

**REPUBLIC OF TRINIDAD AND TOBAGO**

**IN THE HIGH COURT OF JUSTICE**

**In Tobago**

**CV2016 - 03038**

**In the Matter of the Companies Act, Chap. 88:01**

**And**

**In the matter of a complaint pursuant to Section 242 of the Companies Act 1995 of oppressive or unfairly prejudicial conduct and in the matter of a fraudulent appointment of a director and assistant secretary and the subsequent purported disposition of the only asset of a Company a parcel of land comprising TWO POINT ONE NINE HECTARES (2.0119 ha) and situate on Buccoo Road, Tobago**

Between

**LU - ANN FORBES**

**Claimant**

And

**MKJ TOBAGO LIMITED**

**First Defendant**

**FRANKLYN HARRIPAUL**

**Second Defendant**

**JEFFERY ROSS**

**Third Defendant**

**MARGARET SANDRA ROBERTS**

**Fourth Defendant**

**PERTRINA SHANGHIE**

**Fifth Defendant**

**Before the Honourable Madam Justice Eleanor J. Donaldson - Honeywell**

**Appearances**

Mr. Terrance Bharath and Mr. Imran Ali, Attorneys at Law for the Claimant

Mr. Fareed Scoon, Mr. Sayeed Trotter and Ms. Nathifa Lowman, Attorneys at Law for the Second and Fifth defendants

Ms Peggy Francis Pierre for Registrar General

**Delivered on 9<sup>th</sup> April, 2018**

## **Judgement**

### **I. Introduction**

1. This Judgment determines a Claim in company law oppression and fraud brought by the Claimant as 75% owner of the First Defendant Company [“the Company”]. The alleged oppression and fraud were in relation to the unauthorised sale to the Second and Fifth Defendants [“the Purchasers”] at a price well below market value of the sole valuable asset owned by the Company. That asset was a property in Buccoo Tobago [“the Property”] owned by the Company since 1999. The Claimant acquired her shares in the Company by inheritance in 2013 from the estate of her husband Michael Charles. He was one of two Directors of the Company. The purported sale of the property was discovered by the Claimant in August 2016 but the process towards purchase commenced as early as January 13, 2016. At that time an Agreement for sale had been prepared.
  
2. The Claim was partially determined by way of Judgment in Default of Defence delivered in June 2017 against the Company and Mr. Jeffery Ross. Mr. Ross is the Third Defendant herein. He is a Director and the Minority Shareholder of the Company. On the death of the Claimant’s husband, Mr. Ross was the sole remaining Director until February 23, 2016. It was then that by filing a Notice of Change of Directors he purported to make the Fourth Defendant a Director and Assistant Secretary in place of the deceased, effective January 28, 2016.
  
3. The June 21, 2017 ruling herein partially disposed of the Claim against the Company and the Third Defendant by making the following Declarations:
  - i. A declaration that the business affairs of the First Defendant have been carried on in a manner that is oppressive or unfairly prejudicial to the interest of the Claimant, the holder of 75 percent of the shares in the Company.

- ii. A declaration that the powers of the Third Defendant as Director have been fraudulently exercised in a manner that unfairly disregards the interest of Claimant.
  - iii. A declaration that the purported appointment of the Fourth Defendant as Director by the Third Defendant by Notice dated 16<sup>th</sup> February, 2016 and filed on 23<sup>rd</sup> February, 2016 is invalid and fraudulent;
  - iv. A Declaration that the Appointment by notice dated 21 February, 2016 and filed on 23 February, 2016 of the Fourth Defendant as Assistant Secretary was done fraudulently by the Third Defendant and is consequently null and void;
  - v. A Declaration that the action of the Third Defendant in executing a Notice of Change of Directors dated 16 February, and a Notice of Change of Secretary dated 21 February, 2016, both filed on 23 February, 2016 constitutes the use of his office in a manner that is fraudulent, oppressive and unfairly prejudicial and unfairly disregards the interest of the Claimant to her right to be involved in the appointment of any Directors, Secretaries or Assistant Secretaries.
4. The Claimant did not pursue Judgment against the Fourth Defendant who could not be located to be served with the Claim. As it relates to the Purchasers, the Claimant sought to determine the entire Claim at the pre-trial stage by applying for Summary Judgment on grounds that they were implicated in the fraudulent nature of the sale of the property. This was said to be so because the indications of irregularity were so clear that they must have known the sale was unauthorised. The relief sought against them was the setting aside of the Conveyance of the property to them.

