[2016] JMSC COMM 16

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN THE COMMERCIAL DIVISION

CLAIM NO. 2015CD00119

BETWEEN	**ERVIN MOO YOUNG**	**CLAIMANT**
AND	**DEBBIAN DEWAR**	**FIRST DEFENDANT**
AND	**MARSHENEE CHEDDISINGH**	**SECOND DEFENDANT**
AND	**ZIP (103) FM LIMITED**	**THIRD DEFENDANT**

IN CHAMBERS

Symone Mayhew for the claimant

Tana'ania Small Davis, Miguel Williams and Kerri-Ann Allen Morgan instructed by Livingston Alexander and Levy for the first and second defendants

Georgia Gibson Henlin QC and Jullion Stewart instructed by Henlin Gibson Henlin for the third defendants

June 1 and 2, 2016

COMPANY LAW - SECTION 213A OF THE COMPANIES ACT - UNFAIR PREJUDICE - WHETHER INJUNCTION SHOULD BE GRANTED AGAINST POSSIBLE ACTION TAKEN ON PASSED RESOLUTION - WHETHER INJUNCTION SHOULD BE GRANTED AGAINST THE DEFENDANT ACTING AS A DIRECTOR UNTIL COURT CONSIDERS THE MATTER - WHETHER A SUITABLE PERSON SHOULD BE APPOINTED IN THE INTERIM

SYKES J

THE APPLICATION

[1] Mr Ervin Moo Young is a shareholder and director of ZIP (103) Limited ('ZIP'). He wishes to stop two directors of Zip, Mrs Debbian Dewar and Mr Marshenee Cheddesingh, 'from taking any action further to any resolution passed by the company at the Emergency Board Meeting held on May 6, 2016.' He is also asking for an order stopping Mr Marshenee Cheddesingh from continuing to act as a Director until further consideration of the matter. He also wishes suitable persons to be appointed to act as independent directors pending resolution of the claim. These are very ambitious orders in light of the material presented before the court and what the law demands.

[2] Before going any further it is safe to say that the application to stop Mr Cheddesingh from acting as director is refused. Mr Moo Young wishes to achieve the final remedy before a proper hearing.

[3] This claim, stripped of all extraneous matter, is about control of Zip. A struggle has emerged for the control of Zip since the deaths of Mr Karl Young ('Karl') and his son Mr Chad Young ('Chad'). As it presently stands, Mrs Dewar, Mr Cheddesingh and Mr Moo Young are prima facie the directors. The court is not deciding on this interim application on the validity of any of the appointments since that is the issue at the final hearing. Until a decision is made on that issue it is taken that the directors are validly appointed. From the evidence presented, it appears that Mrs Dewar and Mr Cheddesingh have combined to out vote Mr Moo Young on some issues at board meetings.

[4] Mr Moo Young, practical terms, is asking, at this interim stage, for the complete immobilisation of Mr Cheddesingh. Though the interim application states that it wishes to bar him from being a director for the time being. The real effect is to achieve a major victory before the final hearing. For a litigant to secure a final

remedy in all but name at the interim stage would be quite extraordinary. In this case, for Mr Moo Young to secure virtually the final remedy of the removal of Mr Cheddesingh at this stage would require presentation of evidence of exceptional strength and reliability. As will be seen the evidence presented is not of that quality. The interim remedy preventing Mr Cheddesingh from acting as a director is refused.

[5] The amended notice of application was filed because by the time the original application came before the court, which was seeking an order stopping the emergency board meeting scheduled for May 6, 2016, the meeting had already taken place.

[6] The application is made under section 213A of the Companies Act ('the Act'). That section authorises the court 'to make any interim … order it thinks fit, including an order appointing directors in place of, or in addition to, all or any of the directors then in office.'

[7] Under section 213A of the Act a complainant may apply to the court seeking remedies for conduct 'that is oppressive or unfairly prejudicial to any shareholder or debenture holder, creditor, director or officer of the company.' The meaning of these expressions will be explored to see what Mr Moo Young needs to establish on this interim application.

The alleged acts of unfair prejudice

[8] Mr Moo Young in an affidavit sworn on May 10, 2016 sets out to establish his case for the interim remedies. In that affidavit he said that the other two directors have continued to conduct themselves in a manner that is 'oppressive and unfairly prejudicial to' his interest as director and shareholder of Zip.

[9] A bit of history. Mrs Joni Young-Torres brought a claim in which she was challenging the validity of an allotment of 490,000 shares in Zip to Chad. That ended in favour of the allotment. There is now an appeal. A counter notice has been filed by Mr Moo Young, Mrs Dewar and by Zip. The appeal on behalf of Zip

was filed by the firm of Henlin Gibson Henlin ('HGH'). Zip has also filed an application for fresh evidence to show that the allotment was for an improper purpose.

[10] HGH has delivered an invoice for professional services rendered to Zip. Mrs Dewar has declined to pay. Mrs Dewar and Mr Cheddesingh have passed a resolution seeking to retain other attorneys. That resolution was passed at an emergency board meeting held on April 25, 2016.

[11] Mr Moo Young says that HGH advised him that it has not received any notification terminating its representation of Zip. Quite boldly despite the resolution of two out of three directors, Mr Moo Young has stated that 'I have not and I am not terminating their retainer on the Company's behalf.' A very telling statement in face of a prima facie lawfully passed resolution.

