REPUBLIC OF TRINIDAD AND TOBAGO

IN THE HIGH COURT OF JUSTICE
SAN FERNANDO

Claim Nos. C.V. 2009 - 01304
C.V.2009 - 01305
C.V.2009 - 01306

BETWEEN

KHAIMA PERSAD

Claimant

AND

STEPHEN BAIL

Defendant

Claim No. C.V. 2009-04190

BETWEEN

STEPHEN BAIL

Claimant

AND

KHAIMA PERSAD

Defendant

BEFORE THE HONOURABLE MADAME JUSTICE JONES

Appearances:

Mr. G. Mungalsingh instructed by Mr. R. Mungalsingh for the Claimant.

Mr. R. Bissessar instructed by Ms. J. Maicoo for the Defendant.

JUDGMENT

1. Between the years 2005 to 2008 Khaima Persad("Persad") and Stephen Bail("Bail") were friends and joint participants in certain business ventures. Persad was at all material times

the managing director of South M Construction Services Ltd ("South M"). Bail was at all material times a director and principal shareholder of TSI marketing Ltd.("TSI"). In addition Bail was the majority shareholder in two other companies, Protective Clothing Manufacturers Ltd and Joshua's Courtyard Limited.

2. In 2006 International Hardware Ltd ("IHL") was incorporated by Persad and Bail with equal shares being held by them both. Initially IHL operated from the Claxton Bay premises of TSI marketing Ltd by 2007 however, IHL was operating in two divisions. The first division operating out of the Claxton Bay premises of TSI ("the Claxton Bay division") was responsible for the administration and was under the control of Bail. The second division operated out of the Barrackpore premises of South M ("the Barrackpore Division") was responsible for sales and production and was under the control of Persad.

3. By the year 2008 however, the relationship had broken down and in 2009 Persad filed three actions against Bail and Bail filed one action against Persad. All three actions brought by Persad against Bail are for the return of money paid for a consideration which has wholly failed. The action against Persad is in respect to IHL and seeks in the main, that an account be taken and that, Persad compensate Bail pursuant to section 242(3)(j) of the Companies Act.

4. By an order made on the 1st April 2010 all four actions were consolidated. In accordance with the claim made by Bail in CV 2009-04190 on 13th July 2010 and in order to settle the outstanding issues as they related to IHL it was ordered by consent that the accounts of IHL from

its inception to date be audited by PricewaterhouseCoopers Ltd and the costs of the audit be borne by both parties equally and they be bound by the results.

5. CV2009-04190 having been dealt with by way of a consensual position on 10th November 2010 it was agreed that the remaining issues for my determination were:

(i) Was the sum of $181,188.00 paid by Persad to Bail for 20% shareholding in Protective Clothing Manufacturers Ltd and if so,what was the effect of such payment?

(ii) Was the sum of $1 million paid by Persad to Bail for 10% of TSI marketing Ltd and if so, the effect of such payment?

(iii) Whether the agreements dated 23rd February 2006 and 7th April 2007 were fraudulent; whether monies were paid under those agreements and if so, the effect of those payments?

6. By a letter dated December 2010 and put into evidence by consent the auditors indicated that after various meetings with the parties and based on advice received they were of the opinion that no useful purpose would be served by conducting an audit of IHL since:

(i) the only company assets existing at present were plant and machinery located at the Barrackpore division under the control of Persad which assets were not in use but were in reasonably good working condition;

(ii) the company did not have any material liabilities;

(iii) there were minimal receivable balances outstanding from customers;

(iv) the company did not have any debentures; and

(v) the company was no longer trading and as such had no financial statements.

7. In this regard and based on the parties acceptance of the auditor's position by an order made by consent on 18th January 2011 the parties agreed to appoint a valuator to value the equipment and machinery of IHL and to be bound by that valuation. No such valuation was ever put into evidence.

8. On 19th March 2011, after the witness statements had been filed in these actions Persad died and on 4th October 2011 Linda Persad was substituted as Claimant in his stead. Accordingly, evidence on behalf of Persad was by way of his witness statement filed on the 2nd March 2011 pursuant to a hearsay notice dated 6th October 2011 and the evidence of Rehanna Hosein-Dass ("Hosein-Dass") and Kevin Ravi Kawal ("Kawal"). Both Bail and Dean Rampersad gave evidence on Bail's behalf.

