REPUBLIC OF TRINIDAD AND TOBAGO

IN THE HIGH COURT OF JUSTICE

CV2006-00876

In the Matter of the Companies Act 1995

AND

In the Matter of SUNCORP LIMITED

AND

In the Matter of SCOTT FABRES

(Legal Personal Representative of Carmelo Fabres otherwise Carmelo Ramon Fabres, deceased)

BETWEEN

SCOTT FABRES

Claimant

AND

SUNNCORP LIMITED

PROMED SUNNCORP LIMITED

NAILER HOSEIN REDDY GUNDLURA

NIZAM HOSEIN

RAZACK HOSEIN

RAICHNORA REDDY GUNDLURA

Defendants

Before the Honourable Mr. Justice A. des Vignes

Appearances:

Mr. Shastri Roberts for the Claimant

Mr. Anthony Manwah for the Defendants

JUDGMENT

The Proceedings

1. On 4th August 2000 Carmelo Ramon Fabres passed away. He was a shareholder and played a major role in the business operations of Sunncorp Limited, the First Defendant. Shortly after his death his son, Scott Fabres contacted Nailer Hosein Reddy Gundlura, a director of the First Defendant requesting that his father's shares be transferred to him and that his name be placed on the register of shareholders of the company. This request sparked a flurry of correspondence between the two in the form of multiple legal letters from the attorneys representing each party.[1] The request failed to meet with success.

2. On the 14th September 2001, Scott Fabres ("the Claimant") was appointed Legal Personal Representative of his father's estate.[2] In that capacity he filed a claim form and statement of case against the First Defendant on 7th April 2006. On the 1st November 2006, these pleadings were amended, pursuant to an order made by Moosai J., to join Promed Sunncorp Limited ("the Second Defendant"), Nailer Hosein Reddy Gundlura ("the Third Defendant"), Nizam Hosein ("the Fourth Defendant"), Razack Hosein ("the Fifth Defendant") and Raichnora Reddy Gundlura ("the Sixth Defendant"), as parties to the proceedings.

3. In his claim, the Claimant alleges that the allotment of shares in the First Defendant is as set out in the Return of Allotment filed with the Registrar of Companies on 14th December 1994 and that the second Annual Return of the company filed on 31st March 1999 is erroneous. He also alleges that the Third, Fourth, Fifth and Sixth Named Defendants have been consistently diverting funds earned by and due to the First Defendant into banking accounts standing in the name of the Second Defendant and have also been diverting business which ought to be conducted by and for the benefit of the First Defendant to the Second Defendant.

4. The Claimant seeks the following relief:

[1] Tabs 36 – 44 and Tabs 52-53 of the Claimant's Bundle of Documents filed on 20th November 2009

[2] Ibid at Tab 8 – L. 255 of 2001 Grant of Letters of Administration issued by the Registrar of the Supreme Court on 14th September 2001

(i) An order that the Claimant, Scott Fabres as (Legal Personal Representative of the late Carmelo Fabres)(hereinafter referred to as "the deceased") be entered in the Register of Sunncorp (hereinafter referred to as "the Company") as the beneficial owner of 30,000 shares which had been allotted to and vested in the name of the deceased on 15th December 1994;

(ii) An order rectifying the Annual Return of the Company dated the 31st March 1999 to reflect therein the shareholding of the deceased of 30,000 shares;

(iii) An order that the Claimant be authorised to effect the necessary alterations in the Register of Members for the purpose of carrying such Order into effect and that notice of such rectification may be ordered to be given to the Registrar of Companies or that such other order as may be made in the premises as this Honourable Court shall seem meet;

(iv) An order that the directors of the Company do forthwith call a Special General Meeting of the shareholders of the company pursuant to Section 109(b) of the Companies Act 1995;

(iv)(a) An order that the Defendants disclose all bank statements of the First Defendant and Second Defendant from the month of February 2000 to date and continuing and to disclose and declare all existing bank accounts of the First and Second Defendants from their incorporation to the present time and to disclose and declare all existing banks with which Sunncorp Limited and Promed Sunncorp Limited have been dealing from the month of February 2000 to and in the case of Promed Sunncorp Limited, from its date of incorporation,

(iv)(b) An order for accounts and enquiries into the accounts and finances of the First and Second Defendants,

(iv)(c) An order for payment by the Third, Fourth, Fifth and Sixth Defendants for monies properly due and payable by the said Defendants to the First Defendant for distribution to all persons entitled thereto, including the Claimant,

(iv)(d) Damages,

(v) Costs, and

(vi) Such further and/or other relief as the nature of the case may require.

5. The First Defendant initially filed a Defence on 11th May 2006 which was later withdrawn by notice filed on 25th July 2006. Its Amended Defence was filed on 26th April 2007. It contends that the allotment of shares shown in the Return of Allotment filed on 14th December 1994 was *ultra vires* the company and save for this allotment, no other allotments were made. The company issued no shares or share certificates nor has it received any money for any of its shares. It further states that the deceased was in charge of the management of the company and all the documents filed in respect of the company were done with his knowledge and approval. Furthermore, most of the documents relating to the business operations of the company were in the possession of the deceased and have not been returned. It also pleads that the First Defendant ceased business operations shortly after the death of the deceased and it denies that there has been any diversion of funds or business from the First Defendant to the Second Defendant.

6. The Second to Sixth Defendants all filed appearances and Defences on 23rd April 2007. The Second Defendant pleads that the statement of case discloses no cause of action against it and it has no knowledge concerning the alleged diversion of funds and business from the First Defendant to the Second Defendant. The Third Defendant admits that she is a director of both the First Defendant and the Second Defendant but denies the allegation that she has been consistently diverting funds earned by and due to the First Defendant into banking accounts standing in the name of the Second Defendant and/or has been diverting business which ought to be conducted by and for the benefit of the First Defendant to the Second Defendant. The Defences filed by the Fourth and Fifth Defendants are in *pari materia* with that filed by the Third Defendant. In his defence, the Sixth Defendant disputes the claim on the basis that he is neither a director nor a shareholder of either the First or Second Defendant and has no involvement in their business affairs.

