

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 21st June, 2017

Ruling

I. The Application

[1] The Claimant by application filed on the 13th January, 2017 seeks summary judgment against the Second and Fifth Defendants in this matter. The Fourth Defendant was not served. The First and Third Defendants have effectively been served, however, no appearance or defence has been filed by either party. Therefore the Claimant also seeks Judgment in Default of Defence against them.

II. Factual Background

[2] The Claimant's case alleges oppression and fraud against the Defendants. The Claimant contends that the First Defendant was incorporated on 17 April, 1998 and one month thereafter, it acquired a property in Buccoo, Tobago ("the Subject Property"). The Claimant alleges that the property was valued at \$1.5million in 2006 and \$3.5million in 2016. This is based on two valuation reports attached to the Claim.

[3] It is undisputed that the Claimant's common law husband, Michael Charles, was 75% owner of the First Defendant until his death in December 2013. The Third Defendant was the owner of the remaining shares. Upon the death of the Claimant's husband his shares were inherited by the Claimant, leaving her with the majority shareholding.

[4] Thereafter, it came to the Claimant's attention that the Third Defendant purported to fill the vacant director position left by her husband without her knowledge. She claims that a meeting of the shareholders was required to fill such a vacancy. She claims that she cannot locate the by-laws of the company but cites **S.77(2) of the Companies Act, 1995** which states:

"If there is no quorum of directors, or if there has been a failure to elect the number or minimum number of directors required by the articles, the directors then in office shall forthwith call a special meeting of shareholders to fill the vacancy and, if they

fail to call a meeting, or if there are no directors then in office, the meeting may be called by any shareholder.”

[5] In August, 2016 the Claimant visited the Subject Property and found that the ground was being excavated without her knowledge. Upon further investigation she realised the property had been sold to the Second and Fifth Defendants. The Claimant alleges fraud against the Second and Fifth Defendants based upon the following grounds:

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

[6] The Second and Fifth Defendants 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:

- a. 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.
- b. The selling price was not at a gross undervalue but at a negotiated discount from the valued price of \$1.2million.
- c. Although there was no pleading that the Second and Fifth Defendants had any personal contact with the Third Defendant, this did not lead to the conclusion that they had notice of any fraud, but rather that they relied on the ostensible authority of the Attorney-at-law for the company.

III. Decision

[7] It is my determination that Judgment in Default can be entered against the First and Third Defendants as, having considered the overriding objective of dealing with this case justly,¹ it is my view that granting the declaratory relief in default of defence is appropriate. This is so because:

- a. I have had the opportunity to consider not only the pleadings but evidence filed by the Claimant and I am satisfied, based on that evidence that they have made out a strong unanswered case against the defaulting Defendants.
- b. It is my finding that the making of the declarations claimed is essential as a first step to do justice to the Claimant.
- c. The declarations relate solely to allegations of oppression and fraud committed by the First and Third Defendants. They were duly served with notice of the Claim so there was sufficient opportunity for them to refute the allegations by participating in the proceedings. The only other parties that may be affected by the declarations are before the Court. As will be explained hereafter I have decided not to grant summary Judgment against them.

¹ The New Law Journal/ 2002 Volume 152/ Issue 7061, December/ Articles/ Anything to Declare? - 152 NLJ 1937

[8] Although granting the declarations against the defaulting Defendants will not unduly prejudice the interests of the parties before the Court, the grant of the other relief sought by the Claimant will in effect amount to a decision that defeats the interests of the other parties. Decisions will be deferred with regard to:

- a. whether to grant orders against the defaulting Defendants that the Registrar of companies be directed to expunge the Notice of Change of Directors and the Notice of Change of Secretary/ Assistant Secretary filed on February 23, 2016
- b. Whether to order that the Third Defendant be removed as a Director of the First Defendant and replaced with the Claimant and one Lauren Thomas.

IV. Issue

[9] The issue that has been determined in the present case as it relates to the non-defaulting Defendants is whether as prescribed at Rule **15.2 (a) of the Civil Proceedings rules, 1998** [“CPR”] there is on the record before the Court a defence on the part of the Second and Fifth Defendants that has a realistic prospect of success such that summary Judgment ought not to be entered in favour of the Claimants.