9. In the main the evidence of Kawal and Rampersad addressed the operations of IHL. According to Kawal he was employed with the Barrackpore Division as an accountant while Rampersad's evidence was that he was IHL's accountant and provided all the accounting services for the company.

10. With respect to the evidence presented at the end of the day, except for Hosein-Dass and Kawal both in effect employees of Persad, I was not impressed by the credibility of any of the three witnesses. With respect to the evidence of Rampersad from his manner and demeanour in the witness box it was clear that he was not an impartial witness. Indeed given his evidence in the matter, his actions with respect to the disputes between the parties and the manner in which

Bail totally relied on his evidence with respect to the issues surrounding IHL and his claim in oppression it is easy to come to the conclusion that he is the real Claimant in the IHL dispute.

11. In the circumstances, despite the fact that in his capacity as a qualified accountant he was able to proffer opinions and conclusions not available to lay witnesses, in my opinion his obvious lack of impartiality rendered these opinions and conclusions suspect. In addition Rampersad purports to give opinion evidence of the value of the equipment and machinery owned by IHL. I totally reject this evidence. At the end of the day while in his capacity as an accountant Rampersad is entitled to give opinion evidence on the book value of items in my opinion his expertise does not extend to allow him to assess their market value.

12. With respect to Persad for obvious reasons there was no cross examination of him despite this there were parts of his evidence which were either inherently incredulous or were contradicted by the documents presented. As a result I relied heavily on the contemporaneous documents presented in evidence while bearing in mind the fact that some of these documents were documents created by one or the other of the protagonists or on their behalf for the purpose of this dispute. At the end of the day, in my assessment of Persad and Bail I came to the conclusion that these were two businessmen who were too "smart" for their own good.

13. A lot of evidence both in chief and in cross-examination centred around the affairs of IHL. In my opinion given the issues for my determination and, as I will show later, the reliefs sought in CV2009-04190 at the end of the day much of this evidence was irrelevant and unhelpful except perhaps to my assessment of the credibility of the witnesses.

Issue 1

14. This transaction forms the basis of CV 2009- 01306 in which Persad as Claimant seeks the return of the sum of $181,188.00 from Bail. Persad's evidence is that by an agreement in writing dated 7th April 2007 he agreed to pay Bail the sum of $181,188.00 for a 20% shareholding in Protective Clothing Manufacturers Ltd. A copy of the said agreement was tendered into evidence by consent. According to the written agreement signed by both parties the sum of $181,180.00 was to be paid by Persad to Bail for the purchase of 20% shares in the company.

15. According to Persad he made the payment of $181,188 to Bail by way of four cheques and by applying the monies due to South M from TSI marketing Ltd on an invoice No.01/05. According to him Bail signed all the payment vouchers confirming receipt of the cheques. In addition the invoice was on his instructions endorsed by one of his employees indicating that the money was to be applied to the acquisition of the shares. The shares were never transferred to him.

16. This evidence was supported by that of Hosein-Dass, who was employed as an accountant with South M. According to Hosein-Dass she prepared the cheque payment vouchers on instructions from Persad. She says Bail would visit their offices to collect the cheques and she would give him the cheque payment voucher to sign for receiving them. According to her she personally saw Bail sign the relevant cheque payment vouchers. The four cheque payment vouchers, representing a total sum of $150,000.00, and the invoice No 01/05 for the sum of $31,188.00 were tendered into evidence by consent.

17. According to Bail he did not make or sign the agreement. He says that during that period he was abroad and produced copies of his passport with the relevant immigration stamps confirming this statement. With respect payment of the $181,188.00 he says that:

(i) cheque number 20145 represented a payment made to TSI by South M. pursuant to invoices issued by a related company.

(ii) The sum of $50,000 evidenced by cheque number 20353 constituted an investment made by Persad which was in fact repaid by him via a loan settlement to Intercommercial Bank with respect to IHL.

(iii) The sum of $50,000 evidenced by cheque number 21582 in the sum of $50,000 was a payment made by South M to TSI pursuant to various invoices issued by TSI for goods supplied to South M.

(iv) The sum of $10,000, as evidenced by cheque number 23890 relates to monies reimbursed by South M to TSI for payments made of behalf of Persad and;

(v) With respect to the invoice for $31,188.00 this invoice was paid by way of a Scotia bank cheque number 474 in the sum of $20,000 dated 4th May 2007. The balance of the $11,180 was settled by TSI as a credit given in respect of debt of $203,000 owed by South M to TSI.

