher v Cedric Cadman et al** [2005] EWHC 377**; Re a company (No 00709 of 1992), O'Neill and another v Phillips and others** [1999] 2 All ER 961; **Robert Dalby v Neil Wayne Bodily and Coloursource Limited** [2004] EWHC 3078; **Re a company (No 005134 of 1986), ex parte Harris** [1989] BCLC 383; **Mills and others v Mills and others** [1983] 60 CLR 150; **Glory Trading Holding Limited v Global Skynet International Limited and Another** [2002] UKPC 35; **Howard Smith Limited v Ampol Petroleum Limited** [1974] A.C. 821; **Re Sunrise Radio Limited** [2009] EWHC 2893 (Ch); and **Such v RW-LB Holdings Limited** (1993) 11 BLR (2nd) 122 Alta Q.B.

THE 2ND CLAIMANT'S SUBMISSIONS

[20] Learned Counsel for the 2nd Claimant outlined sections 174 and 213A of the Companies Act and the cases which give definitions to the words, "oppression,

unfairly prejudicial and unfair disregard." Learned Counsel for the 2nd Claimant submitted that the 2nd Claimant even though she remained in contact with the 1st, 2nd and 4th Defendant, was never given notice and/or told of the increase in share capital and neither was an offer made to her in her capacity as an existing shareholder for additional shares in keeping with the Articles of the Company. It therefore denied her client the opportunity to increase her shareholding. Learned Counsel for the 2nd Claimant contended that the explanation as given by the 1st Defendant for the increase in the share capital as reimbursement for monies expended ought not be accepted. This, she further contended is not credible based on the timeline of the arrangement, the sale agreement and the provision of the explanation. The increase in the share capital therefore cannot be said the be lawful or in the best interest of the company, the shareholders and for a proper purpose.

[21] It was submitted that the Defendants are in breach of their duties in the conduct of the business affairs of the Company and the execution of their powers as Directors by failing to provide dividend payments to the 2nd Claimant, increasing the share capital without notice and without offering her shares in her capacity as an existing shareholder and failing to provide information when requested as to the operation of the company. This was oppressive, unfairly prejudicial to the 2nd Claimant and also unfairly disregarded her interests.

[22] Learned Counsel relied on the following cases: **Scottish Cooperative Wholesale Society Limited v Meyer** *(supra)***; Lalla v Trinidad Cement 1998 High Court Trinidad** *(supra)*; **Chancery Lane Partner Ltd v Dell** (1986) CA Barbados; **Deveaux v Du Boulay Holdings Limited et al** LC 2005 CA 3; **Diligenti v VRWMD Operaitions Kelowna Ltd** 1976 CanLII 238; **Delores Scott-Carrington and Canute Sadler v Ideal Betting Gaming Company Limited and Donovan Lewis** *(supra)*; **Dallas Corp. Thomas Baker v Alnando Corporation et al** TT 2017 HC 154; and **Benkley Northover v Eric Northover, Rohan Northover, Godfrey Dixon and Winston G. Northover Associates Limited** [2014] JMCC Comm 14.

THE DEFENDANTS' SUBMISSIONS

[23] Learned Counsel for the Defendants outlined section 213A of the Companies Act and submitted the leading case on oppression in Canada. She relied on the case of **BCE Inc v 1976 Debentureholders** [2008] 3 SCR 560 which she submitted has been applied in our local courts in numerous cases. She further submitted that the matters which the Claimants have raised in this case are not reasonable expectations, and even if this Court considers them as such, the conduct complained of does not meet the threshold of oppression.

[24] Learned Counsel for the Defendants contended that the evidence from the Claimants and the Defendants clearly shows that the only legal formality that the Company and the other Defendants failed to comply with was the giving of notices to any shareholders for company meetings. The authorities in this area indicate that this failure ought not, without more, to be considered oppression. The evidence shows that the Company has always operated in an informal manner and notices were not sent out for company meetings to any shareholders. There is no evidence before the Court that at any time between the Company's inception and late 2020 did the Claimants raise any issue regarding the informal operations of the Company or the fact that the Company did not send out notices. Learned Counsel for the Defendants contended that the 1st Claimant and the 2nd Claimant failed to establish a reasonable expectation that the Company would suddenly start to send formal notices of meetings to its shareholders. Learned Counsel further contended that even if this Court were to find that the Claimants had a reasonable expectation of receiving notices in these circumstances, they would have failed to demonstrate any compensable injury resulting from this procedural failure.

[25] It was further contended that the Claimants have also failed to establish that the Company's treatment of dividends was in any way oppressive to them. The Claimants were paid regular stipends from 2005 to 2020 by the Company and it was temporarily ceased in 2020 in light of the Covid-19 Pandemic. This payment, she submits were stipend payments in lieu of dividends, which was a special

benefit extended only to them. No evidence was provided to controvert this evidence on the nature of the stipend payments.

[26] Learned Counsel for the Defendants submitted that the 1st Claimant failed to establish a reasonable expectation that he would continue as a director of the Company while maintaining his positions as a director and shareholder of a cannabis company. Even if this Court were to find that he had a reasonable expectation, it does not amount to oppression as the evidence is clear that the 1st Claimant even while being a director, did not have an interest in or participate in the Company's affairs.

