THE REPUBLIC OF TRINIDAD AND TOBAGO

IN THE HIGH COURT OF JUSTICE

CV2009-04584

BETWEEN

MERVYN ASSAM

Claimant

AND

CLICO INVESTMENT BANK LIMITED

First Defendant

CENTRAL BANK OF TRINIDAD AND TOBAGO

Second Defendant

FIRST CITIZENS BANK LIMITED

Third Defendant

BEFORE THE HONOURABLE MADAME JUSTICE CHARLES

Appearances:

For the Claimant:	Mr. Claude Denbow SC, Mr. Deke Rohlehr, Ms. Donna Denbow
For the Third Defendant:	Ms. Deborah Peake SC, Mr. Bronock Reid, Ms. Kimberly Molligan
Date of delivery:	31st January, 2011

JUDGMENT

BACKGROUND

[1] The Claimant, by way of Claim Form and Statement of Case filed on the 8th December, 2009, instituted proceedings against Clico Investment Bank Limited ("the First Defendant"), the Central Bank of Trinidad and Tobago ("the Second Defendant") and First Citizens Bank Limited ("the Third Defendant").

[2] The essence of the Claimant's claim is that he, a former Director of the First Defendant, invested a total sum of TT$1,050,000. into three (3) Certificates of Deposit issued by the First Defendant. From the total sum, TT$275,000. was invested in Certificate of Deposit No. MM 55531; another sum of TT$275,000. was invested in Certificate of Deposit No. MM 55532 and the remaining sum of TT$500,000. was invested in Certificate of Deposit No. MM 60607.

[3] The Claimant alleges that all three Certificates of Deposit have matured and that he is therefore entitled to the sums so invested plus interest at the rate of 8.75% from the respective dates of maturity of the Certificates of Deposit until payment or judgment.

[4] The basis for the Claimant's claim against the Third Defendant is that the

Third Defendant allegedly assumed liability to satisfy the Claimant's claim to recover monies due under his mature fixed deposits by virtue of the terms of the CIB Transaction Agreement ("CTA"), dated the 15th May, 2009, and/or the Third Defendant is supposed to have assumed and agreed to take over the obligations of the First Defendant.

[5] The Third Defendant has filed this application for summary judgment under **PART 15.2(b)** of the **CIVIL PROCEEDINGS RULES 1998** ("CPR"), to exclude itself from the proceedings as, it contends, that the Claimant has no realistic prospect of success in the claim against them.

BASIS FOR THE APPLICATION BY THE THIRD DEFENDANT

[6] It is submitted on behalf of the Third Defendant that under the CTA it agreed to assume from the 1st February, 2009, all of the First Defendant's rights, duties and obligations in, to and under "Deposit Liabilities" being deposits held by the First Defendant on behalf of its Third Party Customers as defined in the CTA.

[7] Further, that its obligation to pay "Deposit Liabilities" is based solely on a contract, *i.e.*, the CTA. By virtue of that contract, the funds to pay the Deposit Liabilities were provided by the Republic of Trinidad and Tobago

and the decision as to what portfolio was assigned, transferred, conveyed and delivered to the Third Defendant was solely within the purview of the First Defendant acting through its Manager.

[8] As a result of the above arrangement, the Third Defendant submitted that there is no contractual basis upon which the Claimant can seek to have the Third Defendant pay any sum that may be owed to him by the First Defendant.

[9] The Claimant's case against the Third Defendant is pleaded in paragraphs 9, 10, 11, 23, 25, 29, 30, 31 and 34(i) of the Statement of Case. Additionally, at paragraph 20 of the Statement of case, he alleged that it along with the First and Second Defendants are in breach of their obligations to the Claimant by continuing to withhold payment from him of the matured Certificates of Deposit.

[10] Paragraph 10 of the Statement of Case pleads as follows:

> "*... Under the terms of an agreement referred to as the CTA dated 15th May, 2009 entered into among four (4) related parties being the First Defendant, the Second Defendant, the Third Defendant and the Permanent Secretary in the Ministry of Finance, the Third Defendant assumed liability for payment of monies which had become due and payable to the depositors who had invested monies in the First Defendant at the time the*

Second Defendant exercised its statutory powers under the Central Bank Act Chapter 79:02 to take over control of the affairs of the First Defendant with effect from the 31st January, 2009."

[11] Paragraph 31 of the Statement of Case pleads the following:

"*Under the terms of the CTA which is dated 15th May, 2009, the Third Defendant is supposed to have assumed and agreed to take over the obligations to its depositors of the First Defendant under the terms of the CTA. Those depositors are defined as "Third Party Customers" but the definition purports to exclude the Claimant as a Director of CIB up to one year prior to 31st January 2009."*

[12] At paragraph 34 of the Statement of Case, certain facts and matters are pleaded, all of which relate to the First and Second Defendants. At paragraph 33 of the said Statement of Case, the Claimant pleads the following:

"*(i) that the coming into existence of the CTA with effect from 15th May,2009 embodying the definition of "Third Party Customers" which purported to exclude the Claimant from recovery of the monies due and payable under his matured fixed deposits effected a result which was unfairly prejudicial to and in unfair disregard of the Claimant's rights and entitlements as a former director and creditor of the First Defendant within the meaning of Section 242 of the Companies Act Chapter 81:01 of the*

Laws of Trinidad and Tobago;

(ii) that by entering into the aforesaid CTA the Second Defendant was carrying on the business of the First Defendant in a manner which was unfairly prejudicial to and in unfair disregard of the Claimant's rights and entitlements as a former director and creditor of the First Defendant within the meaning of Section 242 of the Companies Act Chapter 81:01 of the Laws of Trinidad and Tobago."

[13] These paragraphs when read in conjunction with the CTA, the Third Defendant submits, do not support a cause of action against them for breach of contract or for monies due to the Claimant under the Certificates of Deposit.

[14] With reference to **SECTION 242** of the **COMPANIES ACT**, the Claimant alleges by paragraph 33 (*supra*) of the Statement of Case that by entering into the CTA, the Second Defendant was carrying on business of the First Defendant in a manner which was unfairly prejudicial to and in unfair disregard of his rights as a former Director and creditor of the First Defendant within the meaning of **SECTION 242** and seeks a Declaration to that effect and an Order pursuant to **SECTION 242(3)(j)** of the **COMPANIES ACT** compensating the Claimant as an aggrieved person in the amounts set out in the Statement of Case.