18. With respect to his evidence it is important to note that Bail was not cross-examined on the evidence of Hosein-Dass with respect to his claim that he was out of the country when the agreement was purportedly made.

19. While it seems passing strange that an invoice dated January 2005 would not be paid

until May 2007 it is clear that this is not the only strange transaction between these parties. At the end of the day the burden of proof on this issue rests with Persad. The difficulty with Persad's evidence is that three of the cheque payment vouchers tendered into evidence are dated 2005 and one is dated 2006. Yet according to Persad the agreement for the purchase of the shares was made in April 2007.

20. In this regard I am faced with the evidence given by him that the payments made in 2005 relate to an agreement made in 2007. While the written agreement relied on by Persad refers to some interest in the company held by Persad the terms of the agreement suggest that the money was to be paid after the agreement was signed. In these circumstances the fact that the payments were made in 2005 does not accord with the terms of the agreement. Further the evidence of Hosein-Dass at best only confirms receipt of the cheques by Bail. She admits she knew nothing of the agreement between the parties and merely followed Persad's instructions with respect to the vouchers. In the circumstances I am of the opinion that Persad has not discharged the burden of proof upon him with respect to this issue. In the circumstances the claim brought by Persad in CV2009-01306 fails.

Issue 2

21. By his claim in CV2009-01304 Persad seeks the return of $1 million, which he says was paid to Bail for a consideration which wholly failed. It is not in dispute that the parties signed an agreement dated 23rd February 2006 by which in consideration of the sum of $1 million paid by Persad to him Bail agreed to transfer to Persad a 10% shareholding in TSI and

from which Persad would receive the sum of $10,000 a month. Neither is it in dispute that Bail received the $1 million and made nine payments of $10,000 each to Persad. Six of these payments in cash while three were settled as credit against receivables owed by South M to TSI.

22. According to Bail however the agreement was a sham prepared for the sole purpose of hiding the said $1 million from being divulged in matrimonial proceedings between Persad and his wife. According to Bail they agreed that the money would not be returned but would be used to fund the parties' future investments. He says that the payments amounting to $90,000 payments were made in order to give support to Persad's story of the investment.

23. I do not accept the evidence of Bail in this regard. The copy of the consent order in Persad's matrimonial proceedings confirms Persad's evidence that by 10th May 2005 the matrimonial proceedings between Persad and his wife had been resolved by way of a consent order which dealt with the property issues. Further it seems hardly likely that, despite the depth of the friendship between them at that time, Bail would have made payments amounting to some $90,000.00 on a sham agreement. In the circumstances I accept the evidence of Persad that by an agreement made in February 2006 he purchased a 10% share in TSI for the sum of $1 million. He claims the return of that sum on the basis that the consideration for the payment of the sum has totally failed. This, however, does not accord with his evidence.

24. According to Persad's evidence by virtue of the agreement in addition to the 10% share in TSI he was also entitled to the sum of $10,000 a month as a return on his invested shares. It is not in dispute that he in fact received 9 such payments. In the circumstances it cannot be said that

he is entitled to the return of the sum of $1 million on the basis that the consideration for this payment has totally failed. Accordingly I find that the agreement of the 23rd February 2006 is not fraudulent. Based on his pleaded case and the evidence adduced, therefore Persad is not in my opinion entitled to the return of the money or the sum of $312,423.15 as claimed in his submissions. Under normal circumstances Persad would in such circumstances be entitled to a declaration that he is the owner of a 10% share in TSI in accordance with the agreement made between himself and Bail. At the end of the day however a declaration is a discretionary remedy not only has this remedy not been sought by Persad, indeed this is to my mind confirmed by the nature of the submissions in this matter, but there has been some suggestion in the evidence that TSI is no longer in operation. In these circumstances I will not make such a declaration.

Issue 3

25. By his claim in CV2009-01305 Persad seeks from Bail the payment of the sum of $230,000.00 being monies due to him on the basis that it was money had and received by Bail for a consideration that has totally failed. According to Persad by a written agreement dated 7th April 2007 Bail agreed to sell to Persad two apartments situate at Joshua's Courtyard for the sum of $230,000. He says in accordance with that agreement at Bail's request he paid to TSI the said sum by way of three cheques numbers 0016; 0029 and 041 drawn on Intercommercial Bank Ltd.

