[2021] JMCC Comm 44

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN THE COMMERCIAL DIVISION

CLAIM NO. SU2021CD000237

BETWEEN	**BENEDETTO PERSICHILLI**	**CLAIMANT**
AND	**LEO TADDEO**	**1ST DEFENDANT**
	NEW ERA HOMES 2000 LIMITED	**2ND DEFENDANT**

Civil Procedure – Application to strike out claim-Whether abuse of process-Whether basis for section 213A claim under Companies Act-Whether settlement agreement between all directors and shareholders a bar to proceeding-Whether prolix pleadings- Whether omission of certificate of truth renders claim null and void-Whether delay a bar to the application – whether consent order makes it unjust to strike out clam.

Nerine Small for Claimant

Kemar Robinson instructed by Robinson & Partners for 1st Defendant

Heard: 14th October and 9th December 2021

In Chambers: By Zoom.

COR: BATTS J.

[1] There were two applications before the court. The first was an application, filed on the 4th October 2021, to amend the Fixed Date Claim. The purpose of the amendment was to add a claim for winding up of the 2nd Defendant. That

application was granted without objection. The other was an application, filed on the 8th October 2021, to strike out the claim. This was of course contested. Each party was allowed 20 minutes for oral submissions as substantial written submissions had already been filed by each side. Having heard the submissions, I reserved my decision until the 9th December 2021.The 2nd Defendant was unrepresented at this hearing.

[2] The 1st Defendant asserts that this claim discloses no cause of action and is an abuse of the court's process. It is, he says, a misconceived effort to avoid litigating a separation agreement and ought not to be entertained. There was also, it was asserted, a failure to comply with certain formalities and the statement of case was bad for prolixity.

[3] The Claimant's counsel, on the other hand, says that this is not a plain and obvious case for striking out. She invited me to have regard only to the Claim Form and statements of case in order to decide if there was a cause of action. There was, she contended, sufficient to establish a prima facia case of oppression, so as to trigger Section 213A remedies under the Companies Act and that, it was too late in the day for the court to entertain the application. As to the allegations, that the pleadings were prolix, and not in the proper form, counsel contended that, they were not indecipherable even if wordy. Further that the irregularities were not fatal and could be cured. Therefore, the claim ought not to be struck out

[4] The factual circumstances that have led to this imbroglio are quite involved. The parties were equal shareholders in a small company (the 2nd Defendant). They were also the only two directors. The 1st Defendant was the one responsible for the day to day administrative and financial operations of the company. The Claimant was responsible for the "*design and construction*" functions of the company. He was designated "*President*" of the 2nd Defendant and the 1st Defendant its "*Chief Executive Officer*"(CEO). After over 20 years in business the parties had disagreements which resulted ultimately in a decision to end their business relationship. The affidavit evidence suggests that this related to mistrust

between the Claimant, who asserts he did all the work, and the 1st Defendant who, he says, controlled the finances of the company to his exclusion.

[5] In January 2021 the parties therefore entered into a "*Separation Agreement*" (see exhibit BP1 to the Claimant's affidavit in support of Fixed Data Claim filed on the 3rd June 2021 and, exhibit LT1 to 1st Defendant's affidavit filed on the 8 October 2021) which contained a formula for division and /or sale of the 2nd Defendant's assets and its ultimate winding up. It is apparent that, as is the case with so many small companies in this situation, the interest of the 2nd Defendant was not their primary concern. In the course of implementing the separation agreement a further dispute arose. This concerned a lot, being the common area, in one of the developments owned by the 2nd Defendant. The Claimant maintained that it ought not to be separately valued whilst the 1st Defendant said it ought to be. Its estimated value is approximately $80 million and therefore its treatment, in the separation agreement, could impact considerably the benefit to one or the other of the parties. This claim for section 213A oppression orders was filed by the Claimant after the disagreement, about implementation of the separation agreement, arose.

[6] The 1st Defendant's arguments for striking out , and I hope I do the carefully posited submissions no injustice, may be summarised thus:

(a) To ground a section 213A claim the Claimant has to show that the 1st Defendant has exercised his power in a manner that is oppressive or unfairly prejudicial or which unfairly disregards the interest of the Claimant as shareholder and director.

(b) Reliance is placed on **Re BCE [2008] 3 SCR 560,** a decision which was analysed by Sykes J (as he then was) in **Ervin Moo Young v Debbiann Dewar et al (2016) JMSC Comm 16 (unreported judgment delivered 2nd June 2016).** Paragraph 44 of that judgment is instructive:

> "*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 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. 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."

