[2014] JMCC Comm. 6

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

COMMERCIAL DIVISION

CLAIM NO. CD00116/2013

BETWEEN	**GEORGE MURRAY**	**1ST CLAIMANT**
AND	**KARIN MURRAY**	**2ND CLAIMANT**
AND	**SAM PETROS**	**DEFENDANT**

Mr. Conrod George and Mr. Adam Jones instructed by Hart Muirhead Fatta for the Applicant/Defendant.

Ms.Symone Mayhew and Ms. Carol Davis for the Claimants/Respondents.

Heard: May 19th, June 12th, July 18th and 30th, 2014

APPLICATION TO STRIKE OUT- WHETHER CLAIM FRIVOLOUS, VEXATIOUS AND AN ABUSE OF THE PROCESS OF THE COURT-WHETHER ANY REASONABLE GROUNDS FOR BRINGING THE CLAIM-PARTIES IN PREVIOUS LITIGATION-CLAIM COMPROMISED AND AGREEMENT ATTACHED IN SCHEDULE TO TOMLIN ORDER FILED IN COURT-TERMS VARIED BY THE PARTIES-COURT REFUSED TO EXERCISE SUMMARY JURISDICTION TO ENFORCE TOMLIN ORDER-WHETHER CURRENT CLAIM AN ATTEMPT TO ENFORCE ORIGINAL AGREEMENT-WHETHER CLAIM SUSTAINABLE TO PROSECUTE NEW AGREEMENT AS VARIED.

SUMMARY JUDGMENT-WHETHER REASONABLE PROSPECT OF SUCCESS ON AGREEMENT AS VARIED-WHETHER THERE WAS A BREACH OF CONTRACT-WHETHER COURT SHOULD GRANT SUMMARY JUDGMENT ON THE CLAIM.

PRACTICE AND PROCEDURE-PROPER PROCEDURE TO BRING CLAIM UNDER SECTION 213A OF COMPANIES ACT-WHETHER CLAIM MUST COMMENCE BY FIXED DATE CLAIM FORM-WHETHER CLAIM FORM AN IRREGULARITY.

CONTRACT-FORMATION-AGENCY-AGENT FOR BOTH VENDOR AND PURCHASER-OFFER AND ACCEPTANCE-BIDDING PROCESS-ISSUE ARISING AS TO WHAT WERE THE TERMS OF

THE AGREEMENT-WHETHER AGENT ACTING FOR BOTH PARTIES OR ONE PARTY-WHETHER ONE PRINCIPAL LIABLE TO THE OTHER FOR AGENT'S BREACH.

EDWARDS, J

THE APPLICATION

[1] The Defendant/Applicant (who for ease of reference and meaning no disrespect I will call Petros) by Notice of Application for Court Orders filed February 20, 2014, applied to have the Claimants'/Respondents' (who for the same reason I will call the Murrays) statement of case struck out. Petros averred that the claim, as founded, was frivolous and vexatious, an abuse of the process of the court and disclosed no reasonable grounds for bringing the claim. In the alternative he sought summary judgment on the claim.

[2] The factual background to this case was set out in the affidavits filed by the parties. For the most part the background facts are not in dispute. The Murrays are husband and wife. Together with Petros they are business partners. The Murrays together and Petros each own 50% share in two companies; Tensing Pen Limited and Tensing Pen (Cayman Islands) Limited. The former manages and operates a hotel in Jamaica and the latter owns the land on which the hotel is situated. The parties worked together and all three were directors of the corporate entities.

[3] Over time the relationship between Petros and the Murrays broke down and with them being equal shareholders and directors, the board of directors inevitably became deadlocked. As a result, the affairs of the company became jeopardized. Sometime in 2011, Petros filed a claim in the Supreme Court of Judicature of Jamaica against the Murrays for relief under section 213A of the Company's Act. However, before the matter came on for hearing it was compromised by the parties and the terms of the agreement was set out in a schedule attached to a Tomlin Order filed in the court and sanctioned by court order made 28th November 2011. Since the board of directors was effectively deadlocked and the equal shareholders were hostile towards each other, the agreement was to facilitate the sale of the corporate entities to an identified third party or through a

broker on the international market. If that effort failed the entities would be sold to one or other of the shareholders making the highest bid through a procedure set out in the agreement.

[4] As part of the agreement also, one of the Murrays had to resign as director to facilitate the appointment of an independent director, agreed by the parties, to the board of directors. To facilitate this aspect of the agreement Mr. Murray resigned from the board and the parties agreed to the appointment of Mr. Kenneth Tomlinson as independent director and chairman of the board. Clause 11 of the agreement set out how the sale of the companies was to be effected. In essence, the companies were to be put up for sale on the open market; an international hotel broker was to be appointed to facilitate the sale, and the price was to be reduced after a certain period if no buyer was found until a certain minimum price was reached. Thereafter, if there was no buyer, then the shareholders were entitled to make bids to purchase the corporate entities and the new board would determine the highest offer in hand which would then be accepted.

[5] The parties subsequently varied the terms of the agreement, by conduct, discussions and e-mails amongst themselves. Firstly, after the sale on the open market fell through there was no downward adjustment of the price to the stated minimum over the agreed period as per clause 11 of the schedule. The parties instead decided to enter the bidding earlier than anticipated by the agreement. It was now agreed that each would make offers to buy out the others shareholding. An attempt was made to agree this process in a protocol, but no agreement was arrived at due to the hostility between the parties.

[6] The parties opted instead to make offers to purchase the others shares and to have Mr. Tomlinson, at his sole discretion, decide which offer to accept. They agreed a different formula from that contained in the schedule as to how these offers were to be made. There is now some dispute as to whether Mr. Tomlinson was authorized to accept the highest offer, the best offer, or the highest and best offer. These were terms

used in varying degrees by the parties' attorneys in the emails which were sent back and forth on the issue. What is clear, however, is that the board of directors no longer had the responsibility of accepting the bid as contemplated in the schedule to the Tomlin Order. That responsibility now resided with Mr. Tomlinson as independent director and chairman. He was to act as agent for both parties.

[7] Ultimately, Mr. Tomlinson accepted the offer made by Petros as the "highest and best" offer received. This outcome proved unsatisfactory to the Murrays and set off another round of litigation. The Murrays filed an application before the Commercial Court in claim no. 2013/CD00066 to enforce the terms of the Tomlin Order to put into effect the provisions of clause 11 for their bid to be accepted as the highest bid. They also filed an application to have Mr. Tomlinson removed as director and chairman and for one to be appointed by the court in his stead. They also made a separate application for the acceptance by him of the Petros offer to be set aside and that the offer of another third party be accepted by the Board or the new chairman pursuant to clause 11.