26. Bail on the other hand denies making the agreement. According to him both he and his family were abroad during that period. He however admits receipt of the sum of $30,000 by cheque number 0029 which he says represents reimbursement for the purchase of a van TBX544

and the sum of $100,000 which he says represents an investment made by Persad in Joshua's Courtyard Limited. He says, however that this was repaid by him by way of a loan settlement to Intercommercial Bank Ltd on behalf of IHL.

27. Insofar as Bail claims to have been out of the country during the period 5th to 18th April 2007 this has not been challenged by cross-examination and is supported by the copies of the pages of his passport presented in evidence. In the circumstances I accept Bail's evidence in this regard. Accordingly in my opinion this claim being based on a written agreement made on the 7th April 2007 must also fail.

CV 2009 – 04190

28. This brings us to CV 2009-04190. Although this action concerns IHL the company is not a Defendant. It is not in dispute that Persad and Bail hold equal shares in this company. Nor is it in dispute that the company has ceased to operate. By this action Bail seeks the following orders:

1. An order that Persad provide all financial statements and accounts pertaining to IHL from its commencement date of operations to the present;
2. An order pursuant to Part 41.2 of the Civil Proceedings Rules that the court appoint an auditor as a referee to conduct a full audit of IHL's affairs so as to present a report of its present financial state which said exercise shall be supervised by the court;
3. An order that the account be taken pursuant to Part 42.2(2)(b) of the Civil Proceedings Rules of the net profits (or losses) of IHL ; and

4. An order pursuant to section 242(3)(j) of the Companies Act Chap. 81:01 that Persad compensate Bail as an aggrieved person for loss and damage suffered as a result of the Persad's actions as set out in the statement of case.

29. Persad on the other hand by way of counterclaim in these proceedings seeks an order for the payment to him of the sum of $592,264.57 being half of the difference paid by him with respect to IHL's loan with the Intercommercial Bank Ltd and the amount of $1,150,000 applied to the said loan from the encashment of Bail's annuity.

30. The first port of call with respect to the claim in these proceedings is the position of the auditor appointed by the court by way of a consent order pursuant to relief no.2. In this regard the first point to be noted is the findings of the auditor with respect to the usefulness of an audit in the circumstances. Based on the findings of the auditor, to which both parties agreed to be bound, it was agreed between Bail and Persad that the assets of IHL be valued and that they both be bound by that valuation, the understanding and that the only reasonable inference to be drawn from this position being that the parties themselves recognised the futility in pursuing an audit of IHL in the circumstances. Unfortunately no valuation was presented to the court.

31. The second point to be noted is the determination of the auditor that there were in fact no financial statements with respect to IHL. It is in this context that the evidence of Kawal on behalf of Persad and Rampersad on behalf of Bail is instructive. It is clear from the evidence of both Kawal and Rampersad that the documents presented to the court as the consolidated management accounts were prepared solely for the purpose of these proceedings. Further, even

at this stage, there was no agreement by both sides on the content of these recently manufactured accounts.

32. At the end of the day and in accordance with the terms of the consent order I accept the findings of the auditor appointed by the court and the parties and am of the opinion that in the circumstances no useful benefit would be achieved by orders in accordance with reliefs 1 and 3 above.

33. Accordingly, with respect to the claim in this action the only relief that remains outstanding is the relief sought pursuant to section 242(3)(j) of the Companies Act ("the Act"). In my opinion Bail is not entitled to such an order. Section 243(3)(j) allows the court in an action by a complainant alleging oppression to make an order compensating an aggrieved person. It cannot be disputed that Bail falls within the meaning of complainant under section 239 of the Act. In order to satisfy the requirements for relief Bail is required to satisfy me that he has met at least one of the criteria set out in section 242(2).

34. **Section 242(2)** provides that on an application pursuant to this section, the court may make an order to rectify the matters complained of where the court is satisfied that in respect of a company or any of its affiliates:

(i) any act or omission of the company or any of its affiliate's effects a result 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.

(ii) the business affairs of the company or any of its affiliates are or have been carried on or conducted 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.

(iii) the powers of the director of the company or any of its affiliate 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.

35. The onus of proof in this regard is on Bail. In order to satisfy the requirements for relief Bail is required to satisfy me that (a) he has met at least one of the criteria set out in section 242(2), and (b) such an order is necessary in order to rectify the matters complained.