7. The Claimant filed his Reply on 18th May 2007 wherein he denies that the Return of Allotment filed on 14th December 1994 is erroneous and that this was the only allotment of shares made by the First Defendant. The Claimant also denies that the deceased retained possession of all documents relating to the business operations of the First Defendant. He similarly denies that the First Defendant ceased operations shortly after his father's death, pointing out numerous business transactions for the period August 2000 to 31st May 2006. He also goes on to detail the formation of the Second Defendant and noted the similarities between Promed Pharmaceuticals Limited, the First Defendant and the Second Defendant, in relation to the products developed and sold by each company. The Claimant also seeks an order requiring an investigation of all the bank accounts of all the Defendants to illustrate the siphoning of funds into various personal and business bank accounts. It should be observed, however, that in the Statement of Case, the Claimant only seeks orders of disclosure in respect of the bank accounts of the

First and Second Defendants and does not seek any such relief in respect of the personal accounts of the other Defendants.

8. The procedural progress of this matter from this point onwards has already been set out in my ruling of 18th January 2011, in relation to the application by the Defendants filed on 1st February 2010 seeking to strike out certain portions of the Reply and the witness statements filed by the Claimant. This relieves me of the necessity of setting out this aspect of the case in exhaustive detail. It is sufficient to note, therefore, that the evidence filed on behalf of the Claimant comprised of witness statements filed on 20th November 2009, from the Claimant, Gina Fabres Trestrail (the Claimant's sister), Velma Snelgrove (the ex-wife of the deceased), Robert Trestrail (the son-in-law of the deceased), Douglas Cummings and Geoffrey Clarke (both of whom are friends of the Fabres family). The Third, Fourth, Fifth and Sixth Defendants all filed witness statements on 15th October 2009 but, at the trial, the Sixth Defendant was not called to give evidence. All the Claimant's witnesses were subjected to cross-examination, save Douglas Cummings, Geoffrey Clarke and the Third, Fourth and Fifth Defendants were also subjected to cross-examination.

The Facts

9. From the witness statements and the cross-examination of the witnesses at trial, the following core facts emerge:

   (i) The deceased, Carmelo Ramon Fabres had a wealth of practical knowledge of and experience in the pharmaceutical industry. His first foray into the business aspect of the industry came in 1971 when he incorporated Promed Pharmaceuticals Limited.[3] Through this company, he was involved in the importation, sale and distribution of several pharmaceutical products to local pharmacies and medical practitioners. Promed Pharmaceuticals ceased operations in the mid-1980s. None of the witnesses were able to shed any light on the circumstances surrounding the cessation of these business operations.

   (ii) Fourteen years later, the deceased decided to formally re-enter the industry with the Third Defendant. Thus, the First Defendant, Sunncorp Limited was born. The First Defendant was incorporated on 17th October 1994. Its initial directors were the Third Defendant and her father, the Fifth Defendant.[4] The company had an authorised share capital of $500,000.00 which was divided into 5,000 shares at $100.00 each.[5] On 14th December 1994 the First Defendant submitted a Return of Allotment detailing the division of each director's shareholding. This document

[3] Tab 11 of the Claimant's Bundle of Documents filed on 20th November 2009
[4] Ibid
[5] Ibid at Tab 1

reflects that the Fifth Defendant held 40,000 ordinary shares, the Third Defendant held 30,000 ordinary shares and the deceased held 30,000 ordinary shares. The deceased and the Fourth Defendant (who is the brother of the Third Defendant) were later appointed directors on 25th December 1995.[6] On 31st March 1999, the First Defendant submitted its Articles of Continuance and Annual Return in compliance with the **Companies Act 1995**.[7] This second Annual Return reflected the following shareholding of the First Defendant: the deceased held 1,000 ordinary shares, the Fifth Defendant held 2,000 ordinary shares; the Third Defendant held 1,000 ordinary shares and the Fourth Defendant held 1,000 ordinary shares.

(iii) The witness statements and cross-examination of the Third, Fourth and Fifth Defendants shed useful light on the day-to-day business operations of the First Defendant. It is readily apparent that all four directors of the First Defendant contributed to the operations of the company, albeit in different capacities. The deceased was the brains and boss of the business. This was conceded in the cross-examination of the Third and Fourth Defendants. This leadership role is readily understandable as all the witnesses were consistent in their testimony concerning the extensive experience of the deceased in the pharmaceutical industry. The Third Defendant admitted that the deceased was the only director with previous experience in the industry and that he had amassed a network of clients as a consequence of the previous operations of Promed Pharmaceuticals Limited. She also explained that she functioned as a sales representative of the First Defendant and interfaced with the clients in this capacity. The Fourth Defendant worked in the offices of the First Defendant under supervision of the deceased. The Fifth Defendant played no major role in the day-to-day management of the First Defendant. His contribution came by way of an initial capital injection at the time of the company's formation.

(iv) Upon the death of the deceased in August 2000, the Third, Fourth and Fifth Defendants took a family decision to close the door on the operations of the First Defendant. Their rationale for this decision was that the business was not being properly run after the deceased's unfortunate demise. However, no formal steps were taken to wind up the company. Instead, on 2nd July 2001, the Third and Fourth Defendants incorporated another company, Promed Sunncorp Limited, the Second Defendant herein. This company had a share capital of 50,000 ordinary shares and its directors were the Third Defendant and the Fourth Defendant. The Sixth Defendant was later added as a director of the Second Defendant on 3th December 2008. The business operations of the Second Defendant were

[6] Ibid at Tab 2
[7] Chap. 81:01

substantially similar to that of the First Defendant. Like the First Defendant, the Second Defendant was heavily involved in the importation, sale and distribution of several pharmaceutical products to local pharmacies and medical practitioners. The Third Defendant admitted that both companies had the same clients and distributed the same products. She further admitted that the very name of the Second Defendant was an amalgamation of the names of the Promed Pharmaceuticals Limited formed by the deceased in 1971 and the First Defendant. Furthermore, she explained that she formed the new company because she wanted a fresh start and desired to have the business properly regularised by obtaining the necessary approvals from the Food and Drug Division, something that the First Defendant never explored. The evidence from the Third and Fourth Defendants illustrates that there was a degree of fluidity between the business operations of the First Defendant and the Second Defendant.