[15] The Third Defendant contends that the Claimant has not pleaded that he is

a shareholder, debenture holder, creditor, director or officer of the Third Defendant. Further, that no facts and matters have been pleaded in the Statement of Case to support a cause of action against the Third Defendant pursuant to **SECTION 242** of the **COMPANIES ACT** or an order being made against the Third Defendant pursuant to **SECTION 242(3)(j)** of the **COMPANIES ACT** to compensate the Claimant as an aggrieved person.

- **The Third Defendant's Application**

[16] By Notice of Application filed on the 4th June, 2010 supported by the affidavit of Kimberly Molligan, the Third Defendant applied to the Court pursuant to **PART 15.2** of the **CPR** for summary judgment on the Claimant's claim.

- **The Claimant's Evidence in Opposition**

[17] In opposition to the application, the Claimant filed the affidavit of Donna Denbow ("the Denbow affidavit") on the 13th October, 2010. At pages 2-10 of the affidavit under the heading "The Factual Background", a number of matters are set out as alleged undisputed facts which emerge from the pleadings.

[18] Paragraphs 17, 19 and 20 relate to the Third Defendant specifically. Paragraph 17 refers to a letter written by the Claimant's Attorneys setting

out the Claimant's claim to recover monies due on his matured fixed deposits. This was on the basis that the Third Defendant has assumed liability to satisfy same by virtue of the CTA notwithstanding the definition of "Third Party Customers" embodied therein.

[19] Paragraph 18 refers to the commencement of the instant court proceedings on the 8th December, 2008 "pursuant to the statutory cause of action in **SECTION 242** of the **COMPANIES ACT** on the ground that the CTA has effected a result which is unfairly prejudicial to him and in unfair disregard of his interests as a former director and creditor of the First Defendant".

[20] Paragraph 19 deposes that as a result of the position adopted by the Second and Third Defendants, the Claimant finds himself in a position where all he can recover is the sum of $75,000.

[21] In the Denbow affidavit at paragraph 28, it is conceded that "*the Claimant's cause of action in this matter is not based on any claim in contract against the Third Defendant*". Further, this paragraph makes it clear that the claim is based on oppression proceedings against the First and Second Defendant, and against the Third Defendant as the party involved in effecting an oppressive result.

[22] The deponent stated that the Claimant is asserting that the Third Defendant is responsible for paying depositors and is therefore directly connected with and involved in effecting an unfairly prejudicial result to the Claimant.

[23] It is further being asserted by the Claimant that in oppression proceedings it is not necessary that a cause of action in oppression be established once the party so joined has some involvement in or is directly connected with the conduct being complained of as unfairly prejudicial and that the remedy being sought in respect of the conduct complained is likely to adversely affect the third party who has been so joined.

SUBMISSIONS OF THE THIRD DEFENDANT

[24] The Third Defendant submitted that the test applicable under **PART 15.2** of the **CPR** is whether the claim has any realistic prospect of success; it must be established that the prospect of success is real: **Swain v Hillman [2001] 2 All ER 91.** Further, the courts will disregard those prospects which are false, fanciful or imaginary.

[25] On the basis of the foregoing, the Third Defendant submits that consistent with the overriding objective, the court is not required to accept without question any contention or assertion a claimant makes - mere 'agruability'

is no longer sufficient. A claimant making a claim is required to show a proper basis for making it. A court should not allow a matter to proceed to trial where the claimant has produced nothing to persuade the court that there is a realistic prospect that the claim will be successful.

[26] It was submitted on behalf of the Third Defendant that a court considering an application for summary judgment should be guided by the principles outlined in the case of **Western United Credit Union Co-operative Society Limited v Corrine Ammon, Civ. App. 103/2006**.

[27] The Third Defendant argues that the claim against them does not allege that any monies are owed to the Claimant by the Third Defendant under the Certificates of Deposit or in contract or that the Third Defendant has engaged in any oppressive conduct about which the Claimant is entitled to complain under **SECTION 242** of the **COMPANIES ACT**.

[28] The Third Defendant further argues that there is no factual or legal basis to support the reliefs which the Claimant seeks against them; there are no reasonable grounds for believing that a fuller investigation into the facts of the case would add to or alter the material available to the court so as to affect the outcome of the claim as it regards the Third Defendant.

[29] It is contended by the Third Defendant that notwithstanding the reliefs set out at paragraphs 35(1)-(4) at page 17 of the Statement of Case, the Claimant has accepted that he has no claim against the Third Defendant in contract. Therefore, it is appropriate for judgment to be entered in favour of the Third Defendant on this aspect of the claim.

[30] As a result of the foregoing, the Third Defendant submits that the Claimant's case against the Third Defendant stands or falls on the statutory cause of action under **SECTION 242**, as stated at paragraph 21 of the Denbow Affidavit.

[31] It was also contended that in order to maintain oppression proceedings against a party, it is necessary for the Claimant to fall within the category of persons who are given *locus standi* to complain about the actions of a corporation or its directing mangers and the conduct of the corporation in question (in this case the Third Defendant) must fall within one of the three categories spelt out in **SECTION 242(2)**. Unless this is satisfied, the party who has been sued is entitled to have the claim dismissed against him on the ground that no reasonable cause of action has been disclosed.

[32] The Third Defendant sought to strengthen its argument that the Claimant is not entitled to a remedy against it under **SECTION 242** by relying upon the cases of **Eugene Lopez v TSTT & RBTT Trust Limited HCA No.**

1997/2003 and **Sharma Lalla v Trinidad Cement Limited & Others HCA No. S-852/1998**.

[33] The Court was urged to find in line with these authorities that in order for the Court's discretion to grant relief to be exercised, an applicant must establish that his interest as a member of the specified category has been affected, since **SECTION 242(2)** of the **COMPANIES ACT** limits actionable oppression to oppression that affects the interests of any one of the members specified therein.

[34] It was therefore contended by the Third Defendant in applying the learning in the foregoing cases that the Claimant does not fall within the specified category of persons whose interests must be affected in order for any relief to be granted against the Third Defendant under **SECTION 242(3)(j)**. Further, none of the events which "concern the nature of events related to acts or omissions, the business or affairs, or the exercise of powers of the directors of a company of its affiliates that are alleged to have resulted in or been conducted or exercised as to cause oppression", which have been described by Jamadar J in the **Lopez** judgment, as the first set of criteria to be satisfied have been met in this case regarding the Third Defendant.