(c) The Claimant's statement of case lacks specificity with respect to the alleged acts of oppression, unfair prejudice and /or unfair disregard. Ground (k) in the Fixed Date Claim, filed on the 3rd June 2021, is the only item with specifics and it states:

"The 1st Defendant has disproportionately used and / or deployed the assets of the 2nd Defendant in the furtherance of his own business interests and activities in a manner deleterious to the rights and interests of the Claimant in the 2nd Defendant."

This allegation is supported by evidence on affidavit, that the 1st Defendant used "*excessive*" amounts of the company's earnings to further his project. The amount, the Claimant alleges, was significantly above that which had been "*agreed*" could be used "*until the terms of our Agreement are finalised*" [see paragraph 14 of the Claimant's affidavit, filed on the 3rd June 2021, in support of Fixed Date Claim Form].

(d) It is apparent that the Claimant admits that it was agreed that the1st Defendant was permitted to use the Company's assets and that this would be taken into account in the final accounting between the parties under the separation agreement.

(e) When the separation agreement, and the accounting related to

it, are examined the assertion of the Claimant as to amounts spent is demonstrably false. The written submission at paragraph 24 states:

> *"As such based on what the Claimant has exhibited the 1st Defendant had spent a total of $27,647,159 whilst the Claimant had spent a total of 11,148,142.39. The updated amount spent by the Claimant now stands at $35,173,779.89……."*

(f) There is, it was submitted, therefore no reasonable ground for bringing the claim.

(g) The complaint by the Claimant on affidavit, that he was not given information when requested, is negated by the Claimant's later affidavit which admits that the information was provided prior to the filing of the claim [see paragraph 21 of Claimant's affidavit filed on the 12th October 2021].

(h) Rule 26.3 (1) (a) of the Civil Procedure Rules says the statement of case may be struck out for failure to comply with the Rules. The Claimant used a Form 7 in breach of Rule 8.1 (4) which stipulates that Form 2 be used in claims begun by Fixed Date Claim. The Fixed Date Claim also has no Certificate of Truth contrary to Rule 3.12. The Claim should therefore be struck out in accordance with Rule 26.3 (1) (a).

(i) The Claimant's statement of case is prolix and should be struck out, pursuant to Rule 26.3.(1) (d), as it does not conform to Rule 8.Reliance is placed on **Kinlock v McFarlane (2019) JMSC Civ 20** at paragraph 37.

(i) The claim is an abuse of the process of the court as it is an attempt to achieve the same result as, and thereby enforce, the separation agreement which has not been placed before the court. This is underscored as the separation agreement has provisions to deal with disputes.

[7] The Claimant's submissions in answer I summarise as follows:

(a) Section 213A allows a claim for remedies for conduct that is oppressive, unfairly prejudicial to or, unfairly disregards the interest of any shareholder, debenture holder, creditor, director or officer of the company "*as well as the legitimate expectation*" of members of that class; **Ebrahimi v Westbourne Galaries Limited [1973] AC 360** is relied upon.

(b) Oppression means burdensome harsh or wrongful and or a departure from standards of fair dealing and abuse of power leading to loss of confidence in probity. Unfairly prejudicial means unjustly or inequitably detrimental and a departure from standards of fair dealing. Unfair disregard means unjustly or without cause paying no attention to, ignoring or treating as of no import. All this can be related to legitimate expectations and where they are breached. **Dallas Corp et al v Alnando Corp et al CV2011-04466 High Court, Trinidad & Tobago (April1 2011)** and **Flolkes Goldson, Corporate Business Principles pages 82-85** were cited.

(c) The focus in an oppression claim, pursuant to section 213A, is on harm to the interests of the claimant.

(d) The two requirements for a section 213A oppression claim are (i) the interests or expectations of the claimant and (ii) conduct that is oppressive, unfairly prejudicial or, unfairly disregards those interests or expectations, **BCE Inc v 1976 Debenture holders (2008) 3 SCR 560**.

(e) There are however no absolute rules. In each case the question is whether in all the circumstances the directors or the officers of the company acted in the best interests of the company when regard is had to all the circumstances, including but not limited to, the need to treat affected stakeholders in a fair manner commensurate with the company's duty as a responsible entity.

(f) In small "quasi- partnership" companies the remedy may lie where there is unfair prejudice, consequent on a breach of a legitimate expectation to participation in the decision making of the company. **Northover v Winston G Northover & Associates (2014) JM CC Comm 14** , **Plummer et al v Plummer et al (2020) JM CC Comm 6** and **Burgess , Commonwealth Caribbean Company Law 334-337** were relied on.

(g) The Claimant is a shareholder and director of the company which operates as a quasi-partnership.