[8] The applications were heard by Sinclair-Haynes J, who delivered judgment in **Sam Petros v George Murray and Karen Murray,** [2013] JMCC Comm.14**.** The learned Judge having examined the correspondence between the attorneys and agents for the parties and the subsequent conduct of the parties post the Tomlin Order, declined to exercise her summary jurisdiction to enforce the terms of the Tomlin Order, as she found that they had been substantially and fundamentally varied. The learned Judge also found that although the terms of the agreement in clause 13 also provided for variation by consent, the correspondence between the parties as to the meaning of certain terms in the contract as varied were imprecise and as such the court was unable to invoke clause 13 in order to enforce the agreement as varied. In making her findings Sinclair-Haynes J had this to say:

> *"The parties have entirely departed from that which the court is asked to enforce thus removing the matter from the*

court's summary jurisdiction. This court is therefore bereft of jurisdiction to intervene.

[9] The gravamen of this dispute was the selection of Mr. Tomlinson to determine which offer to accept. The original agreement in the schedule to the Tomlin Order was for the board of directors to decide which offer was the highest offer. Some of the correspondence between the parties referred to a final day of acceptance and the time being the close of business at that date. The schedule contained no time limit. There was no definition of close of business in the correspondence from either side (and in my view no real agreement whether it was close of business or end of that day.) The Murrays' highest bid came in after 7pm. It was higher than the final bid from Petros. However, the Murrays' bid was subject to financing and or mortgage and there was no firm commitment from any financial institution accompanying the bid. The Petros bid made earlier, although lower, was a cash bid. There was no restriction on financing in clause 11 of the schedule to the Tomlin Order. It was for these reasons that Sinclair-Haynes J found that the parties had deviated from the procedure outlined in the schedule.

[10] Mr. Tomlinson ignored the Murrays' last bid on the basis that it came in after close of business and found that of the two earlier bids made by the parties, the Petros bid was the highest and best offer (presumably as it was a cash offer). The Murrays took the view that their last bid should have been considered and as it was the highest bid it should have been accepted by Mr. Tomlinson. Therefore, three disputed issues arose; firstly, the fact that the earlier agreement was varied substantially by the parties, secondly, what were the terms of the new agreement, and thirdly, whether the parties were ad idem on the meaning of "highest and best offer", and what constituted the "close of business" day.

[11] The Murrays however, despite the acceptance of the Petros offer and the ruling by Sinclair-Haynes J on the Tomlin Order remained undaunted. They filed this claim seeking the following orders:

1. That an independent director for Tensing Pen Limited be agreed between the parties within 14 days of the date hereof, and if no agreement one to be to appointed by this Honourable Court. The said Director is to be Chairman of the Board of Directors of Tensing Pen Limited.

2. In the alternative that a new Director of Tensing Pen Limited and Tensing Pen (Cayman Islands) be appointed pursuant to s.213A of the Companies Act.

3. That the sale price of the hotel known as Tensing Pen be lowered by the International hotel brokers agreed by the parties pursuant to clause 11 of the said Agreement and that the hotel property be sold on the open market pursuant to Clause 11 of the said Agreement between the parties.

4. In the alternative, that the Claimants be permitted to purchase the Defendant's 50% shares in the companies known as Tensing Pen Limited and Tensing Pen (Cayman Islands) Ltd., for a sum of US$1,850,000.00 and that the Claimants and the defendant as shareholders and/or directors of both companies do all that is required to effect the said sale.

5. That the purported acceptance by Kenneth Tomlinson of the Defendant's offer of US$1,750,001 for the date 6th March, 2013 for the Claimant' 50% share of the said companies be set aside.

6. That the Registrar of the Supreme Court be empowered to take all necessary enquires and account with regard to the sale of the hotel property and/or the shares of the Defendant.

7. That the Registrar of the Supreme Court be empowered to execute any document or documents with regard to the sale and/or transfer of the property and/or shares in the event that either party refuses to sign same (a party being deemed to have refused to sign if they refuse and/or neglect to sign a document within 14 days of being requested so to do).

8. Liberty to Apply

9. Further or other relief

10. In the further alternative damages in lieu of specific performance.

11. Interest

12. Costs to be agreed or taxed

[12] Those were the orders sought which have been challenged in this application. Counsel for Petros averred that these orders are seeking to enforce the terms of the

Tomlin Order which Sinclair-Haynes J had ruled were varied and no longer enforceable. The schedule to the Tomlin Order sets out the terms of the agreement, the relevant portions of which state in part that:

SCHEDULE

This agreement is made on the 29th day of November 2011, between Sam Petros ("Sam") of the one part and George Murray and Karin Murray, ("the Murrays"), of the other part.

WHEREAS:

A. …….

B. ……..

C. ……

D. ……

E. A dispute has arisen between Sam and the Murrays and Sam has brought proceedings in Claim No. 2011 HCV 06390 ("the Claim"). In the Claim, Sam alleges that his interest in the Company is being oppressed and expressed a desire to sell the Hotel. The Murrays have denied the allegations but also desire the Hotel be sold, and Sam and Murrays have agreed that the Company and Cayman (together "the Corporate Entities") should be sold as soon as reasonably practicable, for the best price reasonably achievable in the market, using the procedure set out hereinafter.

F. There is an offer to purchase the Hotel for US$4.2 million ("the Sale"). The said offer is acceptable to both parties.

IT IS HEREBY AGREED as follows:

1. ……

2. …….

3. The Murrays will determine that either Murray or Karin Murray will resign as directors of the Company.

4. An independent director, agreed to by Sam and the Murrays, will be appointed to the Company's board of directors within 14 days of this agreement, and it is agreed that such independent director should be chairman. The company shall hold an Annual General Meeting within 60 days of the appointment of the independent director.

5. …….

6. …….

7. …….

8. ……..

9. ……..

10. This Agreement is being made to facilitate a settlement of the disputes herein and to effect the Sale. The New Board will make the final determination as to the acceptability of any offer, and the parties hereto confirm the New Board's authority to do so.

11. In the event that the Sale is not effected, the parties agree that the Company (with the authority of Cayman, which its directors hereby give) will list the property with international hotel brokers to procure a purchaser at a price acceptable to the New Board. In the event that no acceptable offers are received within 12 months from the date of this agreement, the parties shall lower the sale price as recommended by the said international hotel brokers or by 15% whichever is less. The price shall be further marked down as recommended by the said international hotel brokers every 4 months provided that if the price falls to USD$3M the shareholders shall be entitled to lodge bids with the New Board to purchase the Corporate Entities, and upon the New Board being satisfied that it holds the highest such offer for the Corporate Entities, the shareholder who has made such offer shall be entitled to purchase the other shareholders' interest pro-rates based on such offer price.

