BARBADOS

No. 770 of 2008

IN THE HIGH COURT OF JUSTICATURE

HIGH COURT

Civil Division

IN THE MATTER OF the Companies Act Cap. 308 of the Laws of Barbados, sections 228, 66, 175 & 231

IN THE MATTER OF the Beakers Investment Inc, the Company in question.

IN THE MATTER OF the application of Everton Leo Cumberbatch for relief under section 228 of the Companies Act, Cap. 308.

AND IN THE MATTER OF The Rules of the Supreme Court, Cap. 117 of the Laws of Barbados, Order 90, Rules 2 & 6.

BETWEEN

EVERTON LEO CUMBERBATCH — **PLAINTIFF**

AND

LARRY LESLIE TATEM — **DEFENDANT NO. 1**

LEROY C. PARRIS — **DEFENDANT NO. 2**

THE BEAKERS INVESTMENT INC. — **DEFENDANT NO. 3**

Before: Dr. The Honourable Madam Justice Sonia Richards, Judge of the High Court.

2010: June 17, 18

2011: November 04

Ms. Kim Marshall for the Plaintiff

Mr. Alrick Scott and Ms. Makala Holder for Defendants Nos. 1 and 3.

Mr. Amiri Dear for Defendant No. 2.

DECISION

Background

[1] By an originating summons filed on May 09, 2008, the Plaintiff applied for several orders against the three Defendants. In a nutshell, the Plaintiff is claiming oppression, and he seeks relief under section 228 of the Companies Act, Cap. 308. He also filed a lengthy affidavit in support of the summons.

[2] On June 15, 2010, Defendants Nos. 1 and 3 filed a summons asking for the Plaintiff's action to be struck out on the basis that:

> "... the Affidavit of the Plaintiff filed on 9th May 2008 discloses no reasonable cause of action in that the conduct complained of does not fall within the scope of corporate conduct that may be challenged under section 228 (2) of the Companies Act ..."

The Principles Applicable To Striking Out

[3] The relevant portions of Order 18 rule 19 of the Rules of the Supreme Court 1982, provide that:

> "(1) The Court may at any stage of the proceedings order to be struck out or amended any pleadings or endorsement of any writ in the action, or anything in any pleading or in the endorsement, on the ground that
>
> (a) it discloses no reasonable cause of action or defence, as the case may be;
>
> ...
>
> (2) No evidence shall be admissible on an application under paragraph (1) (a).
>
> (3) This rule shall, as far as applicable, apply to an originating summons and a petition as if the summons or petition, as the case may be, were a pleading.".

[4] Order 18 rule 19(3) contemplates that an originating summons, such as that filed by the Plaintiff, may be subjected to an application to be struck out. Defendants Nos. 1 and 3 have done so, but their application is limited to a single ground, that is, that the originating summons discloses no reasonable cause of action.

[5] The Barbados Court of Appeal has had occasion to review the approach to an application to strike out in the case of ***M4 Investments Inc. v. CLICO Holdings (Barbados) Ltd.*** ((2006) 68 WIT 65, p. 76-77). The Court of Appeal relied on the interpretation of similar English rules in relation to Order 18 rule 19 (2). The Supreme Court

Practice 1999 at note 18/19/5, states that no evidence is admissible where the sole ground of complaint is that the pleadings disclose no reasonable cause of action.

(i) Affidavit Evidence

[6] However, the above statement of law does not apply to an originating summons. The final paragraph of note 18/19/5 of the Supreme Court Practice adds that:

> "On an application to strike out an originating summons on the ground that it discloses no reasonable cause of action, the prohibition in [0 18 r 19 (2)] against adducing evidence on the application itself does not apply to an affidavit already put is as supporting the originating summons, and affidavits used before the master without objection cannot be excluded before the judge ***(Re Caines, Knapman v. Servain*** [1978] 1 W.L.R. 540).".

[7] It may well be that the action in ***M4 Investments Inc.*** was filed by writ with a statement of claim annexed thereto. Sir Denys Williams CJ also applied Order 18 rule 19(2) strictly in the case of ***Mirchandani v. Barbados Rediffusion Service Ltd.*** ((1992) 42 WIR 38, p. 46 e-f). That too was a case begun by writ with the supporting statement of claim. The Plaintiff in the instant case took the route of an originating summons with an affidavit in support.