[27] The Defendants' position is that the basis of the share increase, issue an allotment was done pursuant to the Shareholders' Agreement regarding the May Pen properties and there these actions cannot amount to oppression. It was submitted that the Court is empowered to give effect to and infer the reasonable expectations of the parties from the existence of an oral shareholders' agreement. It was further submitted that on a balance of probabilities based on the evidence before the Court, the following was agreed to by the shareholders in 2004:

> *(a) In 2004, Keith Davis and W. Stokes agreed to purchase two offices in May Pen to be used as Riviera's May Pen branch;*
>
> *(b) The two properties would each be purchased by Stokes and Davis;*
>
> *(c) When the Company was able to take transfers of the properties, Stokes and Davis would be reimbursed by the repayment of cash or by issue of shares; and*
>
> *(d) Keith Davis, who was in charge of the Company at the time, informed his family and the other shareholders who were in the office (such as Dalou Wong and Sybil Holness) and no one disagreed or objected, hence the coming into existence of the 2004 Shareholders Agreement.*

[28] Learned Counsel for the Defendants submitted that the letters from Monica Earle-Brown, Attorney-at-Law, the fact that the Claimants do not know how the properties was paid for and that there is no evidence that the Company or the estate of Mr. Keith Davis paid for the properties, supports a finding by this Court that the 1st Defendant did in fact purchase the properties. The Claimants have also not

provided any evidence to this Court or demonstrated in any way that the Company had the cash to reimburse the 1st Defendant for the purchase of the properties. Contrary to the Claimants' assertions, the pre-emption rights do not apply in these circumstances. Learned Counsel for the Defendants directed the Court to section 61 (3) of the Companies Act and Article 3 (21) of the Articles of the Company. It was contended that Articles 5 and 6 of the Articles of Association provides the directors with the power to issue and allot shares to such persons and on such terms as they deem fit. Article 6 would therefore not apply here as the shares were issued pursuant to an agreement between the shareholders.

[29] The share increase, issue and allotment were done for a proper purpose, being an implementation of the Shareholders' Agreement, a means to inject needed capital into the Company and to ensure the Company met its solvency ratio as require by the Financial Services Commission. No credible evidence was adduced of any other purpose. The Court should find that the Defendants were acting in accordance with the Company's constituent documents and statutory obligations, and the Claimants have failed to establish oppression. Learned Counsel for the Defendants submitted that if the Court finds oppression in this case, the only appropriate remedy in the circumstances is a buy-out order.

[30] Learned Counsel for the Defendants also relied on the following cases: **Villeneuve and another v Gaillard and another** [2011] UKPC 1; **Shefsky v California Gold Mining Inc** 2016 ABCA 103; **Mennillo v Intramodal Inc** 206 SCC 51; **Saunder v Alberta** 2020 ABQB 300 & 2021 ABCA 222; **Girvan Janis Fisher v Cedric Cadman et al** *(supra)*; **Badr v 2305136 Ontario Inc** 2016 ONSC 5039; **Howard Smith Limited v Ampol Petroleum Limited** *(supra)*; **Robert Dalby v Neil Wayne Bodily and Coloursource Limited** [2004] *(supra);* **Re a company (No 005134 of 1986), ex parte Harris** *(supra)*; and **Gloria Chung & ors v Mikol Chung & anor** [2018] JMCC Comm 28.

THE APPLICABLE LAW

[31] The appropriate starting point would be section 213A of the Companies Act which provides remedies where a company has been operated in a manner that is oppressive, unfairly prejudicial or unfairly disregards the interest of an officer of a company. Section 213A states that:

> *(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 of any 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 an 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.

[32] It is not in dispute that the Claimants are complainants as defined under section 212 (3) of the Companies Act. They are both shareholders and would therefore qualify as a complainant and may apply to the Court for an order. I am guided by the words of Edwards J in **Benkley Northover v Eric Northover, Rohan Northover, Godfrey Dixon and Winston G. Northover Associates Limited** [2014] JMCC Comm 14 at paragraph 87:

Under section 213A, therefore, what is to be determined in respect of the Company are threefold. That is;

a) Whether an act or omission of the company or its affiliates result in oppression or unfair prejudice to any shareholder, debenture holder, creditor, director or officer of the company;

b) Whether the business affairs of a company or its affiliates have been or are being carried on or conducted in a manner oppressive or unfairly prejudicial to that group of persons; and

c) Whether the powers of the directors of the company or its affiliates are or have been exercised in a manner that is oppressive or unfairly prejudicial to the said group of persons.