V. Procedural History

[10] Proceedings in this matter commenced with the simultaneous filing during the Court Vacation period on September 9, 2016 of the Fixed Date Claim supported by the Statement of Case as well as a Notice of Application seeking interim relief. The Notice of Application for interim relief was supported by an Affidavit of the Claimant sworn on September 8, 2016 and a Certificate of Urgency. An Affidavit setting out the means of the Claimant as evidence of her undertaking in damages to the Defendants was filed on September 13, 2016 and the Second Defendant was served the next day. The Second Defendant entered an Appearance on September 15, 2016.

[11] On September 18, 2016 at an inter partes hearing Boodoosingh J, presiding as emergency court Judge, granted parts of the interim relief sought based on an undertaking of the Second Defendant essentially not to finalise the conveyance of the subject property. Justice Boodoosingh adjourned the application to be heard by the docketed Judge on September 19, 2016. That date was vacated and instead fixed for September 28, 2016. By that time the Claimant had filed an Affidavit of Service on September 26, 2016 establishing that the First Defendant and Third Defendants had been served in accordance with directions given by Boodoosingh J. The Claimant also filed an Affidavit of Attorney Imran Ali dated September 28, 2016 attaching a valuation of the Subject Property.

[12] September 28, 2016, when the matter first appeared on my list as Docketed Judge, was the return day of the Application for Interim Relief. Additional interim orders were made further to the Claimant's request. The additional relief included a direction that the Second Defendant file an Affidavit providing information in answer to four specific questions posed by the Claimant seeking details of the sale of land transaction purportedly entered into by the First Defendant Company. The prior Undertaking given before Boodoosingh J regarding parts of the relief sought was to continue until further hearing.

[13] On the next hearing date of the adjourned Application for interim relief on October 18, 2016 the Court had before it an Affidavit of the Second Defendant dated October 10 expressly, as stated at paragraph one, intended as a response to the Notice of Application for Interim Relief filed by the Claimant.

[14] At the October 18, 2016 hearing directions were sought and granted for the Claimant to join the fifth defendant and amend its claim in view of information provided in the Affidavit of the Second Defendant. The Second and Fifth Defendants filed their Defence on January 6, 2017. Thereafter pleadings were closed and on January 13, 2017 the Claimant filed the instant Notice of Application for summary Judgment.

[15] The Fifth Defendants had not yet filed an Affidavit with responses to the four specific questions posed by the Claimant and the Fifth Defendant was given an extension of time

to do so by February 24, 2017. The Second and Fifth Defendants were also directed to file Affidavit evidence in response to the Application for Summary Judgment. Directions were given for written submissions to be filed by both sides in relation to the Application.

[16] There had at that stage been neither a Hearing of the Substantive Fixed Date Claim nor a Case Management Conference. The Claimant filed a Re-Amended Fixed Date Claim on February 3, 2017. An Affidavit in response to the Application for Summary Judgment was filed on behalf of the Second and Fifth Defendants on February 24, 2017.

[17] All hearings thus far related to the Application for Interim Relief and a decision as to whether undertakings would continue was still pending. There have to date been no directions for disclosure of documents or for filing of witness statements. Accordingly it cannot be said that full evidence was on record as it relates to the substantive claim.

[18] However, in submissions filed by the Claimant in support of the Application for summary judgment, repeated reference was made to the absence of sufficient evidence. For example it is submitted at paragraph 19 as follows:

“The Second and Fifth Defendants say in their Defence filed on January 06, 2017 that the Second Defendant was introduced via telephone to an Attorney, Ms. Carol Ann Bernard, who said she represented the Third Defendant who wanted to sell the Buccoo Property which was owned by the Company. This was sometime during April or May 2015. Pausing here for a moment that is unadulterated hearsay upon hearsay without the proper form in which to introduce same. The evidence here is grossly unreliable as neither Mr. Ross nor Ms. Bernard has deposed to any matter in these proceedings on affidavit. What is before the court is a third-hand account of what someone told someone about what someone told them, all of whom are not before the Court.”

[19] What appears not to have been taken into account by the Claimant in filing this application for Summary Judgment was the fact that the Defendants were not yet required to disclose

all evidence to be relied on for the Trial of this matter. All they had to do at this stage in compliance with the Court's directions was file an Affidavit, if necessary, and submissions to show that they have a realistic defence. This they have done. The Defendants are clearly aware that the evidence herein is not closed. At paragraph 25, for example, they say "*Though no evidence has been adduced **thus far** that the Second and Fifth Defendants contacted the Third Defendant personally, it cannot be argued that the failure to do so, affixes the Second and Fifth Defendant with notice of fraud, since the Third Defendant would not have revealed any fraud or impropriety in the sale.*" The Defendants have highlighted for emphasis the words "*thus far*".