[12] Mr Moo Young stated that no reason was given for the termination of the services of HGH. He is of the view that HGH has always represented Zip and Grove Broadcasting ('Grove') 'impartially and with specific regard to the best interests of each company.' He is concerned about the timing of the resolution in that it came shortly after he attended a disciplinary hearing against Mr Cheddesingh in respect of matter concerning Grove.

[13] On May 5, 2016 he received another notice of an emergency board meeting. The agenda was to consider the appointment of a law firm other than HGH as attorneys for Zip. He says that a change of attorney at this stage of the proceedings is not in the best interests of the company and the refusal to pay the bill submitted by HGH 'may expose the company to unnecessary and additional liability.'

[14] Mr Moo Young expresses the view that it appears that the only reason for the proposed change is that the other two directors do not agree with the positions taken by HGH 'on behalf of the company having regard to their personal

interests.' He noted that the same two directors took a similar view regarding the Zip's previous attorneys.

[15] Before going on to Mr Moo Young's other affidavits, it is as plain as day that this affidavit, by itself, is very weak and incapable of providing a foundation for even a consideration of the interim remedies sought. The affidavit has not stated what the interests of the other two directors are and neither has it shown how those interests are contrary to the position taken by HGH that is said to be in the interest of the company. What Mr Moo Young has done is to state his conclusion but respectfully, what he is required to do is set out the actual evidence and leave it to the court to draw the conclusion. What has happened here is that he has stated the conclusion without laying out fully and completely the evidence. As Mrs Small Davis said, he has used the right formulation of words but without the evidence to back it up.

[16] Mr Moo Young filed another affidavit dated May 18, 2016. This was for use in Claim No 2015HCV05096. This claim was issued by Mrs Young Torres against Mr Ervin Moo Young and others. This affidavit returned to the theme of the change of attorneys and his concerns about that. He also speaks of an aborted disciplinary hearing for Mr Cheddesingh in respect of matters related to Grove. Mr Moo Young refers to matters before the court involving the parties and the stages that those matters have reached in the litigation process.

[17] He says that on May 5, 2016 he received notification of an emergency board meeting to consider the appointment of a firm of attorneys for Zip. The notification also stated that the firm engaged would take instruction from Mr Marshenee Cheddesingh.

[18] Mr Moo Young details the following:

(1) HGH represented Zip and Grove since October 2014 when Mrs Dewar objected to the previous attorneys;

(2) Mrs Dewar filed Claim No 2015CD00089 against all the directors except Mr Cheddesingh, Mrs Young Torres, Miss Kimberly Murphy and Grove in relation to Mrs Dewar's suspension ('the Dewar claim');

(3) Mr Moo Young filed Claim No 2015CD000119 against Mrs Dewar and Mr Cheddesingh on September 25, 2015 ('the Moo Young claim');

(4) A holding position was arrived at in relation to Claim No 2015CD00089;

(5) In the Dewar claim HGH acted for Grove and Mr Moo Young and Mr Beres Warren in their capacity as directors;

(6) Claim no 2015HCV05096 was issued by Mrs Young Torres against Mr Moo Young, Mrs Debbian Dewar (as executor of Chad's estate) challenging the validity of the allotment of 490,000 share to Chad ('the Young Torres claim');

(7) In the Dewar claim Mr Moo Young authorised HGH to accept service for Grove. He says that there was no resolution and none was required. It is noted by the court that he does not say that there was even a board meeting where the matter was discussed. His explanation is that the company did 'not operate with that degree of formality and in any event it is not in the articles.'

(8) By a similar process of reasoning as was utilised in the Dewar claim he gave written authorisation to HGH to accept service on the part of Zip in the Young Torres claim. Again he does not say that it was discussed by the board. So what Mr Moo Young has said is that he alone made two major decisions for two companies never mind that those decisions have financial implications for both companies. He justified this conduct on the basis that (a) the articles do not speak to the necessity for a board resolution and (b) the informal nature in which both companies were or are operated;

(9) He outlined the chronology of events in the current claim;

(10) Mrs Dewar filed her defence in the Young Torres claim and stated that she was appointed Managing Director;

(11) In the Young Torres claim Zip also filed its defence and an ancillary claim to challenge Mrs Dewar's assertion that she was appointed Managing Director because it was felt that had that assertion not been challenged Zip's position in the current claim (Moo Young claim) would have been prejudiced;

(12) A decision in the Young Torres claim was handed down. Mrs Dewar wrote to HGH indicating that its legal fees would not be paid because it was not necessary for the company to advance any defence in that case;

(13) Mrs Dewar again wrote to HGH a second time and pointed out that HGH was not in contact with her as Managing Director. Mr Moo Young then states that the dispute as to her status as Managing Director and the potential prejudice caused by to Zip is shown by the Sykes J's 'finding of fact' made and inferentially would have stood 'but for the fact that the attorneys were asked to review the judgment.'

