REPUBLIC OF TRINIDAD AND TOBAGO

IN THE HIGH COURT OF JUSTICE
(TOBAGO)

CV2010- 00433

BETWEEN

LENNOX GIFT

Claimant

AND

OSWALD GIFT

First Defendant

CITI HARDWARE LTD

Second Defendant

ECOCITI RESORT AND CONDOMINIUMS LTD

Third Defendant

BEFORE THE HONOURABLE MADAM JUSTICE JUDITH JONES

Appearances:

Mr. M. George instructed by Ms. C. Bernard for the Claimant.

Mr. C. Gift S.C., instructed by Mrs. J. Gift for the Defendants.

JUDGMENT

1. In this action the Claimant, the brother of the First Defendant, claims to be a co-owner of the defendant companies and alleges that the affairs of both companies are being operated by the First Defendant in a manner which is unfairly prejudicial and oppressive to his interest. He seeks therefore orders pursuant to section 242 of the Companies Act Chap. 81.01("the Act").

2. **Section 242(2)** of the Act mandates a Court to provide relief pursuant to section 242 (3), for the purpose of rectifying the matters complained of, to a complainant who satisfies the Court with respect to a company or its affiliates that:

(i) an act or omission effects a result; or

(ii) the business or affairs have been carried on or conducted in a manner; or

(iii) the powers of the directors of the company are or have been exercised in in a manner;

that is oppressive, or unfairly prejudicial to or unfairly disregards the interests of any shareholder or debenture holder, creditor, director or officer of the company.

3. For the purpose of section 242 of the Act **section 239** provides that to be a complainant a person must be either:

(a) a shareholder or debenture holder, or former holder of a share or debenture of a company or any of its affiliates;

(b) a director or officer, or former director or officer of the company or any of its affiliates;

(c) the Registrar; or

(d) any other person who, in the discretion of the Court, is a proper person to make an application under this part.

4. Much of the evidence in this case was taken up with the financial input of the Claimant in the two defendant companies. Insofar as the Claimant's financial input into the companies is relevant it is essentially for the purpose of determining whether the Claimant can be considered a

complainant under the Act, and insofar as it may be necessary to show that the acts complained of are unfairly prejudicial to him in the capacity in which he complains.

5. In similar vein much of the First Defendant's evidence related to what he claimed were withdrawals by the Claimant from the accounts of the Second Defendant and unauthorised appropriation of materials from the hardware business. While this may be relevant with respect to my determination of whether the acts complained of are unfairly prejudicial to the Claimant again it must be noted that there is no counter claim, whether by way of a demand for the repayment of the money or by way of set-off, by any of the Defendants herein.

6. As best as I can determine, and in the absence of any specific submission by the Claimant as to whether he relies on section 242(2) (a), (b) or (c), from his statement of case and the evidence led by him it would seem that the Claimant bases his case on subsections (b) and (c) that is, he alleges that the business or affairs of the defendant companies have been carried on or conducted and the powers of the directors have been exercised in a manner that is oppressive or unfairly prejudicial to him as a director and co-owner of the company. In this regard he contends that it is the First Defendant who has orchestrated this situation.

7. This case was commenced by a claim form and statement of case. In his statement of case the Claimant alleges that he was at all material times, together with the First Defendant, the co-owner of the defendant companies and up until 2009 a director of the defendant companies. According to the statement of case in late 2006 the Claimant discovered that he was only receiving 1/10 of his share of the profits. He pleads that from the beginning of 2007 the First Defendant effectively excluded him from the management of the business. He says that from that

time he has been given no account of the operations of either company and has received no dividends, profits, income or benefit from either of the companies. Nor has he received any notices or minutes of board meetings.

8. In particular, he alleges that:

(i) on 15th January 2007 the First Defendant unilaterally changed the name of the Second Defendant from Career Institute of Technology and Information Company Limited to its present name;

(ii) in June 2009 he received a letter indicating that he had been removed as a signatory to the companies' bank accounts;

(iii) without his knowledge or consent his name had been removed as a director of both companies on 26th February 2009 and 28th May 2009;

(iv) on the instructions of the First Defendant he has been refused entry to the office and the hardware business operated by the Second Defendant;

(v) the First Defendant has been contemptuous in his disregard for the Claimant's request for information with respect to the companies and has refused to return his calls.

Despite all of this he remains liable for the financial obligations of the companies.

9. By their defence, while admitting that the Claimant was an incorporator and one of the original directors of both companies, the Defendants deny that the Claimant is a co-owner of either of the companies or that he contributed financially to the companies. According to the defence the Claimant’s involvement in the business was merely as a means of expressing a debt

of gratitude and appreciation to him as his eldest brother and mentor and has no reflection on the nature or the extent of the Claimant's financial contribution which they aver was almost nil.

10. With respect to the Claimant's specific allegations the Defendants do not deny the change of name, the removal of the Claimant as a director and as a signatory to the companies' banking accounts. Neither do the Defendants deny that they failed to pay any dividends, profits or income to the Claimant since 2007, or to provide any accounts to the Claimant. In response the Defendants deny that dividends were ever paid by either of the companies or that any requests were made by the Claimant for accounts. The Defendants further aver that the Claimant was properly removed as a director but provide no particulars with respect to this plea.