12. In the event either party fails or refuses to sign any documents to give effect to this agreement or any sale, the Registrar of the Supreme Court is hereby empowered to sign the same on behalf of the defaulting party.

13. No part of this Agreement may be varied altered suspended or amended by any party or by any resolution of the board without the joint mutual consent of every party to this agreement and the parties agree that they

will not vote at any meeting of shareholders or directors in such a manner as to make any part of this Agreement ineffective.

[13] Counsel for Petros submitted that the Murrays were not entitled to file a new claim seeking essentially some of the same orders as those prayed in the previous application before Sinclair-Haynes J, as those issues had already been decided by the court and the matter was res judicata. It is on that basis that this application for the Murrays' statement of case to be struck out was made. One of the grounds is that the court found that an independent director had already been appointed according to the terms of the Tomlin Order and the court had no power to appoint another outside of those terms and in contravention of the Company's Act. Counsel contended that the Murrays had no basis to seek that same relief in these proceedings.

[14] The complaint by the attorneys for Petros may be summarized as follows;

1. This court cannot enforce clause 11 of the terms of the schedule to the Tomlin Order as a previous court had already determined that that clause had been varied and was no longer enforceable.

2. There was no breach of contract attributable to Petros that could support an order against him to sell his shares to the Murrays. The Murrays' allegations of breaches were all attributable to Mr. Tomlinson.

3. There is no basis for an order to set aside the acceptance of Petros' offer as the best offer made.

4. The Murrays could not obtain relief pursuant to section 213A on a claim form.

5. There is no jurisdiction to grant any powers to the Registrar of the Supreme Court to do anything in connection with the contract.

SUBMISSIONS

[15] Counsel for Petros argued that all the facts in issue had been argued before Sinclair-Haynes J and a decision having been made on those facts which had not been appealed, the matter was res judicata. Counsel also argued that all the causes of action

arising from those facts had already been decided and the facts on which such causes of action could be based had also been decided. It was further submitted that any renewed attempt to seek to deal with these matters afresh should fail as they were res judicata in the plainest possible way and were subject to issue estoppel and cause of action estoppel.

[16] Counsel pointed out that one of the orders sought by the Murrays was for the appointment of an independent director. It was noted that part of the findings made by Sinclair-Haynes J was that the court's hands were tied as regards the appointment of another independent director, one already having been appointed as per the terms of the agreement between the parties. It was also pointed out that the Murrays were also asking for orders to enforce clause 11 of the terms of the agreement which Sinclair-Haynes J had already found to be unenforceable due to the fact that its terms had been varied by the parties.

[17] Counsel for Petros noted that the claim by the Murrays was an attempt to enforce the terms of the original agreement contained in the schedule to the Tomlin Order which a previous court had ruled was varied and no longer enforceable. Counsel pointed out that the Murrays' request for the court to set aside Petros' offer and have theirs accepted as the highest and best was not in keeping with the new agreement. It was suggested that Sinclair- Haynes J having determined the terms of the new agreement, the Murrays were estopped from raising different terms before this court. Counsel cited Halsbury's Laws of England, 5th edition paragraphs 1-1108.

[18] Counsel also argued that relief under section 213 A of the Company's Act could only be sought by Fixed Date Claim Form and as such the claim could not proceed as it was filed by way of a Claim Form. Counsel also argued that all the remedies sought were based on conduct attributable to Mr. Tomlinson and not to Petros. Counsel pointed out that the parties agreed jointly to appoint Mr. Tomlinson to act as agent for the purpose of the sale of the shares on the open market or in default to determine which of the parties was entitled to purchase the shares of the other; these were obligations

placed by the parties on Mr. Tomlinson as their joint agent. Counsel argued that when Mr. Tomlinson accepted the obligations he became the agent of both parties for the purpose of carrying out their joint instructions.

[19] Counsel further argued that the parties were joint principals, so that any misfeasance by Mr. Tomlinson which caused harm to a third party could possibly give rise to a cause of action against the joint principals, each of whom would have a right of indemnity from the other. That cause of action, it was argued, would arise from the principal's liability to an affected third party for the actions of an agent. It was argued that no such cause of action arises between the principals inter se because the actions of the agent were on their joint behalf and liability for such actions cannot be attributed by one principal to another, in the absence of facts to support an allegation of fraud or conspiracy between the agent and one of the principals. Counsel pointed out that accordingly, the pleadings having disclosed no cause of action against Petros and there being no facts to support such pleadings, no cause of action can exist against him for the alleged misdemeanors of Mr. Tomlinson.

[20] Counsel for the Murrays submitted that even though the prayer in the present claim is the same, this claim was based substantially on the new contract, which was the variation of the scheduled terms. Counsel also pointed out that there was also a second and distinct claim under section 213A of the Companies Act, and no res judicata or issue estoppel applied in either instance.

[21] Counsel also conceded that to the extent that any aspect of the claim by the Murrays was inconsistent with the ruling of Sinclair-Haynes J on the unenforceability of the terms in the schedule attached to the Tomlin Order in the summary jurisdiction since they were varied, that aspect of the claim could not stand. Counsel pointed out however, that the current claim is for breach of the contract as varied and not of the original contract. Counsel further pointed out that part of the claim as particularized in the amended particulars of claim averred that Petros was in breach of the agreement when he submitted a bid including retained dividend. Counsel noted that whilst it was

conceded that the agreement was partly oral and partly in writing, it gave Mr. Tomlinson the discretion to accept the highest and best offer.

[22] Counsel also argued that the claimant's claim did disclose a cause of action against Petros for breach of contract, as the agreement made Mr. Tomlinson the agent of both the parties and that as agent for Petros, he breached the agreement between the parties for the sale of the shares. Counsel further argued that there were two separate agencies; the first was where the claimant made an offer to purchase the shares. In receiving and considering that offer, Mr. Tomlinson acted as agent of Petros. The second was where Petros made an offer to purchase the shares, in receiving and considering that offer, he was acting as agent of the Murrays.

[23] Counsel submitted that the claimant's case is that in ignoring the offer made by the Murrays and in failing to follow the agreed procedure for the sale, he was acting as agent for Petros and was so in breach of the agreement between the parties as it related to the sale of their respective shares. It was argued therefore, that Petros was liable for the failures of Mr. Tomlinson and was rightly sued. Counsel relied on the case of **Briess v Woolley &ors** [1954] AC 333 and argued that Mr. Tomlinson, having had the actual authority to receive bids from both parties and to determine and accept one offer through an agreed procedure, breached that agreement. Counsel argued that when he refused to consider the offer of the Murrays, he was then acting as agent of Petros. Counsel also argued that the failure to consider the offer by the Murrays and the acceptance of the offer from Petros, which was not in accordance with the agreed procedure, constituted a breach. Counsel further argued that this breach was actionable and the Murrays were entitled to rescind the agreement and bring an action against Petros, as principal, for the actions of his agent.

