EASTERN CARIBBEAN SUPREME COURT
FEDERATION OF SAINT CHRISTOPHER AND NEVIS
SAINT CHRISTOPHER CIRCUIT

IN THE HIGH COURT OF JUSTICE

CLAIM NO. SKBHCV2017/0043

BETWEEN:

[1] HERITAGE PLANTATION INC

[2] MERVIN GRANT

Respondents/Claimants

and

[1] HERITAGE PLANTATION CONDOMINIUMS LIMITED

1st Defendant

[2] DOCHE & DOCHE INC.

1st Applicant/2nd Defendant

[3] VICTOR DOCHE

3rd Defendant

[4] RAFIK DOCHE

2nd Applicant/4th Defendant

[5] SYLVESTER ANTHONY

3rd Applicant/5th Defendant

[6] THE BANK OF NEVIS

(No longer a party)

Appearances:

Mr. Sylvester Anthony and Mrs. Angelina G. Sookoo-Bobb for the Applicants
Dr. Henry Browne Q.C, for the Respondents

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2017: November 29

2018: April 30

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JUDGMENT

Introductory

[1] **LANNS, J. [AG]:** By notice of application filed on the 20th June 2017, the applicants, Doche and Doche Inc. (D&D), Rafik Doche and Sylvester Anthony, (Mr. Anthony) apply to the court pursuant to sections 142 and 144 of the Companies Act, (the Act) CPR 26.1 (k), CPR 26.3 (b) and (c) and or under the inherent jurisdiction of the court for the following orders:

1. That the claimants' claim be struck out or parts thereof on the ground that the claimants' claim does not disclose a reasonable ground for bringing an unfair prejudice claim:

2. That the claimants' claim against Rafik Doche and Mr. Anthony be struck out or parts thereof on the ground that it does not disclose a reasonable ground for Rafik Doche and Mr. Anthony to defend the claim; pursuant to sections 142 and 144 of the Act and /or CPR 23.1 (b) and (c).

3. That the claim brought by the second claimant Mervin Grant (Mr. Grant) against D&D, Rafik Doche and Mr. Anthony be struck out on the ground that Mr. Grant has no standing, and the claim does not disclose a reasonable ground for him bringing the claim; pursuant to sections 142 and 144 of the Act and /or CPR 23.1 (b) and (c).

4. That the costs of, and occasioned by the application be borne by the respondents; pursuant to CPR 26.3 (2) and CPR 65.11.

5. Alternatively, in the event that any of the applications to strike out is unsuccessful in whole or in part, an order for extension of time within which to file a defence within 28 days of determination of this application.

[2] The grounds of the application can be summarised as follows:

1. The court under its inherent jurisdiction and under CPR 26.3 (1) (b) and (c) has a discretion to strike out a statement of case or parts thereof if it fails to disclose any ground for bringing or defending the claim; as well as a statement of case which is

an abuse of process of the court or likely to obstruct the just disposal of the proceedings;

2. Sections 142 and 144 of the Act create a statutory cause of action for unfair prejudice;

3. The pleaded case before the court, no matter how complete, does not reveal any sustainable factors or grounds to satisfy an unfair prejudice claim contemplated by sections 142 and 144 of the Act or at all. The substance of the claim is to have the validity of the 2014 Shareholders' Agreement executed between the first named claimant Heritage Plantation Inc. (HPI) and D&D voided, and to have the 2010 initial joint venture Agreement and the ownership distribution contained therein revived.

4. The claim and the pleadings contained therein, in particular paragraphs 8 to 18, 21 and 29 are in substance a claim for an alleged breach of contract and not a claim for unfair prejudice.

5. The claim for unfair prejudice by Mr. Grant is wholly without merit as he is not a member under section 142 of the Act. Further or alternatively, Mr. Grant does not have locus standi to bring or prosecute the claim as he is not a party to any of the agreements allegedly breached by the applicants and therefore cannot sue or enforce same pursuant to the doctrine of privity of contract. So, no matter how apparently correct, Mr. Grant's claim will fail as a matter of law.

6. Mr. Anthony is not a party to the Shareholders' Agreement; has never been a director or shareholder; or involved in the conduct of the affairs of Heritage Plantation Condominium (HPCL), and ought not to have been named as a Defendant to the claim. However, Mr. Anthony is the Secretary of HPCL and pursuant to section 78 of the Act, is indemnified from the suit.

7. HPI is a minority shareholder of HPCL. Paragraphs 15, 18, 21 to 32 plead what is in substance a derivative action in HPCL's name. Those paragraphs ought to be struck as HPI failed to obtain leave of the court to bring such an action; this failure

amounts to an abuse of the process of the court, and will obstruct the just disposal of the proceedings.

8. The claimants cannot seek corporate remedies on HPCL's behalf without the court's permission; and the applicants ought not to be required to defend the claim where the claimants have not been granted leave;

9. The claimants have purported to institute personal claims against the applicants for alleged breach of fiduciary duties to them and HPCL. These claims ought to be struck out as they should have been brought by way of a derivative action and required leave.