Issues for my determination

11. In accordance with the Act to be entitled to relief under section 242(3) the Claimant must first establish that he is a complainant within the meaning of the Act. As a former director the Claimant qualifies as a complainant and is therefore entitled to seek redress pursuant to section 242 of the Act. While no shares have been issued with respect to either company as an incorporator the Claimant also qualifies as a shareholder of both companies. The Act defines shareholder in relation to a company by reference to section 107(1). This section defines a shareholder of a company as including a person who is a member of the company under section 349(3). Section 349(3) defines a member in relation to a company as including an incorporator of the company.

12. In my opinion therefore the question of whether shares were issued to the Claimant is irrelevant to his capacity as a complainant. Further if he is deemed to be a co-owner of either or both of the companies then, in my view, even if he was not a shareholder within the meaning of the Act or a director, he would qualify as a complainant under section 239 (d), that is, he would qualify as a person who was a proper person to make an application under section 242.

13. Since the question of oppression and unfair prejudice is to be determined with reference to the capacity in which the complainant claims[1] the issue of whether the Claimant is a co- owner of the company is of utmost importance. It is clear that if the pleas in the defence are proved then the Claimant would be hard pressed to establish any unfair prejudice towards him in his capacity as a director or incorporator since according to the Defendants these appointments were gratuitous.

14. The first issue for my determination therefore is whether the Claimant is a co-owner of either or both of the companies. The second issue for my determination is whether the business or affairs of either company have been carried out or conducted or the powers of the directors exercised in an oppressive or unfairly prejudicial manner with respect to the Claimant in the capacity in which he complains. At this stage the onus of proof on these two issues is on the Claimant. Finally, if the answer to the second question is yes, then I must determine the relief to which the Claimant is entitled.

[1] Jamadar J in Eugene Lopez v TSTT and RBTT HCA No. 1997 of 2003,

THE EVIDENCE

The undisputed facts

15. The Second and Third Defendants were incorporated by the Claimant and the First Defendant in April 1999. There is no evidence of any shares being issued at the time of or at any subsequent time after the incorporation of either company. At the time of the incorporation of the Second Defendant there were three directors, the Claimant, the First Defendant and Lawrence James.

16. Initially the Second Defendant was known as Career Institute of Technology and Information Limited. This name was changed to its present name in January 2007. With respect to the Second Defendant by a notice dated 28th May 2009 signed by the First Defendant notice was given to the Registrar of Companies of the removal of the Claimant as a director and the appointment of two new directors, Sophia St Rose-Mills and Samantha Gift. With respect to the Third Defendant by a notice of change of directors dated 25th February 2009 and signed by the First Defendant notice was given that on 13th February 2009 two directors, the Claimant and Sharon George, ceased to hold office as directors and that two persons, Sophia St Rose-Mills and Samantha Gift were appointed directors.

17. None of these other directors or former directors sought to assist in these proceedings. Nor is it alleged that any of them have made any contribution, financial or otherwise to either company. From the evidence it is clear that the only persons contributing to the welfare of the companies were the Claimant and the First Defendant.

18. Insofar as the Second Defendant is concerned in his statement of case the Claimant refers to and annexes as proof that he and the First Defendant had built up a flourishing business a copy of what he says are audited accounts of the Second Defendant for the year ending 31st of October 2006 ("the financial accounts"). It is from this document that he says he came to the conclusion that the First Defendant was not being totally honest with him with respect to the viability of the Second Defendant. The Defendants do not deny these financial accounts which were tendered into evidence as an agreed document.

19. Despite that fact that this is an agreed document it must be noted, however, that the financial accounts do not provide the name of the auditors. Nor is it signed by them or the directors. There are corrections made in writing, which are illegible and there is no indication by whom they were made. In addition some of the mathematical calculations are obviously incorrect. Two versions of this document were tendered into evidence. The second version, tendered by the Claimant in his witness statement does not contain page 8. It is in fact, page 8 which contains the illegible corrections made in writing. In the circumstances while the complete document is properly in evidence in my opinion I can place no weight on the contents of or veracity of these accounts so far as it may suggest the financial viability, or lack thereof, of the Second Defendant. Insofar as these accounts may be relevant it is in my opinion only with respect to their effect on the relationship between the Claimant and the First Defendant, the First Defendant's credibility and insofar as it suggests the manner in which the companies were run.

20. Insofar as the defendant companies are concerned the assets of the Second Defendant include (i) an interest together with the First Defendant and the Claimant in a parcel

of land situate at Pascal Village Street acquired in 2005 and more particularly described in deed of conveyance registered as DE 200600269570 (ii) an interest together with the Claimant in two adjacent parcels of land more particularly described in deed of conveyance registered as DE2001 02055893 and (iii) a building and car park situate on the above-mentioned parcels of land.

21. The assets of the Third Defendant include (i) a parcel of land situate at Sherwood Park, comprising 917.7 m^2 more particularly described in deed of conveyance registered as No. 21349 of 2000 (ii) a parcel of land situated at All Fields Trace Lowlands and (iii) buildings on that parcel of land.

22. Insofar as the Third Defendant conducts any business it is the rental of premises. Although the Second Defendant also rents two floors of the building situate at Pascal Village Street to the Tobago House of Assembly in the main it operates two businesses, a computer business and a hardware business. The Claimant had no input in the running of the computer business.

The contested facts

23. Evidence in this action was given on behalf of the Claimant by the Claimant and three of his brothers and on behalf of the Defendants by the First Defendant and an employee of the hardware business. The evidence of the employee did not assist with respect to the issues of fact for my determination.