5. The Purchasers responded to the contention that their case disclosed no realistic prospect of success by arguing firstly, that they were bona fide purchasers for value without notice of the fraud. Secondly, they contended that they were entitled, based on the “indoor management rule”, to protection having dealt with purported agents of the Company who could be accepted as having authority to sell the property.
6. In light of the pleadings relevant to the foregoing position of the Purchasers, the decision was made in the June 2017 ruling not to grant Summary Judgment against them. This allowed the opportunity for evidence, if any, to be presented in support of the case pleaded by them. A decision was also deferred regarding the relief claimed against the First and Third Defendants that would have set aside the purported sale.
7. Trial proceeded against the Purchasers to fully ventilate the factual matrix of this case. At the close of oral testimony on November 14<sup>th</sup>, 2017 parties were directed to file written closing submissions. This was not accomplished within the time allotted. There were a number of extensions of time granted and the final submission was received on April 5, 2018 after the parties were informed that Judgment would be delivered on April 9, 2018.
8. This decision concerns the legitimacy of the Property sale having regard to the state of mind of the purchasers. The Purchasers have alleged that they were the bona fide purchasers for value without notice of fraud. The case hinges on what is accepted by this court as fact. The Claimant was required to prove on a balance of probabilities that the Purchasers were not the bona fide purchasers of the property for value without notice. Once this burden is discharged, the Purchasers then bear the burden of proving their own defence of bona fides, in a transaction that has already been established to have been fraudulent and oppressive, based on the Judgment delivered against the First and the Third Defendants.

## **II. Issues and Decision**

9. The context of legal principles to be applied having been set in the June 2017 ruling, the issues relevant to this decision will be primarily determined by analysis of the evidence as to whether the Purchasers were bona fide purchasers for value without notice of fraud.

10. Relevant issues are usefully summarised by the Claimant in closing submissions at paragraph 19, with the exception of the first issue listed therein. The Claimant there puts forward an argument that the defence of bona fide purchaser for value without notice of fraud is not applicable to the instant circumstances. I do not agree because I see the Claimant's interest as a type of quasi equitable interest that has been adversely affected by the fraudulent transaction. Her interest can be protected by a finding that the Purchasers had notice, whether actual or constructive, of the fraud. In any event a determination of that issue is not germane to my findings herein.

11. My final determination in this matter is that the fraudulent sale transaction from which the Second and Fifth Defendants benefited as purchasers should be set aside. This determination is based on my findings in relation to the following issues:

- i. Whether the Second and Fifth Defendants are bona fide purchasers for value without notice of any fraud. As it relates to this issue contentions of the Defendants are underscored as having been considered, including:
  - Whether the Court's decision to Strike Out parts of the Purchasers' evidence prejudiced their case as to proving their bona fides and lack of notice of fraud.
- ii. Whether the Purchasers can avail themselves of the indoor management rule. As it relates to this issue the main consideration is:
  - Whether "*there was something so out of the ordinary*" in the transaction as to put the Purchasers "*upon inquiry to ascertain whether the person or persons making the contract had any authority in fact to make it.*"<sup>1</sup>
- iii. Whether the just resolution of this Company Law Oppression Claim requires that the purported conveyance of the property be set aside.

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<sup>1</sup> Brooks Ltd v Claude Neon General Advertising Ltd [1931] 2 DLR 743

### III. Legal Principles considered

#### Bona Fide Purchaser for Value Without Notice of any Fraud.

12. **Snell's Equity, McGhee J. Q.C, 33rd Edn.** describes “a bona fide purchaser for value without notice” as a person who in good faith without notice of any interest adverse to property has acquired the legal interest in it by giving consideration. Extrapolating from paras. 4-21 to 4-45 there are three main requirements for a purchaser to be considered a bona fide purchaser for value without notice: Firstly, the purchaser must have gained the legal interest in the property. Secondly, the purchaser must have given value for the property. Thirdly, the purchaser must not have had notice of any equitable interest at the time when he or she gave consideration for the conveyance.
  
13. Snell's considers further at para 4-32 to 4-39 that a purchaser is prejudicially affected by notice in equity in 3 cases: (a) Actual notice - where the equity is within his own knowledge. (b) Constructive notice - where the equity would have come to his knowledge if proper enquiries had been made and (c) Imputed notice - where his agent in the course of the transaction had actual or constructive notice of the equity.
  
14. A purchaser is deemed to have constructive notice where, whether deliberately or carelessly, he or his agent abstained from making enquiries that a prudent purchaser would have made. A purchaser also is said to have constructive notice if a reasonable purchaser acting on skilled advice would have discovered the interest of another person in the property had proper enquires been made: See **Mykoo v Mungal CV2015-00784**.

#### The Indoor Management Rule

15. The indoor management rule refers to an entitlement of a person dealing with a company to “infer the fact of a resolution authorizing that which on the face of the document appeared to be legitimately done” – **Royal British Bank v Turquand (1856) 6 EL & BL 327**. The rule, however, does not apply in suspicious circumstances that would put an outsider on notice to inquire into the actual authority of a corporate officer: **Ligget (Liverpool) Limited v Barclays Bank Limited [1928] 1 KB 48**).

Considerations in deciding on just remedies for company Law oppression.

16. Section 242 of the Companies Act, Chap. 81:01 deals with the oppression remedy in company law and is modelled on the Canadian Business Corporations Act (CBCA). The section provides a wide range of statutory remedies against oppression and unfair prejudice in corporate affairs. The CBCA oppression remedy has been described as the broadest, most comprehensive and most open-minded shareholder remedy in the common-law world, providing the Court with a wide discretion to remedy virtually any corporate conduct that is unfair. Section 242, like its Canadian counterpart, ought similarly to be given a liberal and purposive interpretation.