[3] Rafik Doche swore to a short affidavit (4 paragraphs) in support of the application on behalf of all the applicants. In it, Rafik Doche informs that he is co-owner of D&D along with Victor Doche., and he went on to simply adopt the grounds of the application to strike which he stated that he had read and believe same to be true due to his knowledge, information and belief.

[4] The application came before me on the 21st June 2017 whereupon I directed, among other things that the respondents file their responses to the application within 30 days of the date of the order. The applicants were to file and serve their replies if necessary, within 7 days of service of the responses by HPI and Mr. Grant. The parties were required to file and serve submissions and authorities in support of their respective positions by the 18th September 2017.

[5] Neither HPI nor Mr. Grant filed a response to the application to strike as contemplated by the court's order dated 21st June 2017. Instead, they, on the 17th July 2017, filed a document captioned "SUBMISSIONS IN OPPOSITION TO THE NOTICE OF APPLICATION TO STRIKE OUT CLAIM FILED ON 20TH JUNE 2017".

[6] On the 6th October 2017, the applicants filed a document headed "SKELETAL SUBMISSIONS IN SUPPORT OF APPLICATION TO STRIKE".

Brief Factual Background

(a) The Parties

[7] HPI is a company duly incorporated and registered in St Kitts. Mr. Grant is said to be the owner and sole director of HPI.

[8] HPI and D&D are the shareholders of HPCL. It would appear from the filings[1] that HPCL has one class of shares namely, common shares. Ninety (90) common shares are allocated to D&D and nine (9) common shares allocated to HPI. It is said that HPCL was incorporated and registered in St Kitts in July 2010. It is said further that Mr. Grant **was (**my emphasis) the sole shareholder and sole director of HPCL holding the one issued share of HPCL.

[9] D&D is a company which carries on the business of construction development and real estate in St Kitts. Victor Doche and Rafik Doche are directors and shareholders of D&D.

[10] Mr. Anthony is the secretary of HPCL, having on the 1st November 2013, been appointed by its directors Rafik Doche and Victor Doche.

(b) Shareholders' Agreements.

[11] In July 2010, HPI and D&D entered into an agreement styled "Shareholders Agreement" (the 2010 Agreement) to incorporate HPCL to develop and sell condominium units. The parties to the agreement agreed, among other things to be shareholders and directors of HPCL, and they agreed on how shares in HPCL would be distributed. The 2010 Agreement was supplemented by an 'Agreement' dated 20th November 2014 (the 2014 Agreement) between HPI and D&D. Mr. Grant executed the 2010 Agreement on behalf of HPI, and Victor Doche and Rafik Doche executed same on behalf of D&D. As to the 2014 Agreement, Mr. Grant signed on behalf of HPI and Victor Doche signed on behalf of D&D. Seemingly, the 2014 Agreement partly changed the 2010 Agreement in respect of the shareholding of HPI and D&D, as well as the distribution of any profits realised. These two agreements became a bone of contention between the stakeholders.

[1] Unanimous Written Resolution of the Directors of HPCL dated 30th September 2014; Effective from 1st November 2013

(c) Breakdown of Relationships

[12] Unfortunately, the relationship between Mr. Grant and Victor Doche and Rafik Doche broke down. No longer were they 'true friends'. It is apparent that Mr. Grant and HPI became dissatisfied with, among other things, the performance of the terms of the 2010 and 2014 Shareholders' Agreements made between HPI and D&D, Additionally, Mr. Grant and HPI felt they had been victims of unfair prejudice and thus, they resorted to the court for various reliefs/remedies..

(d) Institution of Proceedings

[13] On 20th February 2017, HPI and Mr. Grant filed a fixed date claim and statement of claim against six defendants[2] seeking remedies under sections 142 and 144 of the Act which permit persons who fall within the definition of 'member'[3] (defined in section 25 of the Act), who consider that the affairs of a company have been, are being, or are likely to be conducted in a manner which is unfairly prejudicial to the interests of its members generally, or of some part of its members (including at least himself or herself), to apply for an order.

[14] If the court is satisfied that an application is well founded, it may make such orders as it thinks fit including regulating the conduct of the affairs of the company in the future, suspend the exercise of the powers of the directors, appoint an interim receiver of the company, or order the directors to meet and to consider any matter, and to give all necessary directions and orders in relation thereto.

[15] HPI and Mr. Grant, in their fixed date claim form allege that HPCL's affairs are being, or have been conducted in a manner which is unfairly prejudicial to the interests of its members generally (including the claimants). They complain that the defendants refuse to disclose and share the profits of HPCL in accordance with the 2010 Agreement. They say that by such refusal, the 'defendants' have caused grave and unfair prejudice to both claimants. In their prayer for relief, the claimants seek:

1. A declaration that HPCL's affairs are being conducted in a manner which is unfairly prejudicial to its members generally (including the claimants).

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[2] On 9th October 2017, the claimants withdrew the claim against the sixth defendant

[3] Section 25 of the Act defines members to mean (1) The subscribers of a company's memorandum are deemed to have agreed to become members of the company, and on its registration, shall be entered as such in its register of members; (2) Every other person (a) who agrees to become a member of a company, and whose name is entered in its register of members; or who is the holder of a bearer certificate issued under this Act; is a member of a company.