(14) From these letters from Mrs Dewar, HGH became concerned that it was being " 'set up' to have inappropriate and direct communication with a person who is represented by an attorney at law";

(15) HGH has advised Mrs Dewar and her counsel that it was not proper for there to be direct communication between Mrs Dewar and HGH;

(16) In light of above Mr Moo Young says that he was concerned that Mrs Dewar and Mr Cheddesingh were taking steps to 'secure for themselves an advantage against the interest of ' Zip;

(17) The Moo Young claim came about because the concern was that Mrs Dewar and Mr Cheddesingh were acting against the interest of Zip in the light of the deaths of Karl and Chad;

(18) This concern led to the suspension of both Mrs Dewar and Mr Cheddesingh and an audit was commissioned by Grove;

(19) Mr Moo Young says that he does not know who are the signatories on Zip's account since Chad's death;

(20) In response to HGH's anxiety about being 'set up' HGH sought other counsel to make a derivative application to the court;

(21) Mr Moo Young expresses his concern about the change of attorneys;

(22) He wishes independent directors to be appointed to achieve transparency;

(23) He accuses Mrs Dewar of not wanting the board to get independent legal advice.

[19] The rest of the affidavit relates the contact with other counsel and other matters. These affidavits have not made a case for intervention at this interim stage.

[20] In support of the fixed date claim form in this claim Mr Moo Young filed two affidavits which were pressed into service on this application for interim orders. The first is dated September 24, 2015. The affidavit does speak to the history the allotment of shares, who were the initial shareholders, that Karl and Chad died and that there is a challenge to the appointment of Mrs Dewar and Mr Cheddesingh. Unfortunately the affidavit has not made out case for interim relief. It does not say what has happened or is happening that would warrant interim intervention of the nature applied for.

[21] There is another affidavit dated November 9, 2015. He speaks to the challenge to the appointment of Mrs Dewar and Mr Cheddesingh. He goes on to speak of 'governance issues' relating to Grove and Zip since Chad died. It exhibits an audit report. From that report the question of Zip taking a loan of J$15m in its name from National Commercial Bank and the loan subsequently 'transferred to Grove' thereby making Grove liable to repay Zip's loan has arisen. According to Mr Moo Young this loan was to construct a boundary wall for property where a radio station is located. Grove operates the radio station. He also alleges that Mrs Dewar is the only signatory on Zip's account.

[22] From what Mr Moo Young has produced, it appears to be the case that when the services of HGH were engaged there was no explicit permission from the board. No written permission from the board has been produced. The letters from HGH have not said that it was in receipt of approval by the board for its retention as counsel for Zip. It is clear that it was Mr Moo Young who actually engaged HGH.

[23] Until the validity of the appointment of Mrs Dewar is determined it is certainly and indeed her duty to query any engagement on behalf of Zip. The objective fact is that Mr Moo Young has said that he did not have a board resolution because in his view none was needed. As to whether Mrs Dewar's stance on the payment of fees was legally justified is another matter but certainly in her capacity as Managing Director she was entitled to question and under a duty to do so if there was an absence of lawful authority from the company for that engagement. It is certainly within her remit to enquire into the legality of the engagement.

[24] Other than saying that Mr Cheddesingh consistently votes with Mrs Dewar on issues at board meeting, Mr Moo Young has made no other specific allegations about Mr Cheddesingh.

[25] These affidavits, all of them together, have not met the legal standard. The legal standard for interim relief in this has to be looked in the context the final orders sought in this case and the grounds upon which they are sought. As noted earlier the present claim is one in which the validity of the appointment of the two

directors is questioned. The final remedy is a declaration that the directors were not properly appointed. Then there are consequential orders.

[26] In this specific case, the remedy as framed and the affidavits that were filed in support of the fixed date claim form focused heavily on the process of appointment and not conduct alleged to be unfairly prejudicial to Mr Moo Young. It would be unfairly prejudicial to Mr Moo Young to the extent that the appointments may be invalid. Immediately it should become clear that if the burden of the affidavits supporting the final remedy was to show that the appointments of Mrs Dewar and Mr Cheddisingh were invalid as distinct from their actual conduct of the affairs of the company then seeking an interim remedy of the kind sought here was not going to be an easy task unless something dramatic had occurred since the filing of those initial affidavits.

[27] Also, if there was conduct alleged to be able to ground a complaint of unfair prejudice in existence before or at the time the fixed date claim form was filed, why not state what that conduct was in the supporting affidavits?

Unfair prejudice

[28] During the hearing Mrs Symone Mayhew made it clear that the application for interim remedies was on the ground of unfair prejudice and not oppression. What does the case law say about unfair prejudice? To answer this question assistance is sought from the Supreme Court of Canada. Before the answer there needs to be a bit of context.

[29] When directors are being accused of conducting the affairs of the company that is ‘unfairly prejudicial’ to a shareholder or a director the court has to consider that accusation against the background of a fundamental principle which is that a director is under a duty of loyalty to the company. He or she is in a fiduciary relationship to the company. This duty requires the director to place himself or herself in a position where his or her duty to the company and personal interest

do not conflict. If they conflict then his or her duty to the company takes precedence.

[30] In **BCE, Re** [2008] 3 SCR 560, the Canadian Supreme Court had to consider a derivative action, oppression and unfair prejudice in the context of the Canadian Business Corporation Act section 122.[1] With immaterial alterations the phraseology is identical to section 174 of the Jamaican Companies Act. The Supreme Court made reference to section 122 of the Canadian statute in setting the foundation for its analysis of the remedies available to difference classes of persons who may wish to enforce rights either against the company or against the directors of the company.