(i) The evidence led on behalf of the Claimant

24. With respect to his contributions to the defendant companies the Claimant states that he and the First Defendant made equal contributions of cash, collateral and working capital to start the companies. He says that they shared the operating responsibilities and the debts and obligations of the company. According to him at the time of incorporation the asset base of the Second Defendant comprised 50 computers with an estimated value of $300,000 and a stock inventory with an estimated value of $100,000.

25. While in his witness statement he does not give any specifics with respect to his contribution to this asset base he does however say that he later contributed the sum of $130,000 from the sale of the two motor vehicles as well as his interest in premises situated at Pascal Street Village, Lambeau, the sum $480,000 and the benefit of a loan which he obtained from his employers. He also says that he received $150,000 from his brother Hugh by way of a loan. He however gives no evidence of applying this sum to any of the companies. Under cross-examination the Claimant accepts that he made no contribution to the computer and computer related inventory used to start-up the business.

26. With respect to his interest in premises situated at Pascal Village Street ("Lambeau") the Claimant says that he and his brother Rawle were the owners of two parcels of land: the land at Pascal Village Street and land at Government House Road. He says that by way of an arrangement made between him and Rawle, Rawle gave up his interest in Pascal Village Street to the Claimant and the Claimant gave up his interest in the Government House Road land to Rawle. Since the Government House Road property was the more valuable of the two parcels

of land Rawle also paid him the sum of $480,000. Pursuant to this arrangement Rawle transferred his interest in the Pascal Village Street property into the names of the First Defendant, the Second Defendant and the Claimant. The Claimant says that he gave the cheque for $480,000 to the First Defendant to deposit into the Second Defendant’s account.

27. According to him the land at Sherwood Park was purchased and then mortgaged to Republic Bank. In fact the mortgage deed which he says evidences this transaction confirms that the land was mortgaged to Republic Bank but that the borrower was the Second Defendant while the Third Defendant was only a surety. According to the Claimant the monies raised was then used to erect the apartments on the Sherwood Park property which was in the Third Defendant’s name.

28. With respect to the loan obtained from his credit union the Claimant says that this was used to purchase two parcels of land in Pascal Village Street adjacent the first parcel of land. This land was bought in the names of the Claimant, the First Defendant and the Second Defendant in the year 2001. According to the Claimant he paid the monthly instalments on the loan by way of salary deductions until he retired. He says from 2004, when he retired, the loan was paid through the Second Defendant's account. The Claimant says that he also liquidated a car rental company which he owned and injected the proceeds into “the business”. No details are given by him as to how much money was received from the liquidation of this company or how much was injected into the business or to which business.

29. According to the Claimant while the building on the Pascal Village Street

property was under construction he was responsible for sourcing all the materials required by the contractor. He also located the electricians, plumbers and contractors from Trinidad. With respect to these contractors he says he housed them at his home for long periods while the building was being constructed. Thereafter, when the hardware business had been established, he says that he worked in the hardware three days a week. He was also responsible for going to Miami to buy supplies for the hardware business and to Trinidad to clear the containers.

30. In order to obtain financing to expand the business from solely computers to include the hardware business, the Claimant says the Second Defendant obtained a loan and an overdraft facility from Republic Bank. He says the security for the loan comprised money market funds, a life insurance policy, which he held and the proceeds of the US dollar income fund held by himself and the First Defendant.

31. With respect to the acts of oppression and unfair prejudice the Claimant says that between the years 2002 to 2006 by way of direct payments into his personal account he received from the First Defendant sums of money representing his share of the profits. According to him from about 2003 he received approximately $100,000 to $120,000 a year as his share of the profits. The Claimant does not however make a distinction between the defendant companies with respect to these profits. He says that at the time he thought those payments reasonable. He says, however, he subsequently discovered a financial statement for the year 2006 for the Second Defendant which he says showed that after taxation the net profit of the company was $892,453. This, he said, was contrary to the First Defendant’s indication that they had operated at a loss for that year.

32. He says that when he confronted the First Defendant and asked him for an account of the true net profit of the defendant companies the First Defendant refused to give him any statement of revenue or expenses on the basis that the financial arrangements were under his portfolio. He subsequently discovered from the bank that without his knowledge there had been a request for an increase in the overdraft facility with respect to the Second Defendant.

33. In or around December 2006 he became ill and had to undergo surgery. According to him within three weeks of falling ill and requesting the information from the First Defendant the name of the Second Defendant was changed. Since that time he has only received the sum of $40,000 drawn on the Second Defendant's account pursuant to his request for financial assistance, the sum of $50,000 in 2008 and the sum of $17,500 in 2009 for the payment of the instalments of the loan taken by him from his credit union. Despite his requests he states the First Defendant has refused to give him any information about the company and has stopped taking his phone calls.

34. In June 2009 while he was recovering from the last of his surgeries a letter was sent to him from the First Defendant informing him that he had been removed from the Second Defendant’s bank accounts. Subsequent enquiries revealed that the bank had all the relevant documents necessary to remove his name from the accounts including a consent form purportedly signed by him. He says he never signed this document. Thereafter he says the First Defendant refused him entry into his office and the hardware and he learned that he had been removed as a director of both defendant companies. Sometime thereafter, he received a letter from Republic bank dated 22nd June 2011 which indicated that they were holding him

responsible for the repayment of the sum of $2,043,000 should the Second Defendant default on its debt with them.