[35] It was also submitted that there are two limitations upon the discretionary

powers of the court under **SECTION 242(3)**:

i. That it is only oppressive conduct that must be satisfied; and

ii. That is only a person's interest as a shareholder, director or officer that may be protected.

[36] The Third Defendant submits that the aforementioned cases do not support the Claimant's proposition that a party should be joined as defendant in oppression proceedings merely because he may have some connection with the oppressive conduct of the company or because any order that may be made against the company or those in control of the parties may have an impact on the party joined.

[37] Further, the Third Defendant argues that the mere fact that the Third Defendant is a part of the CTA as pleaded or that pursuant to the CTA a portfolio of Deposit Liabilities has been transferred to the Third Defendant with sufficient assets to back such liabilities cannot found a cause of action by the Claimant against the Third Defendant under **SECTION 242**.

[38] The Court must be satisfied of oppression at the hands of the party or parties sued. Any order made must only rectify the oppressive conduct, may protect only the complainant's interest as shareholder, creditor, director or officer and must be just and equitable having given due

consideration to the "real rights, expectations and obligations that exist between the parties".

[39] There is no dispute that the Third Defendant does not decide what Deposit Liabilities are to be transferred to it and what are any assets are to be transferred by the State to balance the Deposit Liabilities transferred. Further, there is no dispute that the Claimant is not a shareholder, debenture holder, creditor, director or officer of the Third Defendant and therefore cannot satisfy the criteria laid down under **SECTION 242(2)(c)** of the **COMPANIES ACT**.

[40] The Third Defendant argues that no facts and matters have been pleaded in the Statement of Case to support a claim against the Third Defendant pursuant to **SECTION 242(3)(j)** of the **COMPANIES ACT** to compensate the Claimant as an aggrieved person.

[41] The Third Defendant further submitted that being a party to the CTA is not sufficient in law especially since the Claimant has not challenged the Third Defendant's contention that the responsibility for transferring the portfolios of customers of the First Defendant lay solely with that Defendant's manager. It is therefore not open to the Claimant to argue that the Third Defendant is involved in or directly connected with oppressive or unfairly prejudicial conduct towards him or that it unfairly disregarded

his interests within the meaning of **SECTION 242**.

[42] The Court was also urged to find that the mere fact that the Third Defendant is a party to the CTA does not suffice to establish that "*real rights, expectations and obligations … exist between the parties*". Additionally, the case of **Holden v Infolink Technologies Ltd. (2007) 31 BLR (4th) 164**, was relied upon as authority for the proposition that an oppression claim should be struck out where the statement of case discloses no tenable cause of action against the defendant.

[43] The same principle, the Third Defendant submits, applies to complainants who are creditors, directors or officers; their only remedy would be against the company which is indebted to them, or which employs them as directors or officers of those persons in control of the company.

[44] The Third Defendant noted that the cases of **Jabaco Inc. v Real Corporate Group Ltd. [1989] CLD 616** and **Ballard v Stavro 38 OTC 321**, the Court was prepared to allow a case to go forward although no cause of action was disclosed as this was on their peculiar facts. However, even then, the court still had to be satisfied that the claimants were entitled to relief sought if the allegations were proved and that the presence of the particular defendant was required for the oppression remedy.

[45] The Third Defendant submitted that the Claimant cannot discharge the burden placed on him to prove to the court that on the basis of the pleaded facts that he is entitled to any of the remedies sought against the Third Defendant or that the presence of the Third Defendant is necessary to enable the court to give an effective remedy against those Defendants against whom it may have a remedy under **SECTION 242**.

[46] Further, any payment in respect of Deposit Liabilities must be directed by the First Defendant and the State who placed the Third Defendant in funds to effect any such payment.

SUBMISSIONS OF THE CLAIMANT

[47] The Claimant asserts that the contractual relationship and entitlement which was conferred upon and enjoyed by other depositors of the First Defendant, flowing from the intervention of the Second Defendant and the bailout arrangement subsequently implemented, were unlawfully withheld from him.

[48] Further, the Claimant argued that the CTA of 15th May, 2009 which

formalised and recorded the contractual relationship for depositors of the First Defendant excluded him from enjoying the benefit which was accorded to other depositors.

[49] The Claimant submitted that the basis upon which he has been excluded remains unexplained and there is no legal basis for doing so under the Laws of Trinidad & Tobago. He proffered that it is discriminatory and contrary to the statutory mandate and powers conferred on the Second Defendant when it intervened in the affairs of the First Defendant to protect and preserve the interests of all depositors.

[50] The Claimant contended that the Third Defendant, as signatory to the CTA, was charged with the responsibility of carrying into effect the discriminatory policy of the Second Defendant and has done so at the behest and direction of the Second Defendant.

[51] In addition, the Claimant stated that the CTA has effected a result which is oppressive, unfairly prejudicial to and is in unfair disregard of his interest as a former director and creditor of the First Defendant, and the Third Defendant as a party to the CTA has implemented the same.

[52] The Claimant asserted that as he has been deprived of his entitlement to

recover his monies under his matured fixed deposits as had been done with the other depositors by virtue of a contractual relationship conferred upon them by the bailout arrangements formalised by the CTA; the only remaining recourse is reliance upon the oppression remedy under the **COMPANIES ACT** and in particular **SECTION 242(3)(j)** which provides as follows:

> *"In connection with an application under this section, the Court may make any interim or final order it thinks fit including-*
>
> *… (j) An order compensating an aggrieved person."*

[53] It was argued on behalf of the Claimant that **SECTION 242(3)(j)** confers a very wide discretion on the court to fashion any order as it deems fit to deal with any situation brought before it for adjudication. Dr. Denbow, on behalf of the Claimant, relied upon the judgment of R.A. Blair J in **Deluce Holding Inc. v Air Canada (1992) 8 BLR 294** at p. 323 where he opined in relation to the Canadian statutory provision which has the same wording as **SECTION 242(3)(j)**:

> *"The court has a very broad discretionary power the oppression remedy appropriate to the situation at hand. Its mandate is to 'make any interim or final order it thinks fit'. This discretion must be exercised in accordance with judicial principles,, of course, and within the overall parameters of corporate law. Nonetheless, the remedy has been described as … "beyond question, the broadest, most comprehensive and most open-ended shareholder remedy in the common law world … unprecedented in its*

scope" … Courts are prepared to be creative and flexible in fashioning remedies to fit the case when called upon to apply this broad remedy."