17. In applying this section, each case will largely depend on its facts. However, some guidance to the Court in exercising its discretion can be gleaned in the policy outlined in cases such as **First Edmonton Place Ltd v 315888 Alberta Ltd [1988] 40 BLR 28 [10]-[18]** (McDonald J). and **Crete Holdings 23 B.L.R (2d) 286 p.8** wherein Galligan JA in the Ontario Court of Appeal at page 296.20 stated:

*“The provisions of s. 248(3) give the court a very broad discretion in the manner in which it can fashion a remedy. Broad as that discretion is, however, it can only be exercised for a very specific purpose; that is, to rectify the oppression”.*

18. Further, Mark Koehnen, **Oppression and Related Remedies** under the rubric “General Principles relating to Remedies”, highlights the width of the discretion and the purposive approach to be adopted by the courts, but cautions against unwarranted judicial interference in the boardroom:

*“Section 241 of the CBCA and its provincial counterparts gives courts wide-ranging discretion to fashion remedies. In addition to the 14 specifically enumerated remedies, S.241 empowers the court to make any other order it sees fit. The choice of remedy is governed by the same broad, purposive approach that applies to the oppression remedy as a whole. Courts will be flexible and creative when fashioning remedies to suit individual cases. The breadth of remedial discretion recognizes that monetary compensation for oppression is usually inadequate...Both the overriding purpose of*

*ending oppression and the enumerated remedies can be seen as encouraging judicial interference in corporate affairs. The potentially intrusive nature of the remedy has been tempered by the principles of minimal interference and reasonable expectations. As their names suggest, these principles hold that courts should interfere as little as possible in corporate affairs and that the remedy ought to reflect the reasonable expectations of the parties.”*

#### **IV. Pleadings, Evidence and Submissions**

19. The Claimant alleges fraud against the Purchasers based upon the following grounds:

- i. The selling price of the property, \$850,000.00 was at a gross undervalue, and the Purchasers were aware of this;
- ii. The Purchasers had, as disclosed in their Defence, conducted a search at the Companies Registry prior to the Sale. Documents produced from the search showed that the Third Defendant was not the principal of the company, and the Purchasers with reckless disregard for such records proceeded to enter into the transaction;
- iii. The Purchasers made no attempts to confirm the Third Defendant’s identity or his true role in the Company and the due diligence expected of them as Purchasers required that they confirm whether the Third Defendant had the authority to execute the deed of conveyance on the Company’s behalf;
- iv. The Purchasers acted with reckless disregard for the corporate records of the Company, which still showed the Claimant’s husband Michael Charles to be the majority shareholder of the company in January 2016.

20. The Purchasers claim generally that they were the bona fide purchasers of the property in question for value without notice. They answer the Claimant’s claims by pleading that:

- i. The Second Defendant was introduced over the telephone to a person he alleges was Carol Ann Bernard, an Attorney who he says had conduct of sale of the property. He says she informed him the property was owned by the company and that the Third Defendant was the Principal. He was ill and she was his Attorney. She allegedly offered to sell the land for \$850,000.



- ii. The Second Defendant commissioned one Ms. Samaroo to conduct a search on the Company. That search dated January 7, 2016 was the sole search attached to the Pleadings. Thereafter the Second and Fifth Defendants had an Attorney, Dale Kingston prepare an Agreement for sale of the property which they allege was executed in the UK by the Third and Fourth Defendants. The Agreement for sale was dated March 8, 2016. However, the pleading in Reply filed by the Claimant was that it was prepared on or before January 13, 2016 with the fourth Defendant named as Assistant Secretary.
  - iii. The Purchasers plead that they paid a deposit on March 9, 2016 by cheque payable not to the Company but to the alleged Attorney for the Third Defendant. Thereafter, they claim that further work was done by their Attorney towards completion of the conveyance including searches of the records of the Company. Those searches showed the fourth Defendant as a Director replacing the Claimant's husband on January 28, 2016. No date of the said searches is mentioned and a second search report is not attached to the pleadings.
  - iv. Final payment was made by cheque dated July 5, 2016. The Purchasers plead they were under no obligation to ascertain the status of the majority shareholder once they were shown the Company resolution making the Third Defendant a director of the company. Furthermore, they relied upon the expert guidance of their attorney-at-Law who allegedly told them all appeared to be in order with the Company.
21. The Evidence before the Court comprised witness statements and oral testimony under cross and re-examination of six persons. In addition to testifying on her own behalf the Claimant called an expert witness, Mr Jeremy Knott, who gave evidence as to the market value of the property in September 2016. He explained that it was in the Mt. Irvine area where property values are high and valued it at \$3.5 Million. That value was uncontradicted by any expert witness called by the Purchasers to support that their purchase price of \$850,000 could have been anything other than at a grossly suspicious undervalue.
22. The Purchasers' first witness was Mr. Hochoy Charles, who they allege funded the purchase by way of a loan. This explanation for his name appearing as payee on the

cheques in payment for the property the Purchasers claim to have purchased was introduced after note was taken by the Court of this anomaly. It was commented on in the earlier decision herein. At that time parties were informed that there would be no summary judgement against the Purchasers. It was anticipated that there may possibly have been evidence presented on behalf of the Purchasers at Trial by Mr. Hochoy Charles and the Attorneys the Purchasers say they interacted with so as to support their claims to not having notice of fraud or participating in the fraudulent aspects of the sale of the property.