2. A declaration that HPI is entitled to an award in the sum of US$5,437,500.00 or EC$14,682.417.00[4], in accordance with the terms of the 2010 Agreement,[5] and the 2014 Agreement.

3. An order that a receiver/manager be appointed to manage the affairs of HPCL with such directions as the court may see fit;

4. An order restraining Victor Doche and Rafik Doche from further dealings in or for HPCL

5. An order for payment by HPCL, D&D, Victor Doche and Rafik Doche jointly or severally of sums found to be due to the claimants.

[16] None of the defendants[6] has filed a defence, although they expressed an intention to do so.[7] Instead, on the 20th June 2017, D&D, Rafik Doche and Mr. Anthony applied for an order striking out the claim and statement of claim filed by HPI and Mr. Grant against them on the grounds as set forth above in paragraph [2]. Notably, neither HPCL nor Victor Doche applied to strike out the claim and statement of claim against them. This failure apparently triggered an application filed by HPI and Mr. Grant on the 27th June 2017 for permission to enter judgment in default of defence against HPCL, D&D[8] and Rafik Doche. There is authority for the view that it is a proper procedure for applications to be dealt with in the order they are filed[9]. So this decision concerns the application by D&D, Rafik Doche and Mr. Anthony to strike out the claim and statement of case against them.

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[4] The sum of EC$14,682,417.00 is particularised in the claim form

[5] The shareholders agreement is also referred to by the claimants as a joint venture agreement; which is denied by the applicants. The applicants say it is a shareholders agreement and not a joint venture agreement.

[6] It is to be remembered however that the 6th defendant was removed as a party to the claim.

[7] Notably, there were intervening events, namely, an application by the 6th defendant to strike out the claim against it; the withdrawal of the claim against the 6th defendant, and expunging of certain paragraphs /portions of the statement of claim which implicated the 6th defendant; an order adjourning the application by the 2nd 4th and 5th applicants to review the remaining portions of the statement of claim. Additionally, no date had been fixed by the court office for the first hearing of the claim. There was also an application filed by the claimants on the 27th June 2017 for permission to enter judgment in default of defence against HPCI, D&D, Rafik Doche. Without conferring with the judge, the court office assigned that application a hearing date for 9th October 2017 along with the application to strike out the statement of claim. However, I thought it prudent to hear the application to strike, first, because it was filed first, although counsel for the respondents, along the way, made reference to the their application for default judgment, and counsel for the applicants responded briefly, but nonetheless reminded the court that the main business before the court was the application to strike out the claim and statement of claim against D&D, Rafik Doche and Mr. Anthony, and that default judgment is not available on a fixed date claim, and in any event claimants are not entitled to enter judgment against defendants summarily without a hearing in open court where claimants go into the witness stand and prove their case.

[8] Even though D&D is one of the applicants seeking a strike out order

[9] Per Mitchell J.A.[Ag] in Reginald Hull vs The Attorney General et al, SKBHCV2012/0029, paragraph 14.

The Issues

[17] The main issues arising on the application are (a) whether the claimants' claim and statement of should be struck out on any of the grounds put forward by the three applicants; or whether any parts thereof should be struck out. (b) Whether Mr. Grant should be struck out as a party on the ground that he has no locus standi to prosecute a claim for unfair prejudice, and whether Mr. Anthony and Rafik Doche should be removed as parties to the claim.

[18] For the reasons given below, I conclude that Mr. Grant should be struck out as a party to the action on the ground that he is not a member of HPCL; and thus, he has no standing to bring a claim for unfair prejudice. I further conclude that HPI does have standing to bring a claim for unfair prejudice by reason that it is a member of HPCL. However, based on the deficiencies observed in the pleadings, I propose to strike out the claim in its entirety and grant leave to HPI only to file and serve a fresh fixed date claim form and statement of claim in light of the observations I have made and reasons given. The claim is yet in its infancy. The courts strive to promote access to the court. I am of the opinion that it would not be right at this stage to deny HPI access to the court. The submissions of counsel for the respective parties were impressive and attractive indeed. All in all, I prefer and accept the submissions of learned counsel for the applicants in preference to the submissions of learned QC for the respondents. That being said, some of the pleadings/allegations appear to me to be well formulated but others appear to be incoherent and not related to all the applicants/defendants. However, to strike parts of them would not be satisfactory because of the effect this would have on other parts of the pleadings. Moreover, the pleadings appear to be confusing in parts, in their unfocussed and overlapping concepts and causes of action and their failure to identify separately, clearly and precisely the material facts and allegations relevant to each applicant/defendant, so that each may know the case each has to meet. In some cases, there are remedies sought on behalf of HPCL, and in other parts, there are allegations made and remedies sought against HPCL which seem to bring them within the rule in **Foss v Harbottle.** The following criticism and conclusion of Low J in **Lysco v Bradley** [2004] O.J. No. 4727 (SCJ) is, in my opinion equally applicable to the claim form and statement of claim in this case.

> "The pleading in its present form is monstrously unwieldy and does not coherently set out the case the Defendants have to meet. It does not properly serve the purpose of a pleading.