[8] Megarry V.–C. pointed out in **Re Caines**, that one had to consider the difference between the pleadings in actions commenced by writ and those commenced by originating summons.

> "Of course, unlike a statement of claim in an action begun by writ, most originating summonses are remarkably uninformative documents. They usually ask a series of questions, or state the various forms of relief sought, but most of them disclose little or nothing of what the case is about or what the plaintiff's contentions are.". ([1978]1 W.L.R.540, at 542F-G).

[9] In this case, the Plaintiff's originating summons contains 15 paragraphs that detail the relief sought. Another 8 paragraphs contain the grounds for the application. The first seven of these grounds complain about the business and affairs of Defendant No. 3 being conducted in a manner either oppressive to the Plaintiff, or that unfairly disregarded his interests in Defendant No. 3. It is the Plaintiff's affidavit that provides the facts alleged in support of the originating summons. It is an extensive affidavit, containing some 105 paragraphs.

[10] In assessing the application to strike out the Plaintiff's action, the Court will take into consideration both the originating summons and the affidavit filed in support of the summons. Counsel for the Defendants submitted that the Court should also look at the affidavit

filed by Defendant No. 2 on 04 June, 2008. The Court declines to include this affidavit because it was not put in to support the originating summons. The Court has to assume the truth of the allegations contained in the originating summons and the supporting affidavit. Evidence to the contrary is inadmissible (***Lonrho plc v. Fayad (No.2)*** [1991]4 All ER 961 at 965, cited with approval by the Barbados Court of Appeal in the **M4 Investments Inc.** case (2004) 68 WIR 65, at 77b- d).

(ii) Some Chance Of Success

[11] Where an applicant pleads that the Plaintiff has no reasonable cause of action, the Court must determine whether the Plaintiff has "a cause of action with some chance of success when only the allegations in the pleadings are considered.". (See Supreme Court Practice, 1999, parag. 18/19/10; ***Drummond-Jackson v. British Medical Association*** [1970] 1 W.L.R. 688). The Barbados Court of Appeal also relied on these authorities in **M4 Investments Inc** ((2004) 68 WIR 65, at 81 c-f). The Supreme Court Practice goes on to state that:

> "So long as the statement of claim on the particulars (***Davey v. Bentinck*** [1893] 1 Q.B. 185) disclose some cause of action, or raise some question fit to be decided by a Judge or jury, the mere fact that the case is weak, and not likely to succeed, is no ground for striking it out (***Moore v. Lawson*** (1915) 31 T.L.R. 418,

> CA; ***Wenlock v. Maloney*** [1965] 1 W.L.R. 1238; [1965] 2 All E.R. 871, CA)".

[12] The Court's jurisdiction to strike out pleadings is to be "very sparingly exercised, and only in very exceptional cases" (per Lord Herschell in ***Lawrence v. Lord Norreys*** (1890) 15 App Cas 210, at 219). To underscore this principle, Peter Williams JA prayed in aid the Barbados Constitution in the Court of Appeal decision in ***M4 Investments Inc.*** The learned Justice of Appeal opined that:

> "... our decision is reinforced by the knowledge that human rights provisions for a fair hearing (such as contained in the Constitution of Barbados, s.18(8)) require the power to strike out to be exercised with caution, except in the clearest of cases; ***Kent v. Griffiths*** [2000] 2 All E.R. 474 at 485, per Lord Woolfe MR." (see (2004) 68 WIR 65, at 83 h-j).

[13] While considering a petition to strike out an action alleging that the affairs of a company were conducted in a manner that was unfairly prejudicial, Rattee J. referred to the underlying principles in this way:

> "I bear in mind in considering these submissions that to strike out the petition, as to strike out any proceedings, is a draconian measure and I must only adopt it if I am satisfied that the petition is bound to fail. On the other hand, if the petition is bound to fail, it is important that it should be struck out now to avoid continuing damage to the interests of the company and its members arising from the continuing existence of the petition ..." (***Re Leeds United Holdings plc*** [1996] 2 BCLC 545, at 557j - 558a).