23. However only Mr. Hochoy Charles was called. His testimony was inconsistent with his written statement as well as with the evidence of the Defendants in many respects. There was also a distinctly improbable ring to the version of events he spoke to, which gave the unlikely impression that he had made a spur of the moment loan of almost a million dollars for land he had not seen and with no idea how it could be recovered.
24. The only other witness for the Purchasers was Jacey-Ann Samaroo, a title clerk employed in the Ministry of Legal Affairs, who the Second Defendant personally hired to conduct the January 2016 searches. Again, her testimony was unimpressive as she showed little knowledge of rudimentary aspects of documentation relating to companies that should be part of a search.
25. A late application, filed on October 24, 2017 by the Purchasers two weeks before the trial, seeking to file a Witness Summary for Attorney Dale Kingston was withdrawn. In support of the Application the Second Defendant admitted that the reason there was no signed Witness Statement from Ms. Kingston was that she “did not engage” him when he attempted to have her sign one. The Witness Summary that was withdrawn was in the format of a list of questions to be posed to Ms. Kingston.
26. The contents of the Pleadings and Evidence before the Court is addressed comprehensively in the Claimant’s submissions. Significant aspects of the evidence included the following listed at paragraph 103 of the submission:

*“There was a surfeit amount of circumstances which were out of the ordinary in this sale transaction to put these Defendants on inquiry that something was amiss with this transaction, these circumstances being as follows:-*

*i. The Second and Fifth Defendants never spoke with any representative or agent of the First Defendant.*

*ii. There was knowledge of the existence of Mr. Michael Charles from the date of the first company search performed by Ms. Samaroo. This company search predated the agreement for sale. No enquiries were made of him by the Second and Fifth Defendants. The Second Defendant having received the search from Ms. Samaroo had knowledge that Mr. Michael Charles held 75% of the shares in the First Defendant.*

*iii. There was no effort forthcoming from the Second Defendant or the Fifth Defendant to locate Mr. Michael Charles or inquire of his whereabouts. His address in the company forms were given as local addresses.*

*iv. The registered office of the company was located in Trinidad. The fact that the deed of conveyance had to go abroad should have placed the Second and Fifth Defendants on enquiry as to why this was so. Furthermore, the Secretary of the First Defendant Mr. Bhaghan was never contacted by any of these Defendants.*

*v. The purchase price for the Buccoo Property, was almost one quarter of its value. This was a red flag which should have placed mercantile men such as the Second and Fifth Defendants on inquiry as to why the Buccoo Property was being sold for such a “bargain”.*

*vi. The name of the Fourth Defendant to these proceedings appeared on the agreement for sale even before her existence came about in the Companies Registry.*

*vii. None of the monies for this transaction were paid in accordance with the legal documents. The agreement for sale acknowledged payment of the deposit on the date of its signing, yet the loan for the payment of the deposit was entered into the next day. How could payment be made of a deposit the day before a loan was granted to pay it? The Conveyance of the Buccoo Property acknowledged payment*

*of the purchase price a month before the purchase price was actually paid. No explanation was given as to who authorized this concession. The preparation clause of the Deed of conveyance was not signed at the date of its execution so it begs the question who prepared the conveyance?*

27. The foregoing excerpt from the Claimant's submission sets out relevant facts and concerns as to lack of proof from the Purchasers of being paying purchasers, bona fide, for value, without notice of the Claimant's interest in this transaction or of any fraud.
28. However, in the written submissions for the Purchasers, scenarios unsupported by evidence were put forward as having been established. This was done by way of misrepresentations of the evidence before the Court as well as incorrect statements as to parts of the evidence that were struck out, with further misrepresentations of the reasons given by the Court for striking parts of the written evidence as inadmissible.
29. The striking out was not done at the pre-trial stage. A decision on evidential objections filed by the parties before the Trial was delivered at the start of the first day of the Trial. Accordingly, there was no opportunity for an Appeal against the striking out decisions to be filed before the Trial.
30. Despite the Court's Ruling on the evidential objections, the Purchasers set out the struck out material from the Witness Statement of the Second Defendant in their submissions as though still relying on it to prove their case. In particular, paragraphs 16 and 17 had been struck out on the basis that the content was never pleaded in the Defence i.e. that the search Clerk hired by the Second Defendant conducted a second search after the pleaded January 2016 search. Likewise, paragraph 4 of the Witness Statement of Ms. Samaroo was struck out. The entire struck out paragraph 16 of the Second Defendant's Statement was nevertheless recited in his submissions as though it remained part of the admitted evidence.
31. While not setting out some of the other struck out evidence from paragraphs 11, 12, 17 and 20 of the Witness Statement of the Second Defendant in their submission, the Purchasers

failed to properly reflect that the evidence comprised inadmissible hearsay. The submission also incorrectly states that paragraphs 13 and 21 were struck out.

