

REPUBLIC OF TRINIDAD AND TOBAGO

IN THE HIGH COURT OF JUSTICE

Claim No. CV 2016-03436

BETWEEN

KAMAL MOHAMED

Claimant

AND

SAMUEL ALPHEUS

IAN FORBES

CATHERINE GORDON

KATHYANN NICHOLSON

CHARLENE RAMDOO

SALLY SAMPSON

CLARENCE SOO PING CHOW

KRISHNA TEELUCKSINGH

Defendants

Before the Honourable Madam Justice Margaret Y Mohammed

Dated the 20th February, 2018

APPEARANCES

Mr. Yaseen Ahmed instructed by Ms. Shanta Legall Attorneys at law for the Claimant.

Ms. Linda Greene Attorney at law for the First, Second, Third, Fourth, Fifth and Eighth Defendants.

Ms. Tukessa Blades Attorney at law for the Sixth Defendant.

DECISION

1. By Notice of Application filed on the 14th November 2017 (“the Claimant’s Application”) the Claimant applied for summary judgment against the 2nd, 3rd, 4th, and 8th Defendants (“the Defendants”) in the instant action (“the instant action”) pursuant to Part 15 of the

Civil Proceedings Rules (“the CPR”) or alternatively that the Defence and Counterclaim be struck out pursuant to Part 26 of the CPR or alternatively for judgment on admissions. He also sought an order for the Defendants pay the costs of the Claimant’s Application and costs of the instant action to be assessed at 70% of prescribed costs.

2. The grounds in support of the Claimant’s Application are: in October 2014 he instituted proceedings in CV 2014-03593 Kamal Mohamed v De Lamarre Limited (“the first action”) where he sought damages for breach of contract and/or negligence of De Lamarre Limited (“the Company”) for failing to file its Annual Returns and to comply with the requirements as laid out in the **Companies Act 1995**¹ as amended (“the Companies Act”). On the 3rd June 2016 (“the Rahim Order”) Rahim J made an order for summary judgment in favour of the Claimant against the Company and ordered it to pay to the Claimant damages for breach of contract in the sum \$162,900.00, together with interest, the costs of the claim on the prescribed basis and the costs of the application assessed in the sum of \$14,500.00. The Defendants as Directors of the Company have breached their obligations and made no offer or proposal to the Claimant to satisfy the Rahim Order. The Claimant instituted the instant action and the Defendants Defence in the instant action fails to disclose any or any reasonable Defence since they have answered paragraphs 1 to 27 of the Claimant’s Statement of Case but failed to answer in any way whatsoever paragraphs 28 to 31.
3. In support of the Claimant’s Application the Claimant filed an affidavit on the 14th November 2017 (“the Claimant’s Affidavit”). In the Claimant’s Affidavit he repeated the information he set out in the grounds of the Claimant’s Application and he added matters which he set out in his pleaded case.

The Claim

4. The Claimant averred that in February 2014 he was the owner of property in Delamare Avenue, Trincity (“the property”). During the years 2013 to 2014 he was a director in the Company which was responsible for the upkeep maintenance and control of the property and or the housing development at Delamare Avenue, Trincity which comprised

¹ Chapter 81:01

approximately 35 housing units/houses. The Defendants were also directors of the Company.

5. The Claimant entered into an agreement for sale of the property on the 15th August 2013. The completion date was set for the 12th November 2013 but he was unable to transfer the property to the purchaser free from encumbrances because on the 3rd December 2013 Messrs Fitzwilliam, Stone, Furness-Smith and Morgan Attorneys at law discovered that the Company was not operational and there were no up to date receipts with respect to payments of management fees nor were the annual returns filed by the Company since 1999.
6. In or about early December 2013 the Claimant met with the 4th Defendant and informed her that he was experiencing problems competing the sale of the property due to the failure by the Company to file annual returns for the period 2000 to 2013 (“the Annual Returns”). The Claimant requested the 4th Defendant, in her capacity as President of the Company to call a meeting of the Directors to address the issue of the Company’s failure to file the Annual Returns. In late December 2013 the Claimant again met with the 4th Defendant and provided a receipt for a bank deposit showing that he had paid the sum of \$3,000.00 towards his outstanding management fees and he was informed that he was still in arrears of \$300.00 for management fees. By the end of December 2013 no meeting of the Board of Directors of the Company was called to address the issue of the Company’s failure to file the Annual Returns despite the Claimant’s repeated requests.
7. In early January 2014 the Claimant met with the 4th Defendant and presented her with a receipt for a bank deposit in the sum of \$300.00 representing settlement of his outstanding management fee. At this meeting the 4th Defendant represented to the Claimant that she was continuing to conduct enquiries into the Company’s legal position and liability with respect to its failure to file the Annual Returns. The Claimant’s then attorney at law wrote two letters dated 16th January 2014 to the 4th Defendant and 24th January 2014 to the Directors of the Company indicating that due to the failure by the Company to file the Annual Returns and that the outstanding penalties for same was \$142,000.00 he was in danger of not being able to complete the sale of the property.