[24] Counsel also submitted that a valid claim had been made under section 213A of the Companies Act. With respect to whether the claim ought to have commenced by way of Fixed Date Claim Form or Claim Form, counsel submitted that there was nothing in the Companies Act that mandated the claim for relief to be brought by way of Fixed

Date Claim Form and there was no support for this in the Civil Procedure Rules 2002 (CPR), which indicated, in Rule 8, how proceedings were to commence.

[25] Counsel also submitted that the Murrays were not bound by the findings as to the terms of the variation made by Sinclair–Haynes J as that court was concerned only with defining the limits of its jurisdiction to enforce the Tomlin Order in a summary way. Counsel noted that the findings as to the variations in the terms of the contract are in no way binding on this court in such a way as to prevent the Murrays from bringing a claim with regards to it.

[26] Counsel pointed out that the section 213A application became necessary because Mr. Tomlinson, who was the independent director previously agreed by the parties, had resigned. The board of directors was once again deadlocked. Counsel argued that the Murrays were being oppressed and unfairly prejudiced by the actions of the independent director and Petros and that their acts, being directors of the company, were acts of the company.

Law on Issue Estoppel, Res Judicata and Cause of Action Estoppel

[27] In Halsbury's Laws of England 5th edition paragraph 1155 entitled, "Conclusiveness of Judgments between the Parties", the applicable principles were stated thus:

> *"Subject to appeal and to being amended or set aside, a judgment is conclusive as between the parties and their privies and is conclusive evidence against all the world of its existence, date and legal consequences. Thus a verdict followed by judgment operates as an estoppel or conclusive evidence of the facts found as between parties and privies, and in subsequent proceedings between the same parties on the same cause of action the defendant can plead the former judgment as an estoppel (cause of action estoppel). If an order made by the court necessarily involves a finding, whether there was argument or not, on a point which is later sought to be litigated, that point cannot subsequently be argued (issue estoppel) but an order directing an enquiry as to facts, although clearly made on a certain hypothesis of the*

> *relevant law, is not conclusive as to that hypothesis when the whole question of law involved has been reserved until the enquiry has been answered.*
>
> *In order to ascertain what was in issue between the parties the judgment, verdict, if any, and pleadings may be examined, but no evidence is admissible to contradict the record. …….but a judgment is not conclusive of any matter that is neither directly decided nor a necessary ground for the decision."*

[28] At paragraph 1174 "Meaning of "Cause of Action Estoppel" it states;

> "*It is a fundamental doctrine of all courts that there must be an end of litigation. Where res judicata is pleaded by way of estoppel to an entire cause of action, rather than to a single matter in issue, it amounts to an allegation that the whole legal rights and obligations of the parties are concluded by the earlier judgment, which may have involved the determination of questions of law as well as findings of fact….The parties are stopped by the findings of fact involved in the judgment."*

The proviso to that view however, is that the findings of fact must appear from the judgment as delivered to be the ground on which the decision was made and necessarily form part of the order of the court.

[29] In the case of issue estoppel, according to Halsburys at paragraph 1179, it means that a party would be precluded from contending otherwise, if a precise point had been distinctly put in issue and was "solemnly and with certainty" determined against him. Issue estoppels will only arise where it is the same issue which the other party is attempting to re-litigate and it matters not whether the issue is one of fact, one of law or one of mix fact and law. The matter must come directly in issue and not collaterally or incidentally.

Test for Striking Out A Statement of Case

[30] Much of the law on striking out of statement of case is now settled. It is admittedly a largely draconian step which a court ought to be reluctant to take and should take only in the clearest of cases. The consequence of a striking out is that the

party against whom such an order is made is effectively barred from proceeding with his case. Usually this step will be taken either by way of sanction for a breach of the rules or non-compliance with an order which carries a consequential sanction or under rule 26.3 of the CPR. Rule 26.3(1) (b) and (c) of the CPR grants the power in the court to strike out a statement of case or part thereof which is an abuse of the process of the court or which disclosed no reasonable grounds for bringing or defending the claim. The first will be granted where the court's processes are engaged more than once in pursuit of the same subject matter or cause, unless in the interest of justice, the court determines it should not be struck down. The second will be granted where the claim is hopeless and has no chance of being successful or where there is no more than an arguable claim. See **S&T Distributors Ltd. v CIBC Jamaica Ltd** [2007] Civ. App. 112/04 CA, per Harris J for a disposition on the broad based approach the court ought to take where a party seeks to pursue a claim after they had previously been embroiled in another suit and the second suit was not an "obvious endeavour by the claimant to revive an earlier action".

[31] In **Hunter v Chief Constable of West Midland Police** [1987] AC 529, the question of abuse of process was examined. It was considered from the point of view of whether it was a collateral attack upon a final decision against the claimant, made by another court of competent jurisdiction in previous proceedings, where the claimant had the opportunity to contest the decision in the court in which that decision was made.

[32] The principle distilled from the cases is that the court should be slow to strike out a statement of case or defence and dismiss an action as frivolous and vexatious or an abuse of the court processes but should do so if it has been shown that the identical question sought to be raised had already been decided by a competent court. It would be scandalous to permit a litigant to change the form of proceedings to set up the same case, which had already been disposed of in other proceedings.

[33] In this case the abuse of process claimed is that the matters had already been dealt with by the court and is res judicata and issue estoppel applied. If this is true then

the statement of case cannot proceed to trial. A litigant has a right to have his rights and obligations determined by the court of the land and should not lightly be turned away from the judgment seat. A party has the right to have his matter determined by the court and have some finality applied to it. The court's duty is to balance those two rights and see to it that litigation is legitimately, rightly and fully pursued. In considering whether there are no reasonable grounds for bringing the claim, the court must consider whether there is any basis in law for such a claim to be brought; whether there is a legitimate claim properly constituted and whether the goal of the litigant is likely to be achieved when compared to the time and cost of litigation. In conducting this assessment the court has to be mindful that this is not a trial. The court should also consider a proposed amendment to save an existing case rather than striking out, if the existing case can be saved by a legitimate amendment.

Test for Summary Judgment

[34] In the alternative, the applicant Petros sought summary Judgment. Again, much of the law on summary judgment is now settled. It should only be granted to a defendant where there is no real dispute as to facts that should be investigated at a trial and the claimant's claim shows no real prospect of succeeding. The burden of proof in summary judgment rests with the applicant. See **Swain v Hillman** [2001] 1 All ER 91 and **Three Rivers DC v Bank of England** [2003] 2 AC 1. The applicant must assert that the respondent's claim has no reasonable prospect of succeeding. See also **ED & Man Liquid Products Ltd v Patel and Another** [2003] EWCA Civ. 472. It is then for the respondent to show that he not only has more than a fanciful prospect of success but that he has a case which is more than arguable and which has a realistic prospect of success. See the judgment of Brooks J in **ASE Metals NV v Exclusive Holiday of Elegance Limited** [2013] JMCA Civ. 37 for a fulsome exposition on the principles governing the application for summary judgment.