[54] In further support of this contention, reliance was placed on **Peterson on Shareholder Remedies in Canada**, under the heading "Available Orders" and the case of **Sidaplex-Plastic Supplies Inc. v Elta Group Inc. (1995)** where Blair J at p. 187, para. 24 opined:

"When 'oppressive' conduct (in the broad sense), has been found to have occurred under subsection 248, the court has a very broad discretionary power to "make an order to rectify the matters complained of". That broad discretionary power, under subsection 248(3) is to "make any interim or final order it thinks fit", including (j) an order compensating an aggrieved person."

[55] The Claimant then cited paragraph 6.1 of the CTA headed "Role of First Citizens", which states:

"First Citizens shall accept from the Manager the assignment, transfer, conveyance and delivery contemplated by Clause 5.2 above and agrees to assume from and after the transfer date, all of the CIB's rights, duties and obligations in, to and under the deposit liabilities."

[56] Clause 5.2 referred to above, provides *inter alia* the following:

> *"Subject to Clause 6 below, the Manager agrees to assign, transfer, convey and deliver to First Citizens effective as of the transfer date, all of CIB's right, title and interest in, to and under the deposit liabilities free and clear of all liens and encumbrances and the First Citizens shall be subrogated up to the amount of the deposit liabilities to all the rights and interests to the depositors as against CIB and First Citizens may maintain an action in respect of such rights and interest in the name of the depositors or its own name."*

[57] The Claimant asserted as a consequence of the foregoing, it is very clear that the Third Defendant assumed the obligation to satisfy the deposit liabilities of CIB and to pay the depositors of CIB which included the Claimant. It is not disputed that the depositors of the Claimant of the First Defendant have either been paid or arrangements made to satisfy their liabilities, save and except for those persons who have been excluded by the definition of the Third Party Customers into which excluded category this Claimant falls.

[58] The Claimant's case is that he has been unfairly excluded from the payment of his entitlement to the monies due under his matured fixed deposits. Such exclusion constituted discretionary conduct on the part of the Second Defendant in conjunction with the Third Defendant, which has assumed the responsibility for the implementation of the CTA and to that end received the funds of the First Defendant which would have included

the Claimant's deposits.

[59] In this regard, the Claimant states against the Third Defendant as follows:

i. That the Third Defendant having assumed contractual liability to the depositors of the First Defendant has stepped into the shoes of the First Defendant in relation to honouring the contractual obligations of the Fist Defendant to pay its depositors.

ii. That the exclusion of the Claimant from the category of "deposit liabilities" of the First Defendant is a matter to which the Third Defendant is a party in its role of implementing and performing the payment obligation which it has assumed under Clause 6.1 of the CTA as referred to above.

iii. That the Claimant is seeking rectification of the oppressive and unfairly prejudicial result which excludes him from being treated like other depositors under the terms of the CTA and such relief involves his calling upon the Third Defendant to honour its payment obligations under the agreement in a manner which includes him as a depositor.

iv. That the Third Defendant is properly a party to these proceedings because any order for the rectification of the oppressive and unfairly prejudicial result which has been visited upon him by the terms of the CTA would involve the Third Defendant in having to honour its obligation to him as a depositor who should have had accorded to him the same treatment as those depositors who have already been paid.

v. That the Third Defendant was not merely a signatory to the CTA but is acting as an instrument of the Second Defendant and in accordance with its directives as to who is to be paid and any directive excluding the Claimant has been adopted and implemented by the Third Defendant as agent for the Second Defendant.

vi. That the role of the Third Defendant in implementing the bailout arrangements for the First Defendant is so closely intertwined with the role of the Second Defendant in managing the affairs of the First Defendant that is not legally possible or reasonable to separate and regard the Third Defendant as standing alone in a segregated position as an innocent bystander devoid of any involvement in this matter. To do so would be "putting on blinkers" and not looking at the commercial reality of the situation.

[60] The Claimant submitted that the decided cases establish that where a complainant/creditor successfully invoked the Canadian equivalent of **SECTION 242** of the **COMPANIES ACT** then the remedy which is granted to rectify the oppressive conduct is normally made against the parties who are responsible for and directly involved in effecting the oppressive or unfairly prejudicial result. In support of this proposition, the Claimant cited the cases of **SCI Systems Inc. v Gornitzki Thompson & Little Co. (1997) 36 BLR 192** and **Gignac, Sutts Harris (1997) 36 BLR 210**.

[61] The Claimant posits that the joinder of the Third Defendant as a party to these proceedings is wholly justifiable and supported by law by the decided cases which establish:

i. That it is not necessary for there to be a separate cause of action against a Defendant in order for that Defendant to have properly joined as a party. The fact that there is no separate and discrete cause of action is irrelevant and does not entitle such a person to have the claim dismissed.

ii. That the Claimant is entitled under the oppression remedy to join a party who has not been the instrument of the oppressive conduct but is nonetheless exposed to being made liable for same by virtue of having some connection with such conduct.

iii. That the broad remedial reach given to the Courts in **SECTION 242(3)** to making "any order it thinks fit" entitles the Claimant to join a party who may not be guilty of perpetrating the oppressive conduct, but who nonetheless can be adversely affected by the judicial order.

[62] The Claimant submitted that the Third Defendant has been shown to have a nexus with the implementation of the CTA which has effected a prejudicial result to the Claimant. Also, the Third Defendant is to be adversely affected by the remedy being sought and has therefore, being properly joined as a party.

[63] The Claimant submitted that the cases cited show that there is no basis for striking out or dismissing a claim against the Third Defendant because there is no cause of action against that Defendant under the oppression remedy. With this submission, it would appear that the Claimant agrees with the Third Defendant's proposition that he has no cause of action against it.

[64] The Claimant contends that the Third Defendant has been properly made a party to these proceedings because it is not merely a signatory to the CTA but also that **it has received monies of the First Defendant to which the Claimant contributed as a customer and assumed the responsibility by Clause 6 of the CIB Transaction to pay the depositors' liabilities**. Such liabilities have been paid to all depositors save and except for a certain specified categories and the Claimant belongs to the category of director and has been unfairly excluded from payment for no good reason.

[65] The Claimant further argued that in arriving at the present position, the Third Defendant has acted **as agent for and in accordance with the directions of the Second Defendant** and has brought about a result which is unfairly prejudicial to and contrary to law.

[66] The Claimant submitted that this case involves complex issues of law which are incapable of being disposed of in a summary basis; the issues fall within an area of law which is continuously developing and each case depends on its peculiar facts.