In light of the foregoing, I am of the view that the most appropriate disposition of the motion is to strike the pleading in its entirety and grant leave to the plaintiff to deliver a fresh statement of claim in accordance with these reasons ..."

Ground 1: No Reasonable Ground for Bringing or Defending an Unfair Prejudice Claim

[19] The submissions on behalf of the applicants on this ground are the same as stated in grounds 1 to 4 set out above in paragraph [2]. No need for repetition.

[20] In essence, the respondents in their written submissions answer ground 1 by reference to the principle set out by Byron CJ in the pre-CPR case of **Baldwin Spencer v the Attorney General**[10] Learned QC during the course of the hearing, adverted to the capacities in which the claimants sue, and the capacities in which Victor Doche, Rafik Doche and D&D were being sued. Dr. Browne QC then adverted to the allegations contained in certain paragraphs of the statement of claim, and went on to submit that having perused the statement of claim, it is difficult to understand the false assertion both in fact and law that the statement of claim does not disclose a cause of action, or no reasonable ground for bringing the claim for unfair prejudice. Dr. Browne QC submitted that causes of action are disclosed, and it matters not how they are described or disclosed, the court should not use the nuclear option to strike out.

[21] It was Dr. Browne QC's further submission that the application to strike is frivolous, vexatious and an abuse of the court's process, designed to avoid the need to file a defence. In his concluding submission, Dr. Browne QC submitted that the application is unmeritorious and should be dismissed with costs.

[22] Curiously, during oral submissions, Dr. Browne conceded that Mr. Grant is not a member of HPCL, but, says Dr. Browne QC, Mr. Grant brings the suit in his personal capacity as he is personally affected, and is trying to avoid bringing a multiplicity of suits.

The Law and Findings on Ground 1

(a) In relation to Mr. Grant

[10] Antigua and Barbuda Civil Appeal No. 20 A of 1997

[23] Section 142 (1) of the Act expressly provides in essence that a member of a company may apply to the court for an order on the ground that the company's affairs are being, or have been conducted in a manner which is unfairly prejudicial to members generally including himself or herself. What I take from section 142 (1) is that only a member of HPCL may apply to the court for an order on the ground of unfair prejudice. Mr. Grant is not a member of HPCL. This is conceded by Dr. Browne QC. Accordingly, by virtue of section 142 (1) of the Act, the court in these proceedings may not grant the order sought for by Mr. Grant. It may only grant an order to members of HPCL, namely HPI and D&D.

[24] That being said, section 142 (2) of the Act provides in essence that a person who is not a member of a company may apply for an order if shares in the company have been transferred or transmitted to him by operation of law. That is not the position in this case. There is no evidence that Mr. Grant is a person to whom shares of HPCL have been transferred or transmitted by the operation of law, and thus, in my judgment, he has no authority under section 142 of the Act to prosecute a claim in his personal capacity against the applicants/defendants on the ground of unfair prejudice.

[25] In light of the provisions of section 142 of the Act, and the forceful submissions of counsel for the applicants, I am impelled to accede to the application by the applicants to strike out the claim for unfair prejudice brought by Mr. Grant against them.

(b) The Civil Procedure Rules

[26] CPR 26.3 (1) gives the court discretion to strike out a statement of case if it appears that (a) there has been a failure to comply with a rule, practice direction, order or direction given by the court in the proceedings; (b) the statement of case or the part to be struck out does not disclose any reasonable ground for bringing or defending the claim;(c) the statement of case or part to be struck out is an abuse of the process of the court or is likely to obstruct the just disposal of the proceedings; and (d) the statement of case or part to be struck out is prolix or does not comply with the requirements of Part 8.

[27] Looking at the statement of claim, (which I have to assume is true), Mr. Grant, has identified himself in paragraph 1. It is noteworthy that he has not described himself as a member or shareholder of HPCL. Nowhere in the pleadings has he stated that he is a member of HPCL. He describes the members of HPCL as being HPI and D&D. The result is that Mr. Grant has failed to establish in his

claim that he is a member of HPCL, or a person to whom shares have been transferred or transmitted by operation of law.

[28] In these circumstances, the court is in agreement with the submissions of the applicants that Mr. Grant's statement of case ought to be struck out under CPR 26.3 (1) (b) and (c) as disclosing no reasonable ground for bringing the claim against the applicants for unfair prejudice by reason that he is not a member or shareholder of HCPL as contemplated by section 142 of the Act; and by reason that the statement of case brought by Mr. Grant is unsustainable, and cannot proceed. Furthermore, the statement of claim, so far as it relates to Mr. Grant, is an abuse of the process of the court in that Mr. Grant is not a member or shareholder of HCPL. He has no cause of action and his statement of case is likely to obstruct the just disposal of the proceedings. It would be up to Mr. Grant to decide whether he would wish to pursue any other claim against the applicants, that he may deem necessary.

(c) In relation to HPI

[29] There is no dispute that HPI is a member of HCPL; so it has standing to prosecute a claim for unfair prejudice pursuant to section 142 of the Act. The issue to be decided here is whether the pleaded case of HPI discloses any reasonable ground for bringing a claim for unfair prejudice against the applicants, and if not whether it should be struck out, or whether it is in some way an abuse of the process of the court.