[33] Edwards J further stated at paragraphs 90-92 that:

> *[90] An oppression remedy is a statutory right usually available to oppressed shareholders. It empowers the shareholders to bring an action against the corporation in which they own shares when the conduct of the company had an effect that is oppressive, unfairly prejudicial or unfairly disregards their interest as shareholders. Conduct considered in the above includes exclusion from management and diversion of Business. Section 213A now provides much wider remedies to a wider group but in considering what may constitute oppression regard may still be had to the English authorities.*
>
> *[91] According to "Butterworth Shareholder Remedies in Canada" at para.18:21, the oppression remedy is an equitable remedy. It is a broad flexible tool, designed to protect the interest of corporate stakeholders in a variety of corporate circumstances. The remedy is purely a statutory one. Certain elements must be present if the court is to have jurisdiction to invoke the remedy. It must be applied in a way that balances the protection of corporate stakeholders and the ability of management to conduct business in an efficient manner. See Brant Investments Ltd v KeepRite Inc [1987] 37 B.L.R. 65 Ont. H.C. at p 99; 3 O.R (3d.) 289; [1991] O.J. N0. 683 C.A. In that case Anderson J, at first instance, commented that "the jurisdiction is one which must be exercised with care." I wholeheartedly agree.*
>
> *[92] Oppressive conduct is defined as one which is burdensome, harsh and wrongful. It marks a "visible departure from standards of fair dealing and a violation of the conditions of fair play on which every shareholder who entrusts his money to a company is entitled to rely". It may arise on an illegal action, appropriation of corporate property, breach of equitable rights, mismanagement and squeeze outs". See judgment of Charles Hari Prashad J in Joan Devau v Dubulay Holding Limited and others, St. Lucia High Court SLUHCV 2003/0424 decided September 22, 203 (unreported) quoting from the House of Lords in Scottish Co-operative Wholesale Society v Meyer [1959] AC 324.*

[34] There are several Canadian cases which were relied on by Counsel and which the Court also intends to rely on. Section 213A of the Companies Act is modelled on the Canadian Business Corporations Act. As a result of that, cases emanating from Canada are persuasive in interpreting the section.

[35] In the case of **Sharma Persad Lalla v Trinidad Cement Holdings Limited, TCL Holdings Limited and Andy J. Bahan** *(supra)* Jamadar J stated that:

> *Oppression exists where there is conduct that is oppressive or unfairly prejudicial to, or that unfairly disregards the interest of, any shareholder or debenture holder, creditor director or officer of the company, as such.*
>
> *Thus, the three (3) categories of conduct that can give rise to the Oppression remedy, are introduced in the statute by the words 'oppressive', 'unfairly prejudicial', and 'unfairly disregard'. In my view, each of these introduces a separate category of conduct which may overlap in any given case, but each of which if proven, establish Oppression as encoded in section 242 of the Companies Act.*

[36] Jamadar J relied on the text Company Law of Canada at pages 72—721, where the authors commented on the interpretation of the three categories as follows:

> ***"Oppressive" has been interpreted as meaning burdensome, harsh or wrongful.*** *See example, Scottish Cooperative Wholesale Society Limited v Meyer (1959) A.C. (H.L.), and Burnett v Tsang (1985) 29 B.L.R. 196 (Alta. Q.B.).* ***"Unfairly prejudicial" has been interpreted to mean "acts that are unjustly or inequitably detrimental":*** *Diligenti v RWMD Operations Kelowna (1976) 1 B.C.L.R 36 (S.C.).* ***"Unfairly disregards" has been interpreted to mean "unjustly or without cause pay no attention to, ignore or treat as of no importance the interests of security holders, creditors, directors or officers":*** *Stech v Davies (1987) 53 Alta L.R. (2d) 373 (Q.B.).*
>
> *It is not a requirement of the Act that evidence of bad faith or a want of probity must be established by the complainant, although evidence of bad faith may be relevant in a determination of whether the quality or propriety of the conduct is oppressive or unfair: see Bryant Investments Ltd v Keeprite Inc (1991) E Q.R. (3d) 298 of (C.A.) and Palmer v Carling O'Keefe Breweries of Canada Ltd (1989) 67 O.R. (2d) 161 (Div. Ct.)* ***[emphasis mine]***

[37] In **BCE Inc v 1976 Debentureholders** *(supra)* it was stated that:

> *The oppression remedy focuses on harm to the legal and equitable interests of a wide range of stakeholders affected by oppressive acts of a corporation or its directors. This remedy gives a court a broad jurisdiction to enforce not just what is legal but what is fair. Oppression is also fact specific: what is just and equitable is judged by the reasonable expectations of the stakeholders in the context and in regard to the relationships at play. [45] [58-59]*

> *In assessing a claim of oppression, a court must answer two questions: (1) Does the evidence support the reasonable expectation asserted by the claimant? and (2) Does the evidence establish that the reasonable expectation was violated by conduct falling within the terms "oppression", "unfair prejudice" or "unfair disregard" of a relevant interest? For the first question, useful factors from the case law in determining whether a reasonable expectation exists include: general commercial practice; the nature of the corporation; the relationship between the parties; past practice; steps the claimant could have taken to protect itself; representations and agreements; and the fair resolution of conflicting interests between corporate stakeholders. For the second question, a claimant must show that the failure to meet the reasonable expectation involved unfair conduct and prejudicial consequences under s. 241.*

[38] The Canadian Supreme Court set out in **BCE Inc v 1976 Denbentureholders** two related inquiries in a claim for oppression: (1) does the evidence support the reasonable expectation asserted by the claimant? And (2) does the evidence establish that the reasonable expectation was violated by conduct falling within the terms "oppression", "unfair prejudice" or "unfair disregard" of a relevant interest?