The Issues

10. The issues which fall to be resolved in this matter are as follows:

    (i) Who are the shareholders of the First Defendant and what is the extent of their shareholding?

    (ii) Did the Third, Fourth, Fifth and Sixth-named Defendants divert funds and business from the First Defendant to the Second Defendant?

    (iii) In the event that a diversion of funds and business has been made out on the facts, what is the appropriate form of relief to be granted to the Claimant?

11. From the outset it must be appreciated that the first two issues are essentially fact-driven whilst the third issue is solely a question of law.

The Share Allotment of Sunncorp Limited

12. The essence of the Claimant's claim is that the 1999 Annual Return filed by the First Defendant in conjunction with its Articles of Continuance is erroneous to the extent that it represented that the deceased only held 20% of the First Defendant's shares. He contends that the deceased held a substantial number of shares in the First Defendant and this contention is supported by the evidence of his family members, Gina Trestrail, Robert Trestrail and Velma Snelgrove. All the Claimant's witnesses indicated that their information regarding the shareholding of the deceased came by way of their personal interactions and discussions with him during his lifetime. As such, they all said that they were told by the deceased that he held a 50% shareholding in the First Defendant. They readily accepted his assertion based on their view that the deceased was the mastermind of the business due to his extensive experience in the pharmaceutical industry. It should

be noted that the extent of the knowledge and experience of the deceased as well as his leadership role in the company was readily admitted by both the Third and Fourth defendants in cross-examination. There is therefore no factual dispute in this regard.

13. It should be noted that the evidence given by the Claimant and his witnesses, namely that the deceased told them that he held 50% of Sunncorp's shares, amounts to hearsay evidence and the Claimant did not serve a hearsay notice in compliance with Part 30 of the Civil Proceedings Rules 1998 (as amended) ("**CPR**"). However based on **CPR Rule 30.8**, the court retains a discretionary power to allow the statement to be given in evidence and there was no objection taken by the Defendants to the reception of this evidence.

14. The Claimant's witnesses admitted in cross-examination that they were not privy to the incorporation documents of the First Defendant nor were they shown any documentary evidence which supported the deceased's contention as to the extent of his shareholding in the First Defendant. However, the Claimant produced a letter written by the Third Defendant to Republic Bank Limited which states that the deceased held 50% of the shares in the First Defendant.[8]

15. In the alternative, the Claimant submits that the deceased held at least 30% of the shareholding in the First Defendant. This assertion is based on the Annual Return of Allotment filed in 1994 which showed that the deceased held 30,000 shares out of the total 100,000 shares issued by the company.

16. In assessing the Defendants' evidence on this issue, it must be noted from the outset that their Defences do not contain any denial of the Claimant's plea as to the erroneous nature of the 1999 Annual Return. In fact, the Defendants filed what can only be described as the barest of Defences. They focused solely on a denial of the allegation that there was any diversion of funds or business from the First Defendant to the Second Defendant. This type of pleading is at odds with the underlying philosophy of the CPR. In the preparation of a defence, attorneys would do well to bear in mind the following words of Mendonca J.A. in **M.I.5 Investigations Limited v Centurion Protective Agency Limited**:

> "9. *The effect of Part 10.5 and 10.6 is that a defendant must by its defence, provide a comprehensive response to the claim and state its position on each relevant fact or allegation put forward in the claim in the manner*

[8] See Document 17 of the Claimant Bundle of Documents filed on 20th November 2009. The only explanation of this letter lies in the letter written by Byrne and Byrne dated 20th November 2000 (Document 43 in the Claimant's Bundle) which states that "with respect to the letter dated 27th August 2000 signed by Nailer Hosein. We are instructed that same was signed by our client to facilitate a loan which that (sic) was being applied for by the deceased Ramon Fabres."

required by the rules. In particular the defendant must (i) state those facts that are admitted; (ii) state those facts that are denied and (iii) state those facts which it neither admits or denies because it does not know whether they are true but wishes the claimant to prove. In a personal injuries case there is a further requirement a defendant is required in the defence to state whether it agrees with any medical report attached to the statement of case and where any part is disputed the reasons for so doing; Part 10.8 (2)

10.*The rule therefore puts a duty on the defendant to deal with each fact pleaded against it by either admitting or denying the facts and will only allow a defendant to avoid that duty where that defendant has positively stated that he or she cannot do so because he or she does not know. Only in the latter case is the defendant allowed to put the claimant to proof of the facts relied on by the claimant. In my opinion it accords with the policy of full disclosure and an avoidance of litigation on issues which are unnecessary and a waste of resources. A defendant can no longer avoid dealing full frontally with facts by merely requiring them to be proved and may now only require proof where that defendant has stated positively and verified by a statement of truth that the facts cannot be admitted or denied because the defendant does not know whether they are true or not."*[9]

17. Nonetheless, the Claimant failed to raise any objection to evidence led by the Defendants on the circumstances surrounding the 1994 Return of Allotment and the subsequent 1999 Annual Return. The Third Defendant explained that she prepared all of the incorporation documents under the guidance of the deceased. She further states that in 1994, the deceased directed that the shares of the First Defendant should be divided to reflect a 40% shareholding by the Fifth Defendant and a 30% shareholding by the Third Defendant and a 30% shareholding by him. However the Registrar of Companies subsequently informed the First Defendant that this could not be accomplished since the authorised share capital of the First Defendant was only $500,000 divided into 5,000 ordinary shares of $100.00 each. According to the Third Defendant, the deceased subsequently decided to allot shares to the Fourth Defendant and this decision was reflected in the 1999 Annual Return which was filed in conjunction with the Articles of Continuance.