35. By way of dealing with the First Defendant's allegations of payments to him he says that up until the year 2006 any cheques paid to him were for the purpose of purchases made for the company or for clearing cargo and paying customs duty. He accepts under cross - examination however that the sum of $94,266 was paid by the Second Defendant towards the loan instalments with his credit union over the period November 2003 to June 2009.

36. Three of the Claimant's and First Defendant's brothers, Eric, Rawle and Hugh, gave evidence in this action, all in support of the Claimant. According to Eric and Rawle the First Defendant had no interest in the land at Pascal Village Street. In addition Rawle confirms that as a result of the arrangement between himself and the Claimant he gave the Claimant a cheque for $480,000 made out in the Claimant's name. According to the brother Hugh he lent the Claimant and the First Defendant the sum of $150,000 on the understanding that the Claimant would be liable for any default in the repayment. By and large, neither the Claimant nor his witnesses were shaken by the cross-examination.

(ii) The evidence led on behalf of the Defendants

37. According to the First Defendant's evidence in chief the Claimant's involvement in both companies was solely as an incorporator and a director. He says that his decision to

include the Claimant in both of the companies had nothing to do with either the Claimant's contribution or any expectation that the Claimant would advance the business, but solely because of the regard and sympathy he had for the Claimant as a big brother.

38. According to his telling both companies were his idea and financed solely by him. He says he returned from the United States with a 40 foot container containing items to establish a computer-related business in Tobago. While he places the value of these items at in excess of 1 million TT dollars he provides no support for his opinion as to their value. He specifically denies that the Claimant either contributed the two vehicles or the proceeds of their sale to the Second Defendant.

39. With respect to the Pascal Village Street property he accepts that it was the Claimant who proposed using the land to construct a building from which the First Defendant could operate. While he accepts that the land was in the Claimant's and Rawle's name solely the First Defendant states that he contributed to the money used to acquire the land but because he was a minor at the time that his name was not put on the deed. With respect to the land at Government House Road, he says that while this property was in the name of the Claimant and Rawle it was only held by them on trust for a company in which he had a 50% interest. He accepts that he received the sum of $480,000 and says that he placed that money in the Second Defendant.

40. With respect to purchase of the two additional parcels of land on Pascal Village Street according to the First Defendant he paid the sum of $17,000 of the purchase price out of

his personal funds. He accepts that the balance was funded from the proceeds of a loan taken by the Claimant from his credit union. According to him the Claimant made the unsolicited offer to personally finance the balance of the purchase price. He says the Claimant gave the assurance that he would be personally responsible for the repayment of the loan and willingly agreed that the land be owned by the Second Defendant.

41. With respect to the acquisition by the Third Defendant of the Sherwood Park property and All Fields Trace property he says that these purchases were financed solely by him. With respect to the Sherwood Park property he says that the money for the purchase came from his personal funds. With respect to the All Fields Trace property he says that the acquisition of the land and the erection of the buildings on the land came from an interest-free loan made to him from a friend.

42. According to him the initial construction of the building on the Pascal Village Street property began in the latter part of 1999 and was financed solely by him. This building was completed in 2001 with the income from the computer school and the rental income from an apartment complex at Dove Street and a condominium in the United States both owned by him. After the acquisition of the adjoining two parcels and the completion of the building he was approached by the Claimant who proposed that they open a plumbing and electrical store to operate from that building and with which the Claimant would become regularly involved. According to him, the Claimant wished to have some form of income on which he could rely when he retired.

43. The financing of the establishment of the hardware, he says, was as a result of the mortgage of the Sherwood Park property which according to him was at that time in the name of the Second Defendant. The Third Defendant was a surety to this loan. He accepts that the Claimant contributed an insurance policy to the initial start-up of the business. He says he contributed a $100,000 certificate of deposit as well as a US dollar income account as security.

44. With respect to the allegations of improper behaviour the First Defendant says that the name change of the Second Defendant was prompted by a dispute with the VAT office and not for any ulterior motive. According to him in December 2006 an application for the name reservation was made and the directors approved this in January 2007.

45. He says no payments with respect to dividends or profits were ever made by either company. With respect the viability of the Second Defendant he states that by 2008 the Second Defendant was struggling to survive. This, he says, is apparent from the financial accounts. According to him the sum of $1,060,550 attributed to amounts due to the directors in fact represents money injected into the company by him from his own personal funds.

46. According to the First Defendant during the period 2001 to 2004 the Claimant withdrew sums amounting to $349,317.43. He does not however specify from which company these withdrawals were made. Nor does he allege any wrongdoing by the Claimant in this regard. He also says that between the years 2005 to 2009 the Claimant personally received from the Second Defendant the sum of $710,236.96 despite having left the business. No details are given however as to how or when he came to this conclusion. Nor does he provide any supporting

documents. Again he does not in his witness statement allege any wrong doing on the part of the Claimant with respect to these sums. He says however that he discovered that during the period November 2003 to June 2009 the Claimant had made unauthorised withdrawals from the Second Defendant's bank account in the sum of $94,266 which was applied to the repayment of the loan with his credit union. Under cross-examination however for the first time he claims that the Claimant stole some $1.3 million from the companies.