[35] The power to grant summary judgment without trial is provided in Part 15 of the CPR. Rule 15.2 gives the grounds for summary judgment as follows:

15.2 The court may give summary judgment on the claim or on a particular issue if it considers that;

(a) The claimant has no real prospect of succeeding on the claim or the issue; or

(b) The defendant has no real prospect of successfully defending the claim or the issue.

The consideration and disposition of cases under Part 15 should not require the court to conduct a mini trial.

[36] On hearing an application for summary judgment under Part 15 the court is given several options. In rule 15.6 it provides that a court on hearing an application for summary judgment may:

(a) Give summary judgment on any issue of fact or law whether or not such judgment will bring proceedings to an end;

(b) Strike out or dismiss the claim in whole or in part;

(c) Dismiss the application;

(d) Make a conditional order; or

(e) Make such other order as may seem fit.

[37] Borrowing from the examples given in the **Three Rivers Case**, an application may succeed where firstly; there is an alleged contract and a party may prove the facts alleged but as a matter of law may not be entitled to a remedy or the remedy sought. Secondly, the factual allegations made may be found to be without substance even without a trial and thirdly, there may be documentary evidence which clearly contradicts the factual allegations made. In any of the three cases outlined the applicant would be entitled to summary judgment. In hearing these applications and making these determinations the court is fulfilling its mandate to manage cases and dispose of them justly, in keeping with the overriding objective.

The Principles of Agency

[38] Halsbury Laws of England paragraph 817 states the general rule relating to the liability of principals in the following terms;

> *"As a general rule, a principal is responsible for all acts of his agent within the authority of the agent, whether the responsibility is contractual or tortuous. Similarly the principal will be bound by many dispositions of property made by the agent. In some exceptional instances, a principal may be criminally liable even where he does not himself take part in, authorize or connive at the act or default of the agent."*

[39] It goes on to state at paragraph 820 that;

> *"Where an act done by an agent is not within the scope of the agents express or implied authority, or falls outside the apparent scope of his authority, the principal is not bound by, or liable for, that act, even if the opportunity to do it arose out of the agency, and it was purported to be done on his behalf, unless he expressly adopted it by taking the benefit of it or otherwise."*

And at paragraph 821

> *"As a general rule, any contract made by an agent with the authority of his principal may be enforced by or against the principal where his name or existence was disclosed to the other contracting party at the time when the contract was made."*

[40] In **Jacobs v Morris** [1902] 1Ch. 816 where the agent went outside of his actual and ostensible authority and borrowed money in the name of the principal which he then applied to his own use, it was held at page 832 that the principal was not liable. However, the court pointed out that if the principal had received the benefit of the money by its loan being used to pay its debt, he would*, pro tanto*, have adopted the loan and so be liable. Where the agent commits a fraud, acting outside the scope of his authority, the principal cannot be held liable. The agent's knowledge of his own fraud and knowledge of his breach of duty cannot be imputed to his principal unless ratified by

him. See **Newsholme Brothers v Road Transport and General Insurance Company Limited**, [1929] 2 KB 356, which involved an insurance contract. The actions of the agent have to be within his apparent, actual or ostensible authority or otherwise must be ratified.

[41] It may be that in a particular case such as this one, an individual may act as agent for both parties, but when the court comes to analyze his legal position, it may find that he is an agent for one at a particular point in the contract to perform certain functions and for the other at a different point. In making a decision as to the legal consequences of his actions therefore, the court must ask itself whose agent he was at the material time. See St**. Margaret's Trusts, Ltd v Navigators and General Insurance Co. Ltd.** [1949] 82 Ll.L.R. 752 at 765. In the case of a contract for sale and purchase, the same individual cannot be both vendor and purchaser at one and the same time. Therefore, the agent may be agent for the vendor at one point and agent for the purchaser in performing some other function.

[42] The general principle was enunciated by the House of Lords in the case of **Briess v Wooley & ors**, where a director of the company was authorized to conduct negotiations on behalf of the directors of the company to sell their shares to the claimants, he was held to be an agent of the shareholders for the purpose of the negotiations and in those circumstances they were responsible for any fraudulent representations he made in the course of those negotiations, actions which they were held to have adopted and taken the benefit of. The House of Lords having examined the various authorities and the principles derived therefrom, highlighted the following statements of law;

I. An innocent principal was civilly responsible for the fraud of his authorized agent, acting within his authority, to the same extent as if it was his own fraud.

II. In the making of a contract a principal undertakes that his agent will not act fraudulently in the exercise of his authority.

III. No principal can take advantage of the fraudulent acts of his agent

ANALYSIS

[43] I agree that when the parties came before Sinclair-Haynes J, what the learned judge was considering was whether there was jurisdiction to enforce an agreement between them, the terms of which were contained in a schedule attached to a Tomlin Order. Having looked at the terms in the schedule, the affidavit evidence and the facts contained therein as she found them proved and the submissions by the parties, the learned judge concluded that the summary jurisdiction to enforce could not be invoked, as the original terms of the agreement in the Tomlin Order had been varied by the parties. Effectively, therefore, Sinclair-Haynes J lacked the jurisdiction to make any order in respect to the terms contained in the schedule, which were varied.

[44] The variation is a separate contract and there is nothing to prevent either side from seeking to enforce those terms or claiming for breach of any of the provisions of that new contract. That new contract has not been adjudicated on and therefore it is not res judicata; neither does any form of estoppel apply. Furthermore, the Murrays could not have sought to make a claim pursuant to the later agreement in the application for enforcement of the schedule to the Tomlin Order that was before Sinclair-Haynes J and the learned Judge had no jurisdiction to make any orders in respect of it. No abuse of process therefore arises from the making of this new claim pursuant to the new agreement.

[45] The Murrays have brought a fresh claim for breach of contract on the terms as varied between the parties. They have also incorporated a claim for relief under section 213A of the Companies Act. I agree with Counsel for the Murrays that the power to make orders under section 213A is a statutory power granted to the court pursuant to the Companies Act. It gives the court power to grant relief to a complainant with the necessary locus standi, claiming to be oppressed or unduly prejudiced by any action of the company. The section provides for varying remedies which the court may grant one of which is the appointment of directors in place of or in addition to those already in office. This is a relief which the court may grant pursuant to that section, on an application, separate and apart from any agreement between the parties or any findings

of a previous court as regards any contract between the parties. Of course, in determining whether to grant that remedy or any other relief under the Companies Act, the court is entitled to look at the constitution of the company and any binding agreement between the shareholders which may settle the issue. In this case the independent director appointed by agreement between the parties has resigned; the board is once again in deadlock. The Murrays are claiming a situation exists which is oppressive to them and unduly prejudicial and they are entitled to bring a claim for relief in that regard.