18. In resolving this issue, several documents come sharply into focus, namely: (1) the Memorandum and Articles of Association of the First Defendant filed on 17th October 1994; (2) the Return of Allotment filed on 14th December 1994; (3) the Annual Return filed on 31st March 1999; and (4) the Articles of Continuance filed on 31st March 1999. The Memorandum and Articles of Association as well as the Articles of Continuance

[9] Civil Appeal 244 of 2008 at para. 9 and 10.

consistently reflect that the First Defendant had an authorised share capital of $500,000 divided into 5,000 ordinary shares of $100.00 each. The 1994 Return of Allotment is based on a share allotment of 100,000 ordinary shares at $100 each giving a nominal share capital of $10,000,000. By way of contrast, the 1999 Annual Return reflects an allotment of 5,000 ordinary shares.

19. It must be borne in mind that the Claimant bears the burden of proof that the 1999 Annual Return is erroneous and I am not satisfied that he has successfully discharged this burden. Upon a careful perusal of the 1994 Return of Allotment it is readily apparent that the words "Co has 5000 shares only Now Capital of $500,000" are endorsed on the face of the document. This annotation certainly lends credence to the Third Defendant's explanation in relation to the information conveyed by the Registrar of Companies and the subsequent change in the allotment of shares as reflected in the 1999 Annual Return.

20. Additionally, as previously noted, there is a thread of consistency in the evidence of all the witnesses regarding the crucial role played by the deceased in the operations of the First Defendant. The Third Defendant described the deceased as "*the boss of the business*". Velma Snelgrove stated he was "*the brains behind Sunncorp*". Robert Trestrial used the term "*driving force*" whilst the Claimant said the deceased was "*the main driving force*". It therefore stands to reason that the deceased would have played some role in the incorporation of the company and the allotment of its shareholding. Whilst I agree with the Claimant that there are no formal minutes of any Board meetings documenting the decision to allot shares to the Fourth Defendant, I do not consider this as solely determinative of the issue. From the totality of the evidence I do not get the impression that the affairs of the First Defendant were conducted in a strictly formal sense. Instead, it was more akin to a friends and family joint venture. This distinct impression flows directly from the evidence of the Third and Fourth Defendants who are the only witnesses who were familiar with the day-to-day operations of the company. The only person who can refute their evidence is the deceased. This fact certainly does not help the Claimant's cause.

21. In these circumstances, I am prepared to accept the evidence of the Third and Fourth Defendants on this issue and their testimony is supported by the documentary evidence referred to above. I therefore find that that allotment of shares reflected in the 1999 Annual Return is correct. The 1994 Return of Allotment was based on a false premise, namely that the company could issue 100,000 ordinary shares. It follows that the deceased held 1,000 shares or a 20% shareholding in the First Defendant and this shareholding redounds to the benefit of his estate. The Claimant, as Legal Personal Representative of the deceased, is therefore a shareholder of the company in accordance with **section 107(1) (b) of the Companies Act** which defines a shareholder to include a personal representative of a deceased shareholder.

22. As a consequence, the Claimant is not entitled to the reliefs sought at paragraphs (i) to (iii) of his Claim Form and Statement of Case. There is no need for an order of rectification to be granted as I have not been persuaded that the shareholding of the First Defendant is erroneously reflected in the 1999 Annual Return.

23. In any event it should be noted that the procedure governing an application for rectification of the register of shareholders of a company is laid out in **section 245 of the Companies Act** which provides as follows:

> "***245.*** *(1) If the name of a person is alleged to be or to have been wrongly entered or retained in, or wrongly deleted or omitted from, the registers or other records of a company, the company, a shareholder or debenture holder of the company, or any aggrieved person, may apply to the Court for an order that the registers or records of the company be rectified.*
> *(2) An applicant under this section shall give the Registrar notice of the application; and the Registrar is entitled to appear and be heard in person or by an Attorney-at-law.*
> *(3) In connection with an application under this section, the Court may make any order it thinks fit, including—*
> *(a) an order requiring the registers or other records of the company to be rectified;*
> *(b) an order restraining the company from calling or holding a meeting of shareholders, or paying a dividend before that rectification;*
> *(c) an order determining the right of a party to the proceedings to have his name entered or retained in, or deleted or omitted from, the registers or records of the company, whether the issue arises between two or more shareholders or debenture holders or alleged shareholders or alleged debenture holders, or between the company and any shareholders or debenture holders, or alleged shareholders or alleged debenture holders; and*
> *(d) an order compensating a party who has incurred a loss*."

24. It is evident from a perusal of the Statement of Case filed herein that the Claimant has not utilised this procedural avenue to resolve the issue of the shareholding of the First Defendant. I make these observations for the sole purpose of reminding practitioners of the importance of ensuring that their client's case is properly framed. This can only occur if all attorneys, in fulfilment of their professional responsibilities, adopt the discipline of thoroughly researching and analysing the legal options which are available to assist their clients.