47. According to the First Defendant “the Claimant showed a blatant disregard for the interests of the Second Defendant and acted in a manner prejudicial to good sense prudent business, but in obvious self-interest to the prejudice of all else.” As examples he says:

(i) the Claimant had been repeatedly warned that he required his authorisation for the issue of cheques in excess of $5000. Despite this warning in 2005/2006 the Claimant issued a cheque on the Second Defendant’s account for approximately $23,000 for roof sheeting for his house;

(ii) in March/April 2008 at the time when the Claimant had already left the business his son continued to take goods against his father's account;

(iii) between April and November 2008 the Claimant took building materials from the hardware for his personal use

(iv) despite his speaking to the Claimant about his unauthorised removal of material and the challenging financial times the Second Defendant was experiencing the Claimant continued to remove building materials from the Pascal Village Street site for his personal use “running from November 2008 to January 2009;

(v) in February 2009 he observed that building materials would leave the hardware for a building site totally under the Claimant's control. This, he says, would occur after the Claimant had visited the office.

He however makes no connection between these facts and the Claimant's removal as a director.

48. With respect to his statement that the Claimant was properly removed as a director he makes no reference to the actual circumstances of the Claimant's removal. Rather the First Defendant says is that from the latter part of 2006 the Claimant began having health problems and missing work and in early 2007 the Claimant informed him that he was going to retire. Thereafter the First Defendant says "it was the Claimant's course of action to publicly announce his decision to retire from business for reasons of ill-health and that was in or about February 2007." Later in his evidence he says that the Claimant left voluntarily.

49. With respect to the Claimant's allegation that he refused to provide him with any financial information of the company the First Defendant accepts that he did not provide this information but says that the Claimant never requested this. He admits, however, the receipt of a letter from the Claimant's attorneys dated 12th September 2009 requesting detailed information on the financial position of both the defendant companies and accepts that he did not respond. He attributes this to feelings of resentment as a result of the stance taken by the Claimant. He denies that he has refused to speak to the Claimant or refused him entry into the office or hardware business. Indeed according to him it was the Claimant who refused to answer his over 50 calls.

50. At the end of the day I preferred the Claimant's evidence to that of the First Defendant. The Claimant presented as credible and truthful witness and his evidence was supported in material aspects by his witnesses who were themselves credible and convincing. Not so the First Defendant. I did not find him to be a credible witness. The First Defendant had a tendency to obfuscate and dissemble. He rarely met and answered any point directly. He consistently made sweeping statements and arrived at conclusions without presenting any supporting facts. When he did address a point directly it was with regard to facts in the Claimant's favour which he could not dispute in those circumstances his excuses bordered on the incredulous.

51. A good example of this is his explanation with respect to the Claimant's contribution of the Pascal Street property and the receipt by him the cheque for $480,000 in the Claimant's name. An example of his failure to deal directly with a point is shown by the manner in which he deals with the Claimant's removal as a director. Instead of meeting and treating directly with the Claimant's removal and the circumstances under which the notices to the Registrar of Companies were sent the First Defendant glibly concludes that the Claimant was properly removed as a director. Despite this being one of the Claimant's main claims with respect to the oppression and unfairly prejudicial behaviour he fails to say how or why the Claimant was removed. On the one hand without directly referring this to the Claimant's removal as a director he makes sweeping statements as to improper behaviour by the Claimant but provides no supporting documentation or evidence. On the other hand by referring to the Claimant's health problems in late 2006 and the fact that the Claimant informed him in February 2007 that he was going to retire and by his statement that the Claimant left voluntarily he

suggests or insinuates that the Claimant resigned. At the end of the day however I am left with no information as to what caused either defendant company to remove the Claimant as a director. Neither am I given any evidence with respect to the procedure that was followed in this regard.

52. This tendency to obfuscate and dissemble is also brought out in the manner in which he deals with the financial accounts. These accounts were annexed by the Claimant to his statement of case to support his averment that unknown to him the Second Defendant was making a profit. In his evidence however the First Defendant deals with these accounts by seizing on the sum of $1,065,550 identified as monies due to the directors and saying that it represents monies which he interjected into the company from his own personal funds. He concludes that this is evidence that by 2008 the Second Defendant was not making money. In this regard the First Defendant totally ignores the fact the sum of $1,065,550 would already have been taken into consideration in arriving at the net profits of $892,453.

53. Another example comes by way of his attempts to nullify the financial contributions of the Claimant to the companies by his suggestion that there were unauthorised withdrawals by the Claimant of sums in excess of $1 million between the years 2001 to 2009. He divides these payments into three categories, monies paid towards the Claimant's credit union loan, monies drawn by the Claimant for his personal use during the period 2001 to 2004 and monies personally received by the Claimant since 2005. Yet in his evidence in chief it is only with respect to the payments to the credit union that he specifically states that these were in anyway wrongful and then again only because (a) they were made surreptitiously and (b) the Claimant was seeking the benefit of them to increase his interest in the company.

54. With respect to the other sums while not specifically stating that these withdrawals were unauthorised he gives this impression. By the time of his cross-examination however he states that the sum of $ 1.3 million was stolen by the Claimant. It would seem to me that if this was the case the First Defendant would not have hesitated to say so in the defence as well as his witness statement. More importantly he does not provide any supporting documents or even supporting facts upon which he concluded that the Claimant had received the benefit of these sums. This is despite the fact that he, unlike the Claimant, would have had access to all the companies' documents.