[46] On the issue of the appointment of a new independent director as requested by the applicants in the earlier claim, Sinclair-Haynes J found at paragraph 22 and 23 of her findings that;

> "*The schedule stipulated the time frame within which the director was to be appointed. An independent director was duly appointed in the person of Mr. Tomlinson. The schedule does not provide for the appointment of another director. The court's hands are tied in that regard. The parties have agreed to appoint Mr. Tomlinson. The court therefore has no locus standi to appoint another director in the face of the parties' agreement."*

[47] However, that ruling was within the confines of the court's jurisdiction over the terms contained in the schedule attached to the Tomlin Order which the learned judge was being asked to enforce. At that time the parties had, pursuant to that agreement, already appointed an independent director in the form of Mr. Tomlinson. In the absence of any other agreement to appoint another, the court had no jurisdiction to appoint any other director in those proceedings. In this case before me, however, the independent director has resigned; the application to the court to appoint a new director is not made under or by virtue of any agreement between the parties but is made pursuant to the statutory power vested in the court under the Companies Act, section 213A. To the extent that any request is being made to appoint another director under and by virtue of clause 11, that must be struck out.

[48] As far as the pleadings in the current claim attempts or appears to attempt to enforce the terms of the original schedule to the Tomlin Order and more specifically clause 11, that aspect of the claim must be struck out whether on the basis of issue estoppel or res judicata, it matters not. I would want to believe that the matter is more likely to be one of issue estoppel. The fact is however, that, that issue had been determined by the court and it was so necessary for the court to determine that issue in order to find that it lacked jurisdiction to enforce the original agreement. Clause 11 no longer existed as an agreement. It had been replaced by a new agreement. It cannot now be revived in these proceedings. Any attempt to do so would be viewed as an abuse of the process of the court and subject to being struck down. The only agreement on which the parties could proceed to litigate is on the new terms.

[49] The parties conferred on Mr. Tomlinson the absolute discretion to accept the bid offer, which was a variation of the agreement in the Tomlin Order for the Board to determine and accept the highest offer. The disputed issue which arose was whether in the agreement as varied, what was to be accepted was the “highest offer”, “best offer” or “highest and best offer”. Counsel for Petros indicated that the Murrays were bound by Sinclair-Haynes’ J finding that Mr. Tomlinson was empowered by them to accept the highest and best offer. (See paragraph 29 of the judgment). However, in paragraph 31 the learned judge also referred to Mr. Tomlinson’s power to accept the best offer. In the same paragraph she also referred to the Murrays instituting proceedings to determine the meaning of ‘highest and best offer” whilst remarking that the Murrays had not previously taken issue with the fact that such power resided in Mr. Tomlinson. The conundrum was again highlighted in paragraph 32. In that paragraph the court referred to the subsequent controversy as to when was the “close of business” and the ‘inclusion of the word “best” as a consideration in the selection process.

[50] I do not agree that Sinclair-Haynes J made any definitive finding as to what was agreed by the parties, neither do I agree that even if such a finding was made, that it is binding on any court which was being asked to determine the terms of the contract as varied between the parties and whether there was a breach of that contract. With all due

respect to counsel's submission, Sinclair-Haynes J was not determining the terms of the variation in order to bind any of the parties; the court's mandate was to determine jurisdiction to enforce the original contract. In doing so the court necessarily had to find whether that original contract still subsisted as the governing agreement. It was also necessary for the court to determine, if there was a variation, whether it was in accordance with clause 13, because, if it were, then the court would retain its summary jurisdiction to enforce those variations. The court found that the variations were not in keeping with clause 13 because there appeared to be no agreement as to when the time for bidding would close. That issue is therefore in dispute, as well as any other term of the contract as varied which may be raised by the parties because the new contract was not the subject of litigation and its terms have not been settled by any court hearing allegations regarding that contract.

[51] Since the previous court made no orders in the judgment with regard to the variations, none of the terms of the new agreement between the parties is subject to issue estoppel, cause of action estoppel or res judicata. The parties are not bound by any interpretation Sinclair-Haynes J may have appeared to place on the correspondence whilst seeking to establish her jurisdiction to enforce the original contract.

[52] It may be necessary to consider the correspondence at the heart of the learned judge's comments. At paragraph 29 of the judgment Sinclair-Haynes J said;

> *"They further agreed to vary the contract by conferring upon Mr. Tomlinson the discretion to determine the acceptable bid. Instead of accepting the highest bid, the parties conferred on Mr. Tomlinson the discretion to accept the highest and best offer. In so doing, they dispossessed the new board of that authority. This variation removed the right which the schedule had given the party with the highest bid to have his bid accepted. The parties were one accord until the claimant's bid was accepted. Scrutiny of the following emails exchanged among the parties makes this quite manifest."*

[53] The learned Judge then went on to scrutinize the various emails which she said made her findings manifest. The following emails, which I have placed in chronological order, were examined:

1. February 21, 2013 2:25p.m.; email from the Murrays attorney, to Petros attorney; no reference to these terms. But confirms attendance at an auction sale of the shares.

2. February 22, 2013; Letter from the Murrays attorney with no mention of those terms but to an auction sale, that there would be no protocol agreement just an agreement for sale.

3. February 25, 2013, 9:36 a.m. Letter from the attorney for the Murrays to attorney for Petros referring to discussions and the latest position agreed by the Conrad George Team. It stated inter alia "Bids to remain open until 6th March 2013, when they will be closed". "Discussion (sic) to which bid is to be accepted will be solely that of Mr. Ken Tomlinson, the chairman of the board."

4. Letter from the attorney for the Murrays Feb 25, 2013, 10:30 a.m. No mention of those terms.

5. On the morning of the same date letters from Mr. Tomlinson and Mr. Conrad George no mention of terms.

6. February 25, 2013 12:19 p.m. letter from the Murrays attorney to Conrad George, Ken Tomlinson and Karin Murray, referencing the latest position agreed on by the Conrad George team. "Bids to remain open at the discretion of the Board Chairman on the understanding that the time for presentation will not exceed the 6th March, 2013 when they will be closed"; The discussion (sic) to which bid is to be accepted will be solely that of Mr. Ken Tomlinson, the Chairman of the Board"; "The best and final offers must be in by March 6, 2013." "Please confirm and approve".