[39] These inquiries were also seen in the **Peoples Department Store Inc (Trustee of) v Wise SC Canada** 2004 SCC 68; [2004] 3 SCR 461 at para 41 and was relied on by Edwards J in **Benkley Northover**. It was also summarized by the Court of Appeal of Alberta in **Shefsky v California Gold Mining Inc** *(supra)* –

> *[22] A court's broad equitable jurisdiction under the oppression remedy is subject to three governing principles.*
>
> - *First:* ***not every expectation, even if reasonably held, will give rise to a remedy because there must be some wrongful conduct, causation and compensable injury in the claim for oppression****: BCE at paras 68, 89-94.*
>
> - *Second:* ***not every interest is protected by the statutory oppression remedy. Although other personal interests may be connected to a particular transaction, the oppression remedy cannot be used to protect or advance, directly or indirectly, these other personal interests.*** *"[I]t is only their interests as shareholder, officer or director as such which are protected": Naneffv Con-Crete Holdings Ltd at para 27. Furthermore, "the oppression remedy protects only the interests of a shareholder qua shareholder. Oppression*

remedies are not intended to be a substitute for an action in contract, tort or misrepresentation": Stahlke v Stanfield, 2010 BCSC 142 at para 23, affd 2010 BCCA 603 at para 38, 305 BCAC 18.

- *Third**: courts must not second-guess the business judgment of directors of corporations. Rather, the court must decide whether the directors made decisions which were reasonable in the circumstances and not whether, with the benefit of hindsight, the directors made perfect decisions**. Provided the directors acted honestly and reasonably, and made a decision in a range of reasonableness, the court must not substitute its own opinion for that of the Board. If the directors have chosen from one of several reasonable alternatives, deference is accorded to the Board's decisions: Stahlke at para 22; Pente Investment Management Ltd v Schneider Corp (1998), 42 OR (3d) 177 at para 36, 44 BLR (2d) 115 (CA); BCE at para 40.1" **[emphasis mine]***

A. *Whether pursuant to section 213A of the Companies Act, the actions of the Defendants are oppressive, unfairly prejudicial and/or unfairly disregards the interests of the Claimants*

[40] The Claimants are alleging that the actions of the Defendants are oppressive, unfairly prejudicial and/or unfairly disregards their interests. I will examine individually the actions of the Defendants and make a determination as to whether they were reasonable expectations and if they are in any way oppressive, unfairly prejudicial and/or unfairly disregarded the interests of the Claimants. I agree with Learned Counsel for the Defendants that the increase in share capital and the issuing and allotment of the shares is the central focus of the Claimants' case. There are also several other issues which must be dealt with before a determination is made in respect of that.

Notices and Company Meetings

[41] Learned Counsel for the 1st Claimant submitted that their client was not given notice of the meeting to increase the share capital nor for any issue and allotment of the new shares in the Company. The 1st Claimant only became aware of this

when he carried out searches at the Companies Registry in 2020 and 2021. It was submitted that as a shareholder, it was reasonable for the 1st Claimant to expect that any increase in share capital and allotment of shares would be done in accordance with the Articles of Association of the Company, which the 1st Defendant agreed in cross-examination represented the agreement between the shareholders and a company and shareholders with each other. The 1st Claimant therefore had a reasonable expectation of being notified of such a meeting to increase the share capital of the Company and receiving a notice for him to decide if he wanted to take up the new shares which were being issues and allotted.

[42] Learned Counsel for the 1st Claimant relied on the case of **Delores Scott-Carlington**. In that case, the Court held that a shareholder had a reasonable expectation that she would receive notice of the meetings in which the share capital of the Company was increased and new shares issued and that she had been deprived of the opportunity to take up the offer to acquire the new shares and therefore this conduct was unfairly prejudicial to her.

[43] Learned Counsel for the 2nd Claimant submitted that even though her client remained in contact with the 1st and 2nd Defendants, she was also not given notice and/or told of the increase in share capital and neither was an offer made to her in her capacity as an existing shareholder for additional shares in keeping with the Articles of the Company.

[44] Learned Counsel for the Defendants submitted that failure to give notices does not, without more, ought to be considered oppression. They relied on the case of **Mennillo v Intramodal Inc** *(supra)* and **Saunder v 360373 Alberta Limited** *(supra)* to show that even though the company did not comply with certain formalities, it does not on its own amount to oppression. Counsel further submitted that mere failure to comply with statutory requirements does not on its own amount to oppression. In **Saunder**, the Court had to determine whether the alleged oppressive actions of the defendant company did in fact amount to oppression. It was held that even though the failure to comply with the statutory requirements

breached the claimant's reasonable expectation, the claimant failed to demonstrate any compensable injury which resulted from those procedural failures. In **Mennillo** the claimant failed to show that his interested were prejudiced and unfairly disregarded.

[45] However, I am guided by the case of **Delores Scott-Carlington**. In that case the Court inferred from Mrs. Scott-Carlington's evidence that, she had a reasonable expectation that she would receive notice of important meetings especially those relating to the increase in share capital. This reasonable expectation would arise simply from the fact of being a shareholder. The Court found that no oppression had been made out but that Mrs. Scott-Carlington was prejudiced because she was deprived of the opportunity to protect her percentage shareholding, which was decreased at the meeting that she did not receive notice for. The Court also stated that the fact that Mrs. Scott-Carlington might not have been interested in the running of the company, stayed out of contact and did not make any effort to contact the company until 2011 to dispose of her shares is irrelevant and of not merit.