[30] The principle to be applied is the same as obtained in pre-CPR cases (though less draconian) where for example the court in **Spencer v The Attorney General of Antigua and Barbuda** declared that this summary procedure (striking out) should only be used in clear and obvious cases when it can clearly be seen that on the face of it a claim is obviously unsustainable, cannot proceed or in some other way an abuse of the process of the court; the underlying general principle being that cases should be heard on their merits. **Spencer's** case is also authority for the view that mere invective or pejorative allegations are impermissible in a statement of claim.

[31] In the post-CPR case of **Citco Global Custody NV v Y2K Finance INC**[11] Edwards J.A. amplified and further explained the principles to guide the court when exercising the draconian power of

[11] Civil Appeal No. 22 of 2009 (BVI)

striking out a party's statement of case. Paragraphs 13 and 14 of the judgment of Edwards J.A. are critical and instructive:

> "[13] On hearing an application pursuant to CPR 26.3 (1) (b) the trial judge should assume that the facts alleged in the statement of case are true[3]. Despite this general approach, however, care should be taken to distinguish between primary facts and conclusions or inferences from those facts. Such facts and conclusions may require to be subjected to close scrutiny."[4]
>
> "[14] Among the governing principle stated in Blackstone's Civil Practice 2009[5] the following circumstances are identified as providing reasons for not striking out a statement of case where the argument involves a substantial point which does not admit of a plain and obvious answer; or the law is in a state of development[6]; or where the strength of the case may not be clear because it has not been fully investigated. It is also well settled that the jurisdiction to strike out is to be used sparingly since the exercise of the jurisdiction deprives a party of its right to a fair trial, and the ability to strengthen its case through the process of disclosure and other court procedures such as requests for information; and the examination and cross-examination of witnesses often change the complexion of a case. Also, before using CPR 26.3 (1) to dispose of 'side issues', care should be taken to ensure that a party is not deprived of the right to trial on issues essential to its case. Finally, in deciding whether to strike out, the judge should consider the effect of the order on any parallel proceeding and the power of the court in every application must be exercised in accordance with the overriding objective of dealing with cases justly."

[32] Notably too is the case of **Ian Peters v Robert George Spencer**[12].There, George-Creque, J.A. quoted the Court of Appeal in **Bridgeman v Mc Alpine-Browne**[13] as saying: "A statement of case is not suitable for striking out if it raises a serious live issue of fact which can only be properly determined by hearing oral evidence." In the same case, Her Ladyship referred, with approval to the UK rule which states striking out is appropriate in the following instances: where the claim sets out no facts indicating what the claim is about, or if it is incoherent and makes no sense, or if the facts its states, even if true do not disclose a legally recognizable claim against the defendant.[14]

[33] With those principles in mind, I proceed to examine HPI's statement of claim to see if it sets out a coherent set of facts which make sense, or which disclose a legally recognizable claim against the

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[12] ANUHCVAP2009/016
[13] [2002] LT L Jan.19 2000, CA.
[14] See paragraph 17 of the judgment of George-Creque, J.A.

applicants; or which disclose reasonable grounds for bringing or defending a case against the applicants for unfair prejudice.

The Allegations and Remedies in HPI's Claim Form and Statement of Claim

[34] A careful perusal of the fixed date claim form and the statement of claim show instances of incoherent facts. Indeed, I find the statement of claim to be a confusing document in parts. I make the observation that the fixed date claim form seeks two declarations being "remedies pursuant to sections 142 and 144 of the Companies Act" plus an award of US$5,437, 500.00. The particulars of that amount are set out in the claim form under the caption "PARTICULARS OF AMOUNT CLAIMED". Following the particulars, the claimants went on to state, under the heading VALUE OF THE CLAIM" that the claimants intend to apply to the court to determine the value of the claim for the purpose of the proceedings. There then followed under the caption 'PARTICULARS OF CLAIM' a repetition of the particulars of the amount of US$5,437, 500.00.

[35] As regards the statement of claim, it is lengthy[15]. In addition to its 33 paragraphs[16] extending over 10 pages of single line spacing, it incorporates three exhibits consisting of 11 pages. It appears HPI's complaints against all the applicants (as well as defendants) are lumped at paragraphs 8 to 18, 21 and 29. Curiously, the allegations made and remedies sought in the statement of claim are at variance with the allegations made and remedies sought in the fixed date claim form in that the statement of claim focuses on the 2010 and 2014 agreements and it essentially seeks damages for alleged breach of the 2010 and 2014 Agreements between HPI and D&D in relation to a joint venture. It appears that further causes of actions/allegations are pleaded. These include:

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[15] In essence, it alleges the Mr. Grant was the sole shareholder and managing director of the HPCL.; that HPCL and D&D participated in a joint venture contained in two shareholders' agreements dated November 2010 and December 2014; As a consequence of the joint venture, HPCL was formed; that under the joint venture, HPI would to make available to HPCL a portion of land to develop and construct the joint venture project; that as part of the joint venture assets of HPCL would be shared 50/50 between HPI and D&D; that Victor Doche was to inject a capital of US$1Milliom for construction of the joint venture project; that Victor Doche was to pay Bank of Nevis US$100,000.00 for release of Lot No. 3 of mortgaged lands; that victor Doche was to payUS$800.000.00 to be utilised in the construction works; that D&D would pay US$100,000.00 to Bank of Nevis for release of Lots 4 and 5; that D&D, Victor Doche and Rafik Doche breached the Agreements.

