EASTERN CARIBBEAN SUPREME COURT
IN THE COURT OF APPEAL

TERRITORY OF THE VIRGIN ISLANDS

BVIHCMAP2018/0013

BETWEEN:

MANOHAR HARGUN GODHWANI

Appellant

and

[1] BHAVIKA MANOHAR GODHWANI
[2] LARISSA INTERNATIONAL HOLDINGS LIMITED
[3] FLORENZA INVESTMENTS INC

Respondents

BVIHCMAP2018/0014

BETWEEN:

BHAVIKA MANOHAR GODHWANI

Claimant/Appellant

and

FLORENZA INVESTMENTS INC.

Defendant below

and

MANOHAR HARGUN GODHWANI

Respondent

BVIHCMAP2018/0015

BETWEEN:

BHAVIKA MANOHAR GODHWANI

Claimant/Appellant

and

LARISSA INTERNATIONAL HOLDINGS LIMITED

Defendant below

and

MANOHAR HARGUN GODHWANI

Respondent

Consolidated

Before:

The Hon. Mde. Louise Esther Blenman — Justice of Appeal
The Hon. Mr. Mario Michel — Justice of Appeal
The Hon. Mr. Rolston Nelson — Justice of Appeal [Ag.]

Appearances:

Mr. Michael Fay, QC with him Mr. Sulman Iqbal for the Appellant
Mr. Stephen Midwinter, QC with him Mr. Daniel Mitchell for the Respondents

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2018: July 11;
December 13.

Derivative action – *Section 184C of BVI Business Companies Act* – *Leave for derivative proceedings granted in absence of other shareholder/director* – *Whether alternative remedy to derivative claim available* – *Joinder of respondent to proceedings* – *Whether judge functus as to joinder* – *Whether judge erred in granting extension of time to appeal*

Manohar Godhwani is the husband of Bhavika Godhwani **(referred to as "the Husband" and "the Wife", respectively**. They are equal shareholders and the only directors of two deadlocked companies, Larissa International Holdings Limited and Florenza Investments Inc. **("the companies"). The**y both accuse each other of misappropriating assets from the companies. The Husband denies that he has appropriated any assets without authority. However, the Wife has expressly admitted that she has removed unspecified sums of money from the companies without authority and a**lleges that she has done so "for safe-keeping"**. She contends that the companies held their assets on trust for her.

The Wife, on behalf of the companies, filed legal proceedings in Singapore against the Husband. In those proceedings, the Husband contended that the Wife had no locus standi to bring an action on behalf of the companies. The Wife applied in the BVI Commercial Court for leave to file a derivative action, on behalf of the companies, pursuant to section 184C of the BVI Business Companies Act 2004[1] (the **"Act") against the Husband to** recover the funds which she alleges he misappropriated from the companies.

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[1] Act No. 16 of 2014, Laws of the Virgin Islands.

The Wife did not join the Husband as a party to the application for derivative relief and never served him with the proceedings. On 10th January 2018, in the absence of the Husband, the learned judge granted the Wife leave to bring derivative proceedings on behalf of the companies against the Husband and to continue the proceedings in Singapore (the **"derivative order")**. The Husband then applied to the court to be joined as a respondent to the proceedings, to set aside the derivative orders and for directions pursuant to section 184E of the Act. The learned judge on 13th March 2018 and 22nd March 2018, refused the Husband's set aside and joinder applications but granted him an extension of time to appeal and leave to appeal. The learned judge found that he was functus in relation to the derivative order made on 10th January 2018.

There are three appeals before the Court which by consent order have been consolidated. The Husband appeals against the learned judge's refusal to join him in the proceedings giving rise to the derivative order and against the refusal to set aside the leave granted on 10th January 2018, i.e. the derivative order. In the remaining two appeals, the Wife challenges the extension of time to appeal and leave to appeal on her own behalf and on behalf of each of the companies.

Held: dismissing the Wife's appeal against the extension of time to appeal and leave to appeal orders, allowing the Husband's appeal against the order refusing him leave to be joined in the derivative proceedings and setting aside the judge's derivative order of 10th January 2018, and ordering that the Wife pay the cost of the proceedings here and below, to be assessed if not agreed with 21 days, that:

1. The learned judge had jurisdiction to extend time for appealing. In the case at bar, since the Husband was entitled pursuant to section 184C(1) of the BVI Business Companies Act **("the Act")** to take part in the proceedings for a derivative order as a shareholder and the order was made in his absence, he is entitled to appeal against the order. Further, the delay in appealing was not inordinate and the appeal is meritorious. The judge was therefore justified in granting an extension of time to appeal to the Husband.