[46] I am persuaded by the judgment of the Court in **Delores Scott-Carlington**. I agree with the submission of Learned Counsel for the 1st Claimant that the 1st Claimant was entitled to notice regardless of whether or not he expressed an interest in the running of the Company. A meeting that increased the share capital of the Company and decreased the percentage of shares held by the Claimants is an important and detrimental event and as such it must be a reasonable expectation that notice be given to all shareholders. The Defendants had contact with the Claimants, even on their own evidence, and therefore they should have given notice to the Claimants. Even with the consistent practice of informality, the Claimants ought to have received notice of the meeting.

[47] The evidence of the Defendants is that communication with directors and shareholders was done informally in person or by telephone and never in writing. If there had been some form of notice to the Claimants, even if it was informal,

then the Court would be bound to make a finding that the interests of the Claimants were not oppressed, unfairly prejudiced or unfairly disregarded. However, with no notice having been given to the Claimants I therefore find that their interests were unfairly prejudiced.

[48] In relation to company meetings, Learned Counsel for the 1st Claimant submitted that in **Girvan Janis Fisher** *(supra)* it was held that the failure to hold an Annual General Meeting is unfairly prejudicial. However, I see no merit in this submission. Having examined the case, I agree with the submission of Learned Counsel for the Defendants that in **Girvan Janis Fisher**, the Court held that the conduct which was unfairly prejudicial was not as broad as submitted by Learned Counsel for the 1st Claimant. The conduct of the defendants was held to unfairly prejudicial to the interests of the claimant in circumstances where the defendants indicated to the claimant that her reasonable factual queries about the conduct of the defendant company's business would be answered at an Annual General Meeting, but then postponed said meeting indefinitely without good reason and without providing answers to her queries by any other means. I therefore see no merit in the submission that failure to hold company meetings is unfairly prejudicial.

Removal of the 1st Claimant as a director

[49] The 1st Claimant was removed as a director at a meeting held on the 20th day of September, 2017. Learned Counsel for the 1st Claimant submitted that their client was improperly removed as a director from the Company without notice in circumstances where he had been a director from 1997 and he did not agree to step down as director.

[50] Section 179 of the Companies Act outlines the removal of directors. It states that:

> *179.—(1) A company may by ordinary resolution remove a director before the expiration of his period of office notwithstanding anything in its articles or in any agreement between it and him: Provided that this subsection shall not, in the case of a private company, authorize the removal of a director holding office for life on the 5th of February, 1963, whether or not*

> *subject to retirement under an age limit by virtue of the articles or otherwise. Appointment of directors to be voted on individually.*
>
> *(2) Special notice shall be required of any resolution to remove a director under this section or to appoint somebody instead of a director so removed at the meeting at which he is removed, and on receipt of notice of an intended resolution to remove a director under this section the company shall forthwith send a copy thereof to the director concerned, and the director (whether or not he is a member of the company) shall be entitled to be heard on the resolution at the meeting.*

[51] What is clear from that section is that a director may be removed by Ordinary Resolution and special notice shall be sent to the director concerned. The 1st Defendant admitted that no notice was sent to the 1st Claimant of the meeting that purported to remove him as director, nor was any notice sent to the 1st Claimant that he was removed. The evidence of the Defendants is that a decision was taken not to reappoint The 1st Claimant as a director was as a result of the concerns regarding his positions as director and shareholder of a cannabis company.

[52] I see no need to delve into whether or not the reason for the decision was valid or whether it entitled the Defendants to remove the 1st Claimant as a director. What is important is that, regardless of the reason taken to remove the 1st Claimant as director, the procedure as laid out in section 179 ought to be followed. The evidence before me is that this was not done. Learned Counsel for the Defendants submitted that the 1st Claimant has failed establish a reasonable expectation that he would continue as a director of the Company while maintain his positions as a director and shareholder of a cannabis company. Respectfully, I do not agree. In my view, the reasonable expectation would be that if he was to be removed as a director it would be in accordance with the Companies Act and/or the Articles of Association which govern the dealings of the Company. The 1st Claimant would have had a reasonable expectation that if he was to be removed it would be in accordance with section 176 of the Companies Act.

[53] Wiltshire J in **John Fitzgerald Peart v Sandra Palmer-Peart, SSP Aptec Limited and JSJ Holdings Limited** [2018] JMSC Civ 186 found that non-compliance with

the Articles of Association and the Companies Act invalidates the removal of the Claimant and the appointments of new directors. She held that the claimant was entitled to notice of a meeting where he was being removed as a director and where new directors were being appointed. Her ladyship found no evidence that notice was sent to the claimant and no evidence was produced to show exactly what was done to notify the claimant. Even though Wiltshire J was not dealing with a claim under section 213A, the principle emanating from her finding is applicable.

[54] The Defendants have admitted that no notice was sent to the 1st Claimant. Even though I have accepted that the Company operated in an informal manner, there ought to be some form of notice, even an informal one, sent to a person whose interests are being affected. This was not the case and as such it is necessary for me to make a finding that the removal of the 1st Claimant as director is invalidated due to non-compliance with the Companies Act.

[55] In relation to the 2nd Claimant, no submissions were made in relation to her seeking to be appointed as director. In any event, I see no grounds that would support her order.