[31] The Supreme Court then had to consider the oppression remedy and schemes of reorganisation that required court approval. The oppression remedy was dealt with in section 241 of the Canadian statute. [2] The Jamaican statute reproduces this provision word for word except in the following manner:

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[1] **122** (1) Every director and officer of a corporation in exercising their powers and discharging their duties shall

(a) act honestly and in good faith with a view to the best interests of the corporation; and

(b) exercise the care, diligence and skill that a reasonably prudent person would exercise in comparable circumstances.

[2] **241** (1) A complainant may apply to a court for an order under this section.

(2) If, on an application under subsection (1), the court is satisfied that in respect of a corporation or any of its affiliates

(a) any act or omission of the corporation or any of its affiliates effects a result,

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

a) The Canadian statute uses the word ‘corporation’ in section 241; the Jamaican statute uses the word ‘company’;

b) The Canadian statute adds a third category of ‘unfairly disregards’; the Jamaican statute omits it and has no equivalent. The Jamaican statute speaks only to ‘oppressive or unfairly prejudicial’;

c) The Canadian statute says ‘the interests of any security holder, creditor, director or officer’ in section 241; the Jamaican statute says ‘to any shareholder or debenture holder, creditor, director or officer’.

[32] The Jamaican statute deliberately included shareholder whereas Canada’s excluded such a person from the section. Canada has a wide category of security holder whereas in Jamaica the statute identifies one type of security holder, namely, the debenture holder.

[33] Because the court had to consider what is oppression, it sought to distinguish oppression from unfair prejudice and distinguish these two from what is called in Canada ‘unfairly disregards.’ The importance of this third category for Canada is that complainants who fall short of either of the first two may be able to scrape over the finish line under the unfairly disregard. The Jamaican statute, it will be repeated, has no such third category which means if a complainant in Jamaica cannot meet the first two standards he cannot get a final remedy under section 213A of the Companies Act and if he cannot secure a final remedy under that Act then he cannot get an interim remedy under the provision.

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

that is oppressive or unfairly prejudicial to or that unfairly disregards the interests of any security holder, creditor, director or officer, the court may make an order to rectify the matters complained of.

[34] The Canadian Supreme Court had this to say about these three remedies under section 241 at paragraphs 89 – 94:

> *89 Thus far we have discussed how a claimant establishes the first element of an action for oppression — a reasonable expectation that he or she would be treated in a certain way. However, to complete a claim for oppression, the claimant must show that the failure to meet this expectation involved unfair conduct and prejudicial consequences within s. 241 of the CBCA. Not every failure to meet a reasonable expectation will give rise to the equitable considerations that ground actions for oppression. The court must be satisfied that the conduct falls within the concepts of "oppression", "unfair prejudice" or "unfair disregard" of the claimant's interest, within the meaning of s. 241 of the CBCA. Viewed in this way, the reasonable expectations analysis that is the theoretical foundation of the oppression remedy, and the particular types of conduct described in s. 241, may be seen as complementary, rather than representing alternative approaches to the oppression remedy, as has sometimes been supposed. Together, they offer a complete picture of conduct that is unjust and inequitable, to return to the language of Ebrahimi v. Westbourne Galleries Ltd..*
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> *90 In most cases, proof of a reasonable expectation will be tied up with one or more of the concepts of oppression, unfair prejudice, or unfair disregard of interests set out in s. 241, and the two prongs will in fact merge. Nevertheless, it is worth stating that as in any action in equity, wrongful conduct, causation and compensable injury must be established in a claim for oppression.*
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> *91 The concepts of oppression, unfair prejudice and unfairly disregarding relevant interests are adjectival. They indicate the type of wrong or conduct that the oppression remedy of s. 241 of the CBCA is aimed at. However, they do not represent watertight compartments, and often overlap and intermingle.*
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> *92 The original wrong recognized in the cases was described simply as oppression, and was generally associated with conduct that has variously been described as "burdensome, harsh and wrongful", "a visible departure from standards of fair dealing", and an "abuse of power" going to the probity of how the corporation's*

> *affairs are being conducted: see Koehnen, at p. 81. It is this wrong that gave the remedy its name, which now is generally used to cover all s. 241 claims. However, the term also operates to connote a particular type of injury within the modern rubric of oppression generally — a wrong of the most serious sort.*
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> *93 The CBCA has added "unfair prejudice" and "unfair disregard" of interests to the original common law concept, making it clear that wrongs falling short of the harsh and abusive conduct connoted by "oppression" may fall within s. 241. "[U]nfair prejudice" is generally seen as involving conduct less offensive than "oppression". Examples include squeezing out a minority shareholder, failing to disclose related party transactions, changing corporate structure to drastically alter debt ratios, adopting a "poison pill" to prevent a takeover bid, paying dividends without a formal declaration, preferring some shareholders with management fees and paying directors' fees higher than the industry norm: see Koehnen, at pp. 82-83.*
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> *94 "[U]nfair disregard" is viewed as the least serious of the three injuries, or wrongs, mentioned in s. 241. Examples include favouring a director by failing to properly prosecute claims, improperly reducing a shareholder's dividend, or failing to deliver property belonging to the claimant: see Koehnen, at pp. 83-84.*

