THE EASTERN CARIBBEAN SUPREME COURT
IN THE COURT OF APPEAL

TERRITORY OF THE VIRGIN ISLANDS

BVIHCMAP2014/0010

BETWEEN:

[1] MR. FOK HEI YU
[2] MR. JOHN HOWARD BATCHELOR

Appellants

and

[1] BASAB INC.
[2] ACCUFIT INVESTMENTS INC.
[3] DOUBLE KEY INTERNATIONAL LIMITED

Respondents

Before:

The Hon. Dame Janice M. Pereira, DBE	Chief Justice
The Hon. Mde. Gertel Thom	Justice of Appeal [Ag.]
The Hon. Mr. Paul Webster, QC	Justice of Appeal [Ag.]

On the Written Submissions of:

Harney Westwood & Riegels, on behalf of the Appellants
Hunte & Co., on behalf of the First Respondent

2014: May 28.

Interlocutory appeal – Joinder of parties – Application made by appellants in court below to be joined as parties to first respondent's application for leave to bring derivative action in name and on behalf of second respondent – Whether learned judge erred in dismissing appellants' application – s. 184C BVI Business Companies Act, 2004 – Rule 19.3 Civil Procedure Rules 2000

The appellants are the only two directors of the second respondent to this appeal, Accufit Investments Inc. ("Accufit"). The first respondent, Basab Inc. ("Basab"), is the sole shareholder of Accufit. Basab wishes to bring a derivative action on behalf of Accufit in which it contends that the appellants are in breach of their fiduciary duties and/or committed a breach of trust in relation to Accufit, and applied for the leave of the court do

so. The appellants are among the proposed defendants to this derivative action. The appellants sought to be joined as parties to Basab's leave application in their capacity as directors and receivers of Accufit. The learned judge in the court below dismissed the appellants' application to be joined as parties to Basab's leave application.

The appellants appealed the dismissal, arguing that the learned judge erred in so doing. Their grounds of appeal included that the learned judge failed to take into account the wording of section 184C(4) of the BVI Business Companies Act, 2004[1] which implies that evidence from the directors of the company (in whose name and on whose behalf the derivative action would be brought) should be heard at the hearing of the application for leave to bring the derivative action; he failed to take into account that denying the appellants the opportunity to be joined as parties and adduce evidence would result in there being no evidence from the company or any of its officers in relation to the conduct alleged by Basab; and he failed to consider the scope of CPR 19.3(2) in relation to the appellant's entitlement to be joined as parties.

Held: dismissing the appeal, that:

1. The appellants' joinder application in the court below was unnecessary since Accufit was already a party to Basab's application for leave to bring the derivative action, and Accufit essentially acts through the appellants. By section 184C(4) of the BVI Business Companies Act, 2004, Accufit is entitled to appear and be heard on Basab's application and it is the appellants who may cause Accufit to appear and be heard, by putting in evidence on behalf of the company. No additional advantage may be gained from a joinder application.

2. Section 184C(2)(b) states that the court, in determining Basab's leave application, must take into account 'the views of the [Accufit's] directors on commercial matters'. The appellants, as Accufit's only two directors are the only persons able to provide this evidence.

3. Having regard to the nature of Basab's application for leave to bring a derivative action, the appellants' assertion that they wish to be heard on the application in their capacity as 'receivers' does not provide a proper basis for seeking to be joined as parties to the application. Joining the appellants in their capacity as receivers of Accufit at the permission stage serves no useful purpose.

4. While CPR 19.3 states that the court may add, substitute or remove a party to proceedings and sets out, among other things, the procedure for so doing, and while the discretion given to the court is in the widest terms, such a discretion must be exercised judicially. There must be a basis warranting the exercise of the discretion. That basis is captured in the general principles set out in CPR 19.2(3) which states that the court may add a new party to the proceedings if: (a) it is desirable to add the new party so that the court can resolve all the matters in

[1] Act No. 16 of 2004, Laws of the Virgin Islands (as amended by the BVI Business Companies (Amendment) Act, 2005, Act No. 26 of 2005, Laws of the Virgin Islands).

dispute in the proceedings; or (b) there is an issue involving the new party which is connected to the matters in dispute in the proceedings and it is desirable to add the new party so that the court can resolve that issue. In the present case however, neither of these circumstances is engaged. A court is not justified in joining a party to proceedings merely because that party so wishes, without more.