Increase, Issuing and Allotment of Shares

[56] The increase, issuing and allotment of shares is the gravamen of the Claimants' case. A meeting was held where the share capital of the Company was increased from 8,000,000 to 20,000,000 shares. The 1st and 2nd Defendants were the only ones present at this meeting. Counsel for the 1st Claimant submitted that it was reasonable for the 1st Claimant to expect that any increase in share capital and the issuing and allotment of shares would be done in accordance with the Articles of Association of the Company. I think it is prudent to set out the relevant sections of the Articles.

> *4. The company is a Private Company and accordingly-*
>
> *(a) the right to transfer shares is restricted in the manner herein after prescribed*

> *5. The shares shall be at the disposal of the Directors who may allot or otherwise dispose of them (subject always to Articles 4 and 6) to such persons on such terms and conditions and at such time as the Directors think fit but so that no share shall be issued at a discount except in accordance with section 58 of the Act. Any preference share may, with the sanction of a Special Resolution be issued on the terms that it is, or that at the option of the Company is liable to be redeemed.*
>
> *6. Unless otherwise determined by the Company in General Meeting, any original shares for the time being unissued and not allotted as provided in Article 5 and any new shares from time to time to be created shall before they are issued be offered to the Members in proportion as nearly as may be, to the number of shares held by them. Such offer shall be made by notice specifically the number of shares offered, and limiting a time within which the offer, if not accepted, will be deemed to be declined, and after the expiration of such time, or on the receipt of an intimation from the person to whom the offer is made that he declines to accept the shares offered, the Directors may, subject to these Articles, dispose of the same in such manner as they think most beneficial to the Company. The Directors may, in the like manner, dispose of any such new or original shares as aforesaid, which by reason of the proportion borne by them to the number of persons entitled to such offer, cannot in the opinion of the Directors be conveniently offered in the manner hereinbefore provided.*

[57] It has already been determined that failure to give notice of meetings is unfairly prejudicial to the Claimants especially in circumstances where the actions at the meeting are detrimental to them. It must now be determined whether the increasing, issuing and allotting of shares, was oppressive, unfairly prejudicial and/or unfairly disregarded the interests of the Claimants. It is evident from the case law that when dealing with allotment of shares, the Courts must consider the duties that a director owes to a company. The director in exercising his duty is required to exercise his or her power for a proper purpose. The *locus classicus* case of **Howard Smith Limited v Ampol Petroleum Ltd** *(supra)* and others deals with the doctrine of proper purpose and it was held that it is a question of law as to whether a power was exercised for a proper purpose. In **Joni Kamille Young-Torres** *(supra)*, the Court of Appeal found that the directors' ability to allot shares was subject to the doctrine of proper purpose, that is the allotment of shares by a director must be made for a proper purpose.

[58] Learned Counsel for the 1st Claimant submitted that the increase, issue and allotment of the shares was done in contravention of the Companies Act and the Articles, which their client had a reasonable expectation would be adhered to by the persons in control of the Company. Learned Counsel for the 1st Claimant argued that the Articles provide that any original shares for the time being unissued and not allotted and any new shares from time to time to be created must first be offered to existing members of the Company before they are issued in proportion as nearly as may be to the number of shares held by them unless the Company determines otherwise in a general meeting. It was further argued that it is only if the existing shareholders do not accept the offer or declines to accept that offer that the directors may dispose of the shares in the manner most beneficial to the Company. It was submitted that the issuing and allotment of the shares was a breach of the pre-emption rights afforded to the Claimants under the Articles.

[59] On the other hand, Learned Counsel for the Defendants submitted that pre-emption rights do not apply in these circumstances as the Companies Act provide that shareholders have no pre-emptive rights in respect of shares issued by the Company for consideration other than cash or pursuant to rights previously granted by the company. The Defendants' position is that the basis of the share increase, issue and allotment was done pursuant to the Shareholders' Agreement regarding the May Pen properties and therefore these actions cannot amount to oppression.

[60] Dead men tell no tales and that is certainly true in this case. The 1st Defendant evidence is that both himself and Mr. Keith Davis had agreed that they would purchase two properties in May Pen for the use and benefit of the Company. This is not in dispute as both the 1st and 2nd Claimant accepted that there was an arrangement for the purchase of the said properties. However, they did not accept or agree with the Defendants that the agreement also included that both the 1st Defendant and Mr. Keith Davis would both be reimbursed for the purchase of the properties either in cash or by way of shares. The other person, Ms. Sybil Holness, the sister of Mr. Keith Davis who based on the evidence was privy to the terms of the agreement and who would have been able to shed light on the terms is also

deceased. The only evidence regarding the terms comes from the 1st Defendant himself, as even the 2nd Defendant is only able to say what the 1st Defendant told him.

[61] Unfortunately, the purchase of the properties was not complete until after the death of Mr. Keith Davis and this is where further dispute arises between the parties. The 1st Defendant maintained that he paid for the property and that it is confirmed by the letters of Monica Earle Brown. However, I will place no reliance on the letters by Monica Earle Brown. She clearly states in the letter that the information she received is not based on her first-hand knowledge of the transaction but rather it only reflects what the 1st Defendant told her. Even though, there is no evidence that the estate of Mr. Keith Davis paid for the property, there is also no evidence that the 1st Defendant solely paid for it either. The 1st Defendant mentioned hypothecating his JMMB account but no evidence of that was placed before this Court. What is clear, to me is that the properties were purchased and transferred to the Company.