(h) The 1st Defendant operated, managed and/or, controlled the company as though he was the sole owner and "*locked*" the Claimant out of matters concerned with the operation and management of the company. He has also "*contrary to a verbal agreement between the parties*" applied exorbitant amounts of the company's resources "*over and above the agreed amount*" to a project "*allocated*" to the 1st Defendant under the separation agreement. Thirdly the 1st Defendant, contrary to the verbal

agreement, prevented the Claimant using the company's resources on the Claimant's project.

(i) The above stated conduct is prejudicial to the Claimant's interests and constitute conduct which is oppressive, unfairly prejudicial and unfairly disregards the Claimant's interests as shareholder and director.

(j) The Claimant has a cause of action and it is no answer to say that the 1st Defendant alone managed the company for years. The Claimant had been responsible for the design and construction work of the company. He should not be excluded from its financial management particularly after he sought to be involved in the decision making.

(k) As regards the separation agreement the matters raised in the claim are outside the "*ambit*" of that agreement. The affidavits show that the 1st Defendant's conduct, of which complaint is made, occurred prior to the separation agreement.

(l) The 1st Defendant has still not fully complied with the consent order made in this claim on the 14th June 2021 for, among other things, disclosure.

(m)The valuations in furtherance of the settlement agreement, to which the 1st Defendant objected, were procured by the 1st Defendant. It is the Claimant's position that the omitted Lot 8 is not to be valued as a separate lot.

(n) The Claimant has concerns about the accuracy of information previously submitted by the 1st Defendant. Hence the need for a forensic audit.

(o) The 1st Defendant is not opposed to a winding up of the company as this is indeed what the separation agreement itself was intended to achieve.

(p) It is too late to apply to strike out the claim as an abuse of process **Brown v Rodney and another [2017] JMSC Civ 32** is cited.

(q) As regards the assertion of prolixity, which should give rise to a striking out, it was submitted that the statement of case is not incoherent or hopeless and contains no irrelevant material, it does not fail the test established in **Atos Consulting Limited v Avis Europe Plc [2005] EWHC 982 (TCC) and Tchenguiz et al v. Grant Thornton UK L. L.P et al [2015] EWHC 405 (com).**

(r) As regards the omission of a certificate of truth and other formal omissions the rules allow a discretion in 26.9. Further this does not render proceedings null and void and is not fatal, **Whylie and others v West and others SCCA Appeal No.120/2007** and **Dixon v Jackson SCCA 042/2002** cited.

[8] It is apparent to me that, when the Fixed Date Claim and the affidavit in support are considered, the Claimant is disgruntled about the breakdown in the implementation of the separation agreement. This view is solidified when all the affidavits are considered, as well as, paragraph 2 of the consent order made on the 14th June 2021 by Laing J. The separation agreement, entered into between two equal partners, was designed to end the partnership. Hence, in consideration of their own interests to the exclusion of the company's, they agreed to a formula for dividing between themselves the assets and liabilities of the company. They even agreed orally, and collateral to the written agreement, that each could expend the company's resources on their respective projects. The 1st Defendant is disgruntled about a valuation of one asset and the Claimant about the amount of company resources used by the 1st Defendant on projects. The Claimant would have filed no claim for an oppression remedy under Section 213A had the separation agreement been performed to his satisfaction.

[9] The section 213A remedies represent an exercise of the court's equitable jurisdiction. By its very nature therefore the remedy is discretionary. The discretion, to be sure, must be exercised judicially that is fairly. In this case both the 50 percent shareholders and directors elected to resolve the dispute they had, about how the company was being operated, by way of a separation agreement. They were both represented by an attorney at law and signed onto a comprehensive formula to end their business relationship, see exhibit BP 1 to the affidavit of the Claimant filed on the 3rd June 2021 in support of the Fixed Date Claim and, paragraph 32 of the Claimant's affidavit filed on the 12th October 2021. The separation agreement also provides for an approach to the resolution of disputes (clauses 6 ,7 and 8). The parties may ultimately resort to the court for its interpretation and/or enforcement. It seems to me to be a waste of judicial time to embark upon a section

213A process which in all likelihood will ultimately lead to a result very similar to that contemplated in the separation agreement. That is, winding up of the company and liquidation of assets and a 50-50 divide. It is arguable that the Claimant, by entry into the separation agreement, has waived, acquiesced in and/or, elected to compromise, the or any alleged breaches as at the date of the agreement. Furthermore, equity will not allow a party to blow hot and cold. The Claimant agreed to resolve the issues in one way. Upon the 1st Defendant expressing a contrary view, as to how the agreement is to be interpreted /implemented, the Claimant then says "I will go back on our agreement". This is not a case where there is an allegation that the 1st Defendant repudiated the agreement. Indeed, the affidavits do not assert that the separation agreement is at an end. In my view, and subject to the effect of the consent orders, the Claimant ought not to be allowed to pursue a section 213A claim having already entered into a binding contract to achieve the same end.