Alleged Diversion of Funds and Business from the First Defendant to the Second Defendant

25. The Claimant's case is that the Third, Fourth, Fifth and Sixth Defendants consistently diverted funds and business from First Defendant to the Second Defendant. He alleges that the First Defendant continued operating after the death of the deceased. He points to several instances where payments which were made by clients of the First Defendant were not deposited into the company's accounts but instead were placed in accounts held in the name of the Second Defendant. In this regard he relies primarily on accounting information relating to the operations of both companies. In particular he points to:

(i) Account Statements from Republic Bank Account #350189338-01 held in the name of the First Defendant for the period 29th January 1998 to 31st July 2002 which show a range of credits and debits;[10]

(ii) Cheque Number 008903 dated 31st December 2003 for the sum of $868.38 issued by Kappa Drugs Limited and made payable to the First Defendant which was deposited into Account #1911009072 at RBTT Bank Limited, St. Augustine and stamped "Promed Sunncorp Limited";[11]

(iii) Cheque Number 0014435 dated 30th September 2005 issued by Kappa Drugs Limited and made payable to the First Defendant for the sum of $1,003.68 deposited at Scotia bank, Mid Centre Mall, Chaguanas, and stamped "Promed Sunncorp Limited";[12] and

(iv) Cheque Number 0016499 dated 31st May 2006 issued by Kappa Drugs Limited and made payable to the Second Defendant for the sum of $3,110.08 deposited at RBTT Bank Limited, St. Augustine, and stamped "Promed Sunncorp Limited".[13]

26. In their Defences, the Defendants all deny the allegation that there has been any diversion of funds or business from the First Defendant to the Second Defendant. In their witness statements, the Fifth and Sixth Defendants both state that they have no involvement in the business or affairs of the Second Defendant. The Fifth Defendant remained consistent in this regard, even in the face of cross-examination at the trial but, as stated before, the Sixth Defendant was not called to give evidence.

27. From the evidence, it is clear that the persons directly involved in the operations of the First Defendant and the Second Defendant were the Third and Fourth Defendants. I therefore now turn to an examination of their evidence on this issue.

28. In the witness statements of the Third and Fourth Defendants, they both state that by the time of the incorporation of Second Defendant, the First Defendant was no longer

[10] Documents 57,58,59,61 and 63 of the Claimant's Bundle
[11] Document 3
[12] Document 4 and 5
[13] Document 4 and 5

supplying any goods even though it was still collecting outstanding monies due to it and paying some expenses, all from its accounts. They further admit that there were a few instances where customers paid for goods sold by the Second Defendant but made the cheques payable to the First Defendant. These errors were subsequently rectified and the monies deposited into the accounts held in the name of the Second Defendant.

29. Under cross-examination, the Third Defendant admitted that the Second Defendant is involved in exactly the same business as the First Defendant. It supplies the same products and has the same clients. Initially, she was very reticent in response to questions regarding the bank accounts held by the First Defendant and the Second Defendant. Her consistent refrain was that those types of questions ought to be addressed to the Fourth Defendant as he was responsible for the accounting aspect of both business operations. However, in response to specific questions posed by this Court, the Third Defendant eventually admitted that the First Defendant did hold stock after the death of the deceased. There was an even further admission that she never accounted for any of the monies collected from the sale of this stock in hand, even though she would have expected such a course of action had she pre-deceased Carmelo Fabres. She attempted to explain that the First Defendant was not a very profitable enterprise and all the monies earned from the sale of stock was utilised to import further pharmaceutical products. She maintained that no one ever took any money out of the First Defendant to pay for any personal expenses.

30. The Fourth Defendant also admitted that the clients of the Second Defendant are virtually identical to that of the First Defendant. He clarified that the First Defendant held accounts at Scotiabank and Republic Bank, whilst the Second Defendant held accounts at RBC (formerly RBTT) and Scotiabank. When shown the cheques which were made payable to the First Defendant but were deposited into the bank accounts of the Second Defendant, his explanation was that after discussions with the banks he was allowed to deposit Sunncorp cheques into Promed Sunncorp's accounts. He also admitted that he did not account to the family of the deceased for the sales of the First Defendant for the period from the death of the deceased in August 2000 and the formation of the Second Defendant. He said that these monies were used to clear an overdraft facility which had been extended to the First Defendant. However, he also conceded that he never accounted to the Fabres family and that, in hindsight, proper accounting should have been done. He accepted the entire responsibility for this oversight.

31. From all the evidence led on this issue, it is clear to me that there was an unacceptable degree of fluidity between the business operations of the First Defendant and the Second Defendant. The affairs of the First Defendant were not properly brought to an end as the company was not wound up. At the time of the death of the deceased the company still had stock in hand. The revenue earned by the sale of this stock has not been properly accounted for. Both the Third and Fourth Defendants admit the same. I do not accept the

assertion of the Third Defendant that the lack of proper accounting was attributable to the unprofitable nature of the First Defendant's operations. Both the Third and Fourth Defendants admitted that the First Defendant was their sole source of income. To my mind, it is therefore incredible that the company generated no profits. Additionally, the bank statements of the account held in the name of the First Defendant at Republic Bank refute any suggestion that there were no revenue streams after the death of the deceased. It is apparent that the Third and Fourth Defendants simply set up a new company, the Second Defendant, to replace their former business venture. Their core business operations and clients remained the same. Some of their clients, notably Kappa Drugs, continued to treat with them in their previous incarnation as Sunncorp Limited and issued payments in the name of this company. However, these payments were deposited into the bank accounts held in the name of the Second Defendant.

32. In my view, all of the foregoing occurrences must of necessity trouble the conscience of any court. I accept the documentary evidence presented by the Claimant on this issue. I also note that in the cross-examination of both the Third and Fourth Named Defendants, both witnesses basically admitted that the clients of the First Defendant were absorbed into the business of the Second Defendant, that there was no accounting for the sale of stock held by the First Defendant and that cheques made payable to the First Defendant were not deposited into that company's bank accounts but instead were placed in bank accounts held in the name of the Second Defendant. This Court cannot approve of this modus operandi. I am satisfied that the Claimant has shown that there was a diversion both of funds and business from the First Defendant into the Second Defendant.