55. At the end of the day the case presented by the Defendants was based on insinuation and innuendo with few facts being presented and accusations without supporting documents. I find that the evidence of the Claimant and his witnesses was the more credible. I accept the evidence led by them and prefer it to that led by the Defendants.

Is the Claimant a co-owner of either or both of the defendant companies

56. At the end of the day I am satisfied that Claimant contributed to the acquisition of the assets of both defendant companies. Insofar as much of the Claimant's evidence referred to his contribution to "the business" I am satisfied that the business referred to is the businesses carried on by the Second Defendant and in particular the hardware business. From the evidence it is clear that the Claimant's direct contributions were, in the main, with respect to the Second Defendant. With respect to the Second Defendant it seems to me that the company was

incorporated and its businesses conducted in a manner which suggests equal ownership but with the parties having different functions.

57. In the absence of any supporting evidence confirming the First Defendant's assertions that the assets of the Third Defendant were acquired solely from his private funds I do not accept the evidence of the First Defendant as to their acquisition. It would seem to me that the evidence of the Claimant as to the acquisition of the Sherwood Park property and the financing of the construction of the apartments is the more likely. I accept the Claimant's evidence in this regard. I also accept the Claimant's evidence with respect to his receipt of a share in the profits of the companies up to the year 2006. This to my mind is consistent with the First Defendant's allegations of the Claimants receipt of some $349,317.43 during the period 2001 to 2004.

58. Given the incorporation of both defendant companies at the same time, the contributions made by both the First Defendant and the Claimant to the start-up capital of both defendant companies, the interlocking directorships, the obvious lack of proper accounting procedures and, despite the fact that it is not in dispute that he is now in control of both companies, the failure of the First Defendant to provide supporting documents I am satisfied that there was a sufficient intermingling of funds between both companies to conclude that the Claimant also contributed to the acquisition of the assets of the Third Defendant. Indeed the evidence with respect to the acquisition and erection of the apartments on the Sherwood Park property to my mind confirms that monies raised by the Second Defendant was used to acquire the assets of the Third Defendant.

59. It would seem to me that in the circumstances a reasonable inference to be drawn from this evidence is that the original intention of the Claimant and the First Defendant as incorporators was that the Claimant and the First Defendant would be equal owners of both companies. In this regard I do not intend to engage in a computation of every cent spent on behalf of or contributed to the Second and Third Defendant by either party. Even if this is appropriate, and I do not accept that it is, neither party has provided sufficient evidence for this to be done. At the end of the day in the absence of the issue of shares in the companies in my opinion what is relevant is the intention of the parties at the time of incorporation as disclosed by their actions. From the evidence therefore I am satisfied that the Claimant is a co-owner of both defendant companies and owns the companies in equal shares with the First Defendant.

60. On the evidence before me, therefore I am of the opinion that the Claimant also qualifies under section 239(d). In my opinion as a co-owner of both defendant companies the Claimant is also a proper person to make an application pursuant to section 242 of the Act.

Has the business or affairs of either company been carried out or conducted in an oppressive or unfairly prejudicial manner with respect to the Claimant.

61. In the interpretation and application of sections 239 and 242 of the Act our courts have looked for assistance to the interpretation adopted by the Canadian Courts with respect to similar sections in the Canadian Business Corporations Act. In the case of **Demerara Life Insurance Company Limited** [2] adopting a position taken in the case of **First Edmonton**

[2] HC A No. 3015 of 2000/CV 2006 – 00099 paragraphs,

Limited v 315888 Alberta Ltd[3] Moosai J was of the opinion that section 242 of our Act gave the court a wide discretion to remedy virtually any corporate conduct that is unfair. According to Moosai J. the element of fairness apparent in the use of the words "unfairly prejudicial" and "unfairly disregards" gives the court a broad basis on which to apply notions of fairness and equity to the conduct of a specified category of persons. "The equitable remedy gives a court broad equitable jurisdiction to enforce not just what is legal but what is fair"[4] I accept this interpretation of the section.

62. While the burden of proof in this regard is initially on the Claimant the burden is a shifting one.[5] Upon making out a prima facie case the onus shifts from the applicant to the person it is alleged is acting in the oppressive, or unfairly prejudicial manner. According to Eberle J. in **Re Bury and Bell Gouinlock Ltd**[6] since the basis for the respondent's action lies particularly within the knowledge of the respondent any onus on the applicant is met where no ground is advanced to justify the decision. The deprivation to the applicant is sufficient to raise a prima facie case of oppression or unfairness.

63. In my opinion the Claimant has provided sufficient evidence to raise a prima facie case of oppression and unfairness to him as in his capacity as a co-owner and director of the defendant companies. Indeed an examination of the evidence shows that with respect to most of the acts complained of there is no denial by the Defendants. In the circumstances the onus shifts

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[3] (1988) 40 BLR 28,

[4] Paragraphs 35 to 37 pages 20 and 21

[5] Gobin J. In the matter of Trincan Oil Ltd CV 2006-01245.

[6] (1985) 12 DLR (4th)451(Ont. H.C.) at page 454

to the Defendants to satisfy me that the companies' actions are justified.