7. February 25, 2013, 2:19 p.m.; email from counsel acting for the Murrays to counsel for Petros, Mr. Tomlinson and Karin Murray referencing the latest position which has been agreed with the Conrad George team. It refers to bidding to commence 25th February at 3:30p.m. Bidding to remain open for all parties to complete with details for the completion; bids to remain open at the discretion of the board chairman on the understanding that the time for presentation will not exceed the 6th March, 2013 when they will be closed; the discussion (sic) to which bid is to be accepted will be solely that of Mr. Ken Tomlinson, the Chairman of the Board; the best and final

offers must be in by March 6, 2013". Request was made for confirmation and approval.

8. February 25, 2013, 2:38 p.m.; email from Conrad George to Ken Tomlinson refers to his discussions with Mrs. Messado, Counsel for the Murrays and an agreement for the auction sale not to take place. Most importantly it does not reflect what appears in Mrs. Messado's letter. Instead it speaks "respective offers to purchase shares of each other, including price and any relevant terms"; that "Mr. Tomlinson would be entitled to discuss each offer with the offeror with a view to obtaining clarification or improvement of any of the proposed terms (including but not limited to price) and having done so by no later than close of business on the 6th March 2013, you will in your absolute discretion decide which offer is better."

9. February 25, 2013 3:17p.m. from Conrad George to Mr. Tomlinson marked draft email to be sent to Ken Tomlinson. No attachment. From Conrad George to Stacy Long also no attachment.

[54] The remaining emails considered by the court sent after 3:17p.m. on the 25th February, 2013 do not refer to these terms but go on to discuss the dispute which arose over the Murrays' offer being not for cash, some deposit which was not paid and impending litigation. I myself see no correspondence actually confirming that the offer to be accepted was the "highest and best". It is unclear from the face of the emails whether the offer to be accepted was the best, the highest, the highest and best, the best and final, the better or otherwise. The emails refer to discussions between the attorneys and request for written confirmation which were either not disclosed or never made. However, the Murrays instituted proceedings for the court to interpret the meaning of "highest and best" as in Mr. Tomlinson's letter accepting the Petros offer, he claimed to have accepted the "highest and best offer". The documentation does not disclose from whence his instructions to do so was derived.

[55] What is clear, however, is that the variation contains wording which requires judicial interpretation to determine the true meaning and effect. This cannot be done in a summary way. These are questions of fact which cannot be determined by a judge in chamber on affidavit evidence only. The issue of what offer Mr. Tomlinson was authorized to accept and the interpretation of the meaning of the governing words, as

well as the issue of when the bidding was to be closed, are questions which are subject to further consideration by the court.

[56] Although the parties in this case are the same and the subject matter of the dispute is the same, the issues are different. It is open to either party to this fresh agreement, on new proceedings to sue on it in hope of a favourable interpretation of its terms. There is no issue estoppel, subject matter estoppel, cause of action estoppel or res judicata applicable to this claim for breach of contract. It is open to the court in this present claim to determine, on the facts, whether there was an agreement at all, and if so, the precise terms of that agreement and whether there was a breach of those terms.

[57] The challenge raised by counsel for Petros that the complaint was as regards the actions of Mr. Tomlinson who is not a party to the suit, and not those of Petros presents a greater difficulty. Counsel for the Murrays argued that the challenge was ably met by the court applying the principle of agency. The claimant's claim is that Mr. Tomlinson was to act as agent for both parties so that when he rejected the offer made by the Murrays he did so as the agent for Petros; the actions of the agent acting within his authority binds his principal.

[58] There is little doubt that the Murrays have a cause of action based on the agreement. The question is whether they can bring that action against Petros. The general rule is that the master is liable for the wrongful actions of his servant or agent as committed in the course of the service and for the master's benefit. There is no doubt that Mr. Tomlinson was as much Petros' agent as he was the Murrays. He had the authority given by both men to act on their behalf. His selection formed part of the agreement between them as to how the shares would be disposed of. Part of the agreement was for the sale of the shares to a third party. If Mr. Tomlinson had entered into a contract with a third party on behalf of his principals, then the third party would have an action against Mr. Tomlinson as agent or against Petros and the Murrays as principals or both. Is there any justification for denying the Murrays the same remedy

which would have been available to a third party to the contract of sale? The answer lies in the functions performed by Mr. Tomlinson.

[59] In the agreement between the Murrays and Petros to purchase the other's shares there was a contract to purchase and a contract of sale. The invitation was for the parties to make bids. In a bid contract the offer comes from the person submitting the bid and there is no valid contract unless and until the person asking for the bid accepts one of them. Where the person inviting the bid states in the invitation that he intends to bind himself to accept the highest offer, he is so bound as soon as the highest offer is received, all other terms being equal. In this case there were to be two unilateral contracts in identical terms. The first was between Petros and Murray and the second between Murray and Petros. The terms of the contract were contained in the invitation to make the offers. Each vendor assumed a legal obligation to the purchaser under each contract. The obligation of each party under the unilateral contracts was conditional on the occurrence of an event as specified in the invitation to make offers. The vendor in each case was obliged to enter into a reciprocal contract to sell shares to the promisee under the terms set out in the invitation to bid. The promise by the vendor was to sell shares to the person who makes a bid which conforms to the terms of the invitation. A failure by the vendor to meet this obligation is a breach of the reciprocal contract. The case of **Harvela Investsments Limited v Royal Trusts Co**. **and ors** [1986] 1 AC 207 is instructive on this point.

[60] In **Harvela Investsments Ltd.,** The Royal Trust Co. was the vendor of its minority shares in A. Harvey and Company Ltd. In deciding to sell their minority share holdings they invited the two other shareholders to make fixed bids to purchase the shares. The terms of the invitation was that the offers must be by sealed tender or confidential text which the vendors could not disclose before expiry of the invitation period set at 3pm on the 16th September 1981. After the expiry of the period for bidding the vendors would accept the highest offer with completion of the purchase to take place 30 days thereafter in Canadian currency. Harvela, who as the Harvey family, already owned 43% made a bid in a fixed sum whilst the other shareholder Sir Leonard

Outerbridge, representing the Outerbridge family, who owned 40%, made a referential bid. The shares were sold to Sir Leonard as the highest bidder. Harvela claimed the shares and won at first instance. Sir Leonard appealed and won in the Court of Appeal. Harvela appealed to the House of Lords and won. The Lords found that the agreement was for fixed bids to be made and not referential bids; that referential bidding was as per an auction sale but that the invitation was not to participate in an auction but in a bidding process. They declared unanimously that Harvela, having made the highest bid was entitled to the shares. They found that the terms of the invitation not only contained the terms of the unilateral contracts (the terms upon which each was to make a bid) but they also formed the basis of the reciprocal contract entered into by the vendors upon the purchasers carrying out the conditions in the invitation (which was to accept the highest offer once all other terms were complied with) and that the vendors were in breach of their legal obligation to Harvela who had complied with all the terms of the contract.