[16] These were reduced to 23 consequent upon the withdrawal of the application by the Bank of Nevis to strike out the claim against it. Certain paragraphs were expunged with the consent of counsel for the claimants.

a. an allegation of breach of an agreement for the provision of 'monthly accounting' on the part of HPCL, D&D, Victor Doche and Rafik Doche;

b. an allegation of 'collusion' between Victor Doche and Rafik Doche regarding wire transfers to accounts of companies owned by Rafik Doche and Victor Doche;

c. an allegation of 'secret payments to wives';

d. an allegation of collusion between all the defendants to injure the claimants (it does not say which defendant) and to breaches of fiduciary relationship against HPI and HPCL;

e. an allegation of sale of property and pocketing the proceeds without involving or consulting with HPI;

f. an allegation of mismanagement of HPCL by the applicants/defendants;

g. an allegation of illegality in removing Mervin Grant as sole Director of HPCL;

h. an allegation of illegally appointing Victor Doche and Rafik Doche as the new directors of HPCL;

i. an allegation of fraudulently re-appointing and re-allocating the shares of HPCL without shareholders' authority;

j. an allegation that Mr. Anthony produced to the Financial Services Regulatory Commission, 'so-called' "Resolutions' of HCPL said to have been passed at meetings of HPCL that never took place and was a mere sham to cover up the misdeeds of the 'defendants'; which meetings were never notified to the 'claimants' (sic) as the sole director and other joint venture shareholders (sic) of the shares of HPCL;

k. An allegation of divestment of shares registered in the name of Mervin Grant and/or HPI, and re-vestment in D&D Inc.

[36] As previously stated, during the course of hearing Dr. Browne QC submitted it matters not how the pleadings are set out, or how causes of actions are described, the court should not strike out the claimants' statement of case. I am afraid, I do not agree with Dr. Browne QC's submission in the light of the established

principles pronounced by George-Creque J.A. in **Ian Stevens**, which outlines appropriate instances where a statement of case should be struck out.

[37] As I see it, HPI's claim form claims two declarations, and it is seeking to recover US$547,437.500.00 or EC$14,682,417.00, The statement of claim on the other hand focuses on the breach of the shareholders' agreements and pleads general allegations against all applicants/defendants, alleging that all of the applicants/defendants (and other defendants) have committed a series of torts, in addition to what is alleged in the claim form. If these allegations are to remain or be answered, HPI should set out and plead the case it has against each applicant/defendant separately and adequately particularise them, so that they each know the case they have to meet,[17] in order for them to provide a proper and/or fulsome defence thereto. That is the purpose of pleadings. Furthermore, the statement of claim seems to be alleging that all of the applicants/ defendants were privy to the two Agreements when, as previously stated, the said Agreements were entered into between HPI and D&D, albeit executed by Mr. Grant and Victor Doche and Rafik Doche (on behalf of their respective companies) in the case of the 2010 Agreement, and by Victor Doche and Mr. Grant in the case of the 2014 Agreement. Additionally, it is not pleaded in what capacity Mr. Anthony is joined, or what specific allegations of misconduct are directed at him which gives rise to a cause of action for unfair prejudice against him pursuant to section.142.

[38] Given my observations, in respect of the statement of claim, it cannot be said that HPI's statement of case is a coherent document which makes sense. Additionally, the pleadings contain conclusions expressed in the most pejorative terms, and unparticularised insinuations of oppression and fraud which does not establish any ground on which the court could adjudicate. The question as to whether all of the applicants acted fraudulently is non-justiciable unless this allegation is particularised, as it relates to the relevant applicant. To my mind, the way this allegation is pleaded is a manifest abuse of the process of the court and on that ground alone the statement of claim is liable to be struck out. In the circumstances, I find that the statement of claim does not disclose any reasonable ground for bringing the claim for unfair prejudice and is an abuse of the process of the court, and is likely to obstruct the just disposal of the proceedings.

[17] East Caribbean Flour Mills v Boyer, Civil Appeal No. 12 of 2006, (St Vincent and the Grenadines) paragraph 43

[39] The findings which have been made so far should be dispositive of the application and therefore, it is unnecessary for me to address the further and or alternative ground of locus standi and the derivative action issue. However, for completeness, I will go on to address them briefly, at the risk of being repetitive in parts.

Ground 2: The Locus Standi Issue

[40] The further and or alternative argument of the applicants is grounded on the points which have been partly alluded to above[18].