2. The proceedings were brought by way of fixed date claim with no affidavit of service or acknowledgment of service as required by rule 27.2(7) of the Civil Procedure Rules 2000 **("CPR")**. The failure of the Wife to comply with CPR 27.2(7) is a sufficient ground to challenge the derivative order. The learned judge therefore erred in making the derivative order without proper regard to the failure to file an affidavit of service of the application.

3. Section 184C(2) of the Act prescribes the matters which the judge must take into account in deciding whether to grant leave. Critically, the court focuses on whether an alternative remedy to the derivative claim is available. In the present

case, the learned judge expressly asked whether an alternative remedy was available but because of counsel's negative reply, the judge did not go on to consider whether there were available alternative remedies. It was open to the judge to consider whether an independent receiver could be appointed having regard to the fact that the dispute arises in a family context in which both sides accuse each other of misappropriating funds. Thus, in making the derivative order, the learned judge exercised his discretion without proper regard for principle and to the mandatory requirements of section 184C(2) of the Act.

Barrett v Duckett and others [1995] 1 BCLC 243 applied.

4. The power under CPR 19.2 in relation to joinder and substitution exists after judgment as well as before. Section 184E of the Act empowers the learned judge at any time after granting leave under section 184C, to make any order it considers appropriate in relation to the proceedings brought by the member or in which the member intervenes. Accordingly, the learned judge could join the Husband as a party, being a 50% shareholder, at any stage of the proceedings. The learned judge was not functus as to joinder of the Husband.

Dunwoody Sports Marketing v Prescott [2007] 1 WLR 2343 applied.

JUDGMENT

[1] NELSON JA [AG.]: Manohar Godhwani is the Husband of Bhavika Godhwani. I will refer to them as "the Husband" and "the Wife" respectively.

[2] The Wife is the daughter of a wealthy entrepreneur, who died leaving substantial assets. The Wife and her siblings squabbled over their father's wealth but ultimately the Wife, with support from the Husband, obtained a substantial legacy from her father's estate.

[3] The proceeds of the Wife's inheritance were vested in, among others, two companies, Larissa International Holdings Limited and Florenza Investments Inc. ("the companies") in which the Husband and the Wife each hold 50% of the shares and are the only directors.

[4] Unhappy differences supervened between them, with the result that the board and the general meeting are deadlocked. The Husband and the Wife accuse each other of misappropriating assets from the companies. The Husband states that he never appropriated any assets without authority. However, the Wife has expressly admitted that she has removed unspecified sums of money from the companies without authority and alleges that she has done so "for safe-keeping". Counsel for the Wife has argued that the companies held their assets on trust for her and that she is the beneficial owner of the companies' assets.

[5] The Wife, on behalf of the companies, filed legal proceedings in Singapore against the Husband. When the Husband contended in those proceedings that the Wife had no locus standi to bring proceedings on behalf of the companies, the Wife applied in the BVI Commercial Court for leave to file a derivative action on behalf of the companies pursuant to section 184C of the BVI Business Companies Act 2004[2] ("the Act") against the Husband to recover the funds she alleges he misappropriated from the companies.

[6] The Wife did not make the Husband a party to the application for derivative relief and never served him with the proceedings. However, she served the proceedings on the registered agents of the companies in the BVI and gave no written permission to the registered agents to release the proceedings to the Husband.

[7] On 10th January 2018, in the absence of the Husband, Adderley J granted the Wife leave to bring derivative proceedings on behalf of the companies against the Husband and to continue the proceedings in Singapore (hereinafter referred to as "the derivative order"). The Husband then applied to the court to be joined as a respondent to the proceedings, to set aside the orders made on 10th January 2018 and for directions pursuant section 184E of the Act. On 13th March 2018, Adderley J refused the

[2] Act No. 16 of 2014, Laws of the Virgin Islands.

Husband's joinder application as well as the application to vary the derivative order pursuant to section 184E of the Act (the "March orders").

[8] On the same date, the learned judge granted the Husband leave to appeal against the March orders. He recalled that order to receive submissions of the Wife. On 22nd March 2018, the learned judge reinstated order granting leave to appeal and granted the Husband an extension of time to file an appeal in relation to derivative order.

[9] There are three appeals before the Court. The Husband's appeal is against the refusal of Adderley J to join him in the proceedings in which the learned judge gave the Wife leave to bring derivative actions on behalf of the companies, and against the refusal to set aside the leave granted on 10th January 2018, i.e. the derivative order.

