THE EASTERN CARIBBEAN SUPREME COURT
IN THE HIGH COURT OF JUSTICE
ST CHRISTOPHER AND NEVIS
NEVIS CIRCUIT
(CIVIL)
AD 2012

Claim No: NEVHC 2011/0162

BETWEEN

SM LIFE VENTURES LLC

Claimant

and

(1) SUSAN MORRICE
(2) TONY QUINN
(3) INTERNATIONAL NATURAL ENERGY LLC
(4) BELIZE NATURAL ENERGY LLC

Defendants

Appearances: Mr Frank Walwyn and Ms Myrna Walwyn for the Claimant
Mr John R Macdonald QC and Mr Jeffrey E Nisbett for the Defendants

JUDGMENT
[2012: 27, 28, 29 February; 2 March]

[1] **Bannister J [ag]:** There are three applications before the Court. The first, made by the Claimant ('SM Life'), is for interim relief pending trial of these proceedings. Of the other two, one is brought by the fourth Defendant ('BNE') and asks that the claim against it be struck out. The other is brought by all four Defendants and asks that the claim made by SM Life for certain particular relief be struck out.

Background

[2] SM Life is a member of the third Defendant ('INE'). Like SM Life, INE is a Limited Liability Company formed under the Nevis Limited Liability Company Ordinance of 1995 ('NLLCO'). BNE is a wholly owned subsidiary of INE and is a participant, together with a company called CHx Capital LLC ('CHx') and the Government of Belize, in a joint venture ('the JV') for the exploitation of oil reserves discovered by BNE within the territory of Belize. BNE is entitled to a 56% share in the JV, with CHx having 34% and the Government of Belize 10%. The JV has been very successful and INE's consolidated accounts show total members equity of some US$39 million as at 31 December 2010 after previous distributions to certain members of INE of some US$10 million.

[3] The founders of INE, described in its Operating Agreement ('OA') as 'Originators', were Sheila McCaffrey ('Ms McCaffrey'), who is the sole owner of SM Life, together with the first Defendant ('Ms Morrice'), Michael Usher (now dead and whose shares have been transmitted to his widow, Patricia), Jean Cornec and Paul Marriott. Cornec's interest was subsequently acquired by Ms Morrice and Marriott was later bought out by INE itself. At some time in around 2006 the second Defendant ('Mr Quinn') was appointed to the board of INE and he claims to be the holder of some 64,000 shares in its capita', although SM Life claims that those shares were never validly allotted. Unless and until that dispute is resolved in Ms McCaffrey's favour, the upshot is that between them Ms Morrice and Mr Quinn have *de facto* control of INE. I should mention for completeness that INE has a separate class of B Members. These are investors with no controlling power and for present purposes can be ignored.

[4] Under the OA management of INE is conferred upon its directors. The original directors were the five Originators, who were entitled to remain on the board for life, subject to their being removed by a vote of two third of the Members (Ms McCaffrey, Ms Morrice, Cornec, Usher and Marriott – or their nominees).

[5] SM Life's case is two pronged. It says, first, that Ms McCaffrey has been excluded from the management of INE and of its subsidiary, BNE. There may be a question whether that is a matter of which SM Life is entitled to complain and there are issues as to the validity of her removal, but as a matter of fact there can be no doubt that Ms McCaffrey has been excluded from participation in the management of INE and of its wholly owned subsidiary, BNE. Secondly, SM Life complains that the affairs of INE and of the JV have been mismanaged in such a way as to confer benefits upon entities and individuals connected with Ms Morrice at the expense of BNE (and, thus, of CHx and the Government of Belize) and INE.

[6] Pleadings are closed and by consent I made an order for disclosure during the course of the hearing. Both sides are anxious for a speedy trial and steps are being taken to try and arrange for this to take place before the summer vacation.

The applications

[7] It is against this background that the applications mentioned in paragraph [1] of this judgment came on for hearing. Although I heard SM Life's application for interim relief first, it is convenient if I decide the two strike out issues first.

BNE's strike out application

[8] SM Life claims against BNE, first, that together with Ms Morrice and Mr Quinn, it has induced INE to beak its contractual obligations to its members by failing to pay dividends, withholding information and making unlawful distributions to some, but not all, of its membership. In respect of Ms Morrice and Mr Quinn, it is said that they induced these breaches 'by their actions as set out herein' and 'using the corporate vehicle of BNE.' It seems to me that this pleading is defective since it alleges no act of interference or inducement on the part of BNE itself, without which, in my judgment, the ingredients of the tort are not established.