Closing Submissions

33. The Defendants' Attorney in his closing written submissions sought to raise issues relating to the locus of the Claimant to maintain an action in relation to the alleged diversion of funds and business from the First Defendant to the Second Defendant. He submitted that the Claimant's claim in respect of the payment of money due to the First Defendant amounts to an attempt to enforce rights which belong to and are enforceable only by the company. He further submitted that such conduct cannot sustain an oppression claim under **section 242 of the Companies Act**. The only case cited as authority for his submissions is **Bodhan Ramkissoon and others v Bridglal Ramkissoon and others.**[14]

34. However, upon a perusal of the Defences served herein, none of these issues was raised on their behalf. Further, in his cross-examination of the Claimant's witnesses, Counsel for the Defendants did not at any time challenge the locus of the Claimant to bring this action or suggest in any manner that the Claimant was seeking to enforce the rights of the

[14] H.C.A. Cv. 427 of 2004

First Defendant. Further, the witness statements filed on behalf of the Defendants did not support this line of argument.

35. Accordingly, I am of the view that, apart from arguing as an issue of law that the Claimant is not entitled to invoke the oppression remedy under **section 242 of the Companies Act**, it would be manifestly unfair and unjust to permit the Defendants' Attorney to raise the other issues contained in his closing submissions, without any foundation in pleading or in fact.

36. Counsel for the Claimant has sought to ground his claim for relief in relation to the diversion of funds and business from the First Defendant to the Second Defendant on two limbs: (1) **section 242 of the Companies Act**; and (2) the actions of the Third and Fourth Defendants amounted to a breach of fiduciary duties. He placed reliance on the cases of **Southern Real Estate PTY Ltd. v Valerie Dellow and Wayne Arnold**,[15] **Canadian Aero Services Ltd v O'Malley**[16] and **57134 Manitoba Ltd. v Palmer**[17] to illustrate that the courts are prepared to impose upon fiduciaries a standard of accountability that is stricter than that undertaken contractually. In particular, he contended that a fiduciary is precluded from obtaining for himself, any property or business advantage either belonging to the company or for which it has been negotiating. Further, he argued that the general standards of loyalty, good faith and avoidance of conflict of duty and self-interest to which the conduct of a director must conform must be assessed on the facts of each case and the courts should not attempt to exhaustively prescribe or delineate the exact content of these duties. He also submitted that a fiduciary duty may be imposed upon a senior officer or an employee holding a substantial management position and may even extend beyond the termination of employment.

37. Further, Counsel for the Claimant submitted that in small family companies, such as the First Defendant, the principle that a director's fiduciary duties are only owed to the company can be extended to embrace the imposition of a fiduciary duty upon directors towards shareholders of the company as well. In this regard, Counsel relied on the **Coleman v Myers** exception which operates to create a fiduciary duty owed by directors to individual shareholders of the company in special circumstances and relied on **Curry v CPI Plastics Group Ltd**[18].

38. Section 242 of the Companies Act provides as follows:

> **"*242.*** *(1) A complainant may apply to the Court for an order under this section.*

[15] [2003] SASC 318
[16] [1974] SCR 592
[17] (1985) 65 B.C.L.R. 355 (S.C.)
[18] [2001] O.J. No. 4870 at para. 13

(2) If, upon an application under subsection (1), 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 effects a result;

(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 of 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 officer of the company, the Court may make an order to rectify the matters complained of." (emphasis mine)

39. A complainant is defined to include a shareholder or debenture holder, or a former holder of a share or debenture of a company or any of its affiliates: **section 239** of the **Companies Act**. As previously noted, the term "shareholder", is defined in **section 107(1)(b)** of the **Companies Act** to include a personal representative of a deceased shareholder. As such, the Claimant, as the Legal Personal Representative of the deceased shareholder, falls within the definition of shareholder and is entitled to be a complainant under **section 242 (2)** and to seek an Order of the Court rectifying the matters complained of.

40. The term "Oppressive" has been defined as "burdensome, harsh and wrongful": **Scottish Co-Operative Wholesale Society Ltd v Meyer and Another**. [19] "Unfairly prejudicial" has been interpreted to mean "acts that are unjustly or inequitably detrimental": **Diligenti v RWMD Operations Kelowna**[20] and "unfairly disregards" connotes "unjustly or without cause pay no attention to, ignore or treat as of no importance the interests of security holders, creditors, directors or officers": **Stech v Davies**. [21] These definitions have been accepted and applied by Jamadar J. (as he then was) in **Sharma Lalla v. Trinidad Cement Limited & Ors.** [22]

[19] [1959] A.C. 324
[20] (1976) 1 BCLR 36 (S.C.)
[21] (1987) 53 Alta L.R. (2d) 373 (Q.B)
[22] HCA No. Cv S -852/98

41. The oppression remedy introduced by the **Companies Act** was heavily influenced by Canadian corporate law.[23] The philosophy behind the oppression action as well as the forms of conduct which it was intended to address has been explained as follows:

> "*The potential protection [of the section] offered to corporate stakeholders is awesome. Nevertheless, the legislative intent of the oppression remedy is to balance the interests of those claiming rights from the corporation against the ability of management to conduct business in an efficient manner. <u>The remedy is appropriate only where as a result of corporate activity, there is some discrimination or unfair dealing amongst corporate shareholders, a breach of a legal or equitable right, or appropriation of corporate property.</u>"*[24] *(emphasis mine)*

42. Further, it is my view that Counsel for the Defendants has misinterpreted the true import of the decision of Stollmeyer J. in **Bodhan Ramkissoon**. The learned judge emphasised that **section 242** only provides redress where the company has acted. However, in his judgment, Justice Stollmeyer recognised that a company can only act through its directors and if persons, in their capacity as directors or officers of a company, engage in oppressive conduct to the detriment of the shareholders of the company, it is appropriate to rectify any such oppression by orders against the directors or officers personally. The following passage from his judgment makes the matter plain:

> "*Section 242 applies only where the company has acted ..... Actions by directors and officers which are not properly attributable to the company cannot meet the requirements of Section 242 ... ...he section provides a statutory means by which shareholders may gain redress for corporate conduct which has one of the effects described in the section. It serves "...as a judicial brake against abuse of corporate powers, particularly, but not exclusively, by those in control of a corporation and in a position to force the will of the majority on the minority... [it] enables the Court to intercede in the affairs and operations of a corporation and to effectively override the decisions of those charged with the responsibility of corporate governance" ..... Where a plaintiff seeks a remedy against a director personally under the section, he is not alleging that he was wronged by a director or officer acting in his personal capacity. He is asserting that the company, through the actions of the directors or officers has acted oppressively and that in the circumstances it is appropriate to*