32. On a review of the pleadings highlighted in bold in the Defendant's submissions it is apparent that the parts of the witness statements which purported to prove those pleadings but were struck out, comprised mainly inadmissible hearsay information about searches allegedly carried out on the instructions of and advice given by an Attorney never called by the Purchasers as a witness.
33. In any event, the fact that the said evidence was struck out in no way impacted on the Purchasers prospects of defending the Claim by proving they were bona fide purchasers for value without notice of any fraud. The Struck out evidence failed to address the fact that the first search done early in January 2016 did not provide any information to support that the fourth Defendant was a Director or Secretary of the Company. Yet the purchase agreement prepared that month included her name as Assistant Secretary.
34. The Purchasers in the delayed submission that they were permitted to file on April 5, 2018 sought for the first time to respond to the Claimants pleading that a cover letter from Dale Kingston sending the Sale Agreement to the Third Defendant's alleged Attorney was dated January 13, 2016 and as such the Agreement would have been prepared at that time with the fourth Defendant's name on it. The submission at paragraph 21, which is unsupported by any evidence referred to from the Trial, is that "when the Agreement was sent to the vendors its form would have been perused and it is more than likely that changes could have been made between January 2016 and March 2016".
35. The submission clearly lacks merit as it is framed in a manner requiring the Court to speculate on events that could have taken place. The Purchasers had every opportunity to present evidence on this point as it was pleaded in the Claimant's Reply. If an earlier Draft of the Agreement existed naming some persons other than the Fourth Defendant, Ms. Roberts as Assistant Secretary or as a Director they should have disclosed it as part of the case management process in these proceedings.

36. Furthermore no-one else could have been named as a Director because the Claimant's husband was deceased. This scenario, even if it had been proven, would have raised even more red flags putting the Purchasers on inquiry which would have led to definite knowledge of the Claimant's interest. Accordingly, there being no basis for being persuaded by the submission, I hold that the contention that Ms. Roberts name appeared quite unusually in the Agreement drafted in January 2016 remains unanswered.
37. The Purchasers' submissions were ineffective in persuading the Court that there was any cogent evidence to prove that the Second and Fifth Defendants were paying purchasers for the property or that the deal struck was not at a very suspicious undervalue. Further, the submission failed to properly address the fact that the appearance of the Fourth Defendant named as a party to the Agreement prepared in January 2016, before she was made a Director and officer of the company, was very suspicious and should have put them on inquiry as to the legitimacy of the transaction.
38. The Purchasers' submissions also failed to provide an answer to the Claimant's submission that there was no evidence to support that their Attorney, the person the Purchasers say they relied on as to legitimacy of the transaction, actually carried out any due diligence on their behalf and gave them advice on same.

**V. Analysis and Findings**

**Issues (i) and (ii) –The Defendants were not Bona Fide Purchasers for Value without Notice of any fraud and they were not protected by the Indoor Management Rule.**

**Purchase Price**

39. The Purchasers bought the Property for \$850,000. The Claimant has annexed two valuations of the Property, one in 2006 at \$1.5million and the other in 2016 at \$3.5million. The Purchasers have admitted that there was no valuation done by them on the Property prior to the sale.

40. The Claimant submits that the sale price was a gross undervalue of the property and that the Purchasers had knowledge of this. It is admitted by both the Purchasers that they have experience as transacting real estate deals as a business. The Fifth Defendant has been a real estate agent for around 8 years and the Second Defendant a “land development entrepreneur”. While this, as they submit does not make them expert valuers, it indicates that they likely had a general understanding of property values in that area. This is buttressed by their evidence that it was a “very good deal”, “a great bargain” and that they were in a hurry to grab it up. The Second Defendant also diverted from his evidence in chief under cross-examination when he gave an estimate of 1 million or 1.1 million as the value of the land as opposed to the 1.5 million that was indicated in his statement.
41. Overall, the evidence of the Second Defendant was uncharacteristic of a person with her years of transacting real estate business. When asked how much she thought the land was worth when she was buying it, the Fifth Defendant was evasive, saying she did not do a valuation and “I am not going to go down that path. I don’t know”.
42. The evidence elicited surrounding the loan agreement with Mr Hochoy Charles also made the Purchasers’ contention that they were unaware of the value of the land more improbable. If so how was it that they were prepared to agree to loan conditions that would require repayment of the \$850,000 plus a lump sum of \$500,000 at the end of one year with interest thereafter at 12%?
43. The Evidence before the Court was that the balance of the purchase price was paid one month after the conveyance. I find this to be an indication that certain details of the deal were not disclosed in the Defendant’s case. This contributes to the overall suspicious nature of the transaction.