[20] The Claimant's submissions are however clearly premised on the idea that the pleadings and evidence are closed. No consideration has been given, in the submissions of the Claimants that there is no Defence with a realistic prospect of success to any evidence that the Defendants may possibly present if the matter goes to trial.

VI. Law and Analysis

[21] The Claimant cites **Ryan and Ryan v Alexis CV2014-04725** for the relevant principles to be applied in an application for summary judgment. The Judgment sets out the law as follows:

"[16] Rule 15.2(a) Civil Proceedings Rules, 1998 ("CPR") provides:

"The court may give Summary Judgment on the whole or part of a Claim or on a particular issue if it considers that—on an application by the Claimant, the Defendant has no realistic prospect of success on his Defence to the Claim, part of Claim or issue."

[17] The Caribbean Civil Court Practice 2011 states at page 144:

*"The test under Part 15 is whether there is a real prospect of success in the sense that the prospect of success is realistic rather than fanciful; when undertaking this exercise, **the court should consider the evidence which can reasonably be expected to be available at trial.**"*

[18] In *Western Union Credit Union Co-operative Society Limited v Corrine Amman* (followed in *John v Allsop & ors*²) Kangaloo, J.A. gave the following guidance from *Federal Republic of Nigeria v Santolina Corp* [2007]EWHC 437 (CH) in dealing with applications for Summary Judgment:

“i) The court must consider whether the Defendant has a “realistic” as opposed to a “fanciful” prospect of success: *Swain v Hillman* [2001] 2 AER 91.

ii) **A “realistic” defence is one that carries some degree of conviction. This means a defence that is more than merely arguable:** *ED & F Man Liquid Products and Patel* [2003] EWCA Civ. 472 at 8.

iii) In reaching its conclusion the Court must not conduct a “mini trial”: *Swain v Hillman* [2001] 2 AER 91.

iv) This does not mean that the court must take at face value and without analysis everything the Defendant says in his Statements before the court. In some cases it may be clear there is no real substance in the factual assertion made, particularly if contradicted by contemporaneous documents: *ED & F Man Liquid Products v Patel* EWHC 122.

v) However, in reaching its conclusion **the court must take into account not only the evidence actually placed before it on the application for Summary Judgment but also the evidence which can reasonably be expected to be available at trial:** *Royal Brompton NHS Trust v Hammond (No 5)* [2001] EWCA Cave 550.

vi) Although a case may turn out at trial not to be really complicated, it does not follow that it should be decided without the fuller investigation into the facts at trial than is possible or permissible on Summary Judgment. Thus the court should hesitate about making a final decision without a trial, even where there is no obvious conflict of fact at the time of the application, where reasonable grounds exist for believing that a fuller investigation into the facts of the case would add to or alter the evidence available to a trial

judge and so affect the outcome of the case: Doncaster Pharmaceuticals Group Ltd v Bolton Pharmaceutical Co 100 Ltd [2007] FSR 63.” [Emphasis added]

[22] Importantly, as underscored by **Zuckerman**², “An applicant for summary judgment must establish that the respondent has no real prospect of succeeding; it is not for the respondent to show a real prospect of success.” Accordingly, the Claimant’s case must first be examined.

[23] The Claimant cites the case of **Wattley v Lopez and others CV2014-00845** as authority for her contention that “reckless indifference” or “calculated, wilful blindness” to consideration of a relevant matter can amount to fraud. The Claimant submits that the Second and Fifth Defendants exhibited such reckless indifference in their handling of the conveyance, particularly:

- a. The search report on title exhibited to the Defence is dated 7 January, 2016. It purports to examine documents that are around 11 years old.
- b. A Change of Address form dated 24 November, 2015 was included in the report, yet in the conveyance the previous address is used.
- c. The search report did not include the Sixth Schedule returns of the Company, which indicates the indebtedness of the Company.
- d. The Notice of Change of Directors stating that the Claimant’s husband ceased to hold office of Director is dated 25 January, 2016 and the Notice of Change of Secretary stating that he ceased to hold office of Secretary is dated 28 January, 2016. However, the search report upon which the Defendants rely as the basis for their conclusion that the Fourth Defendant was a Director was conducted prior to that on the 7th of January.

² Zuckerman on Civil Procedure-Principles of Practice, Third Edition at 9.51.