[10] The further question arises as to how, if this section 213A application were to proceed, would the court treat with the separation agreement and the collateral oral agreement. An agreement that, without regard to the interests of the company, permitted its only two shareholders and directors to strip the company of its assets and use them for their private ventures. To be fair the agreement also made provision, in clause 3, for the assumption (proportionately) of the company's liabilities. Ought a court to afford parties, who so conducted themselves, the benefit of its resources to now oversee the disentanglement of that conundrum? If so, to what end? There is no other interest adversely affected. The two parties are each 50% owners of the company. Therefore, to unwind the agreement and reallocate resources, only to subsequently order a winding up and division of assets which is the inevitable result, would be most unwise. This court is not here for that. This is however not what the court has done. The orders, made by consent, demonstrate an intent to specifically enforce the separation agreement and not only to grant section 213A remedies. I will return to the significance of this later in this judgment.

[11] If I am wrong, and somehow a court will in these circumstances entertain the section 213A application, I now briefly consider the arguments posited. Both parties relied on the same authorities to define the circumstances which allow for such an application. I need not restate them. The question is whether, as the facts alleged, a cause of action is made out and, if it is, whether in all the circumstances of this case there is an abuse of the court's process.

[12] The complaint about being locked out and oppressed is, on the face of it, rather odd given that the Claimant is a 50% shareholder and director. There are no letters exhibited in which he called for meetings or in which he complains about no meetings being held. The Claimant does not seem to have attempted to exercise any power given to him as a director or shareholder. The complaint relates to a request for financial information. This information was provided after some delay (see paragraph 21 of Claimant's affidavit filed on the 12th October 2021). The Claimant complains that he has since then not received any more information. However, the 1st Defendant asserts, and this has not been denied, that the Claimant is a joint signatory on all company accounts and had the ability to access the information at all times. The Claimant admits this is so but says he was unaware (see paragraph 22 of the Claimant's affidavit filed on the 12th October 2021). This state of affairs, to my mind, is most unlikely to meet any test of oppression.

[13] The Claimant also complains about the 1st Defendant's excessive use of company resources on his project. However, this assertion is in the context of his admitted agreement to this being done (see paragraph 14 of the Claimant's affidavit in support of Fixed Date Claim filed on the 3rd June 2021). The Claimant says the 1st Defendant went over and above that which was agreed. Here again I am of the view that the litmus test of oppression would not be met. In the first place use of company resources for a director's own private business is a breach of duty to the company. It really is not an act oppressive to the Claimant within the meaning of S.213A. He is complaining of conduct more appropriate for a section 212 claim (for which the leave of the court is required) see, **Wilkinson et al v Chambers et al**

JMCC Comm 41 (unreported judgement dated 20th July 2021), for a recent decision of this court explaining the distinction. In the second place, the complaint is essentially about a breach of their alleged oral agreement not misuse of company assets, the Claimant having himself also misused company assets on his own admission.

[14] As regards the procedural aspects I will not strike out this matter for prolixity, for the failure to use the correct form or, for the absence of a certificate of truth. I accept the submission that section 26.9 affords an opportunity for the court to put such technical breaches right. The rules are not designed to entrap the litigant or, to prevent a case being heard on the merits because of an error of form, where there is not a substantial prejudicial effect. In that regard see, **Gladston Watson v Rosedale Fernandes [2007] CCJ 1(CCJ Appeal No. CV2 of 2006)** per Saunders J at paragraph 39, as applied in **Beverly Chin-Spence v Munair Badeloo et al [2014] JMSC Civ 238 (unreported judgment dated 6th January 2014)**. This is why section 26.9 was inserted. I will therefore make the appropriate "unless" orders giving the Claimant time to put things right by filing appropriately amended documents. As regards the statements of case they are not so confusing unclear or lengthy as to offend the rule against prolixity.

[15] The Claimant's counsel submitted that it was too late in the day for this claim to be struck out as being an abuse of process. Reliance was placed on **James Brown v Karl Rodney et al [2017] JMSC Civ 32 (a judgment of my brother Anderson J delivered on the 20th January 2017).** In that case the application to strike out for abuse of process was made after the pre-trial review had been heard, so the case is distinguishable, as in this case there has not as yet been a case management conference. This claim is still in its early stages. However, on the larger question, whether delay is necessarily fatal when applying for dismissal on the ground of abuse of process, I make the following observations.