[10] The remaining two appeals were filed by the Wife challenging the extension of time to appeal and leave to appeal order on her own behalf and on behalf of each of the companies.

[11] This Court, by a consent order, consolidated the three appeals.

The Wife's Appeals

[12] The Wife challenges the extension of time to appeal and leave to appeal order on several grounds. There is no need to consider them in detail since there was jurisdiction in the judge to extend the time in relation to these appeals which were interlocutory. In any event, the extension of time was justified on the ground that the delay in appealing was not inordinate and on account of the substantial merit of the appeal.

[13] Additionally, the judge was justified in granting the Husband an extension of time to appeal against the order because section 184C(1) of the Act entitled him to take part

in the proceedings for a derivative order as a shareholder and the order was made in his absence. Since he had locus standi in the court below to be heard and was not, he has locus standi to appeal against the order when made.

[14] The Court turns now to deal with the substantive appeal filed by the Husband.

The Husband's Appeal

[15] An application for leave to file a derivative action pursuant the section 184C of the Act was made on 27th November 2017. As indicated above, the Wife did not join the Husband in the proceedings or serve him with copies of the documents filed. The applications for the derivative order were served on the companies at their registered offices in the Territory. No authorization was given to the registered agents to release the proceedings to the Husband.

[16] Counsel for the Wife, Mr. Midwinter, QC avers that the letter sent to the company served to advise the Husband of the fixed date claim and so counsel for the Husband must have known that a date of hearing had been endorsed thereon.

[17] Counsel for the Husband, Mr. Fay, QC states that although **the Husband's legal** advisers kept watch on the court list for January 2018, they did not see any fixture relating to the Wife. **In fact, the matter was listed by the first letter of the parties'** names on 10th January 2018.

[18] At that hearing, counsel for the Wife appeared. There was no appearance of the company or of the Husband, who was not a party. The Court refrains from drawing any adverse inferences against the Wife, which resulted in the non-appearance of the Husband at the hearing on 10th January 2018.

[19] The proceedings were by way of fixed date claim. No affidavit of service or acknowledgment of service was filed as required by rule 27.2(7) of the Civil Procedure Rules 2000. The matter proceeded on 10th January 2018 without an affidavit of service. Some seven (7) weeks later the Wife sought to file an affidavit of service without leave and without filing any evidence in support of an application for an extension of time. For present purposes, the failure of the Wife to comply with CPR 27.2(7) is a sufficient ground to challenge the derivative order of 10th January 2018.

The mandatory requirements for the grant of leave under section 184C of the Act

[20] Section 184C(2) prescribes what the judge must take into account before deciding to grant leave:

> "(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."

[21] The Court focuses on whether the learned judge considered 'whether an alternative remedy to the derivative claim is available'. Indeed, Adderley J expressly asked lead counsel for the Wife whether any alternative remedy was available:

> "Court What would be her likely alternative remedy?
> Mr. Nader Well there isn't one.
> Court Right
> Mr. Nader I'm just trying to see if I can think of one. Not really..."[3]

[3] At p.22 of the transcript of proceedings dated 10th January 2018.

[22] On 10th January 2018, the learned judge declared:

> "Well, it seems to me that you have satisfied the requirements under Section 182 (sic), subsection 2(c) certainly, and also sections (a) through (e)."[4]

[23] However, at the later hearing, on 13th March, 2018, to set aside the derivative order the learned judge had recanted as follows:

> "Section 184C(2)(b) of the Business Companies Act requires the Court to take into account the views of the directors in deciding whether it is in the interest of the company to grant … leave in respect of the derivative action. One director's views were not taken into account, namely ("the husband") because he did not appear. The other director of the company ("the wife") was taken into account.
>
> Section 184C(2)(c) requires the Court to consider whether the proceedings are likely to succeed. There was no extensive discussion of this at the leave stage.
>
> Section 184C(2)(e) requires the Court to consider whether an alternative remedy to the derivative claim is available. This was not explored in any detail at the ex parte stage."[5]

[24] As regards consideration of an alternative remedy, counsel for the Wife sought to rely on Andriy Malitsky et al v Oledo Petroleum.[6] In that case, reliance was placed on dicta of Millett J in Re Charnley Davies Ltd (No 2)[7] which referred to Re a company (No 005287 of 1985).[8] In Re a company (No 005287 of 1985), the petitioners who were minority shareholders, alleged that the respondent had disposed of the company's assets in breach of his fiduciary duty to the company and in a manner which was unfairly prejudicial to the interests of the petitioner. Hoffmann J refused to strike out the petition, holding that the fact that the petitioners could have brought a derivative action did not prevent them seeking relief under section 459. Millett J agreed with that proposition. However, Millett J did not decide the case on that

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[4] At p.32 of the transcript of proceedings dated 10th January 2018.
[5] At pp. 4- 5 of the transcript of proceedings dated 13th March 2018.
[6] BVIHCMAP2013/0006 (delivered16th August 2013, unreported).
[7] [1990] BCLC 760.
[8] [1986] BCLC 68.

ground. Further, Andriy Malitsky et al v Oledo Petroleum was not a case of a deadlocked company as is the present case.