The Statutory Remedy

[14] The Plaintiff's action is brought under section 228 of the Companies Act, Cap. 308. Section 228 is the source of the oppression remedy, one of a suite of civil remedies enacted under Division L of the Act. Section 229 (1) provides that "A complainant may apply to the court for an order under this section.". A complainant is defined in section 225 as meaning:

> "(i) a shareholder or debenture holder, or a former holder of a share or debenture of a company or any of its affiliates;
>
> (ii) a director or an officer or former director or officer of a company or any of its affiliates;
> (iii) the Registrar; or
>
> (iv) any other person who, in the discretion of the court, is a proper person to make an application under this Part.".

[15] The Plaintiff is a complainant by virtue of his role as a director in Defendant No. 3. Therefore, he has satisfied an initial requirement that allowed him to make the application under section 228. And even if he was not a director, section 225 (b) (iv) gives the Court a discretion to decide who is a "proper person" to make an application under section 228.

[16] Subsection (2) of section 228 prescribes the conditions under which a court will assist a complainant. This provision states that:

> (a) any act or omission of the company or any of its affiliates effects a result,
>
> (b) the business or affairs of the company or any of its affiliates are or have been carried on or conducted in a manner, or
>
> (c) the powers of the directors of the company or any of its affiliates are or have been exercised in a manner,
>
> that is oppressive or unfairly prejudicial to, or that unfairly disregards the interests of, any shareholder or debenture holder, creditor, director or officer of the company, the court may make an order to rectify the matter complained of.".

[17] The Plaintiff's originating summons has framed the grounds for his application in terms of the conduct of the business or affairs of the company under section 228 (2) (b). Cap. 308 defines what is meant by the "affairs" of a company. Section 448 provides that:

> "In this Act
>
> (a) "affairs" means, in relation to any company or other body corporate, the relationship among the company or body corporate, its affiliates and the shareholders, directors and officers thereof, but does not include any

businesses carried on by the companies or other bodies corporate.".

[18] In some countries, the legislative definition of what constitutes the affairs of a company is much more expansive than section 448(a) of Cap. 308. For example, section 53 of an Australian Corporations Law defined the affairs of a company as including a wide range of matters. Despite the expanded definition, Drummond J. held in ***Australian Securities Commission v. Lucas*** that "Quite apart from these statutory provisions, the concept of the affairs of a corporation is a very wide one indeed." (36 FCR 165, at 184).

[19] In the ***Lucas*** case, a notice to produce documents from a company's auditor was held to be seeking documents that related to the affairs of a group of companies. Likewise, in ***Cousins v. Corporate Affairs Commission*** ((1977) 3 ACLR 398, at 401-402), Helsham CJ held that an inspector's examination into how a contract of audit was carried out, what advice was given or withheld, and what was the ambit of the auditor's operation, were all properly categorized as "affairs of the company".

[20] Another interesting case, that speaks to the determination of what constitutes the affairs of a company, is ***Re Leeds*** (supra). Referring to section 459(1) of the 1985 Companies Act of England, which

authorized members of companies to petition the court on the ground that the company's affairs were conducted in a manner unfairly prejudicial to them, Rattee J. expressed the view that:

> "In my judgment, the legitimate expectation which the court has held in other cases can give rise to a claim for relief under s. 459 must, having regard to the purpose of the section as expressed in s. 459(1), be a legitimate expectation relating to the conduct of the company's affairs, the most obvious and common example being an expectation of being allowed to participate in decisions as to such conduct.". ([1996] 2 BCLC 545, at 559h – i).

[21] The Barbados Companies Act, although it defines the "affairs" of a company, offers no definition of the "business" of a company. Counsel for Defendants Nos. 1 and 3 argued that it is only upon the holding of an organizational meeting that a company is able to carry on its business and affairs. He quoted from McGuinness "Canadian Business Law", where that author submitted that:

> "As a practical matter, the holding of an organizational meeting is a pre-requisite to the conduct of business and affairs by the corporation. On the absence of such a meeting (or unanimous written resolutions of the directors in lieu thereof), there would be no validly appointed signing officers for the corporation, and no authorities given to deal on the corporation's behalf." (parag 5.166).