[9] Secondly, SM Life says that Ms Morrice, Mr Quinn and BNE have unlawfully interfered with the corporate activities and governance of INE with the intention of causing loss to SM Life and INE's other members (including, it must be inferred, themselves). The unlawful means of interference are said to 'include' breach of contract and statute, breach of fiduciary duty, fraud, inducement of breach of contract and civil conspiracy 'as described herein.' It is not alleged that BNE was party to, let alone breached any contract with INE. Nor is it alleged that BNE is in breach of any statutory requirement or obligation or that it owed, let alone broke, any fiduciary duty to its parent, INE. For the reasons given earlier, no case is established against BNE for inducing breach of contract. As for conspiracy, that claim is pleaded as a separate cause of action elsewhere in the statement of claim. The conspiracy relies upon exactly the same wrongful acts as those which are relied upon for unlawful interference and, for the reasons given earlier, must be regarded as largely defective.

[10] It is, however, alleged[1] that BNE's funds have been siphoned off to the benefit of entities affiliated to or associated with (among others) Ms Morrice. That allegation seems to me capable (I put it no higher) of sustaining a plea of unlawful interference and conspiracy on the part of BNE itself, which ought to have been ensuring that its revenues were not diverted to the prejudice of its parent. Whether such a case could be made good at trial is not something with which I am concerned on the present application.

[11] I have to bear in mind that striking out a claim is a drastic remedy. It seems to me that while the pleading is hopelessly unparticularised, it just manages to make out a claim for wrongful diversion of income by BNE in conjunction with Ms Morrice and Mr Quinn. Furthermore, BNE was clearly intimately involved in the events of which complaint is made. In my judgment, therefore, it should remain as a defendant. In those circumstances, I do not think that it would be right, and Mr Macdonald QC has not invited me, to dissect the pleading so as to strike out some only of the claims made against BNE. It seems to me to be better to let them all go to trial. I should, however, add that SM Life would be well advised, before that stage is reached, to decide which of its claims it wishes to maintain and whether it might not be prudent to particularise the survivors with considerably more precision. My decision, as a matter of discretion, to leave BNE in as a defendant does not mean that at trial the claims against it will not be determined by strict reference to the pleadings as they then stand.

[12] This application must therefore be dismissed.

The Defendants' strike out application

[13] A key head of relief sought by SM Life in these proceedings is an order that that its shares be bought out by INE or Ms Morrice or Mr Quinn at an independent valuation without minority discount. Mr Macdonald QC says that this claim is bound to fail and should be struck out accordingly, because the Court has no power to make such an order in relation to shares in a company incorporated under the NLLCO.

[14] The NLLCO does not contain an express power to make a buy out order and Mr Macdonald says that no such power can be implied. He submits, by analogy with UK company law, that it requires the intervention of statute before a court can arrogate such a power to itself and that it cannot be

[1] In paragraphs 44 to 46 of the statement of claim

collected from the general jurisdiction to grant injunctions. He relied upon **CVC/Opportunity Equity Partners v Demarco**[2], where the Privy Council held that while the Grand Court of the Cayman Islands had jurisdiction to wind up Cayman Islands companies on the just and equitable ground, it had no jurisdiction to grant buy out relief because 'no such jurisdiction had been conferred upon it.' That observation was, however, obiter, since the question before the Board was not whether the Grand Court could make a buy out order, but whether, in persisting in petitioning for the winding up of the company in the absence of a reasonable offer for his shares, an excluded member was abusing the winding up procedure. The Board held that he was not.

[15] I do not, therefore, get much in the way of assistance from this authority. More formidable was Mr Macdonald's submission that the overlay of equity, at any rate in respect of English company law, is derived from the law of partnership[3] and that the Court has never, in exercising its partnership jurisdiction, forced one partner to purchase the partnership share of another in the absence of express provision in the partnership agreement itself. So, he says, appeals to general equitable principles cannot assist SM Life.