JUDGMENT OF THE COURT

[1] The appellants appeal the decision of Bannister J [Ag.] made on 24th February 2014, dismissing their application dated 21st February 2014 to be joined to the first respondent's ("Basab's") application for permission to bring a derivative action ("the Permission Application") in the name and on behalf of the second respondent ("Accufit") in respect of the sale of 131,000,000 shares ("the Shares") held by Accufit in Kith Holdings Limited, a company incorporated in Bermuda, to another entity called Double Key International Limited ("Double Key"), a company incorporated in the Virgin Islands ("BVI"). Basab is the sole shareholder of Accufit. The proposed defendants to the derivative action are the appellants herein, as directors of Accufit; Double Key, the third respondent herein; and a BVI entity called Superb Glory Holdings Limited ("Superb Glory"). Essentially Basab complains that the appellants are in breach of their fiduciary duties and/or committed a breach of trust in relation to Accufit in respect of the sale of the Shares.

Chronology

[2]
(a) 14th September 2012 – Accufit borrowed HKD140,000,000 from Superb Glory pursuant to a loan agreement.

(b) 14th February 2013 – Basab grants to Superb Glory a debenture, by which Basab charges all its assets in favour of Superb Glory for the purpose of guaranteeing Accufit's loan obligations to Superb Glory.

(c) 6th May 2013 – the appellants were appointed receivers and managers of the assets of Basab for Basab's alleged failure to perform its obligations under the debenture.

(d) 7th May 2013 – the appellants caused themselves to be appointed as directors of Accufit, in exercise of their powers as receivers under the debenture.

(e) 18th December 2013 – the appellants caused Accufit to sell the Shares to Double Key for HKD49,780,000.

(f) 19th February 2014 – Basab issued the Permission Application.

(g) 21st February 2014 - the appellants applied to be joined as parties to the Permission Application ("the Joinder Application").

(h) 24th February 2014 – the Joinder Application was dismissed.

[3] The appellants say that the learned trial judge was wrong to dismiss the Joinder Application because he:

(a) held that section 184C(2)(c) of the BVI Business Companies Act, 2004[2] ("the Act") does not 'really mean what it says' and that it does not require the Court to consider evidence from the appellants in relation to the merits of Basab's claim in the derivative action;

(b) failed to take account that it is implicit in the wording of section 184C(4) of the Act (which expressly provides that Accufit is entitled to appear at the hearing) that evidence from the directors should be heard;

(c) failed to take into account that Accufit was not being separately represented, in which case, by denying the appellants opportunity to be joined as parties and to adduce evidence, there would be no evidence from the company or any of its officers in relation to the conduct alleged by Basab;

[2] Act No. 16 of 2004, Laws of the Virgin Islands (as amended by the BVI Business Companies (Amendment) Act, 2005, Act No. 26 of 2005, Laws of the Virgin Islands).

(d) failed to consider the scope of rule 19.3(2) of the Civil Procedure Rules 2000 in relation to the appellant's entitlement to be joined as parties; and

(e) exercised his discretion wrongly in dismissing the Joinder Application.

Discussion

[4] In respect of the complaint made at paragraph 3(a) above, this Court has to date not been furnished with a transcript of the proceedings, nor is there a written judgment so as to assess what the learned trial judge did or did not say, and if he did so say, the context within which the statement may have been made. We do not consider it necessary however, that either a transcript or a judgment be produced as the background facts giving rise to the Joinder Application are not in dispute and the question turns in the main on a consideration of section 184C of the Act and a consideration of CPR 19.3 dealing with joinder of parties. Section 184C states as follows:

> "(1) Subject to subsection (3), the Court may, on the application of a member of a company, grant leave to that member to
>
> (a) bring proceedings in the name and on behalf of that company; or
>
> (b) …
>
> (2) Without limiting subsection (1), in determining whether to grant leave under that subsection, the Court must take the following matters into account
>
> (a) whether the member is acting in good faith;
>
> (b) whether the derivative action is in the interests of the company taking account of the views of the company's directors on commercial matters;
>
> (c) whether the proceedings are likely to succeed;
>
> (d) the costs of the proceedings in relation to the relief likely to be obtained; and
>
> (e) whether an alternative remedy to the derivative claim is available.
>
> (3) Leave to bring or intervene in proceedings may be granted under subsection (1) only if the Court is satisfied that

(a) the company does not intend to bring, … the proceedings, as the case may be; or
(b) it is in the interests of the company that the conduct of the proceedings should not be left to the directors or to the determination of the shareholders or members as a whole.

(4) Unless the Court otherwise orders, not less than 28 days' notice of an application for leave under subsection (1) must be served on the company and the company is entitled to appear and be heard at the hearing of the application.

(5) …

(6) … ." (emphasis added)

[5] It is not in dispute that Accufit was served with notice of the application. Accufit has not appeared, is unrepresented and was unrepresented at the hearing of the application below. It is also common ground that the appellants are the only directors of Accufit. They say[3] that they seek to be heard on the Permission Application in their capacity as directors ***and*** receivers of Accufit. Among the grounds listed by the appellants for seeking to be joined as parties to the Permission Application are that:

(a) as directors of Accufit they are the only parties who are able to provide evidence on the commercial reasons behind their facilitation of the sale of the Shares; and

(b) the appellants have a personal interest in Basab's Permission Application given that they are the intended defendants of the proposed derivative action and therefore will need to spend significant time and money in participating in those proceedings should Basab's Permission Application succeed.

[6] The appellants' Joinder Application was in our view wholly misconceived and totally unnecessary. Firstly, the appellants appear to overlook the fact that as the only directors of Accufit they are its controlling mind. In short, Accufit acts through

[3] See para. 33 of the appellants' skeleton arguments.

them. Accufit is a party to the Permission Application. Section 184C(4) is clear. Accufit is entitled to appear and be heard on the Permission Application. It is therefore the appellants who may cause Accufit to appear and it is the appellants who must cause Accufit to be heard on the Permission Application by putting in any relevant evidence to be considered on behalf of Accufit. Any further joinder for this purpose is unnecessary as no further or additional advantage may be gained thereby.

[7] Secondly, section 184C(2)(b) says that the court, in determining the Permission Application, must take into account 'the views of the company's directors on commercial matters'. We reiterate that the appellants are the company's (Accufit's) only two directors. Accordingly, as directors they are already properly placed and indeed the only persons able to provide evidence for the purpose of setting out their views on commercial matters. This is accepted by the appellants in paragraphs 30-32 of their skeleton arguments. Accordingly, it is unclear as to what benefit is to be derived from a joinder of the appellants when they are for all practical purposes joined through Accufit with the implicit ability to do through the company (as its directors) that which they seek to do in the very same capacity. Such a joinder in our view would be simply superfluous and unnecessary and would only seek to add a layer of costs in respect of additional parties for no good reason which this Court can discern. Indeed grounds 3 and 4 of the appellants' appeal captures the very essence of the position under section 184C which no one is preventing them from utilising.

[8] The fact that the appellants assert that they wish to be heard on the Permission Application in their capacity as 'receivers' of Accufit does not, in our view, provide a proper basis for seeking joinder to the Permission Application having regard to the nature of the Permission Application. It is an application by which a member/shareholder of a company seeks permission to bring proceedings 'in the name and on behalf of [a] company' against a person alleged to have wronged the company. We can see no useful purpose to be served at the permission stage for joining the appellants in their capacity as receivers. Surely, where, as here, it is

intended to bring proceedings against the appellants as defendants to the derivative action then, were the Permission Application to succeed, the appellants, as parties to the action, will have every opportunity to be heard.

[9] The 'personal interest' basis advanced by the appellants is unpersuasive for similar reasons. If the Permission Application succeeds then the appellants will become defendants to the derivative action, which will afford them a full opportunity to be heard. In the event that the Permission Application fails then that is the end of the matter. No gain or loss will have been occasioned to the appellants in their personal capacity. Were the appellants joined on this basis the only foreseeable consequence on a failure of the application may be the attraction of a costs order. Joinder for such a purpose would be unwarranted and in our view tantamount to an abuse of process.