[25] As a result of lead counsel's negative replies, the learned judge never considered whether there were available alternative remedies. Counsel for the Husband suggested, rightly in my view, that it was open to the judge to consider whether a neutral receiver could be appointed, having regard to the fact that each of the two directors and shareholders had alleged that the other had diverted assets of the company to their own use.

[26] In Barrett v Duckett and others,[9] the company was deadlocked owing to family disputes between the two shareholders and directors. One of the 50% shareholders brought a derivative action, which was struck out on appeal on the grounds that there was a viable alternative remedy of appointing a liquidator to collect in funds and monies alleged to have been diverted or stolen from the company by each of the two factions in the company.

[27] In Barrett v Duckett, Peter Gibson LJ said at page 367:

> "The general principles governing actions in respect of wrongs done to a company or irregularities in the conduct of its affairs are not in dispute:
>
> (1) The proper plaintiff is prima facie the company…
>
> (6) The shareholder will be allowed to sue on behalf of the company if he is bringing the action bona fide for the benefit of the company for wrongs to the company for which no other remedy is available. Conversely, if the action is brought for an ulterior purpose or if another adequate remedy is available, the court will not allow the derivative action to proceed."

[28] In Barrett v Duckett, the Court of Appeal in England struck out the derivative action and allowed a winding-up petition to continue in the circumstances of a deadlocked

[9] [1995] BCC 362.

company described above. In the present appeal, in the context of a family dispute in which both sides accuse each other of misappropriating funds, it would be better to proceed by way of an independent receiver or liquidator.

[29] It is clear therefore that the learned judge on his own admission did not exercise his discretion with proper regard for principle. This Court may therefore set aside the derivative order.

Was the learned judge functus?

[30] On being approached on 13th March 2018 by counsel for the Husband with an application to be joined in the derivative action or for directions pursuant to section 184E of the Act, the learned judge protested that he was functus in relation to the derivative order. Counsel for the Wife, Mr. Midwinter QC, contended that the learned judge should have said that he had no power to set aside the derivative order and further that the Husband was not a party.

[31] There is no doubt that the Husband as a 50% shareholder, had a dispute with the Wife who was the driving force behind the derivative action. In those circumstances, the learned judge could join him as a party at any stage of the proceedings even after judgment pursuant to CPR 19.2(3). In considering that rule, Lawrence Collins LJ in Dunwoody Sports Marketing v Prescott[10] said: "In my judgment the power under CPR rule 19.2 in relation to joinder and substitution exists after judgment as well as before …"

[32] Further, section 184E of the Act clearly empowered the learned judge 'at any time after granting leave under section 184C, [to] make any order it considers appropriate in relation to the proceedings brought by the member or in which the member intervenes…'

[10] [2007] 1 WLR 2343 at para. 23.

[33] The Court agrees with Mr. Midwinter, QC that CPR 11.18 does not apply since the Husband was not a party, but nothing now turns on that point.

Conclusion

[34] For the reasons set out above, the learned judge was not functus as to joinder of the Husband. The learned judge erred in making the 10th January 2018 derivative order without proper regard to the failure to file an affidavit of service of the application and to the mandatory requirements of section 184C(2) of the Act. The H**usband's appeal** is therefore allowed, and the W**ife's appeals are dismissed**. The Wife will pay the costs of the proceedings here and below to be assessed if not agreed within 21 days.

Order

[35] It hereby ordered that:

(1) The W**ife's appeals are dismissed.**

(2) **The Husband's appeal is allowed as follows:**

(i) The refusal of the application for joinder in the proceedings is set aside.

(ii) The order of the learned judge of 10th January 2018 is set aside.

(3) The Wife will pay the costs of these proceedings here and below, to be assessed if not agreed within 21 days.

I concur.
Louise Esther Blenman
Justice of Appeal

I concur.
Mario Michel
Justice of Appeal

By the Court

Chief Registrar