[67] Dr. Denbow urged the Court to follow guidelines set out in the case of **Partco Group Ltd. and another v Wragg and another [2002] 2 BCLC 323** when determining the issue of whether summary judgment should be granted to the Third Defendant.

SUBMISSIONS IN REPLY OF THE THIRD DEFENDANT

[68] The Third Defendant argued in response that there is no pleading in the Statement of Case that it implemented a policy at the request of the Second Defendant or is charged with the responsibility of carrying into effect the alleged discriminatory policy of the Second Defendant or that it has done so at the request and direction of the Second Defendant. Further, there is no pleading that the Third Defendant has received monies of the First Defendant to which the Claimant contributed as a customer.

[69] The Third Defendant distinguishes the case of **Deluce Holding Inc. v Air Canada (*supra*)** from the present case on the basis that it related to a

shareholder remedy and abuse by the majority shareholder of its powers. The Court, at paragraph 14 of the judgment, held that the oppressive acts of the majority shareholders only "… *trigger the arbitrable mechanism in the agreement to the advantage of the majority and the disadvantage of the minority, the majority ought not to be entitled to reply upon that mechanism to effect its wrongful objective*".

[70] The Third Defendant also urged the Court to distinguish this case on the ground that this case concerned a sole shareholder, director and officer of a debtor company which was found to have acted oppressively. The court there held that since the director was the sole director and shareholder and he caused the corporation to behave oppressively, this was an appropriate case for him to be held personally accountable for the obligation and an order was made to that effect under the Canadian equivalent of **SECTION 242(3)** of the **COMPANIES ACT**.

[71] Further, the Third Defendant submitted that upon examination of the reasoning of Blair J in **Sidaplex**, the fact that the court in holding that the director was personally liable was not acting under any broad discretionary power but within the confines of the relevant legislation focused specifically upon the acts or omissions of the corporation and the exercise of the powers of the directors. This was conduct which was contemplated by the legislation and no creativity or flexibility was required by the Court in reaching this decision.

[72] The Third Defendant argued that since it has not been challenged that all the Third Defendant has done is to act in accordance with the directions of the First Defendant's manager, no bad faith or misconduct is alleged against the Third Defendant in carrying out those directions nor has it been claimed that the Third Defendant benefited from any oppressive action, no order can be made against it under **SECTION 242(3)**.

[73] Further, the Third Defendant contended that there is no basis even on the Claimant's pleaded case for saying that the Third Defendant assumed the obligation to satisfy the deposit liabilities of the First Defendant and to pay the depositors including the Claimant.

[74] The Third Defendant distinguished the case of **Gignac, Sutts v Harris (1997) 36 BLR 210**, relied upon by the Claimant, on the ground that the respondents were shareholders and directors. The company was closely held with only four shareholders who also acted as directors and officers. As a result of several conveyances, the corporation was left without assets and it was held that since the directors had exercised their powers *qua* directors in a manner that unfairly disregarded the interests of the applicant that they were held personally liable.

[75] It was contended on behalf of the Third Defendant that the cases cited by the Claimant are but examples of circumstances where liability lies with

the directors and/or shareholder of the company or oppressive actions and nothing more.

[76] The Third Defendant argued that the there is no complexity about this case as alleged by the Claimant, since the extent of the involvement of the Third Defendant is that of a party to the CTA, which it is alleged has an oppressive result. Further, the facts are not in dispute so far as the Third Defendant is concerned.

[77] The Third Defendant contended that the reference made by the Claimant that the issues to be determined are an area of developing jurisprudence was made in the context of the necessity for decisions to be based on actual findings of fact. The same applies to the passage cited from the **Caribbean Civil Court Practice**. The Claimant has not argued that any facts need to be investigated before conclusions can be drawn on the law relating to oppression by the Third Defendant.

ISSUES

[78] The following issues must be considered:

i. Whether the Claimant can rely upon **SECTION 242(3)(j)** of the

COMPANIES ACT in order to obtain relief against the Third Defendant; and

ii. Whether summary judgment should be granted to the Third Defendant.

LAW (ON SUMMARY JUDGMENT)

[79] The Third Defendant's application for summary judgment is based on **PART 15.2** of the **CIVIL PROCEEDINGS RULES,** which provides as follows:

> "*The Court may give summary judgment on the whole or part of a claim or on a particular issue it if considers that -*
>
> *… (b) on an application by the defendant, the claimant has no realistic prospect of success on the claim, part of the claim or issue."*

[80] In **Swain v Hillman (*supra*)** Lord Woolf MR explained at p. 92:

> "*Under r 24.2, the court now has a very salutary power, both to be exercised in a claimant's favour or, where appropriate, in a defendant's favour. It enables the court to dispose summarily of both claims or defences which has no real prospect of being successful. The words 'no real prospect*

of succeeding' do no need any amplification, they speak for themselves. The word 'real' … direct[s] the court to the need to see whether there is a 'realistic' as opposed to a 'fanciful' prospect of success."

At page 94 Lord Woolf MR continued:

"It is important that a judge in appropriate cases should make use of the powers contained in Pt. 24. In doing so he or she gives effect to the overriding objectives … It saves expense: it achieves expedition; it avoids the court's resources being used up on cases where this serves no useful purpose, and I would add, generally, that is in the interests of justice. If a claimant has a case which is bound to fail, then it is in the claimant's interests to know as soon as possible that that is the position."

[81] Further, in **Partco Group Ltd. and another v Wragg and another (*supra*)** it was stated at p. 356, para. 28:

"Summary disposal will frequently be inappropriate in complex cases … It is inappropriate to deal with cases at an interim stage where there are issues of fact involved, unless the court is satisfied that all the relevant facts can be identified and clearly established … It is inappropriate to strike out a claim in an area of developing jurisprudence. In such areas, decisions should be based upon actual findings of fact … "

[82] In addition, pages 231-232 of the **Caribbean Civil Court Practice** states as follows:

> *"A case should not be struck out where the claim is in an area of developing jurisprudence and the facts need to be investigated before conclusions can be drawn about the law."*

[83] In **Western United Credit Union Co-operative Society Limited v Corrine Ammon, Civ. App. 103/2006**, Kangaloo JA accepted that the learning on the similar English provisions are applicable in this jurisdiction. He went on to state:

> *"The principles to be applied in dealing with applications for summary judgment have been recent set out by Beason J in Toprise Fashion Ltd v Nik Nak Clothing Co. Ltd., Nik Nak (1) Ltd., Anjum Ahmed [2009] EWHC 1333 (Comm). In his judgment the following passage from the case of Federal Republic of Nigeria v Santolina Investment Corp. [2007] EWHC 437 (CH) is re-produced:*
>
> *… (iii) In reaching its conclusion the court must not conduct a "mini trial"…*
>
> *(iv) This does not mean that the court must take at face value and without analysis everything that a defendant says in his statements before the court. In some cases it may be clear that there is no real substance in factual assertions made, particularly if contradicted by contemporaneous documents …*

(v) However, in reaching its conclusion the court must take into account not only the evidence actually placed before it on the application for summary judgment, but also the evidence that can reasonably be expected to be available at trial …"

LAW (ON SECTION 242 OF THE COMPANIES ACT)

[84] In the case of **Jabaco Inc. v Real Corporate Group Ltd [1989] CLD 616**, the court held that the third party joined was not a shareholder, director or officer of the defendant and had no direct involvement in the allegedly oppressive conduct; nonetheless he refused to dismiss the action against the third party. This decision was based on the fact that the relief sought in the application was adverse to the third party. Doherty J at paragraph 23 stated:

"… The remedial breach of s. 241(3) of the Act is very wide and clearly extends to relief against parties other than those who engage directly in the oppressive conduct … Furthermore, the appropriateness of any particular form of relief will rest in the discretion of court, which can make any order the court "thinks fit". There is no way of measuring the scope of relief available through this section in the abstract. The facts of each case will be crucial."

[85] In **Pappas v Acan Windows Inc. (1991) 2 BLR (2d) 180**, in oppression

proceedings, an application to strike out the statement of claim as disclosing no reasonable cause of action was made. It was held that each allegation has to be tested to determine if it disclosed a reasonable cause of action or should be struck out. At paragraphs 37-40 of the judgment of L.D. Barry J. he referred to, but did not follow, the earlier case of **Jabaco Inc. v Real Corporate Group Ltd (*supra*)**, he was of the view that the proper approach was to go through the statement of claim paragraph by paragraph in order to establish whether a reasonable cause of action with respect to each defendant was disclosed. He opined at paragraph 96:

> *"… in Jabaco … an action was permitted against a third party under the oppression sections. With respect, I believe the learned trial judge erred in his conclusion that it is sufficient to justify joining a third party if a remedy is sought which might adversely affect his interests. I believe that, first, a cause of action must be shown against that shareholder.*

He continued at para. 102:

> *"… I believe that the relief sought against any particular defendant must be related to the cause of action set out in the statement of case against that particular defendant. "*

[86] The case of **Ballard v Stavro 38 OTC 32,** which relied on **Jabaco**, held that it was not necessary to have a separate cause of action against a third party. The Court stated that what is important is the fact that relief is being

sought against a party who has been joined and such party is exposed to being adversely affected because of its connection with the oppressive or unfairly prejudicial conduct being complained of.

[87] In **Hovsepian v West Fair Foods Ltd (2001) BLR 291**, the question that arose for determination was whether affiliated companies of the defendant company, which was the subject of the oppression action, were the proper parties to the proceedings. It was held that although there may be no viable cause of action against such affiliated companies, nonetheless on a striking out application the court should not fetter the trial judge at the preliminary stage especially where there are potential remedial order which may be made against a party joined in the action.

[88] Further, on this is the statement in **Peterson on Shareholder Remedies in Canada**, para. 18.230, where it is stated:

> *"All relevant persons must be joined as parties to the application if an order is to be made against them."*

[89] In **Eugene Lopez v TSTT & RBTT Trust Limited (*supra*)** Jamadar J (as he then was) at p. 5 explained the structure of **SECTION 242**, as well as **SECTION 239** which defines 'complainant' as follows:

> *"Section 242 is divided into three subsections:*

(I) Subsection 1 prescribes who may apply for relief under this section - and that person is a 'complainant' as defined in section 239. This is a locus standi provision.

(ii) Subsection 2 empowers the Court to rectify oppression in relation to companies, provided any one aspect in all of three sets of criteria are 'satisfied'. The first set of criteria to be satisfied are any one of the three events stated as (a), (b) or (c) in section 242(2). These criteria are not crucial to the argument to be determined by this Court. They concern the nature of events related to acts or omissions, the business or affairs, or the exercise of powers of the directors of a company or its affiliates, that are alleged to have resulted in or been conducted or exercised as to cause oppression.

The second set of criteria describes the types of conduct which attract relief and rectification. That is, that the alleged oppression (circumscribed by the first set of criteria) must be 'oppressive or unfairly prejudicial to or … unfairly disregards the interests of' a specified category of persons.

The third set of criteria describes that specified category as being: 'any shareholder or debenture holder, creditor, director or officer of the company'. This set of criteria clearly describes the category of persons whose interests must be affected by the alleged oppression if relief is to be granted.

(iii) Subsection 3 prescribes a range of some of the rectification orders that a Court may make on a successful section 242(2) application …

In order to determine who may approach the Court for relief under section 242(2), resort must be had to section 239, which defines 'complainant'. Under the definition of complainant, the first three categories of persons are all definitively described, for example, shareholder, director, registrar. The fourth category is descriptive of a discretionary power of the court to allow 'any other person who is a proper person' to be a complainant.

Clearly, on a plain and ordinary reading of these sections, section 242(2) is the subsection that confers jurisdiction in the court to grant substantive relief to rectify particular oppressive conduct impacting on specified persons. It is this subsection that creates substantive rights. Equally clearly, section 242(1) when read together with section 239 prescribes who may have locus standi; standing to invoke the Court's jurisdiction under section 242(2).

On the face of it, these sections do not envisage that a proper person, who is not either himself or herself within the specified category in section 242(2) or alleging oppression of the interests of someone within that class, is entitled to any relief under section 242(2)."

[90] After reviewing leading Canadian cases on the equivalent section in the Canadian legislation the learned Judge concluded that the plaintiff in that case was not a person within the specified category of **SECTION 242(2)** whose interests could have been affected by alleged oppression by the second defendant and therefore the plaintiff was not entitled to any relief under **SECTION 242(2)**. Simply put, the originating summons disclosed

no reasonable cause of action against the defendant and the claim against the defendant was dismissed.