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.

37. 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, or

oppressive, or unfairly prejudicial or similar conduct of the corporation." : **Paragraph 9.219, page 949**.

38. The proper defendant apart, it seems to me that Bail has not discharged the burden of proof placed on him by this section to satisfy me of the need for such an order. In this regard by his statement of case Bail contends that the business and affairs of IHL have been and or is being carried out or conducted by Persad in a manner that is oppressive, or unfairly prejudicial to or unfairly disregards his interests as a joint and equal shareholder, director and investor in that:

(i) he has been excluded and prevented from participation in its management; and

(ii) the affairs of IHL have been carried on by Persad as though he was the sole shareholder and entitled to sole and exclusive dominion and control.

39. It is in these circumstances that Bail seeks an order for compensation from Persad pursuant to section 242(3)(j) of the Act. Contrary to the submissions of Bail's attorney this is not a claim for restitution but rather for compensation pursuant to section 242(3)(j) of the Act.

40. Insofar as the evidence in support of these contentions is concerned Bail's evidence is scant. His evidence merely is that in March 2007 Persad took the decision to transfer all the production and sales to Barrackpore and that is when all the problems started because he never accounted for the sales which were very profitable. That apart Bail merely states that he agrees with everything said by Rampersad in his witness statement.

41. In this regard Rampersad in his evidence confirms Bail's statement as to the failure of Persad to account for the sales and revenue of the Barrackpore Division. Insofar as the other complaints are concerned, Rampersad gives evidence of:

(i) a special resolution, filed with the Companies' Registry on 10th April 2007 signed by Persad on behalf of IHL which advises of decisions taken at an extraordinary meeting of IHL held on 2nd April 2007. According to Rampersad, neither he, Bail, or the other director Melissa Deoraj were present at this meeting. In this regard what Rampersad does not say is whether or not they were given notice of this meeting.

(ii) A board meeting convened on 25th July 2007 at which both he and Bail were present. According to him at that meeting unknown to him, Persad took the decision to exclude Bail from IHL's operations and Rampersad as its accountant. In support of this he refers to a notice of change of secretary filed on 30th July 2007 signed by Persad as director of IHL which advises that from 27th July 2007 Garnet Mungalsingh, attorney at law, was appointed secretary of IHL in place of Bail. Again no details are given by him of what transpired at the meeting and the circumstances in which such a decision was made in his absence. Of more importance is the fact that there is no evidence of Bail's position in this regard.

(iii) A statement of charge filed by Persad on behalf of IHL on the 9th October 2007 recording a debenture over the assets of IHL in favour of Republic Bank Ltd. stamped to secure the sum of $700,000. He says that this

debenture was subsequently upstamped on the 6th of March 2008 to secure the sum of $1 million. According to him Bail was unaware of these transactions.

(iv) Bail and himself being shut out of the Barrackpore Division.

42. Persad on the other hand denies any failure on his part to account for the sales and revenue of the Barrackpore Division. According to him, prior to March 2007, the Barrackpore division was responsible for production while the Claxton Bay division was responsible for sales, administration and ensuring that the loan was paid. He says all monies received from any ad hoc sales by the Barrackpore division was remitted by him to Bail at the Claxton Bay division. According to him Bail received all monies related to IHL.

43. He says that by a letter dated 27th August 2007 from Bail and signed on his behalf by Rampersad Bail sought the cessation of the joint-venture arrangement between them. According to him, this letter effectively bought an end to Bail's involvement as a director of IHL and thereafter he, Persad, made decisions as director IHL and Bail took no part in the running of the company.

44. On the evidence therefore it is not in dispute that by at least the 27th August 2007 Bail had been excluded from the management of IHL. In this regard therefore two questions arise: (a) was such exclusion voluntary or was Bail forced out; and (b) if he was forced out are the circumstances such that would persuade this court to make an order "to rectify the matters complained of".

45. With respect to (a) three things stand out:

(i) the copy of the letter of 27th August tendered into evidence refers to a separate restructuring proposal by Bail enclosed in the letter to address the difficulties which had arisen. For some reason this attachment was not put into evidence.

(ii) absolutely no mention is made of this letter by either Bail or Rampersad in the their evidence.