[61] In the case of the Murrays and Petros, the agreement as to how the bidding should take place and under what terms, formed the basis of their two individual unilateral contracts. They were both entitled, as prospective purchasers, to consider the words forming the terms to say what the intention of the promisor was. Their unilateral contracts (to make a bid) was converted on the same terms to a reciprocal contract between the vendor and whomever the vendor's agent considered to have made a bid conforming to the terms of the invitation. Each party then made a unilateral contract and in so doing each bid was an offer to purchase the others shares at a set price. The acceptance of the offer created a reciprocal contract between buyer and seller. The purchaser made the offer with no input from Mr. Tomlinson and Mr. Tomlinson accepted the purchaser's offer on behalf of the vendor. He was mandated to accept offers not to make them. The only point at which Mr. Tomlinson was the individual agent of any one of these parties, was at the point where the other was the vendor and not the purchaser.

[62] For there to be a valid sale there must be a seller and a buyer. Mr. Tomlinson could not effect a valid sale by being both the seller and buyer. He could not sell to

himself. Neither could he buy from himself. A man cannot contract with himself, neither as principal or agent. The only rational interpretation of his agency then was that when he was accepting the bid he did so as agent of the vendor and not the purchaser. His authority was to accept the bid in his sole discretion, whether highest, highest and best or the best. I make no findings on that either way. He however, clearly had no input in the making of the offers only in the acceptance. He could only therefore be accepting on behalf of the vendor in those circumstances. The person who made the bid made an offer as purchaser to buy the shares. If he had accepted the Murrays bid he would have done so as agent for Petros who would be the vendor. When he accepted Petros' bid to purchase he accepted that bid on behalf of the Murrays as vendors. At the point where each man was to make the offer, they acted on their own behalf. Any breach of contract of the sale then is a breach as between the vendor and the purchaser. In this case the vendor was the Murrays and the purchaser was Petros, the agent for the vendor was Mr. Tomlinson.

[63] The Murrays cannot then sue Petros for the actions of their own agent. They may sue Petros for breach of contract but they must allege what constitutes the breach by Petros. In this case there were potentially two contracts. Each party was to be given the same opportunity under their respective contract to purchase the shares. The other side of the coin was where the offer came from the Murrays to be accepted on the behalf of Petros by Mr. Tomlinson. At the point of considering the Murrays offer Mr. Tomlinson acted as agent for Petros the vendor, in the same way as if Petros was acting for himself. It follows therefore, that if Mr. Tomlinson failed to follow the agreed procedure which was embodied in the contract, to effect the sale to the Murrays, he would be in breach of the terms of the reciprocal contract between vendor and purchaser and ipso facto so would be Petros, as his principal.

[64] It follows therefore, that since the agreed procedure contained the terms of the unilateral contracts and was embodied in the reciprocal contract where the vendor agreed to contract with one party on the happening of a specified event, the Murrays

may sue Petros as vendor and or his agent Mr. Tomlinson for any alleged breach in the agreed procedure (the terms of the contract) for acceptance of the bids.

[65] The actions of Petros are also relevant to the claim for relief under section 213A, as he was a director of the board, such acts being acts of the company. As for the commencement of the claim for relief under section 213A of the Companies Act by claim form, Rule 8.1 makes provision as to how parties are to commence proceedings. Rule 8.1(4) speaks specifically to the Fixed Date Claim Form. It provides:

> (4) Form 2 (Fixed Date Claim Form) must be used-
>
> (a) In mortgage claims;
>
> (b) In claims for possession of land;
>
> (c) In hire purchase claims;
>
> (d) Where the claimant seeks the court's decision on a question which is unlikely to involve a substantial dispute of fact;
>
> (e) Whenever its use is required by a rule or practice direction; and
>
> (f) Where by any enactment proceedings are required to be commenced by petition, originating summons or motion.

[66] Since matters brought under the Companies Act do not appear in the list then Rule 8.1(4) (d), (e) or (f) would have to apply. The question of whether a member of a company is being oppressed or unduly prejudiced by the acts of the company may or may not involve substantial dispute as to fact. That question could only be determined on an examination of the constitution of the company, any shareholders agreement which may exist and the facts pleaded in support of the claim. It cannot therefore be said that based on Rule 8.1 (4) (d), such a claim under 213A must commence by Fixed Date Claim Form. No rule or practice direction has been cited which governs the issue and I verily believe there is none. That leaves us with (f). The question is whether applications under section 213A are required by the Companies Act to commence by petition, originating summons or motion. The section provides that a complainant may apply to the court for an order under that section. It makes no mention of what specific process is to be used on making this application.

[67] In this case the Murrays are claiming damages for breach of a contract with Petros but are also claiming for relief under section 213A of the Companies Act. Rule 8.3 permits a claimant to use a single claim form to include all or any other claims which can conveniently be disposed of in the same proceedings. The question is really therefore, whether the application for relief can conveniently be disposed of in the same proceedings as the claim for breach of contract.

[68] Where a claimant uses the Fixed Date Claim form it must state amongst other things under what enactment it is being made if the claim is being made under a specific enactment: see Rule 8.8 (c). In this case, where the claimant is seeking damages for breach of contract and for relief under the Companies Act section 213A, generally the first could only be brought on a claim form and the second may or may not be brought by either process. The result of having both in one claim in this case is that the pleadings are inelegant, unclear and verbose, which I believe is what led to this application.

[69] Part 25 of the CPR mandates the court to manage the cases. It provides that the court must further the overriding objective by actively managing cases and encouraging the parties to co-operate in the conduct of proceedings amongst other things. The alternative approach of having the claimant file a separate claim under 213A by Fixed Date Claim Form may create inconvenience, hardship and expense. I believe the best course, bearing in mind that the issues and the parties are the same, considerations of time, expense and convenience, to have matter continued as filed. I am bolstered in this view by the fact that the claim has been consolidated with two other claims brought by Petros on a Fixed Date Claim Form. One of which is a similar claim under section 213A.

DISPOSITION AND ORDERS

[70] In consequence of the above ruling the court makes the following orders;

I. The sections of the Claimant's statement of case for breach of contract against Petros which refer to the provisions of the Tomlin Order are struck out; specifically paragraphs 1 and 3 of the Claim Form and paragraphs 5 to 20, paragraphs 34-41, paragraphs 49 and 50 and paragraphs 1, 2 and 3 of the prayer in the Amended Particulars of Claim are also struck out.

II. The Claimant is permitted to file and serve a Fixed Date Claim Form for the action under section 213A of the Companies Act.

III. Since Petros did not totally succeed in the application, the Murrays are to pay 30% of his cost of this application.