[91] In **Sharma Lalla v Trinidad Cement Limited & Others (supra)**, there was an application by the defendants for oppression proceedings to be dismissed on the ground that there was no cause of action under **SECTION 242** of the **COMPANIES ACT**. The defendants in this case accepted as did the learned judge that this criterion had to be satisfied in order for the matter to proceed to trial. In that case, however, the plaintiff qualified as a complainant under SECTION 242. Jamadar J. (as he then was) quoted from the text **Fraser and Stewart on Company Law of Canada, 6th Edition, at p. 708:**

> "*The oppression remedy is a statutory creation which was previously unavailable at common law. Limited personal actions could be brought at common law as an exception to the rule in Foss v Harbottle … Nevertheless, at common law, the fairness of the actions and policy decisions of corporate management could not be questioned. The Act was intended, in light of the existing common law, to widen the class of persons who could bring personal actions against the corporation or its directors and widen the scope of conduct to be reviewed.*"

[92] Additionally, the judgment of Galligan JA in the case of **Naneff v Con-Crete Holding Limited 23 BLR (2d) 286** was relied upon at paragraph 27:

"I conclude therefore, that the discretionary powers … must be exercised within two important limitations:

i. they must only rectify oppressive conduct

ii. They may protect only the person's interest as a shareholder, director or officer as such."

[92] Jamadar J (as he then was) in **Sharma Lalla** accepted these two limitations and stated that once a court was satisfied that there has been oppression giving due consideration to the 'real rights, expectations and obligations' that exist between the parties it can make such order it thinks fit once it is just and equitable. Jamadar J at p. 12 stated:

"… in determining whether there has been oppression, the court must determine what reasonable expectations of the person were according to the arrangements which existed between the principles."

[93] Jamadar J continued at page 24, stating that the proper approach to dealing with a defendant's application was to ask whether or not the evidence of the plaintiff discloses some cause of action or question fit to be heard under either **SECTIONS 242** or **249** of the **COMPANIES ACT**. He stated at page 25:

"Thus, the real question is whether the plaintiff has some chance of success in his action against the defendants for oppression. There is no doubt that

he qualifies as a complainant under the Companies Act. Is there evidence, even if weak, that can sustain the plaintiff's claim that the directors of the first and second defendants and the third defendant exercised their powers as such in a manner that was oppressive, or unfairly prejudicial to or that unfairly disregarded the interests of the plaintiff as officer and/or director of the first and/or second defendants?"

[94] In **Cholakis v Cholakis & Others [2006] MBQB 91**, Beard J sought to define oppressive conduct. In reviewing Section 234 of the Corporations Act, R.S.M 1987, he stated at paragraph 10:

> *"Oppressive conduct requires a breach of a legal right, such as when corporate actions do not accord with the constitution of the corporation or when the directors breach duties to the corporation … In conclusion, "oppressive" conduct is the exercise of dominant power against the will of weaker corporate stakeholders by some breach of legal or equitable rights or discrimination. The requirement that dominant power be abused in an important limit on the application of the oppression remedy. Certainty and security in the management of corporate affairs must be counterbalanced against judicial intervention under the oppression remedy. Each case will depend on its own facts. The following facts should be considered in assessing a potential case of oppression:*
>
> *a. general commercial practice;*
>
> *b. protection of the underlying expectations of shareholders;*

c. the extent to which the shareholder could have reasonably protected itself; and

d. the detriment to the shareholder.

[95] In **Thompson v Quality Mechanical Service Inc. (2001) 18 BLR (3rd) 99**, Royal Bank of Canada (RBC) moved to strike out the claims against it in oppression proceedings on the basis that they did not disclose a cause of action. RBC also moved for summary judgment. After reviewing the statutory provisions governing oppression, C. Campbell J stated at paragraph 18:

> **"***It is the conduct of the business by the corporation that provided the basis of relief. The breach of legal or equitable rights or discrimination must arise from the abuse of corporate power, typically by a majority."*

He continued at para. 22:

> "*The acts in question must be those of the company. That is why the shareholder has the cause of action in oppression. The actors who are responsible for the oppression are those who are responsible for the company …* "

He further stated at paras. 27 and 28:

"… RBC has no role whatsoever in the control or operation of quality, nor did it do anything that could be considered direct as it related to the plaintiff in terms of its dealings with the company."

[96] In **Marciano v Landa (2005) 11 BLR (4th) 172**, the question before the Saskatchewan Court of Appeal was whether the Putermans were necessary or proper parties to the claim. It was argued that they were not implicated by Marciano's oppression proceedings: they were not directors, officers or shareholders of Sask Ltd. At para. 32, Richards JA stated:

"… The Putermans were not shareholders, officers or directors of Sask Ltd. Accordingly, it is not clear how any order "regulating the internal affairs" of Sask Ltd. could have any effect on them personally."

He continued at para. 34:

"It is trite law that the oppression remedy provisions of the Business Corporations Act should be given a generous and purposive interpretation. However, it is nonetheless apparent that the Putermans are not proper or necessary parties to the oppression claim advanced by Marciano against Sask Ltd., in this case."

[97] In **Canadian Commercial Bank v Prudential Steel Ltd. 66 CBR (NS) 172**, it was held that the complainant's remedies under the oppression section

were against the corporation not third parties. In this case, the plaintiff and the defendant had business dealings with a third company. The defendant provided steel pipe to the company which act as its distributor. The company fell into financial difficulties and the defendant agreed to accept the return of $500,000. worth of inventory as a credit on the company's account. The plaintiff subsequently called in the company's loan and sought, *inter alia*, a declaration that the inventory that was returned was subject to its debentures. It also sought relief as a complainant under sections 231 and 234 of the Business Corporations Act (equivalent to sections 239 and 242 of the Companies Act).

[98] Virtue J held that the plaintiff was not a complainant under the Business Corporations Act and the remedies available to a 'complainant' are limited to remedies against the corporation in which that complainant holds security. The action was thus dismissed.

Whether SECTION 242 of the COMPANIES ACT is applicable.