[23] The history of the oppression remedy has been fully traced by Brian Cheffins in his article "The Oppression Remedy in Corporate Law: The Canadian Experience" Vol. 10:3 U. Pa. J. Int'l Bus. L. 305 - 339

[24] Dennis H. Petersen, Shareholder Remedies in Canada, para. 18.1

rectify that oppression by an order against the directors or officers personally (see Doherty JA in Budd at paragraph 35)."[25]

43. The recent decision of Justice Jones in **Khaima Persad v Stephen Bail[26] and Stephen Bail v Khaima Persad[27]** also provides useful assistance in this regard. In that case Mr. Bail, a shareholder of International Hardware Ltd brought a claim under **section 242** of the **Companies Act** seeking redress against Mr. Persad, a director of the company, for allegedly improper and oppressive corporate conduct. However Mr. Bail did not commence proceedings against the company but instead sued Mr. Persad personally. In dismissing the claim against Mr. Persad, the learned judge held that:

> "*36. In my opinion Bail is not entitled to such an order. In the first place it would seem to me that the action ought to have been commenced against the company. The section in my view, seeks to address a wrong relating to the conduct of the corporation itself, albeit as a result of the actions of an officer, director or shareholder of the company. There is nothing in this section or the case law spawned from the section which suggest that that relief under section 242 is available against an individual as opposed to the company.*"

44. In this regard the statement of **McGuinness** in the **Law and Practice of Canadian Business Corporations** is of some assistance. According to McGuinness the oppression remedy provides **"***the courts with the power to intervene in the affairs of the corporation at the behest of the complainant where it is necessary to prevent or protect the complainant from, or to stop, oppressive, or unfairly prejudicial or similar conduct of the corporation.*" : **Paragraph 9.219, page 949**."[28] (emphasis mine)

45. There is an important point of distinction between those two cases and the present matter. In this matter, the Claimant has joined the company, the First Defendant, of which he is shareholder as a party to the action. As such, his claim is not fatally flawed and is saved from the fate suffered in **Bodhan Ramkission** and **Khaima Persad**.

46. To my mind, the actions of the Third and Fourth Defendants in diverting funds and business from the First Defendant to the Second Defendant, fall squarely within the form

[25] See pages 19 – 20 of the judgment
[26] CV 2009-01304, CV 2009-01305, CV 2009-01306
[27] CV 2009-04190
[28] See para. 36-37 of the judgment

of oppressive and prejudicial conduct which is made actionable pursuant to **section 242 (c)** of the **Companies Act**. They have appropriated corporate property, in the form of clients and revenue, from the First Defendant to the Second Defendant. The Claimant is therefore entitled to an Order rectifying the acts complained of.

47. However, I am of the opinion that the Claimant's claim insofar as it based on the breach of fiduciary duties is unsustainable, as I will now demonstrate.

48. The Claimant's submitted that there are special circumstances which bring this case within an exception to the general rule that a director's fiduciary duty is owed to the company only. The general principle governing the fiduciary duties owed by directors is that they are owed solely to the company. This principle is clearly encapsulated in **section 99** of the **Companies Act** which provides that:

> **"*99.*** *(1) Every director and officer of a company shall in exercising his powers and discharging his duties—*
> *(a) act honestly and in good faith with a view to the best interests of the company; and*
> *(b) exercise the care, diligence and skill that a reasonably prudent person would exercise in comparable circumstances.*
> *(2) In determining what are the best interests of a company, a director shall have regard to the interests of the company's employees in general as well as to the interests of its shareholders.*
> *(3) The duty imposed by subsection (2) on the directors of a company is owed by them to the company alone; and the duty is enforceable in the same way as any other fiduciary duty owed to a company by its directors."(emphasis mine)*

49. However, fiduciary duties may arise between a director and individual shareholders where the shareholders appoint the directors as their agents in any matter or where the special circumstances of a particular transaction place the directors in a fiduciary position in relation to the shareholders. The *locus classicus* in this regard is the case of **Percival v Wright**[29] where Swinfen Eady J held that the directors of a company are not trustees for individual shareholders and may purchase their shares without disclosing pending negotiations for the sale of the company's undertaking.

50. However, in **Coleman v Myers,**[30] Mahon J at first instance declined to follow **Percival v. Wright**. Following on from this lead, the New South Wales Court of Appeal in the

[29] [1902] 2 Ch 421
[30] [1977] 2 N.Z.L.R 225

case of **Brunninghausen v Glavanics**[31] decided to adopt the reasoning in **Coleman**. However Handley JA, who delivered the leading judgment still noted that "*the general principle that a director's fiduciary duties are owed to the company and not to shareholders is undoubtedly correct, and its validity is undiminished.*" The learned judge framed the issue in **Brunninghausen** as "*whether the principle applies in a case, such as the present where the transaction did not concern the company, but only another shareholder.*"

51. It should also be noted that no case has been cited by Counsel for the Claimant where either **Coleman** or **Brunninghausen** has been applied by our local courts. To my mind, these cases do not disturb the general principle that a director's fiduciary duties are normally owed to the company alone, although they do show an increasing willingness to impose fiduciary obligations on directors of a company in certain circumstances.

52. In any event, in my opinion, the cases of **Coleman** and **Brunninghausen** are distinguishable on the facts. In this matter, there is no issue raised as to the Claimant having appointed any of the Defendants to act as his agent. As such, the Claimant's case does not fall within the rubric of a breach of fiduciary duties or the **Coleman** exception. Instead, it falls to be ventilated in the context of an oppression action, as noted above.