[41] As I previously stated, learned QC Dr. Browne concedes that Mr. Grant is not a member of HPCL. However, Dr. Browne has taken issue with Mr. Anthony's submission that Mr. Grant has no locus

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[18] (1) Mr. Grant has no locus standi to bring or prosecute the claim because he is not a party to any of the agreements allegedly breached by the defendants and therefore cannot sue to enforce same pursuant to the doctrine of privity of contract. As a result, the statement of claim in so far as it relates to alleged breaches of the Shareholders Agreement, no matter how complete and apparently correct it may be will fail as a matter of law;

(2) Rafik Doche and Sylvester Anthony cannot be prosecuted in the subject claim as they are not parties to any of the Shareholders Agreements allegedly breached and therefore cannot be sued, pursuant to the doctrine of privity of contract. As a result, the statement of claim in so far as it relates to alleged breaches of Shareholders Agreement, no matter how complete and apparently correct it may be, will fail as a matter of law;

(3) Further or in the alternative, Sylvester Anthony is the secretary of HPCI, and in accordance with sections 78 and 79 of the Act, is indemnified from the subject suit;

(4) Sylvester Anthony is not a party to the Shareholders' Agreement; nor is it pleaded that he was a part of the joint venture, or a director or shareholder or involved in the conduct of HPCI's affairs. The claimants therefore have no reasonable prospects of obtaining the relief sought against Mr. Anthony, and ought not to have named him as a defendant to the claim.

(5) Mr. Grant must be struck out as claimant as he has no standing in the matter. He is not a member; he is not a shareholder and he was not a party to the shareholders agreement which is the subject of the fixed date claim.

standi to bring the claim. So far as Dr. Browne QC was concerned, locus standi for Mr. Grant in the suit is shown in paragraph 20 of the statement of claim, and is founded on the basis that Mr. Grant is suing in his own right in his personal capacity as he was a director and managing director of HPCL, and he was divested of those offices which were personal to him. Dr. Browne QC further argued that the Shareholders' Agreement told Mr. Grant what office he would hold in HPCL and he was locked out. As those offices were personal to Mr. Grant, and as he was denied those offices, he has a right in his personal capacity to sue for breach of contract and for unfair prejudice, submitted Dr. Browne QC. It was Dr. Bowne QC's further submission that Mr. Grant was an employee of HPCL and he was denied a wage and an income which the Agreements show was personal to him and to the workmen whom he hired. Dr. Browne QC was of the view that Mr. Grant could not bring a multiplicity of actions otherwise it would be regarded as an abuse of process.

[42] I understand Dr. Browne to be suggesting that Mr. Grant is entitled to bring a claim for unfair prejudice because he is the victim of unfair prejudice and breach of contract; that the allegation in the statement of claim for breach of the 2010 and 2014 Agreements is inherent in section 142 of the Act; that Mr. Grant is personally affected by the alleged breach of contract and unfair prejudice; that the alleged breach of the 2010 and 2014 Agreements was the conduct alleged to ground the claim for unfair prejudice. Assuming that Dr. Browne QC is correct, in his submissions on this ground of the application, this still, to my mind does not give Mr. Grant standing under section 142 of the Act. Moreover, whether those matters are true or not is not for this court to pronounce on at this point and time. Moreover, it bears repeating and it is common ground, Mr. Grant is not a party to the shareholders agreements which are clearly central to the claim. As he was not a party to the shareholders agreements, he cannot personally sue or enforce the agreements in light of the doctrine of privity of contract. Notably paragraph 20 of the statement of claim, on which Dr. Browne QC relies to say that Mr. Grant has locus standi, reflects that whatever payments were made to Mr. Grant were made to him on behalf of HPI. Therefore, I fail to see where in that paragraph warrants a finding that Mr. Grant has locus standi to bring a claim for unfair prejudice. This brings me back to section 142, which is the applicable law. It gives Mr. Grant no authorisation to prosecute a claim for unfair prejudice because he does not fall within the definition of 'member'. In the premises, and with the utmost of respect, I find that the locus standi argument of Dr. Browne QC on behalf of Mr. Grant is devoid of merit and therefore fails.

The Derivative Action Issue

[43] In summary, the submissions on behalf of the applicants on this issue are grounded on the following points; (1) HPI is a minority shareholder of HPCL; (2) The statement of claim at paragraphs 15, 18, 21 to 32 pleads what is in essence a derivative action in HPCL's name, without seeking

leave of the court, and should be struck as an abuse of the court's process.

[44] Dr. Browne QC does not agree that HPI is a minority shareholder. Nor does he agree that HPI has brought a derivative action without leave of the court. Learned QC submitted that section 142 of the Act provides a fulsome statutory footing which previously existed at common law within **Foss v. Harbottle** replacing what Dr. Bowne QC described as 'the problematic rule in **Foss v Harbottle'.** Dr. Browne QC's further submission was that section 142 expresses no conditions as to leave. He submitted that section 142 right is unfettered and a freestanding right is given to HPI as shareholder. Dr. Browne QC then took the court on an excursion through (a) the two Shareholders' Agreements; (b) the original shareholding of HPI; (c) the purported watering down of the shareholding of HPI from 50%.; (d) the Resolution of HPCL passed on the 30th September 2014, which purportedly came about in the absence and without the knowledge of, or notice to HPI. In the end, Dr. Browne QC submitted that HPI maintains its 50% shareholding in HPCL and thus, it is not a minority shareholder, and the action is not a derivative action.