[16] There is, I think, no such rule of law or practice. Justice Anderson relied on two authorities. One was a decision at first instance of Rimer J, in **Coca Cola Co v**

Ketteridge [2003] EWHC 2488(Ch). Rimer J, and I say so respectfully, misapplied **Johnson v Gore Wood & Co. (a firm) [2002] 2 AC 1 (HL),** which is the other decision relied on by Anderson J. Lord Millet's words at page 61 in **Johnson v Gore (cited earlier)** were obiter, unsupported by authority and, not adverted to by any of the other four judges in that case. The leading judgment, with which all the judges agreed, suggests otherwise. The case concerned an application to strike out a claim as being an abuse of process in circumstances where the claim may have been made a part of earlier proceedings and, it was argued, was harassing to the defendant contrary to the rule in **Henderson v Henderson 3 Hare 100**. The House of Lords decided that, as the earlier claim had been settled on the mutually held assumption that the second claim would be brought, it would be unjust to dismiss the second claim as an abuse of process. The court also decided that the delay of 4 years, before applying to strike it out, was evidence that the defendant did not regard it as abusive and that it was not in fact abusive. I respectfully adopt without reservation, as a true statement of the law, the words of Lord Bingham of Cornhill at page 22 of the report:

> *"The rule of law depends upon the existence and availability of courts and tribunals to which citizens may resort for the determination of differences between them which they cannot otherwise resolve. Litigants are not without scrupulous examination of all the circumstances to be denied the right to bring a genuine subject of litigation before the court:* ***Yat Tung Investment Co. Ltd. V Dao Heng Bank Ltd [1975] AC 581,****590 per Lord Kilbrandon, giving the advice of the Judicial Committee;* ***Brisbane City Council v Attorney General for Queensland [1979] AC 411****,425 per Lord Wilberforce , giving the advice of the Judicial Committee).This does not however mean that the court must hear in full and rule on the merits of any claim or defence which a party to litigation may choose to put forward. For there is , as Lord Diplock said at the outset of his speech in* ***Hunter v Chief Constable of the West Midlands Police [1982]***

AC 529, *'inherent power which any court of justice must possess to prevent misuse of its procedure in a way which, although not inconsistent with the literal application of its procedural rules ,would nevertheless be manifestly unfair to a party to litigation before it , or would otherwise bring the administration of justice into disrepute among right-thinking people. The circumstances in which abuse of process can arise are very varied ; those which give rise to the instant appeal must surely be unique. It would ,in my view, be most unwise if this House were to use this occasion to say anything that might be taken as limiting to fixed categories the kinds of circumstances in which the court has a duty (I disavow the word discretion), to exercise this salutary power'*

One manifestation of this power was to be found in RSC Ord. 18 r 19 which empowered the court at any stage of the proceedings, to strike out any pleading which disclosed no reasonable cause of action or defence, or which was scandalous, frivolous or vexatious, or which was otherwise an abuse of the process of the court. A similar power is now to be found in CPR r 3.4." [Emphasis mine]

Each case, I do believe, will be decided on its own facts and a delay in making the application is but one of the circumstances to be considered.

[17] In the case at bar it is not so much the delay, as it is the parties' conduct since the filing of the action, that concerns me. The Defendant whilst represented by counsel agreed to specific enforcement, by this court in this action, of the separation agreement. He should not be allowed to resile from that decision. Just as the Claimant will not be allowed to pursue section 213A relief, because of the existence of the separation agreement, neither will the 1st Defendant be permitted to avoid an order made by consent to give effect to the said agreement. Laing J made orders on the 7th and 14th June, by and with the consent of the parties, one effect of which was to enforce the separation agreement. On the 22nd July 2021 I

made an order to facilitate the carrying out of the said consent orders. The 1st Defendant's application, to strike out the claim, was not filed until the 8th October 2021 and is designed to avoid compliance with the orders already consented to. Those orders if performed may bring this litigation to an end, or resolve significant aspects of the matter, by giving effect to the separation agreement. Any alleged ambiguity in the terms of the agreement may be clarified by declaratory order of the court. In these circumstances it is neither just nor equitable to strike out this claim as being an abuse of process.

[18] The Claimant is hereby ordered to file on or before the 20th December 2021 an amended claim, in the appropriate form and with a certificate of truth appended, failing which the claim will stand dismissed. The application filed on the 8th October 2021 to strike out the claim is refused. Half costs, of the application, will go to the Claimant against the 1st Defendant.