64. Insofar as the Claimant alleges that he was removed as a signatory to the companies' bank accounts and as a director of both companies the Defendants have not denied this claim. Nor have they denied that he has been given no account of the operations of either company or received any notices or minutes of board meetings. Insofar as these allegations are concerned the Defendants seek to justify this position by saying that the Claimant (i) did not request the information; (ii) was properly removed as a director and (iii) was not a co- owner of the company

65. Insofar as the Defendant's claim that the Claimant was not a co-owner of the company for the reasons already stated I reject this claim. Insofar as the First Defendant suggests that the reason he did not provide the information requested by the Claimant is because he did not request it I do not accept that this is the reason the information was not provided . Indeed the First Defendant does not dispute that when this information was requested by Attorneys for the Claimant it was not provided. I accept the Claimant's evidence that from late 2006 he demanded that the First Defendant provided with financial information with respect to both companies and the First Defendant refused to provide same. This to my mind is consistent with the positions taken by the Defendants that the Claimant was not entitled to such information and the attitude exhibited by the First Defendant at the trial.

66. With respect to the Defendant's claim that the Claimant was properly removal as a director the Act provides the mechanism by which a director ceases to hold office. Section 74(1) of the Act provides that a director of a company ceases to hold office when: (a) he dies or

resigns; (b) is removed in accordance with section 75; or (c) becomes disqualified under section 68 or 69. With respect to a resignation the Act provides for the resignation of the director to become effective at the time when his written resignation is served in the company or at the time specified in the resignation whichever is later. [7]

67. I do not accept the statement of the First Defendant that the Claimant voluntarily left the company. In the first place there is no evidence of any written resignation by the Claimant. According to the First Defendant in February 2007 the Claimant said he was going to retire yet the notices effecting the change of a director were only filed in February and May 2009. Neither is there any allegation that the Claimant was removed in accordance with section 75 or disqualified under sections 68 or 69 of the Act. In the circumstances I am satisfied that the Claimant was not properly removed as a director as claimed by the First Defendant.

68. With respect to the Claimant's allegation that he was removed as a signatory to the companies' bank accounts again this is not denied by the Defendants. The Defendants do not provide any specific reason for such removal. Nor is there any evidence of the concurrence of the other directors in this regard. Insofar as it may be assumed that this was pursuant to his removal as a director in my opinion since this removal was improper it provides no justification. Insofar as it may be inferred that his removal was as a result of the First Defendant's allegations of the Claimant withdrawing large sums of money for his personal use the First Defendant has not specifically said this and in my opinion cannot rely on inferences and imputations in this

[7] section 74 (2)

regard. In any event absolutely no documentary evidence was provided in support of these allegations.

69. In any event with respect to the monies used to repay the credit union loans these payments were to discharge a debt owed by the company by the Second Defendant. The thrust of the First Defendant's complaint in this regard seems to be directed merely to the fact that the Claimant seeks in these proceedings the benefit of the loan repayments which he did not in fact make. This in my mind cannot be used to justify his removal as a director in 2009. Neither is this behaviour which in my opinion would preclude the Claimant relief.

70. While there may not have been any formal declaration of dividends I am satisfied and accept the Claimant's evidence that up until the year 2006 there was a division of profits. Indeed, from the evidence of the Claimant it would seem that it was his discovery of the financial accounts and his conclusion that the profits were not being shared equally that caused the breakdown in the relationship. Let me say here that, given my inability to place any weight on these accounts I am not satisfied that the Claimant's dissatisfaction was in fact warranted. Indeed, it may very well be that it was the First Defendant's anger over the reasonableness of the Claimant's position that prompted the Defendants' subsequent actions. On the evidence I have no doubt that the First Defendant was the driving force behind both defendant companies. That said the fact that the Claimant's accusations may have been unwarranted does not in my opinion excuse the actions of the Defendants.

71. In response to the Claimant's complaint that the name of the Second Defendant

was changed without his knowledge the First Defendant, without specifically stating that this was done with the Claimant's approval, says that the name change was done with the approval of the directors. On the evidence it is clear that the Claimant was still a director at that time. It would seem to me that if the name change was done with the approval of the Claimant the First Defendant would have specifically said so. The fact that there was may have been a genuine reason for the change and that the Claimant may have known of those facts is, to my mind, irrelevant. The real question here is whether the Claimant as a director was consulted and/or approved of the name change. The Defendants present no evidence of this.

72. At the end of the day I am satisfied that from the beginning of 2007 the Claimant was effectively excluded from the management of the companies and from the benefit of the profits of either company. I am also satisfied that this was due to the accusations made by the Claimant against the First Defendant with respect to the withholding of profits. This exclusion was as a result of the actions of the First Defendant in the purported exercise of his powers as a director. Despite this exclusion the Claimant remains liable for the repayment of the Second Defendant's debt to Republic Bank in excess of $2 million.

73. In my opinion the Defendants have not discharged the onus upon them to satisfy me that their actions in this regard were justified. In the circumstances I am satisfied that the Claimant's removal as a director was improper, not bona fides and was for the sole purpose of excluding the Claimant from the management of the companies of which the Claimant was a director and co- owner. The actions of the First Defendant acting on behalf of both companies in my opinion have the effect of denying the Claimant the benefit of his investment in both

companies and his rights as a director to contribute to the management and control of the defendant companies.

74. In this regard therefore I find that the business and affairs of both defendant companies have been carried on and continue to be carried on in a manner which is oppressive and unfairly prejudicial to and unfairly disregards the interests of the Claimant in his capacity as a director, shareholder and a co-owner of the Second and Third Defendants. Further I find that the actions complained of have been as a result of the exercise of the powers of the directors by the First Defendant in a manner which was not bona fide or in keeping with his responsibilities to both defendant companies as a director.