[35] Earlier in its judgment the court outlined the proper approach to section 241. The court noted that there were two approaches revealed in the jurisprudence but went on to hold that the best approach was the interpretation that combined both approaches. In doing so, the court observed at paragraph 56:

> *56 In our view, the best approach to the interpretation of s. 241(2) is one that combines the two approaches developed in the cases. One should look first to the principles underlying the oppression remedy, and in particular the concept of reasonable expectations. If a breach of a reasonable expectation is established, one must go on to consider whether the conduct complained of amounts to "oppression", "unfair prejudice" or "unfair disregard" as set out in s. 241(2) of the CBCA.*

[36] The thread linking the three remedies under section 241 of Canada and, possibly, section 213A of Jamaica is that of reasonable expectation. The court also noted that although oppression was an equitable remedy which sought to do what was 'just and equitable', it was also very fact specific. This meant that what was oppressive in one situation may well turn out to be not oppressive in another.

[37] The concept of 'reasonable expectation' apparently flowed out of Lord Wilberforce's important judgment in **Ebrahimi v Westbourne Galleries Ltd** [1973] AC 360. His Lordship said at page 379:

> *The words ["just and equitable"] are a recognition of the fact that a limited company is more than a mere legal entity, with a personality in law of its own: that there is room in company law for recognition of the fact that behind it, or amongst it, there are individuals, with rights, expectations and obligations inter se which are not necessarily submerged in the company structure.*

[38] The Canadian Supreme Court concluded on the concept of reasonable expectation in the following manner at paragraphs 62 – 66:

> *62 As denoted by "reasonable", the concept of reasonable expectations is objective and contextual. The actual expectation of a particular stakeholder is not conclusive. In the context of whether it would be "just and equitable" to grant a remedy, the question is whether the expectation is reasonable having regard to the facts of the specific case, the relationships at issue, and the entire context, including the fact that there may be conflicting claims and expectations.*
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> *63 Particular circumstances give rise to particular expectations. Stakeholders enter into relationships, with and within corporations, on the basis of understandings and expectations, upon which they are entitled to rely, provided they are reasonable in the context: see 820099 Ontario; Main v. Delcan Group Inc. (1999), 47 B.L.R. (2d) 200 (Ont. S.C.J. [Commercial List]). These expectations are what the remedy of oppression seeks to uphold.*

64 Determining whether a particular expectation is reasonable is complicated by the fact that the interests and expectations of different stakeholders may conflict. The oppression remedy recognizes that a corporation is an entity that encompasses and affects various individuals and groups, some of whose interests may conflict with others. Directors or other corporate actors may make corporate decisions or seek to resolve conflicts in a way that abusively or unfairly maximizes a particular group's interest at the expense of other stakeholders. The corporation and shareholders are entitled to maximize profit and share value, to be sure, but not by treating individual stakeholders unfairly. Fair treatment — the central theme running through the oppression jurisprudence — is most fundamentally what stakeholders are entitled to "reasonably expect".

65 Section 241(2) speaks of the "act or omission" of the corporation or any of its affiliates, the conduct of "business or affairs" of the corporation and the "powers of the directors of the corporation or any of its affiliates". Often, the conduct complained of is the conduct of the corporation or of its directors, who are responsible for the governance of the corporation. However, the conduct of other actors, such as shareholders, may also support a claim for oppression: see Koehnen, at pp. 109-10; GATX Corp. v. Hawker Siddeley Canada Inc. (1996), 27 B.L.R. (2d) 251 (Ont. Gen. Div. [Commercial List]). In the appeals before us, the claims for oppression are based on allegations that the directors of BCE and Bell Canada failed to comply with the reasonable expectations of the debenture holders, and it is unnecessary to go beyond this.

66 The fact that the conduct of the directors is often at the centre of oppression actions might seem to suggest that directors are under a direct duty to individual stakeholders who may be affected by a corporate decision. Directors, acting in the best interests of the corporation, may be obliged to consider the impact of their decisions on corporate stakeholders, such as the debenture holders in these appeals. This is what we mean when we speak of a director being required to act in the best interests of the corporation viewed as a good corporate citizen. However, the directors owe a fiduciary duty to the corporation, and only to the corporation. People sometimes speak in terms of directors owing a duty to both the corporation and to stakeholders. Usually this is

harmless, since the reasonable expectations of the stakeholder in a particular outcome often coincides with what is in the best interests of the corporation. However, cases (such as these appeals) may arise where these interests do not coincide. In such cases, it is important to be clear that the directors owe their duty to the corporation, not to stakeholders, and that the reasonable expectation of stakeholders is simply that the directors act in the best interests of the corporation.