#### Loan Agreement

44. It is submitted by the Defendants that the questions relating to the loan agreement are irrelevant. This cannot be properly a position of the Purchasers as the version of events

related to the loan was introduced by them to explain why their names were not on payment cheques for the property. The loan details were set out in the witness statements of the Purchasers and that of Mr Hochoy Charles. It directly concerns the consideration for the conveyance of the property and is therefore highly relevant in determining the circumstances involved in the transaction.

45. The Purchasers' submission that the loan agreement was legal does not answer the Claimant's submission that the terms of the loan agreement pointed to the fact that the Purchasers were aware that they were being sold land at a gross undervalue. The unusual arrangement with Mr. Charles points to the fact that there was reluctance on the part of the Purchasers to go through the formalities of taking a bank loan. This was clearly due to the irregular nature of the transaction and the lack of a valuation for the land.
46. Counsel for the Claimant in raising questions about this agreement was not challenging its legitimacy/legality but highlighting the illogical and suspicious nature of the Purchasers' conduct in relation to the land transaction. Their uncertainty about important details of the loan arrangements, in addition to the lack of forethought the Purchasers appeared to have regarding repayment of the loan were taken into account in my assessment of their lack of credibility.
47. Neither Defendant testified to having the means to repay the loan within the time stated in the agreement. The Fifth Defendant even spoke of her inability to pay a surveyor to survey the property. Her statement that she intended to make the repayment by the "grace of god" was an obvious attempt to avoid answering Counsel's question truthfully. Equally improbable is the Second Defendant's indication that he trusted that Mr. Charles would have dropped off the part of the loan agreement that spoke about interest. Mr. Charles, himself did not seem to be aware of the details as to how he would be repaid despite the stringent terms of the loan agreement.
48. The existence of the loan and the repayment scheme has the tenor of an afterthought introduced to answer questions raised by the Court as to why as alleged Purchasers the



Second and Fifth Defendants were not the payees on the cheques said to have been used to pay for the property.

Searches

49. The Purchasers accept in their written closing submissions that willful blindness of a purchaser and/or failure to make standard inquiries where those inquiries would have led to the discovery of fraud would constitute notice. They state that “further searches” would have confirmed that the Third and Fourth Defendants were the Directors of the First Defendant.
  
50. It is evident that the search report prepared in January 2016 revealed the Deceased and the Third Defendant as the Directors of the company. This search was said by the Second Defendant to have been provided for the drafting of the Agreement for Sale. The said Agreement for sale, drafted in the first week of January, 2016 names one Margaret Roberts, the Fourth Defendant, as Assistant Secretary of the company. This name did not and could not have appeared in the searches at that time as Margaret Roberts was not recorded as Assistant Secretary until the end of February 2016.
  
51. Both the appearance of the Deceased’s name on the company records prior to the Agreement for Sale and the appearance of the name of Margaret Roberts on the Agreement for Sale should have raised red flags in the minds of the Purchasers. Despite the fact that the record was eventually changed to reflect the Third and Fourth Defendants as Directors prior to the execution some four months later of the conveyance, these discrepancies detectable since January 2016 should have put a prudent purchaser on alert to perform further inquiries into the authority of those purporting to execute the sale.
  
52. Further, Counsel for the Defendant submits, without more, that it is clear that Ms. Samaroo’s search report contained all the necessary company documents that are required to be inspected when dealing with a company. However, they fail to have regard to the failure of Ms. Samaroo to explain why she did not include the annual returns which would have shown the company shareholding. In the present case, such an inquiry would have

raised further suspicion in the minds of the Purchasers as to why the information the Second Defendant had about the Third Defendant being the Principal was not reflected.

53. A proper search would have shown the Claimant's deceased husband as Principal since he was the majority shareholder. This should have put the Purchasers on inquiry to look for him instead of dealing with an unknown person resident in the UK. They would no doubt have discovered that he was deceased since 2013 and that in January 2016 the Company was not in a position to sell its sole valuable asset since there was only one living Director.
54. They would have seen that there was a living Secretary, a Mr. Bhagan and would have been put on inquiry as to why it was necessary to have the sale executed by a new Assistant Secretary. In short they would have been put on inquiries in January 2016 as to the fraudulent nature of the transaction geared to deprive the Claimant of her interest in the property.
55. The Purchasers submit in their closing arguments that there are many instances of legitimate transactions taking place where purchasers do not communicate with the majority shareholder. No supporting authority or evidence is provided.
56. However, it must be observed that this is a case of a company with only one director at the time the Purchasers allegedly made their offer to purchase its sole valuable property. The position remained the same at the time of preparing the agreement for sale. It was unusual and suspicious that even if they thought the Claimant's husband was alive so that there were two directors, communication was limited to the Third Defendant who was the minority shareholder at the time as well as being overseas.
57. Prior to concluding the conveyance, the Purchasers and their attorney either did not know of the change in directors or were put on notice of a change sometime between the conclusion of the agreement and the execution of the conveyance. This in itself would excite suspicion in a prudent purchaser, and coupled with the severely undervalued purchase price would have been enough to warrant further inquiry.