To what remedy is the Claimant entitled

75. At the end of the day the Claimant is entitled to such orders as will allow for the rectification of the matters complained of. Section 242(3) provides that a Court may make any interim or final order it thinks fit, including the orders identified in (a) to (n) of that subsection. With respect to the reliefs available it must be borne in mind that in cases of this kind, a minimalist approach towards judicial intervention in the internal affairs of the company is to be preferred. Any order of the court should be directed clearly to provide a remedy of appropriate character and that that the court should approach that conservatively favouring the least meddlesome approach in the affairs of the company.[8]

[8] **Re Enterprise Goldmines N L.(1991) 9 ACLC 168**

76. The Claimant seeks a number of reliefs, in particular, he seeks orders to the effect that the First Defendant and/or the defendant companies purchase his 50% interest in the companies at a price to be fixed by such value determined by a firm of chartered certified accountants. The order sought is in accordance with section 242(3)(f) and (g) of the Act. I think that in all the circumstances this case such an order is not appropriate.

77. In the first place by an order made by me on 27th July 2011 an expert was appointed to value the defendant companies. As indicated by way of correspondence copied to me by the court expert there were more than a few hiccups along the way respect to the production of the relevant documents and information. Eventually by way of correspondence from the expert dated 21st September 2011 he advised that, given the paucity of the information provided by the Defendants and despite requests made in this regard, he was unable to perform the valuation exercise. In these circumstances it seems to me that to order and expect a proper valuation of the companies while under the control of the First Defendant is an exercise in futility.

78. In any event section 242(6) of the Act provides that the company shall not make payments to a shareholder under subsection (3)(f) or (3)(g) if there are reasonable grounds for believing that either the company is unable, or would after the payment, be unable to pay its liabilities as they become due, or the realisable value of the company's assets would thereby be less that the aggregate of its liabilities. In the instant case it is not in dispute that as of 22nd June 2011 there was outstanding to Republic Bank Limited on a loan to the Second Defendant the sum of $2,043,000. Nor is it in dispute that one of the assets of the Third Defendant, the

Sherwood Park property, is mortgaged to the bank to secure that loan. In the absence of any information as to the value of the assets held by the defendant companies it seems to me that there are reasonable grounds for believing that if an order is made for the defendant companies to purchase the Claimant's half share this would result in either companies being unable to pay its liabilities as they become due, or the realisable value of the companies' assets being less than the aggregate of its liabilities.

79. It would seem to me therefore that an order for the payment of the value of the Claimant's 50% interest in both companies is therefore in inappropriate in the circumstances. At the end of the day seems to me that I am left with two options first is to order the winding up and dissolution of both companies in accordance with section 242(3) (l) or to make orders the effect of which would be to put the Claimant back into the position that he was prior to his removal as a director but with one additional remedy, that is, an order in accordance with section 242(3)(d) that the defendant companies issue shares to both the Claimant and the First Defendant to reflect their 50% shareholding in both companies.

80. At the end of the day bearing in mind that the least meddlesome approach in the affairs of the companies is to be preferred, and given the fact that at the end of the day these companies are small family owned companies. I think the second option is the more appropriate option. To my mind, given the outstanding liabilities of the companies and the fact that both companies are conducting relatively profitable businesses or at least businesses which allow them to meet their existing liabilities, both companies are more valuable to both the Claimant and the First Defendant as going concerns.

81. It would seem to me therefore that the second option is the more appropriate. Such an option would protect the Claimant from any oppressive or unfairly prejudicial behaviour by the First Defendant while formalising both parties' interests in the companies. It will however require the Claimant to take a more responsible and hands on attitude with respect to the management of the companies. In the event that the Claimant and the First Defendant are unable manage the company together then the option of a voluntary winding up is still available. In the circumstances the effect of my orders will be to declare the interests of the Claimant and the First Defendant in each of the defendant companies and to set aside the purported decisions of the companies as reflected in the notices of change of directors dated 25th February 2009 and 28th May 2009.

In the circumstances I order:

1. With respect to the Second Defendant the Claimant is appointed a director and Sophia St. Rose- Mills and Samantha Gift are removed as directors.
2. With respect to the Third Defendant the Claimant and Sharon George are appointed directors and Sophia St. Rose-Mills and Samantha Gift are removed as directors.
3. The Second and Third Defendants are directed to file the necessary notices reflected the changes at 1 and 2 above with the Registrar of Companies on or before 15th November 2012.
4. The Second and Third Defendants are directed to issue shares to the Claimant and the First Defendant so as to reflect their 50% equal ownership in the each of the companies and, in accordance with the Bye-Laws of the

companies, issue the necessary share certificates on or before the 15th November 2012.

In order to ensure compliance:

5. The First Defendant is directed to call a meeting of the directors of Second and Third Defendants, as constituted by my order, on or before 31st October 2012. A notice of such a meeting shall be given in accordance with the Bye- Laws of the companies.
6. An injunction is granted restraining the First Defendant from dealing with all bank accounts in the name of the Second and Third Defendants and in any way acting on their behalf without the necessary approval of the directors as presently constituted.
7. Liberty to apply.

Dated this 24th day of October, 2012.

Judith Jones
Judge