[10] The appellants referred to the English position and to the text by Victor Joffe, QC on Minority Shareholders: Law, Practice and Procedure[4] and to the English position under their Companies Act and Civil Procedure Rules. They however concede, in our view rightly, that the provisions under English law are different to the provisions under the Act. We derive no assistance from them.

Rule 19.3 of the Civil Procedure Rules 2000

[11] While rule 19.3 states that the court may add, substitute or remove a party and sets out, among other things, the procedure for so doing, and while it is also true that the discretion given to the court is in the widest terms, it is also true and trite law that a discretion must be exercised judicially. In other words there must be a basis warranting the exercise of the discretion. That basis, in our view, is captured in the general principles set out in rule 19.2(3) which states, in effect, that the court may add a new party to the proceedings if:

(a) it is desirable to add the new party so that the court can resolve all the matters in dispute in the proceedings; or

[4] Victor Joffe, QC, Minority Shareholders: Law, Practice and Procedure (2nd edn., LexisNexis UK 2004).

(b) there is an issue involving the new party which is connected to the matters in dispute in the proceedings and it is desirable to add the new party so that the court can resolve that issue. Neither of these circumstances is engaged on the Permission Application for the reasons given above. A court is not justified in joining a party merely because that party so wishes, without more.

Conclusion

[12] For the foregoing reasons we hold that the learned trial judge rightly dismissed the Joinder Application. Further, were this court minded to exercise the discretion afresh, we also would dismiss the Joinder Application as no justifiable basis for it has been made out. The appeal is accordingly dismissed.

[13] Finally, we mention that the first respondent's notice in opposition and skeleton arguments were not timely filed as provided by the Rules of Court (CPR 62.10). There is no expressed sanction in the rules, which applies to late filing of same. As such, an application for extension of time for the filing of skeleton arguments does not fall to be treated as an application for relief from sanctions under CPR 26.8. Rather, such an application will engage the exercise of the court's wide discretion applying well settled principles.[5] The court will ordinarily have regard to the length of the delay, the reason for the delay, and the degree of prejudice, among other factors. The court will also consider in appropriate circumstances whether a refusal of such an application which simply deprives the court of assistance would be a proportionate response for the untimeliness, bearing in mind the overriding objective of the rules. We do not consider that the delay was inordinate in the sense that it impacted the earlier consideration of this appeal. Whereas the reason proffered for the delay is not impressive, we did find the

[5] See: John Cecil Rose v Anne Marie Uralis Rose (Saint Lucia High Court Civil Appeal SLUHCVAP2003/0019 (delivered 22nd September 2003, unreported)); Carleen Pemberton v Mark Brantley (Saint Christopher and Nevis High Court Civil Appeal SKBHCVAP2011/0009 (delivered 14th October 2011, unreported)); C.O.Williams Construction (St. Lucia) Limited v Inter-Island Dredging Co. Ltd. (Saint Lucia High Court Civil Appeal SLUHCVAP2011/0017 (delivered 19th March 2012, unreported)); The Attorney General v Keron Matthews [2011] UKPC 38.

skeleton arguments of the first respondent, albeit filed late, to be of assistance. We accordingly grant the extension sought.

Costs

[14] The appellants are to bear the first respondent's costs of this appeal to be assessed, and discounted by 15% in relation to the application for extension of time, unless agreed within twenty one days.

The Order

[15] The Court accordingly orders that:

(1) the appeal be dismissed;

(2) the appellants shall bear the first respondent's costs of the appeal to be assessed and discounted by 15% in relation to the application for extension of time, unless agreed within twenty one days;

(3) the court below gives directions for the filing of evidence on behalf of Accufit in the event Accufit is desirous of appearing and being heard.

Dame Janice M. Pereira, DBE
Chief Justice

I concur.

Gertel Thom
Justice of Appeal [Ag.]

I concur.

Paul A. Webster, QC
Justice of Appeal [Ag.]