[99] **SECTION 242** of the **COMPANIES ACT** appears under the rubric "Restraining oppression" and the relevant part of the section states:

> *"(1) A complainant may apply to the Court for an order under this section.*
>
> *(2) If, upon an application under subsection (!), the Court is satisfied that*

in respect of a company or any of its affiliates-

(a) any act or omission of the company or any of its affiliates are or have been carried on or conducted in a manner; or

(b) the business or affairs of the company or any of its affiliates are or have been carried on or conducted in a manner; or

(c) the powers of the directors or the company or any of its affiliates are or have been exercised in a manner that is oppressive or unfairly prejudicial to, or that unfairly disregards the interests of, any shareholder or debenture holder, creditor, director or office of the company, the Court may make an order to rectify the matters complained of …

(3) In connection with an application under this section, the Court may make any interim or final order it thinks fit, including -

… (j) an order compensating an aggrieved person …"

[100] The Claimant asserted that he is applying for relief not under **SECTION 242(2)** but rather under the broad scope of the Court's power under **SECTION 242(3)(j)** to award compensation to an aggrieved person for oppression. The Claimant bolstered this assertion by submitting that he is entitled under this section to a remedy against a third party, i.e. the Third Defendant, because of its connection with the oppressive conduct of the First and Second Defendants.

[101] Upon a review of the evidence, I find as follows:

i. The third party designation which excluded the Claimant from the group of persons to be paid by the Third Defendant was formulated by the First and Second Defendant before the Third Defendant became a party to the CTA on 15th May, 2009;

ii. The Third Defendant's role was restricted to that of paying depositors of the First Defendant whose deposits had been transferred to it, as well as from advances from the Second Defendant and the State;

iii. A perusal of the CTA reveals that there was no benefit or advantage accruing to the Third Defendant in the execution of its role under the CTA. The Agreement provided, inter alia, the wherever there was a shortfall in monies to cover the pay-out to third party deposits the Second Defendant would cover such outstanding monies. In addition, the Second Defendant agreed to indemnify the Third Defendant for any action arising from the performance of its duties.

iv. A perusal of the evidence in this case reveals that under the CTA, the Third Defendant was not liable to pay depositors out of its own funds but as previously mentioned, agreed to act as facilitator of payment to these persons. There is no dispute between the parties that it was the Second Defendant and the State who had to put the Third Defendant in funds in order to effect any such payment.

THE PLEADINGS

[102] Although the Claimant in his submissions argued that the Third Defendant acted as agent of the Second Defendant and that it implemented a discriminatory policy at the behest of the First Defendant, this was not pleaded by the Claimant. As a result, I hold that this is not an argument that could be taken into account in determining the issue.

[103] Additionally, the Claimant had also argued that the Third Defendant received his monies from the First Defendant, the former having assumed responsibility by Clause 6 of the CTA to pay depositors liabilities, it was thereby obligated to refund the Claimant's monies. Again, the Claimant has not pleaded this issue in his Statement of Case and there is therefore no support for this argument. Further, it is clear from the CTA that it is only the deposits of the third party customers which were transferred to the Third Defendant; as such the Claimant's deposit was retained by the First Defendant.

[104] In light of the above and applying the principles enunciated by Jamadar J in the case of **Eugene Lopez (*supra*)**, I hold that the Claimant does not come within the definition of 'complainant' so as to obtain relief within **SECTION 242(3)(j)**.

[105] I respectfully decline to follow the decision in **Jabaco (supra)** on the ground that neither the evidence nor the pleadings in this case indicate that the Third Defendant stands to be adversely affected by any order that this Court may make.

[106] In all the circumstances of this case, I do not consider that the Third Defendant is necessary to give an effective remedy to the Claimant should the Court come to the conclusion at the end of the day that the First and Second Defendants acted oppressively against the Claimant.

[107] In the course of his submissions, the Claimant has conceded that he has no claim in contract against the Third Defendant, neither does he a claim under **SECTION 242(3)(j).**

[108] In the circumstances, I hold that the Third Defendant is not so connected to any alleged acts of oppression by the First and Second Defendants, so as to make it liable under **SECTION 242(3)(j)**. Therefore, the Claimant is not entitled to a remedy against the Third Defendant under **SECTION 242(3)(j)** of the **COMPANIES ACT**.

Whether summary judgment should be granted to the Third Defendant

[109] Under **PART 15.2** of the **CPR**, the Court may give summary judgment on the whole or part of a claim or on a particular issue if it considers on an application by the defendant the Claimant has "no realistic prospect of success" on the claim or issue.

[110] In considering whether the Claimant had a realistic prospect of success in his claim against the Third Defendant I had regard to case of **Swain v Hillman (*supra*)** and I applied his definition of 'reasonable prospect of success' in this case. At page 94, Lord Woolf MR opined:

> "*If a claimant has a case which is bound to fail then it is in the claimant's interest to know as soon as possible that that is the position.*"

[111] There is no dispute between the parties with respect to the role of the Third Defendant in this case:

i. There is no contractual relationship between the Claimant and the Third Defendant;

ii. There is no cause of action against the Third Defendant for having committed any acts of oppression against the Claimant;

iii. The Claimant hinges his case against the Third Defendant upon the

latter having acted as agent for the Second Defendant in implementing a policy that was discriminatory and oppressive against him. Applying the case of **Western Credit Union (*supra*)**, I had regard to the evidence placed before me on this application, as well as the evidence that can "reasonably be available at trial" and I do not consider, nor has it been suggested by the Claimant, that there are any other facts and matters to be investigated at trial or relied upon at trial, which have not been stated at this stage. I applied the *dicta* in **Partco Group Ltd (*supra*)**, which suggests that where the Court is satisfied that all the relevant facts can be identified and are clearly established, the matter could then be dealt with upon a summary application for judgment. In my view, for the reasons outlined above, there are no facts "*that need to be investigated before conclusions can be drawn about the law*" (Caribbean Civil Court Practice, pp. 231-232).

[112] I also had regard to:

a. the overriding objective;

b. whether this was a complex case which would make this application inappropriate. I formed the view that the Claimant has no cause of action against the Third Defendant and it had no remedy under **SECTION 242(3)(j)** which is the main plank upon which the Claimant rests his case against the Third Defendant, and that there are no facts or matters pleaded in the Statement of Case which

suggest otherwise. In the circumstances I consider that this case, based on the pleadings and the evidence, is one which is susceptible to summary judgment.

[113] In the circumstances, I hold that the overriding objective of the **Civil Proceedings Rules** would be achieved by granting summary judgment to the Third Defendant, in that:

a. time and costs would be saved;

b. it will enable the Court to deal with the matter justly and expeditiously; and

c. the Court's resources would be saved as a result of a trial against the Third Defendant being substantially reduced.

CONCLUSION

[114] I therefore order that:

i. judgment be entered for the Third Defendant against the Claimant;

ii. the Claimant to pay to the Third Defendant costs to be assessed certified fit for Senior and Junior Counsel.

JOAN CHARLES

JUDGE