- e. Further, the agreement was prepared on 8 January, 2016 as evidenced by the date crossed out and replaced by 8 March, 2016. However, the Fourth Defendant was named as Secretary in the original draft.
- f. The date of execution of the deed of conveyance was stated by the Second Defendant to be on 9 June, 2016. However, the balance of the purchase price was not paid until 5 July, 2016.
- g. The Second and Fifth Defendants hastily set about clearing the Subject Property before the deed was registered.
- h. the purchase price was undervalued by around 30% even if the Valuation of the Commissioner attached by the Defendants is used.

[24] The Claimant cites the case of **Chan v Griffith HCA No. 5009 of 1996** as a comparator where the learned judge held that a sale at a reduction in value of around 30% was not only a bargain but a very considerable undervalue.

[25] The Defendant, however, relies on the “indoor management rule” as authority for their position that they were not required to look beyond the resolution shown in the search report. They claim that they were entitled 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**.

[26] They admit, that the rule does not apply in suspicious circumstances that would put an outsider on notice to inquire into the actual authority of a corporate officer (**Liggett (Liverpool) Limited v Barclays Bank Limited [1928] 1 KB 48**), but disagree that the circumstances of the present case evince such suspicion.

[27] They claim that they have established themselves as bona fide purchasers for value without notice of fraud through their investigation of the title of the Subject Property through the search report and that they have discharged their duty of due diligence having seen the

Change of Directors form and having conducted business through the First Defendant's purported Attorney-at-law. They further submit that the purchase price was merely a negotiated discount and is not significantly under-value.

[28] The Claimant has only raised the discrepancies concerning dates in the search reports outlined in [19] a. to f. above. Though not mentioned by the Claimant, another factor that may be relevant for consideration as to whether the Defendants knew of the interest of the Claimant based on the death of Michael Charles is the fact that neither of the Defendants paid for the property. The cheques for same were signed by Mr. Hochoy Charles. Could it be that the 3rd and 5th Defendants had actual knowledge of Michael Charles's death through Mr. Hochoy Charles when they were entering into the transaction. Would that have put them on notice to check to find out who was the new 75% owner of the company selling them the property? These issues raise questions of fact which may be further clarified by disclosure of documents, in witness statements filed by the Defendants and any other persons they choose to call and upon cross-examination of the witnesses.

[29] Therefore, there is need for further ventilation of what on the face of it is a realistic Defence at trial. Reasonable grounds exist for my finding that a fuller investigation into the facts of the case may add to or alter the evidence available and may affect the outcome of the case.

VII. Conclusion

[30] In conclusion, therefore, the Claimant's case, although strong, leaves some questions to be answered by the Defendants which must be determined at trial unless the matter is otherwise settled out of Court.

[31] The defence is not clearly hopeless. The determination whether the Second and Fifth Defendants were bona fide purchasers for value will turn on the strength of possible evidence to be tendered and witnesses written statements tested by cross examination. The strength of the case depends, for example, on whether the attorneys involved in the conveyance and Mr. Hochoy Charles who paid the cheque for the property are called. Did

the Defendants have access to information through Mr. Hochoy Charles that Michael Charles died and as such they deliberately ignored the new 75 percent owner?

[32] The Defendants' defence does have some realistic prospect of success as the case hinges upon the state of mind of the Second and Fifth Defendants leading up to the conveyance. Oral testimony may assist greatly in ascertaining their truthfulness. Accordingly this hearing will be converted to a Case Management Conference. I will give directions for disclosure, the filing of witness statements, expert evidence of the value of the property and propositions of law. A Trial date will be set for oral evidence, oral closing submissions and decision.

VIII. Decision

- a. Judgment in Default of Defence is awarded against the First and Third Defendants and the following declarations are hereby made:
 - 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 16th February, 2016 and filed on 23rd February, 2016 is invalid and fraudulent;
 - iv. A Declaration that the Appointment by notice dated 16 February, 2016 and filed on 23 February, 2016 of the Fourth Defendant as 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 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.

- b. A decision with respect to the award of other relief claimed against the First and Third Defendants is stayed pending determination of the Claims against the Second and Fifth Defendants.

- c. The First and Third Defendants are to pay the Claimant's costs on the prescribed basis.

- d. The Claimant's Notice of Application for Summary Judgment against the Second and Fifth Defendants is dismissed with costs of defending the Application to be paid by the Claimant to the said Second and Fifth Defendants.

- e. This hearing date of the Claimant's application is converted to a Case Management Conference.

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Eleanor Joye Donaldson-Honeywell
Judge

Assisted by:
Christie Borely, JRC I