[22] The company (Defendant No. 3) was incorporated on 01 February, 2007. The parties agree that, since incorporation, the company has

purchased land. Therefore, there is a possibility that the business and/ or affairs of the company have been carried on prior to the convening of the meeting of 26 April, 2007. But this can only be determined after the Court hears and considers all of the evidence. Also of interest is that Defendant No. 3 is represented in this action. How was this decision taken, and was it made as part of the business and affairs of Defendant No. 3?

[23] Findings of fact as to what transpired on 26 April, 2007, will be crucial. The Plaintiff in his affidavit alleged a course of conduct by certain individuals, including a Director (Defendant No. 1) that forced him to leave the meeting before it began. Another Director, who is not a party to these proceedings, was also present for that meeting. The Plaintiff contends that the company has been hijacked, and that Defendant No. 1, and these other individuals have carried on or are carrying on the business and affairs of the company in a manner that is oppressive and that unfairly disregards his interests as a Director. Section 228(2)(b) of Cap. 308 does not restrict the actions complained of to the actions of company members.

[24] The Plaintiff believes that the meeting may have continued in his absence after his departure. In paragraph 94 of his affidavit, the

Plaintiff deposes that "... in subsequent conversation with Defendant No. 1's son, I 'picked up' that the meeting did in fact take place, whilst he was expressing his disbelief that [Defendant No. 2] even asked him why *he* was at the meeting.".

[25] Much of the Plaintiff's affidavit spoke to the pre-incorporation history surrounding Defendant No. 3. What this affidavit conveys is that the Plaintiff went to the meeting as a validly appointed Director with a reasonable and legitimate expectation of:

(i) participating in the meeting;

(ii) participating in the management of Defendant No. 1; and

(iii) having shares in Defendant No. 3 allocated to him.

[26] The Plaintiff's affidavit annexes an Exhibit ELC 8 that purports to be the agenda for the meeting. Item 1 on the agenda is the introduction of fellow shareholders. Item 2 (c) refers to other expenses related to the conveyance and their distribution among shareholders. The question therefore arises as to whether the shareholding in Defendant No. 3 was decided, during the conduct of the business and affairs of Defendant No. 3, and without the knowledge or participation of the Plaintiff. Was the meeting convened after the Plaintiff left, and, if so, were any decisions taken at the meeting after the forced exclusion of

the Plaintiff? These and other findings of fact have to be made by the Court at the close of pleadings or after a trial.

[27] In ***Re Pasgate & Denby (Agencies) Ltd*** ([1987] BCLC 8 at 14), Hoffman J. postulated that the concept of unfair prejudice:

> "... enables the court to take into account not only the rights of members under the company's constitution, but also their legitimate expectations arising from the agreements or understandings of the members inter se.
>
> ... The common case of such expectations being superimposed on the members' rights under the articles is the corporate quasi-partnership, in which members frequently have expectations of participating in the management and profits of the company, which arise from the understandings on which the company was formed and which it may be unfair for the other members to ignore.".

A court will have to decide, after the essential findings of fact in this case, whether a similar concept may be applied to those facts.

[28] The Court is satisfied, that even on this limited view of the originating summons and the affidavit filed in support, the Plaintiff has established the prerequisites for the statutory remedy under section 228 of Cap. 308. At this stage, the Court is not concerned with the weakness or strength of the Plaintiff's case. It is open to the Plaintiff to further amend his pleadings if he so chooses. And, equally, it is open to the Defendants, at the close of pleadings, to make another application for the summary dismissal of this matter. The success or

failure of the Plaintiff's case can only be gauged after the Court is able to determine critical issues of fact that at this stage are uncertain or in dispute.

[29] The Court takes further guidance from the ***M4 Investments*** case, where the Court of Appeal expressed the opinion that:

> "Applications to strike out are often appropriate in cases involving questions of law in which the facts are not in dispute and where discovery of documents and oral examination of witnesses will not assist in determining the issues:" ((2004) 68 WIR 65 at p. 84a).

There is no doubt that in this case, critical facts cannot be determined at this stage. And additional evidence will be required before the determination of facts and the application of the relevant law can be made.

Disposal

[29] This Court is not satisfied that the Plaintiff's action is bound to fail. Therefore, the summons to strike out the action is denied. Costs are awarded to the Plaintiff against Defendants Nos. 1 and 3, in any event, to be agreed or taxed.

S. L. Richards
Judge of the High Court