58. The Purchasers further contend that they have only a layman's knowledge of the law and would not have any understanding of the implication of the contents of corporate records. However, it was elicited in cross-examination that the Fifth Defendant indeed had knowledge of the differences between a company and a sole trader and that the Second Defendant had been in the business of buying and selling land for many years. It is patent that they would have some knowledge of what a shareholder is and what is prudent in a transaction such as this one.

59. The Purchasers both expressed ignorance of some aspects of the real estate business which I found to be improbable in light of their professional involvement in the business. For instance, the Second Defendant declared that he knew it was important to do a company search when transacting with a company. In fact, he did not leave it to an attorney to secure the search clerk but did so himself. On the other hand, he said he didn't know that he should require some written authority from the attorney-at-law he believed was authorized to conduct the sale and/or to receive monies on behalf of the Company selling the Property.

60. The Purchasers submit that it is really only the knowledge of their Attorney, Dale Kingston which is crucial in this regard. Yet, they failed to have her to testify on their behalf. Therefore, she cannot answer whether or not she did indeed have sight of all the corporate records. Indeed, she cannot give an explanation as to why the agreement for sale was drafted to include the Fourth Defendant prior to her being named as Director in the Notice of Change of Directors.

Witnesses

61. Overall, the Claimant and her witness, Mr Knott presented as credible witnesses in that their testimony was consistent with the pleadings. The Purchasers' cross-examinations, on the other hand, revealed inconsistency and uncertainties. One example was in the different indications of how the loan agreement was decided upon. Another was in relation to the application for a loan from Sagicor where the Fifth Defendant stated in her witness statement that she received a proposal but that it was too risky. Under cross-examination she indicated however, that she never received a proposal from them.

62. The failure to call the Attorneys-at-Law to support the Purchasers' case resulted in adverse inferences being drawn as to their credibility: See dicta of Rajnauth-Lee J (as she then was) in **Sieunarine v Doc's Engineering Ltd HCA No. 2387 of 2000**. The Purchasers have submitted that the onus was on the Claimants to call the Attorneys-at-Law involved in the transaction as their witnesses. However, the facts surrounding the transaction would be solely within their knowledge and the witnesses thereto. The Purchasers assert that the Attorneys-at-Law can support their defence of bona fide purchaser for value without notice. In order to prove their case they needed therefore to have them attend as witnesses. It is to be noted also that in answer to the statement of the Claimant's Counsel that she hadn't brought any of the lawyers as witnesses, the Fifth Defendant said "it was better for them maybe not to be here..."
63. The fact remains that the alleged but unproven involvement of Carol Ann Bernard/Carol Sears Bernard/Carol Ann Bernard Sears, as is referred to in different parts of the defence, is a critical part of the Purchasers' defence as they are relying on statements made by this person to prove that they were bona fide purchasers for value without notice of fraud. In fact, they rely on representations made by that person to prove that their transaction appeared to be above board. Further they aver that it was on that person's offer that they were made aware of the intended sale of the land.
64. Much of the Defendant's defence hinges on evidence that the Attorneys-at-Law could have given. For instance, Counsel for the Defendant declares that any notion that the attorney for the Purchasers would not have had sight of the corporate records with the change of directors made after 23 February, 2016 is "preposterous". There is, however, no evidence of that due to the failure of the Purchasers to call or summon this witness. As a result, the Court cannot infer that it was indeed done.
65. Counsel for the Purchasers now refers to the Attorney-at-Law for the Third and Fourth Defendants (and purportedly the First Defendant) as Carol Ann Bernard Sears. Nowhere in pleadings or witness statements was it stated or proven that Carol Ann Bernard and Carol

Sears Bernard were in fact the same person. Now it appears that the Purchasers have made that assumption without calling her as a witness in their case.

66. Counsel for the Purchasers provides in closing submissions hypothetical scenarios at [106](iv)&(v) regarding the Attorneys-at-Law in this case which are irrelevant to the issues herein but could perhaps have been ventilated at trial had these witnesses been called.

Findings as to issues (i) and (ii)

67. Having regard to all the above circumstances and discrepancies in the Purchasers' evidence surrounding the details of the transaction, I find that the Claimant has sufficiently proven on a balance of probabilities that the Purchasers were not bona fide purchasers for value without notice of fraud. It is apparent that there were many suspicious circumstances leading up to the transaction which should have raised red flags in the eyes of the Purchasers and caused them to question the legitimacy of the sale. Their case was further weakened by their failure to call relevant witnesses whose testimony could have provided further clarity on the role of the Purchasers in the transaction process.