[39] On proof of the complainant's reasonable expectation, the court had this to say at paragraphs 70 – 72:

> *70 At the outset, the claimant must identify the expectations that he or she claims have been violated by the conduct at issue and establish that the expectations were reasonably held. As stated above, it may be readily inferred that a stakeholder has a reasonable expectation of fair treatment. However, oppression, as discussed, generally turns on particular expectations arising in particular situations. The question becomes whether the claimant stakeholder reasonably held the particular expectation. Evidence of an expectation may take many forms depending on the facts of the case.*
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> *71 It is impossible to catalogue exhaustively situations where a reasonable expectation may arise due to their fact-specific nature. A few generalizations, however, may be ventured. Actual unlawfulness is not required to invoke s. 241; the provision applies "where the impugned conduct is wrongful, even if it is not actually unlawful": Dickerson Committee (R. W. V. Dickerson, J. L. Howard and L. Getz), Proposals for a New Business Corporations Law for Canada (1971), vol. 1, at p. 163. The remedy is focused on concepts of fairness and equity rather than on legal rights. In determining whether there is a reasonable expectation or interest to be considered, the court looks beyond legality to what is fair, given all of the interests at play: Re Keho Holdings Ltd. and Noble. It follows that not all conduct that is harmful to a stakeholder will give rise to a remedy for oppression as against the corporation.*
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> *72 Factors that emerge from the case law that are useful 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.*

[40] Having discussed reasonable expectation the court turned its attention to the other requirements of proof. It pronounced this important caveat at page 89:

> *Not every failure to meet a reasonable expectation will give rise to the equitable considerations that ground actions for oppression. The court must be satisfied that the conduct falls within the concepts of "oppression", "unfair prejudice" or "unfair disregard" of the claimant's interest, within the meaning of s. 241 of the CBCA.*

[41] This court has set out these passage so that all can have a clear picture of what is required at the interim stage where these applications under consideration are made. Mrs Mayhew suggested that all Mr Moo Young needed to establish was that there was a serious issue of 'unfairly prejudice' to be tried.

[42] What is clear from Canadian Supreme Court is that there is a sliding scale of conduct which move from one end to the other. Some conduct will clearly be in one only of the categories but there is some conduct that falls close to boundaries. The sliding scale seems to be at one end oppression and at the other unfair disregard, with unfair prejudice in the middle. Under the Canadian statute there are two boundaries: one between oppression and unfair prejudice and another between unfair prejudice and unfair disregard. In Jamaica there is only one boundary and it is that between oppression and unfair prejudice.

[43] It is obvious that there will be case where the facts are somewhere in the border regions.

[44] The Canadian Supreme Court held that for oppression to be made out it requires wrong doing of a very serious kind. The court also said that wrong doing that falls short of burdensome and harsh may fall within the other two categories. At paragraph 93 of the judgment the court noted that unfair prejudice is generally conduct that falls short of being described as burdensome and harsh. It includes

‘include squeezing out a minority shareholder, failing to disclose related party transactions, changing corporate structure to drastically alter debt ratios, adopting a “poison pill” to prevent a takeover bid, paying dividends without a formal declaration, preferring some shareholders with management fees and paying directors’ fees higher than the industry norm.’ These examples are not exhaustive. They served to illustrate the concept of unfair prejudice. They give a sense of the type of conduct the court is looking for in cases of that kind.

[45] Unfair disregard may include ‘favouring a director by failing to properly prosecute claims, improperly reducing a shareholder’s dividend, or failing to deliver property belonging to the claimant.’

[46] It should be clear why this court says that the conduct alleged by Mr Moo Young falls very short of what the law requires. As stated earlier, the affidavits filed in support of the fixed date claim form did not contain allegations of the type indicated by the Canadian Supreme Court. However, this court was prepared to accept, at face value, for now, that improperly appointed directors may amount to unfair prejudice because of the potential harm that may result. The directors may commit the company to endeavours that may prove to be unlawful. Based on the affidavits filed in support of the fixed date claim form and those affidavits alone, Mr Moo Young made no allegations suggestive of ‘*squeezing out a minority shareholder, failing to disclose related party transactions, changing corporate structure to drastically alter debt ratios, adopting a “poison pill” to prevent a takeover bid, paying dividends without a formal declaration, preferring some shareholders with management fees and paying directors’ fees higher than the industry norm*.’

[47] The Jamaican statute does not have a concept of unfair disregard. This is a statutory concept and not a common law concept. Thus if it turns out that what Mr Moo Young is complaining about in his other affidavits filed in 2016 to support the interim application amounts to ‘*favouring a director by failing to properly prosecute claims, improperly reducing a shareholder’s dividend, or failing to*

deliver property belonging to the claimant' he is not entitled to any relief under the Jamaican statute because there is no final remedy known as unfair disregard. The principle is that if you cannot secure a final remedy on the allegations as filed then there cannot be any serious issue to be tried which would justify any interim injunction or restraint at this stage. The court will now demonstrate its conclusions by analysing the material presented in light of the legal standard indicated by the Canadian Supreme Court.

The acts relied on to say that there is a serious issue be tried under the rubric of unfairly prejudicial

[48] Three acts of Mrs Dewar were relied on by Mr Moo Young in support of this application. The first is the decision by Mrs Dewar and Mr Cheddesingh to retain a law firm other than HGH to represent Zip. The second has to do with a loan taken out by in Zip's name to be used for the benefit of Grove and to be spent on property where Grove operates the Irie FM radio station. The third it said that Mrs Dewar and Mr Cheddesingh have conducted themselves in a manner that is unfairly prejudicial to Mr Moo Young.