[45] It is the law that defendants cannot be called upon to defend derivative actions brought by shareholders without leave of the court unless the shareholders can bring themselves within one of the exceptions to the rule in **Foss v Harbottle**[19]**.** Sections 142 and 144 contemplate that leave be sought to bring civil proceedings in the name and on behalf of a company by such person or persons and on such terms as the court may direct.

[46] Accordingly, I am persuaded by, and in agreement with the submissions of counsel for the applicants that HPI has in paragraphs 15, 18, 21 to 32 pleaded what is in substance a derivative action without leave of the court. A derivative action is one for the redress of a wrong to the company itself. It may very well be that the matters set out in the impugned paragraphs are true (and I have to assume they are true) and that they fall within the conduct complained of[20]. It may

[19] 2 Hare, 460

[20] It is to be remembered that one of the allegations is fraud, and the court has already ruled that it is non-justiciable unless sufficiently particularised.

very well be and I assume that they affect the interest of HPI, (and by extension, Mr. Grant) but no matter how true, the fact remains that HPI has made allegations on behalf of, and against HPCL without seeking permission of the court so to do. Undoubtedly, the general tenor of the impugned paragraphs constitutes, in essence a derivative action. It is noted too that the remedies as framed in the fixed date claim are remedies available under section 142 of the Act. In addition to those remedies, there is a claim for a specified sum of money. The sum claimed and remedies pleaded in the claim form are against all the defendants including HPCL, and at the same time representations are made on behalf of HPCL such as breach of fiduciary duty and impropriety. Contrary to Dr. Browne QC's position that the Act does not speak to leave, I am impelled to accept based on sections 142 and 144 that leave was required to represent HPCL and the failure to obtain such leave is a form of abuse of the court's process, warranting striking out of the impugned paragraphs 15, 18, 21-32.

Conclusion

[47] The court has come to the conclusion that Mr. Grant must be struck out as a party to the action by reason that he is not a member of HPCL, and has no standing to prosecute a claim for unfair prejudice, and he is not a party to the 2010 or the 2014 shareholders' agreements. Mr. Anthony was not a party to the shareholders' agreements, and ought not to have been joined and must be removed as a party to the proceedings. Further still, section 78 of the Companies Act expressly states in essence that a secretary of the company is indemnified from suit.

[48] On a careful perusal of the claim form, the statement of claim and the allegations therein, I find that some of the pleadings/allegations appear to be well formulated but others appear to be incoherent and not related to all the applicants/defendants, and do not show which of the defendants have conducted themselves in a manner that is unfairly prejudicial to HPCL and in what way.

[49] Additionally, I find the pleadings to be generally confusing in their unfocussed and overlapping concepts and causes of action and their failure to identify clearly and precisely the material facts relevant to each applicant. However, to strike parts of them would not be satisfactory because of the effect this would have on other parts of the pleadings. The following criticism and conclusion of Low J in **Lysco v Bradley** [2004] O.J. No. 4727 (SCJ) is, in my opinion equally applicable to the Statement of Claim and Reply in this case.

> "The pleading in its present form is monstrously unwieldy and does not coherently set out the case the Defendants have to meet. It does not properly serve the purpose of a pleading.
>
> In light of the foregoing, I am of the view that the most appropriate disposition of the motion is to strike the pleading in its entirety and grant leave to the plaintiff to deliver a fresh statement of claim in accordance with these reasons ..."

[50] I would be content to adopt the approach of the court in **Lysco's** case. Accordingly, I have no recourse but to strike out the pleadings in their entirety rather than strike out parts thereof, and give HPI permission to file a new claim form and statement of case in the interest of promoting access to the court, and furthering the overriding objective of the court to do justice

[51] For all the reasons stated above, I make the following orders:

1. That the application by the applicants is granted;
2. That Mr. Grant is struck out as a party to the action as he has no locus standi to prosecute an action for unfair prejudice pursuant to section 142 of the Companies Act.
3. Mr. Anthony and Rafik Douche are removed as parties to the action as there is no reasonable ground for bringing the claim against them.
4. That in any event, the claim form and statement of claim are struck out in their entirety as disclosing no reasonable ground for bringing the claim; additionally, the claim and statement of claim are struck out as an abuse of the process of the court.
5. HPI has leave to file and serve a fresh claim and statement of claim under section 142 of the Act in light of the observations made by the court and the reasons given herein.
6. Costs of the application to be assessed if not agreed by the parties.

[52] Notwithstanding this judgment, I feel impelled to urge/invite the parties to engage in discussions with a view to settling their disputes in an amicable manner. After all, they once regarded each other as 'true friends'. I would hope that the animosity and the disputes which have arisen between them would be speedily resolved.

[53] I am grateful to counsel for their helpful submissions, but I would be remiss if I did not commend in particular, the industry of Mrs. Sookoo-Bobb who apparently prepared the submissions on behalf of the applicants, and not only cited, but presented relevant authorities for the assistance of the court.

Pearletta E. Lanns
High Court Judge [Ag]

By the Court

Registrar