[16] In the case of companies governed by the NLLCO, however, there does not exist even an express power in the Court to wind them up on the just and equitable ground. There is such power in the general Nevis companies legislation, but it is common ground that does not apply to entities incorporated under the NLLCO. The Court does have an express power to dissolve a LLC[4], but only where it is not reasonably practicable to carry on the business of the LLC in conformity with its OA. The general framework within which LLC's operate in Nevis is therefore radically different from that which obtains in Cayman - let alone in the UK.

[17] Central to the scheme of the NLLCO is the operating agreement, which may provide for any matter including the rights of the members *inter se* so long as such provision is not inconsistent with the NLLCO itself, any other Law of Nevis, or the Articles of Organisation of the LLC.[5] None of the various operating agreements propounded in these proceedings makes any provision for a member's shares to be bought out by other members on retirement or 'termination.'[6] Section 40(4) of the NLLCO provides that: upon retirement a member may not withdraw his share from the LLC before dissolution unless the OA provides otherwise and he remains liable for capital calls unless the OA provides otherwise.[7] This is not a promising background for implying a power in the Court to step in and direct members to buy out the shares of other members when the relationship breaks down.

[18] Mr Walwyn relies upon section 31(4) of the NLLCO:

> 'A court may enforce an operating agreement by injunction or by granting such

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[2] [2002] BCLC 108

[3] see, for example, **Westbourne Galleries** [1973] AC 360

[4] NLLCO s 52

[5] NLLO s 31(1)

[6] there are elaborate preemption provisions in the first, unamended, OA and, if I have correctly understood them, provisions in the amended (but disputed) OA for conversion a Originators' class A shares into B shares if a member wishes to retire.

[7] s 42(2)(c)

other relief that the court in its discretion determines to be fair and reasonable.'

He submits that this enables the Court to step in to remedy conduct which is unfair and inappropriate, that SM Life, having been excluded, is being treated unfairly and inappropriately by not being made a reasonable offer for its shares and that section 31(4) permits the Court to make any order to remedy this state of affairs. The difficulty which I feel with this submission is that the orders envisaged by section 31(4) are orders in aid of enforcement of operating agreements. An order that Ms Morrice and Mr Quinn buy out SM Life would not be enforcing either OA unless there can be implied into whichever OA in fact governs the parties' relationship an obligation to buy out excluded members. In my judgment, no such obligation can, on ordinary principles of construction, be implied into either OA, particularly in light of the provisions of section 42(2)(c) of the NLLCO.

[19] Mr Walwyn showed me passages from a work on LLC's by two United States authors.[8] This shows that the Courts in a number of States have been prepared to assume a power to order members to buy out the shares of other members, although others have held that the provisions of the applicable legislation are exclusive and have refused to intervene. I get no assistance from those references, which could only usefully be taken into consideration after the full facts of each case and the legislative background against which it was decided had been examined.

[20] Mr Walwyn submitted that the question whether the Court has power to order buy outs of the shares of excluded members should be left to trial, rather than being decided in the sterile atmosphere of a strike out application. I have come to the conclusion that he is right. It seems to me to be arguable that if the provisions of the applicable OA do not deal with the position of a member who has been excluded then section 40(2)(a) of the NLLCO does not apply. In those circumstances it seems to me to be further arguable that the Court may be able to step in and fill the gap. If that point is reached, then SM Life may be able to pray in aid some principle which might permit the Court to order a buy out in order to achieve a just and equitable result. I am very far from suggesting that any such arguments would succeed, but in my judgment they are better made, and better decided, after the full facts have been found and after a thorough investigation of all relevant legislation. I respectfully agree with Mr Macdonald QC that SM Life cannot rely upon anything approaching an express power in the Court to order a purchase of SM Life's shares. I differ from him in not agreeing that that is necessarily the end of the argument.

[21] I therefore decline to strike out the claim for buy out relief at this stage.

Interim relief

[22] Mr Walwyn sought a broad range of interim relief against the Respondent Defendants, some of which he has subsequently modified. Mr Macdonald QC rightly accepts that SM Life is entitled to some protection in the interim. The question is as to what that protection should be.