[62] The 1st Defendant has given two reasons for the increase in share capital. He said that the increase in the share capital was to inject much needed capital into the Company and this is what is reflected on the minute sheet of the meeting where the share capital was increased. He has also said that the increase in the share capital served as reimbursement for the purchase of the properties in May Pen. These two things do not contradict each other. As it can be said that the 1st Defendant in upholding the agreement between himself and Mr. Keith Davis by reimbursing himself was injecting needed capital into the Company.

[63] If I was to agree that, on a balance of probabilities, the 1st Defendant purchased the properties and was to be reimbursed, then I would be inclined to agree with the submissions of Learned Counsel for the Defendants that the pre-emption rights would not apply. Section 61(3) of the Companies Act state that:

> *Notwithstanding that the articles provide the pre-emptive right referred to in subsection (1), the shareholders of the company have no pre-emptive right in respect of shares to be issued by the company—*
>
> *a) for consideration other than cash;*
>
> *b) pursuant to the exercise of conversion privileges, options or rights previously granted by the company.*

[64] However, this would not be the end of the matter. The next logical question, having issued the 12,000,000 shares to himself, is whether the 1st Defendant was entitled to issue and allot some of those shares to the 2nd and 4th Defendants. In my view, the pre-emption rights afforded the other shareholders would apply here. The exception under section 61(3) of the Companies Act would only apply to the shares issued to the 1st Defendant. Before he issued and allotted same to the 2nd and 4th Defendants, he would have been bounded by the pre-emption rights afforded to the other shareholders. This would mean that the shares that were issued and allotted to the 2nd and 4th Defendant could be set aside. Another issue arises if I was to make such a finding. I would have to consider whether the fiduciary duty was breached as the shares were not valued in order to determine how many shares should be allotted to the 1st Defendant for the purchase of the properties. I see no need to go in depth with this discussion, however, what I will say is that the director in exercising his powers to act in accordance with section 174 of the Companies Act. The 1st Defendant stated that the shares were not valued when the decision to increase the share capital was made. I am mindful that he also stated that at the Company, the principle is that they are issued at par and therefore no valuation is needed before the shares are issued. If it was found that this fiduciary duty was breached, then it could support a finding that the actions amounted to unfair prejudice of the interests of the Claimants and the issued and allotted shares could be set aside.

[65] On the other hand, if on a balance of probabilities, I do not find that the 1st Defendant was entitled to be reimbursed for the purchase of the properties and the increase in share capital was in fact to inject needed capital into the Company, then the right of first refusal ought to have been offered to the existing shareholders

before it was offered to anybody else. The Court would still be in the similar position regarding the setting aside of the issuing and allotment of the shares to the 1st, 2nd and 4th Defendants.

[66] Even if, the shares issued to the 2nd and 4th Defendants were for services rendered there are other factors that ought to have been taken into consideration before this was done. Pursuant to section 38 of the Companies Act, there are certain considerations that must be into account before such an allotment can be made. I agree with Learned Counsel for the 1st Claimant the evidence shows that no qualified accountant valued the services they provided in monetary terms. There is no evidence to show the nature of the consideration, the value or the extent to which the shares to be issued will be credited as paid up.

[67] In any event, I am of the view that the increase in the share capital was valid. There is nothing in the evidence that suggests to me that there was an improper purpose for which the share capital was increased. If I was to accept one reason over the other, my finding would remain the same. What is left for my determination is whether the subsequent issuing and allotment of the shares was valid.

[68] I am willing to accept that the increase in share capital was done so that capital could be injected into the Company. The increase, in my view, is therefore valid. However, in light of the fact that there is no evidence before to suggest how the property was paid for and there is also no evidence of the director acting for an improper purpose, I am inclined to make a finding that the issued shares should have been offered to the existing shareholders. Notice should have been given to them of the increase in share capital and they should have also been given the option of first refusal when the shares were issued. The 1st Defendant therefore acted in breach of the Articles of Association and the Companies Act when he issued and allotted the shares to himself, the 2nd Defendant and the 4th Defendant. This pre-emption right is there to maintain the balance of control between the existing shareholders. It could have prevented the diminution in value of the existing shares. The effect of the issuing and allotment of the shares substantially

diluted the shareholding of the Claimants and this is an act that proved to be detrimental to them.

[69] The conduct of 1st Defendant could therefore be held to amount to unfairly prejudicial conduct. In **Benkley Northover**, Edwards J found that the procedure outlined in the articles of the company were breached and therefore the allotment and issuing of the shares were invalid. Her ladyship did not accept the submission that a breach of the pre-emption rights provisions in and of itself does not mean that the issuing and allotment of the shares was automatically invalid. Similarly, I am of the view that it was not the mere act of the breach of the pre-emption rights that led me to my decision. The breach coupled with the fact that the shareholding percentage of the Claimants were reduced and proved to be detrimental to the Claimants' interest supports my decision that the issuing and allotment of the shares was invalid.