68. Furthermore, the Purchasers cannot rely on the indoor management rule in the present circumstances to obviate the need to look further than the official company records. This is because the Purchasers, from the first search conducted in January 2016 would have been aware of the existence of the Deceased as a Director prior to the preparation of the Agreement for Sale. There is no evidence provided of what took place for their Attorney to have included the Fourth Defendant Margaret Roberts in that Agreement prepared in January 2016. As propounded in **K.P. McGuinness Canadian Business Corporations Law** (Second Edn, Lexis Nexis) at [6.82] p. 330:

*“[A] person may not rely on the indoor management rule where he or she has notice of the defect in authority. More generally, at common law, a person is not entitled to rely upon apparent authority where the circumstances are such as to put a reasonable person on notice that something is out of the ordinary and that there may be a defect in authority.”*

69. The present case is one where in all the circumstances the Purchasers were on notice since January 2016 because of the low sale price for the property together with the strange appearance of the Fourth Defendant in the Agreement prepared that month. The search prior to the sale agreement, coupled with the gross undervalue of the property and all the other suspicious circumstances outlined above are sufficient to put a reasonable purchaser on notice of some defect in authority.

70. The Purchasers submit, citing **S.25 Companies Act, Chap. 81:01**, that only in very limited circumstances must a prospective purchaser from a company make inspection beyond the corporate records. Regarding the doctrine of constructive notice, they submit that they did indeed make such inquiries and inspections as they ought reasonably to have done and further a search of corporate records prior to the sale could not have revealed any fraud.

71. However, this case does not involve a regular transaction for the sale of land. It involves

- i. a deal the Purchasers found out about by telephone call with a person they did not know but who, they say, said she was an Attorney for an ill Principal of the company that owned the property,
- ii. a conveyance for a significant undervalue,
  - a. executed by purported directors of a company who are both resident abroad, and
  - b. whom the Purchasers have never met or confirmed their identities,
- iii. a sale agreement prepared to be executed by a named person who a January 2016 search revealed was not even a director/officer of the company and another who was not the majority shareholder.

72. Given these circumstances it is the submission of the Claimant with which I find favour that further inquiries should have been made by the Purchasers. Such inquiries would have revealed the fraud in this transaction.

**Issue (iii) - The Just Resolution of the Claim requires that the Deed of Conveyance be set aside.**

73. It is my finding that even if the Claimant had not succeeded on the first two issues, there is merit in the submission of the Claimant that the justice of the case requires setting aside of the conveyance as the appropriate remedy for the company law oppression, having regard particularly to the fact that the Buccoo Property is the sole asset of the Company and that the Claimant's Majority Shareholding will be rendered valueless without this relief being granted.

**VI. Conclusion**

74. The Claimant has succeeded in proving her case against the Purchasers. She did so by presenting cogent evidence in support of her pleadings as to actual or constructive notice that the Purchasers must have had about the fraud involved in the sale of the property. On the Claimant's case it was proven on a balance of probabilities that it was more likely than not that the Second and Fifth Defendants may not have been the actual purchasers of the property, that they must have had notice of the glaring red flags pointing to a lack of authority to sell the property and they were aware that the sale price was at such an undervalue as to be a steal of a deal.
75. The Purchasers failed to prove on a balance of probabilities their bona fides in the transaction. The evidence presented regarding the loan arrangements with Mr. Hochoy Charles, so as to explain why his name was on the purchase cheques as payee, was so improbable and inconsistent that it lacked credibility. It was impossible for me to find it probable that the Second and Fifth Defendants were the actual Purchasers of the Property. They also failed in their testimony to refute the strong case presented by the Claimant that they had knowledge of and participated in the fraudulent aspects of the sale. My finding therefore is that they were not bona fide Purchasers and they had notice of fraud in the transaction

76. The Indoor Management Rule was inapplicable to allow them to rely on the Third and Fourth Defendants as having authority of the Company, since they would have been put on inquiry by the red flags to fraud highlighted in the Claimant's case. The justice of this case whereby the Claimant has succeeded in proving Company Law oppression, requires that the sale of the property be set aside.

77. The Claimant is therefore entitled to the remaining reliefs claimed in her claim form.

**78. IT IS HEREBY ORDERED:**

**I AS AGAINST THE SECOND AND FIFTH DEFENDANTS:**

- i. An order setting aside the Deed of Conveyance;
- ii. An order restraining the registration of the Deed of Conveyance in respect of the Buccoo lands in the Land Registry of Trinidad and Tobago;
- iii. An order for the production of the original of the Deed of Conveyance for its cancellation;
- iv. An order that the Second and Fifth Defendants whether by themselves, their servants and/or agents be restrained from remaining upon or performing any land works thereon of any nature whether by way of bulldozing or excavating any part of the said lands;

**II AS AGAINST THE THIRD DEFENDANT:**

- i. An order directing the Registrar of Companies to expunge the Notice of Change of Directors and the Notice of Change of Secretary/Assistant Secretary(ies) both filed in respect of MKJ Tobago Limited on 23 February, 2016; and
- ii. An order that the Third Defendant be removed as a Director from the First Defendant and that Lauren Thomas and Lu-Ann Forbes be appointed in his place as Directors of the First Defendant.

**III THE SECOND, THIRD AND FIFTH DEFENDANTS are to pay the costs of the Claim to the Claimant on the prescribed basis in the amount of Fourteen Thousand Dollars (\$14000.00)**

**Delivered on 9<sup>th</sup> April, 2018**



.....  
**Eleanor Joye Donaldson-Honeywell**  
**Judge**

**Assisted by: Christie Borely JRC I**