[23] Mr Walwyn asked me to appoint a receiver to INE. I have no intention of doing any such thing. A receiver is properly appointed to preserve property to which a claimant makes claim. SM Life claims no property in these proceedings. Even if they are treated as being derivative in nature

[8] O'Neal and Thompson's Oppression of Minority Shareholders and LLC Members (Thompson Reuters, November 2011 Update)

(which as yet they are not) I would not appoint a receiver in circumstances where there has been inordinate delay on the part of SM Life; where the appointment is certain to do great reputational damage to the business of INE and its subsidiary, to the detriment of persons, including the Government and people of Belize, who are not parties to these proceedings; and where the appointment could achieve nothing more than can be achieved by the grant of an injunction. There is the further risk that such an appointment could cause difficulties with banking or other covenants. Nor am I persuaded that it would be right at this stage to appoint a person (whether in the guise of a receiver or otherwise) to investigate the affairs of INE. Quite apart from the difficulty of identifying any sort of precedent, in the context of a shareholders dispute, for the making of such an appointment, it would, in my judgment be inflammatory and likely merely to aggravate an already tense situation without being productive of a resolution of this dispute. SM Life has, or arguably has, certain rights to information under the OA and it is always open to it to pursue those rights should it so wish. So I decline to appoint an investigator.

[24] Next, Mr Walwyn asks me to make wide ranging orders restraining INE, Ms Morrice and Mr Quinn from entering into contracts for new projects, hiring consultants or non-clerical employees or making any extraordinary commitments or expenditures on behalf of INE; or accepting any new liability in excess of US$10,000; or making further loans pursuant to the arrangements under which the distributions referred to in paragraph [2] of this judgment (under the so-called Loan Release Program); without the consent of SM Life. Mr Macdonald QC offered an undertaking that the Loan Release Program will not be operated until after judgment in this action and I accept that undertaking. As for the rest, Mr Macdonald suggested that the appropriate undertaking or order was to prevent INE, Ms Morrice and Mr Quinn from doing any of the specified acts without first giving 21 days notice to SM Life. In my judgment, that is the appropriate order to make. I consider that it is right to grant an injunction to that effect and that is what I propose to do.

[25] It emerged at the hearing that in August 2011 INE had entered into an agreement with Mr Quinn for the purchase of his shares for US$23 million. INE has already granted him a floating charge over its assets in order to secure payment of that sum. It will be recalled that SM Life claims that those shares are not validly in issue. Mr Walwyn asks me to restrain completion of this purchase. Mr Macdonald offered an undertaking that it would not be proceeded with otherwise than on 21 days notice to SM Life. In my judgment, that is not adequate. I will grant an order that no further step is to be taken in prosecution of the share sale agreement until after judgment in this action, with permission to apply should circumstances change.

[26] SM Life seeks an order that the Defendants disclose the status of all projects in which INE and BNE are currently involved and the status of all negotiations in which they are involved regarding potential projects. I decline to make any such order on grounds similar to those on which I have refused to appoint an investigator.

[27] Mr Walwyn seeks an order that INE pay all SM Life's 'interim legal fees and disbursements' in any event. There is no warrant for any such order and I need not devote time to explaining why I decline to make it.

[28] Mr Walwyn argued that SM Life should be relieved from the usual requirement that it give a cross undertaking as to damages as the price for the grant of these orders and the giving of these undertakings. I decline to grant injunctive relief or to accept interim undertakings without the

corresponding offer of a cross undertaking in damages. The choice is one for SM Life, but unless it offers and gives such an undertaking I will neither grant any relief nor accept any undertakings in its favour. Mr Macdonald QC did not press for any fortification to be provided for the cross undertaking and I say no more about that.

Derivative proceedings

[29] Mr Walwyn asked for permission to continue the present proceedings as a derivative action in the name and on behalf of INE. I will not grant such permission now. The present action is not structured as a claim on behalf of INE. Before any application for the grant of permission to bring derivative proceedings in the name of INE can be considered, the Court needs to be provided with a properly drafted document so that the relief to be sought in the name of INE, together with that company's grounds for seeking such relief, can be properly considered. In this regard, I was helpfully referred by Mr Macdonald QC to the list of considerations summarized at paragraph 2-13 of Mr Hollington's Book on Shareholders Rights.[9] The Court will also need to consider how, if at all, a claim in the name and on behalf of INE can co-exist with a personal claim by SM Life for unfair prejudice relief. That can be done only by reference to draft pleadings put together for that purpose. Mr Walwyn has permission to renew the derivative action application if so advised and on that basis.

Edward Bannister
2 March 2012

[9] 6th Ed