[49] Before dealing with these allegations separately the court will make some observations.

[50] The point being made then is that for an interim remedy to be granted at this stage Mr Moo Young would need to show that there is a serious issue to be tried on the issue of unfair prejudice. In the fixed date claim form Mr Moo Young has excluded oppression as one of the bases for the relief that he is seeking as a final remedy. This means that the court does not have to consider whether there is a serious issue to be tried in relation to oppression. Since the Jamaican statute has no concept of unfair disregard this court does not have to consider whether there is a serious issue to be tried on that score. This leave unfair prejudice.

[51] The court has to be very careful at this point. The final remedies Mr Moo Young is seeking are declarations that (a) Mrs Debbian Dewar and Mr Marshenee

Cheddesingh were not duly appointed as directors of Zip and are not directors of Zip; (b) Mrs Dewar was not duly appointed as Managing Director of Zip. He is asking for orders that (a) the Registrar of Companies correct the records accordingly and (b) Mrs Dewar and Mr Cheddesingh stop holding out themselves as directors of Zip.

[52] The decision of this court on this application is not to be understood as a pronouncement on the final remedy. It is restricted solely to the application for interim remedies. This important caveat has to be made because there is the situation here where the affidavits that were filed in support of the final hearing were pressed into service along with other affidavits to support the interim application and therefore the court must address all the evidence.

The attorney at law issue

[53] According to Mr Moo Young the other two directors wish to retain a firm other than HGH and in his view this is unnecessary, unfairly prejudicial to him and it is a strategy by Mrs Dewar to secure an attorney whose opinions coincide with her own.

[54] According to the evidence before the court, there are two aspects to this issue. In the Young Torres claim an appeal has been filed and that matter is currently before the Court of Appeal. Mrs Dewar sought to convene a meeting on Monday, April 25, 2016 to discuss whether Zip should participate actively in that appeal or simply watch and abide any decision made by the court. The second issue related to a second and final demand letter from HGH in the Young Torres claim.

[55] Mrs Dewar's position is that she did not see any authorisation from the board to retain HGH. She also says that the matter was not discussed at the board level and as far as she is concerned Mr Moo Young had no lawful authority to retain HGH. She goes further to say that she has never seen any letter of engagement setting out the agreed terms of the retainer for Zip. Mrs Dewar stated until the demand letter from HGH she has never seen any free notes or the like from

HGH. She points out the irony of HGH and its clients referring to her as the alleged Managing Director but now wishes her to authorise payment of legal fees on behalf of Zip. Mrs Dewar stated that the April 25, 2016 board meeting was prompted by the second demand letter from HGH which contained a threat to sue for the fees if they were not paid. The meeting was also called to discuss HGH's filing of a counter notice of appeal on behalf of Zip in the Young-Torres claim when the company has not approved that course of action. She explained that in light of these developments an urgent meeting was necessary.

[56] At the April 25, 2016 meeting, Mrs Dewar explained, a majority vote was taken to advise Zip. One of her concerns is whether it is in the best interest of Zip to file a counter notice in the Young Torres claim. She also states that she does not think it appropriate for HGH to be taking instructions on behalf of Zip from Mr Moo Young only. Mrs Dewar high lights the ironic situation where it being said that the HGH cannot communicate her and neither she with HGH on the ground that she has a personal interest in the matter but at the same time HGH who represented Mr Moo Young in personal matters and who has a personal stake in the outcome is taking instructions from Mr Moo Young. Her position seems to be if it is thought not right for HGH to communicate with her then it should not be alright for HGH to speak to Mr Moo Young since both she and Mr Moo Young suffer from the same disability, that it to say, a personal interest in the outcome. In those circumstances, Mrs Dewar thinks that a new set of lawyers should be engaged on behalf of Zip and it is in that context that Zip wishes to dispense with the service of HGH.

[57] Mrs Dewar also stated in her affidavit that no lawyer from HGH has ever attended any board meetings of Zip and neither had HGH furnished any written anything (yes anything) to Zips board.

[58] Mrs Dewar goes on to say that she and Mr Cheddesingh met with Mr Walter Scott QC of Rattray Patterson Rattray on May 4, 2016. Mr Scott told her that his firm had no difficulty representing Zip but would need a board resolution. It was

this advice from Mr Scott that necessitated the board meeting of May 6, 2016. The directors were notified of the meeting on May 5, 2016. The time line then is (a) meeting with Mr Scott on May 4, 2016; (b) notification to directors of meeting on May 5, 2016 and (c) meeting held on May 6, 2016. Mr Moo Young was absent from the May 6, 2016. Mr Moo Young's response was to seek to secure an ex parte order stopping the meeting.

[59] Mrs Dewar has given a detailed and comprehensive account of the reasons for Zip's desire to have new attorneys and what Zip did in order to secure new attorneys. Mr Moo Young has not filed any affidavit to say that sequence of events and the reasons for the emergency meetings are not completely accurate.

[60] Mr Moo Young has not denied that he did not take the matter to the board. He has not said he had authorisation from the board. He took the view that since the articles of association did not specifically govern the issue of retaining lawyers he could simply go out retain counsel and have the company pay the bill.

[61] The letters from HGH do not refer to any resolution from the board to retain the firm. What they say is that Mr Moo Young retained the firm on Zip's behalf.