(iii) by his defence in CV 2008-0134 Bail pleads an agreement made between himself and Persad in March 2008 by which he states that, among other things, Persad would obtain the benefit of all Bail's shares and interest in IHL so that Persad would have and maintain full control of IHL and obtain all the revenues therefrom.

46. It would seem to me that based on these facts it is reasonable to come to the conclusion that at least from the 27th August 2007 Bail was willing to step away from the management of the company. With respect to the position prior to August 2007 I am not satisfied that Rampersad's evidence is sufficient to discharge the burden of proof on Bail in this regard.

47. Of relevance to (b) is the fact that the company is no longer in operation and that this position had predated Persad's death as confirmed by the auditor's letter. Further it is clear from the letter of 27th August and, according to Bail in his defence in CV 2008-0134, the agreement of March 2008 that before this hearing the parties had themselves arrived at a solution remedying whatever impasse there may have been between them.

48. It seems to me that in the circumstances, even if I accept Rampersad's evidence and find that with respect to IHL prior to 27th August, the actions of Persad amounted to an oppression or an exercise of his power in a manner which was unfairly prejudicial to or unfairly disregarded the interest of Bail as a shareholder, officer or director of the company in my view, given the position adopted by the parties subsequent to August 2007 and as admitted by Bail in his defence to CV2009-0314 and the fact that the company is no longer in operation there is no longer any need for an order by this court to rectify the matters complained of.

49. Persad on the other hand by way of counterclaim in these proceedings seeks an order for the payment to him of the sum of $592,264.57 being half of the difference paid by him with respect to IHL's loan with the Intercommercial Bank Ltd and the amount of $1,150,000 applied to the said loan from the encashment of Bail's annuity. The evidence on this counterclaim comes from Persad in his witness statement. To some extent this evidence is supported by the letter dated 20th September 2010 from the Intercommercial Bank Ltd and the statement of the auditors in their letter of December 2010 to the effect that there are no outstanding liabilities due from IHL.

50. The difficulty with the counterclaim is that this is not a winding up action. Neither is this a claim against IHL on whose behalf the money was paid. This is a claim against Bail in his personal capacity. There is no allegation that the payment was made pursuant to an agreement made between the parties that Persad would be repaid a half of all monies paid by him on behalf of IHL. It is perhaps for this reason that attorney for Persad in his submissions indicated that no

relief was being sought in regard to the counterclaim. In these circumstances no order is made on the counterclaim.

51. Let me say here that in any event even if there was no need for the company to be the Defendant in this action Bail had satisfied me that he was entitled to an order pursuant to section 242 of the Act, given the history of the transactions between the parties, including the transactions the subject of the counterclaim, in my opinion an order for compensation is not appropriate. Were I minded to make an order under the section, the more appropriate order would be one for the winding up of the company. It is clear to me that these parties operated IHL in a manner analogous to a partnership. It is also clear that prior to the institution of these proceedings there existed circumstances which would justify the dissolution of that partnership. It cannot be disputed that circumstances such as these could induce court to order the winding up of a company under the just and equitable grounds: **Re Yenidje Tobacco Company [1916] 2 Ch. 426.**

52. At the end of the day however Bail has not satisfied me that he is entitled to an order under this section. In any event, given the fact that the company has ceased trading; there are no outstanding liabilities and the only assets are the machinery and equipment, the value of which is unknown to me, I am not convinced that an order for the winding up of the company by the court will make financial sense. In the circumstances, even if such an order was open to me, I would not in these proceedings make an order for the winding up the company.

53. Accordingly I am of the opinion that insofar as actions CV 2009-01304; CV 2009 – 01305 and CV 2009-01306 are concerned they have not been proved. With respect to CV2009-01304, while it is open to me to declare that Persad is the owner of a 10% share in TSI in accordance with the agreement made between himself and Bail, at the end of the day a declaration is a discretionary remedy. Not only has this remedy not been sought by Persad, but the intercompany dealings have been such that I am not comfortable in making such a declaration. Indeed to my mind this position has been validated by the submissions made on Persad's behalf in this matter. Further there has been some suggestion in the evidence that TSI is no longer in operation. In these circumstances I will not make such a declaration. In the circumstances these actions are dismissed.

54. With respect to CV 2009-04190 the result is the same. The claim and counterclaim in this action is also dismissed. On the issue of costs in all the circumstances it seems appropriate that there be no orders to costs on any of the claims or the counterclaim.

Dated this 20th day of March, 2012.

Judith Jones
Judge