[70] I accept that the 1st Defendant may not have intended to be unfair to The 1st Claimant and that he believed that his actions were simply to reimburse himself for the purchase of the properties and in the case of the 4th Defendant to remunerate her for services rendered in accordance with Article 3 (30) of the Articles of Association. I also accept that he did not put his interests above the interest of that of the Claimants. However, as was held in the case of **Such v RW-LB Holdings Ltd** (supra), *"…proof of bad faith was not required to obtain an oppression required to obtain an oppression remedy and that the burden of proof of unfair prejudice or disregard is less rigours than the burden of proof of oppression because as stated what is at issue is the unfair result, not a state of mind."* Even though a finding has been made that the actions of the Defendants unfairly prejudiced the Claimants, it is not a finding of this Court that the Defendants and in particular the 1st Defendant was dishonest or acted in bad faith. It is simply that the actions resulted in an unfair result that prejudiced the interests of the Claimants.

B. *If this is so, what, if any, remedy is available to the Claimants*

[71] Section 213A (3) outlines the remedies that can be granted pursuant to a claim for oppression. I see no difficulty in granting the Declarations that the Claimants are seeking regarding the actions of the Company being unfairly prejudicial. In light of the finding that the issuing and allotment of the shares is invalid, it must therefore follow that the appropriate remedy would be to set aside the said issuing and allotment of the shares must be set aside. This is a remedy that the Court may grant pursuant to section 213A (3). The Court is inclined to make an Order that the increased shares should be offered to the members of the Company in accordance with Article 6 of the Articles of Association.

[72] In respect of the directorship, I am inclined to make a finding that the 1st Claimant be re-appointed as director. I see no evidence before me to support a finding that the 2nd Claimant ought to be appointed as director of the Company. On her own evidence, her directorship ceased in 1997 and no submissions advanced as to why she ought to be appointed as one now.

[73] Respectfully, I find no favour with the submission of Learned Counsel for the Defendants, that the only appropriate remedy in the circumstances is a buy-out. I agree that the Court is at liberty to order a buy-out even where the claimant has not sought that relief. However, the cases as relied on by Learned Counsel for the Defendants show that a buy-out is ordered where there is a total breakdown in trust and confidence between the parties as was the case in **Gloria Chung** *(supra).* I see no breakdown in trust between the parties or confidence between the parties in this case. Even though, the Claimants showed no interest in the Company over the years, the directors of the Company are still expected to act in accordance with the Articles of Association and maintain the minimum standard of fairness as was the case in **Delores Carlington-Scott.**

CONCLUSION

[74] This Court concludes that the Claimants have established that unfair prejudice is present in the case at bar. Based on the evidence and the applicable case law, the Claimants in their capacity as shareholders reasonably expected that they would receive notices of meetings, in particular the ones that sought to increase share capital and to issue and allot new shares which would seek to reduce their percentage of shares in the Company. Having established that this reasonable expectation existed, I also concluded that the Defendants' conduct amounted to unfair prejudice. The actions of the Defendants breached the Articles of Association of the Company and the Companies Act and demonstrated to this Court that even though the Defendants may not have been acting in bad faith, the effect of same was detrimental to the Claimants. As such the reduction in the Claimants' percentage of shareholding was unfair and prejudicial. The Claimants are therefore entitled to the remedies as outlined above.

ORDERS & DISPOSITION

[75] Having regard to the forgoing, these are my Orders:

(1) The Court declares that the business and/or affairs of the Company have been conducted in a manner that is unfairly prejudicial to the interests of the Claimants.

(2) The Court declares that the powers of the directors have been exercised in a manner that is unfairly prejudicial to the interests of the Claimants.

(3) The removal of the 1st Claimant, Rickie Davis, is invalid as same is not in keeping with the Companies Act.

(4) The 1st Claimant, Rickie Davis, is hereby re-appointed as a director of the 5th Defendant, Riviera Insurance Agency Limited, alongside the current directors, the 1st Defendant, Wellesley Stokes, the 2nd Defendant, Keroy Myers and the 3rd Defendant, Dalou Wong.

(5) The issuing and allotment of the shares on the 11th day of October, 2019 and the 27th day of November, 2020 are hereby set aside.

(6) The Register of Members is to be rectified within fourteen (14) days of the date hereof to reflect the names of the shareholders before the issuing and allotment of the shares before the 11th day of October, 2019.

(7) The 12,000,000 additional shares are to be offered to the members of the Company in accordance with Article 6 of the Articles of Association. This means that the shares, before they are issued, are be offered to the Members in proportion as nearly as may be, to the number of shares held by them. Such offer shall be made by notice specifically the number of shares offered, and limiting a time within which the offer, if not accepted, will be deemed to be declined, and after the expiration of such time, or on the receipt of an intimation from the person to whom the offer is made that he declines to accept the shares offered, the Directors may, subject to these Articles, dispose of the same in such manner as they think most beneficial to the Company. The Directors may, in like manner, dispose of any such new or original shares as aforesaid, which by reason of the proportion borne by them to the number of persons entitled to such offer, cannot in the opinion of the Directors be conveniently offered in the manner hereinbefore provided.

(8) Costs to the Claimants to be taxed if not agreed.

(9) Orders stayed for six (6) weeks pending the filing of an appeal. Nothing further is to be done with the shares or the assets until the expiration of the six (6) weeks.

(10) 1st Claimant's Attorneys-at-Law to prepare, file and serve Orders made herein.