53. In an oppression action brought pursuant to **section 242** of the **Companies Act**, a court is empowered to grant any order to rectify the matters complained of. Quite often, the form of relief granted in such matters takes the form of an injunction which acts as a judicial brake against the abuse of corporate powers by those in control of a corporation as noted by Stollmeyer J in **Bodhan Ramkission**. However, there is nothing in the actual wording of the section to suggest that a court can only grant injunctive relief in an oppression action. It should be noted that **section 242** is unique with regards to the extensive nature of its provisions. For example, it allows an oppression action to be brought by any shareholder of a company in the face of corporate misconduct. This marks a definite point of departure from its Canadian counterpart which only grants locus to minority shareholders to maintain an oppression claim.[32] The matters complained of by the Claimant relate to the diversion of funds and business from the First Defendant to the Second Defendant. In this case, therefore, by way of relief, the Claimant is entitled to an order for accounts and inquiries into the finances of the First and Second Defendant company, as claimed in paragraph (iv) (b) of his Claim Form and Statement of Case. This avenue would provide an appropriate starting point for the monetisation of his claim in

[31] (1996) 14 ACLC 345
[32] Ibid at f.n. 20

light of the diversion of funds and business, which I find has been proven based on the preponderance of the documentary and viva voce evidence in this matter.

Reliefs

54. The Claimant as Legal Personal Representative of the deceased, has established to my satisfaction that the deceased held 1,000 shares or a 20% shareholding in the First Defendant company as at the date of death. Further, he has made out his case in relation to the diversion of funds and business from the First Defendant to the Second Defendant which was accomplished at the hands of the Third and Fourth Defendants, respectively. However this does not mean that personal liability attaches to them.

55. In the Statement of Case, the Claimant sought an Order that the Defendants disclose all bank statements of the First and Second Defendants from the month of February 2000 to date and continuing and all existing bank accounts of the First and Second Defendants from the date of their incorporation to the present time and to declare all existing banks with which the First Defendant had been dealing from the month of February 2000 to date and in the case of the Second Defendant from the date of its incorporation.

56. The deceased died on the 4th August 2000 and the Claimant obtained a grant of letters of administration of his estate on the 14th September 2001. Therefore, insofar as the Claimant is seeking disclosure of bank statements and bank accounts by the First Defendant, such orders can only be made in respect of the period after 4th August 2000, and not February 2000 when the deceased was still alive.

57. With respect to the orders sought against the Second Defendant, the evidence of both the Third and Fourth Defendants confirm that, on 2nd July 2001 they formed the Second Defendant and thereafter the pharmaceutical business previously carried on by the First Defendant was conducted through this Company and not the First Defendant.

58. Accordingly, based on the evidence of the Claimant and the Third and Fourth Defendants, I am of the view that the Claimant is entitled to the following declarations and orders:

    (a) A declaration that the Claimant, as the Legal Personal Representative of Carmelo Ramon Fabres, deceased, is entitled to 1,000 shares in the First Defendant;

    (b) The Third, Fourth and Fifth Defendants do, within thirty (30) days of the date of this Order lodge with the Registrar of Companies a Return of Allotments reflecting the transfer of 1,000 shares from Carmelo Ramon Fabres, deceased to the Claimant as Legal Personal Representative of the deceased;

    (c) The First, Third, Fourth and Fifth Defendants do, within forty-five (45) days of the date of this Order, disclose to the Claimant full details of all

bank accounts operated by and/or in the name of the First Defendant, including but not limited to bank accounts at Republic Bank Limited, Grand Bazaar, Valsayn and Tunapuna and Scotiabank Trinidad and Tobago Limited, Port of Spain, together with all bank statements in respect of all such accounts from the 4th August 2000 to date;

(d) The Second, Third and Fourth Defendants do, within forty-five (45) days of the date of this Order, disclose to the Claimant full details of all bank accounts operated by and/or in the name of the Second Defendant, including but not limited to Royal Bank of Canada, formerly Royal Bank of Trinidad and Tobago Limited and Scotiabank Trinidad and Tobago Limited, together with all bank statements in respect of all such accounts from July 2001 to date;

(e) The Third, Fourth and Fifth Defendant do file, within ninety (90) days of the date of this Order, full accounts of the business operations of the First Defendant, including sales of pharmaceutical products and collection of monies due and owing in respect of such sales together with all supporting invoices, vouchers, receipts and other books of account in support thereof for the period 4th August 2000 to date;

(f) The Third and Fourth Defendants do file, within ninety (90) days of the date of this Order, full accounts of business operations of the Second Defendant, including sales of pharmaceutical products and collection of monies due and owing in respect of such sales together with all supporting invoices, vouchers, receipts and other documentation in support thereof for the period July 2001 to date;

(g) The Registrar of the Supreme Court do take accounts of the business operations of the First Defendant and the Second Defendant and make such inquiries as may be necessary to determine the value of the funds and business diverted by the Third, Fourth and Fifth Defendants from the First Defendant to the Second Defendant;

(h) The First, Third, Fourth and Fifth Defendant do pay to the Claimant such amount as may be found to be due and payable to the Claimant as Legal Personal Representative in respect of his shareholding of 1,000 shares in the First Defendant within forty-five (45) days of the certification by the Registrar of the Supreme Court of that amount.

59. In respect of the claims made against the Sixth Defendant, I am not satisfied that the Claimant has proved his case against this Defendant and I therefore dismiss this aspect of the claim.

Costs

60. On the question of costs, the Claimant is entitled to costs which fall to be determined pursuant to **Rule 67.5.** When calculated the Claimant is entitled to an Order for costs against the First, Second, Third, Fourth and Fifth Defendants in the amount of $14,000. Since the claim has not succeeded against the Sixth Defendant, the claim will be dismissed. However, since the Sixth Defendant did not give evidence and took no active part in the trial, I do not consider that it would be appropriate to make an order for costs in his favour in respect of the dismissal of the claim against him.

Dated this 20th day of March 2013.

……..
André des Vignes
Judge.