[62] The issue of whether Mr Moo Young had lawful authority to do what he did is not before court but what the court can say is that Mrs Dewar, until lawfully removed, is the Managing Director of Zip and she is under an obligation to ensure that the company's resources are expended in accordance with proper governance. Since there is no board resolution and the board did not discuss the matter then on the face of it she is entitled and in fact under a duty to question the expenditure. That conduct is impossible to be regarded as giving rise to a serious issue of unfair prejudice.

[63] On May 6, 2016, the board held a meeting to consider whether another firm of attorneys should be appointed as Zip's counsel. The majority of the board voted to retain another set of attorneys. Mr Moo Young disagrees. But what is the basis of the disagreement? He wishes to have HGH. He has not suggested that the

attorney selected is incompetent, inexperienced or has a conflict of interest that would inhibit him from properly representing Zip. What this comes down to is preference. There is absolutely no suggestion that the counsel retained is a ventriloquist's dummy who simply mouths the words of the client without giving thought to what he or she is doing. There is no suggestion that the counsel selected will not or cannot provide competent legal advice on the matters identified for legal advice.

[64] From the narrative given by both sides on the issue of legal representation for Zip it is as plain as the day is bright that the conduct of Mrs Dewar is so far removed meeting the legal standard for unfair prejudice that the court cannot even begin to contemplate whether there is a serious issue to be tried based on these allegations. There is nothing in Mr Moo Young's narrative that suggests that Mrs Dewar has done anything wrong in relation to legal representation for Zip. This cannot amount to unfair prejudice.

[65] It is the fundamental right of all persons including companies to have an attorney of their choice. This court will not prevent any litigant from choosing his attorney. He can change his attorney for just about any reason. As this court indicated to counsel the only bases this court would interfere in the choice of attorneys is if it can be shown, for example, that the attorney in question does not possess the relevant skill and competence required for the job and thus the company is at risk of getting inadequate advice or that the cost of the service from that attorney is so far out of the norm that it would be an unreasonable choice. These are just examples but the point is that it would have to be shown that the decision by the directors was not in the best interests of the company for reasons given in the examples.

The loan

[66] The directors of Grove agreed to take out a loan to erect a boundary wall around property from which Grove operated a radio station known as Irie FM. The minutes of a board meeting held on October 15, 2015 shows Mrs Dewar

explaining that the boundary wall loan was approved by the directors of Grove. She also pointed out that the three directors of Zip were also directors of Grove. She also pointed out that Zip operates from the same property around which the boundary wall was to be erected.

[67] Mr Moo Young says that in March 2016 the directors of Grove made a decision about the boundary wall. It was agreed that the project would be funded by a loan for approximately JA$7m. He says that he subsequently found out that a loan was borrowed in the name of Zip from a bank in the sum of JA$15m. He also found out that the loan was approved from March 2015. He also discovered that the loan proceeds were transferred from Zip to Grove. He says he does not know whether the loan is being repaid by Zip or Grove or at all. He did not participate in the decision to take the loan and pass it on to Grove. This and other matters he says have given him cause for concern

[68] In light of Mrs Dewar's response which on the face of it accepts the allegation of borrowing JA$15m in Zips and then transferring the liability to Grove although Zip has the responsibility of servicing the loan does not **at this stage** rise to an arguable case of unfair prejudice to Zip. The loan was taken to build a wall for property where Grove was operating the radio station. The question that would arise is why would Zip be taking out a loan to spend on property to benefit Grove? Mrs Dewar says that this was done because Zip was heavily indebted to Grove and one method of reducing that indebtedness was for Zip to make these improvements for and on behalf of Grove and that action on the part of Zip would go to reducing the debt owed to Grove. Let Mrs Dewar's full explanation be set forth:

> *The company is indebted to Grove Broadcasting in a sum in excess of $80 million dollars. This debt is largely from Grove over the years, from Karl Young's management, funded/advanced the Company's capital needs in connection with equipment purchase as well as management fees for the operation of the business. The 2nd defendant and I utilised the method of having the company obtain the loan in its name and disburse the proceeds for Grove*

> *Broadcasting's benefit which would be credited to write off a portion of the company's debt to Grove Broadcasting. The long standing practice is that the business of the company and Grove Broadcasting are interconnected; this was in place from the inception of Zip 103 Limited which started about twelve years after Karl started Grove. This related party relationship continued under Karl Young and Chad Young's stewardship of the companies.*

[69] Whether that is sound practice or not is not for this court to pronounce upon at this stage. What the court can say is that that explanation, if true, does not fall within unfair prejudice to Mr Moo Young in his capacity as a director and shareholder of Zip. On the contrary it confers a benefit because the debt burden of Zip is being reduced which can only be a good thing since Zip would have more resources available over time to use for its own development. This conduct on behalf of Mrs Dewar falls woefully short of unfair prejudice. There is no serious issue to be tried in relation to that conduct.

[70] The court, again, repeats that these allegations whether by themselves or taken as a whole cannot amount to unfair prejudice in law and on that basis that are no grounds for granting the interim relief sought by Mr Moo Young.

Disposition

[71] The application is refused with costs to the first and second defendants to be agreed or taxed.