8. In January 2014 the Claimant visited the home of the 4th Defendant and presented her with a document prepared by the Companies Registry disclosing the total sum of the financial penalty owed by the Company for failing to file the Annual Returns. The 4th Defendant informed the Claimant that the sum stated as the penalty far exceeded the Company's available funds. The 1st Defendant visited the Claimant and the 4th Defendant and informed them that he would make enquiries as to the possibility of a waiver or amnesty of the penalty fees for the Annual Returns from the Companies Registry.
9. In February 2014 the Claimant again met with the 4th Defendant and he indicated that he was advised by his accountant that the Company was obligated to pay the penalty fees to enable it to file the Annual Returns. The Claimant indicated that unless the Annual Returns were filed he would be unable to proceed with the sale of the property. Due to the urgency of the situation, the Claimant offered to pay the penalty fees of \$145,400.00 owed by the Company to the Companies Registry in exchange for an undertaking from the Defendants that he would be reimbursed by the Company. The Claimant was advised not to do so by the 4th Defendant.
10. The Claimant then entered into a supplemental agreement in February 2014 whereby the purchaser agreed to pay to the Claimant the sum of \$145,960.00 being the sum due for the Annual Returns. The purchase price for the property was further reduced by \$10,000.00 to facilitate the delay and to acquire the advance from the purchaser and an extension for the completion of the sale was given until March 2014.
11. The Claimant personally filed the Annual Returns for the Company on the 19th February 2014 and he paid the sum of \$145,400.00. The agreement for sale was completed on the 28th February 2014.
12. The Claimant instituted the first action against the Company and he obtained the Rahim Order. The Company did not satisfy the judgment debt owed in the Rahim Order therefore he instituted the instant action against the Directors of the Company in their individual capacities. The Claimant's case is that the Defendants breached their statutory duties under Section 99 of the Companies Act by failing to act honestly and in good faith in the best

interest of the Company and in failing to exercise the care, diligence and skill that a reasonably prudent person would exercise which caused him to suffer loss and damage and to be put in expense.

13. At paragraph 28 of the Statement of Case, the Claimant contends that the Defendants were in breach of their duties under section 99 of the Companies Act by:
- a) Failing to act and/or acting negligently in accordance with the Company's Constitution and/or Bye-Laws;
 - b) Failing to seek and/or to give effect to the objectives of the Company;
 - c) Failing to conduct any and/or to make adequate enquiries into the Company's legal obligation to file the Annual Returns and the consequences of its failure to do so;
 - d) Failing to ensure the Annual Returns were filed on behalf of the Company in a timely manner (under section 194(1) of the Companies Act);
 - e) Failing to call a Special General Meeting of the Shareholders or Special Board Meeting to address the issue of the outstanding debt carrying a monthly penalty of \$300.00 (under section 516 of the Companies Act) that the Annual Returns were not filed;
 - f) Failing to take steps to secure a loan and/or raise share capital and/or increase monthly management fees from the property owners to meet the liability/debt owed by the Company to the Companies Registry;
 - g) Failing upon being notified by two letters dated 16th January 2014 and 24th January 2014 from the Claimant's then Attorney-at-Law to take prompt and/or expedient steps to ensure that the penalty charges owed by the Company to the Companies Registry for the failure to file the Annual Returns were paid;
 - h) Failing to request and/or to actively and vigorously pursue an amnesty and/or waiver and/or reduction of the Annual Returns charges and fees due to the Companies Registry for the Company's failure to file Annual Returns within the prescribed time;

- i) Treating the issue of the late filing of Annual Returns by the Company negligently and/or recklessly and paying insufficient regard to resolving the issue in a timely manner;
- j) Failing to exercise their powers and bona fides for the purpose for which they were conferred upon them.
- k) Failing to discuss pertinent and/or priority issues concerning the housing development at meetings of the Board of Directors of the Company;
- l) Failing to have regard to the interest of the creditors and/or potential creditors of the Company where there was the possibility of the Company becoming insolvent;
- m) Making the decision to retain legal representation to defend the first action despite lacking any and/or any meritorious defence and having no reasonable prospect of success thereby increasing the outstanding debt, incurring further legal costs and interest; and
- n) Failing to take any and/or prompt action to satisfy the sums owed to the Claimant under the Rahim Order thereby incurring further statutory interest on a daily basis.

14. The orders which the Claimant seeks in the instant action are:

- (a) A declaration that the Defendants are jointly and/or severally are in breach of their statutory duties under the Companies Act particularly the duty to act honestly and in good faith with a view to the best interest of the Company and in failing to exercise the care, diligence and skill that a reasonably prudent person would exercise in comparable circumstances.
- (b) A declaration that the Directors of the Company failed to act in the best interest of the Company in relation to the outstanding debt incurred by the failure to file the Annual Returns.
- (c) A declaration that a special fiduciary duty was owed to the Claimant by the Defendants to ensure that the issue of outstanding annual returns was dealt with in an appropriate and timely manner.
- (d) Damages for breach of statutory duty and/or negligence;

- (e) An order that the Defendants be held jointly and or severally liable for the sums due to him in the first action namely:
- (i) Damages for breach of contract in the sum of \$162,900.00 interest at 3.5% per annum on the sum of \$152,900.00 from the 2nd October 2014 until 3rd June 2016;
 - (ii) Costs in the first action in the sum of \$33,626.29;
 - (iii) Statutory interest on the judgment debt inclusive of interest and costs at a rate of 12%per annum from the 3rd June 2016 until the date of payment.
- (f) Costs.

The Defence

15. The Defendants averred that up until November 2014, they did not know the Claimant made the payment in relation to the filing of the Annual Returns. They also averred that they were unaware of the requirement that the Annual Returns must be filed in order to sell any of the properties.
16. The 4th Defendant pleaded that previously two homeowners contacted her with respect to the sale of their property and there was never any request by them to know whether or not the Company was fully operational and viable or to show that all annual returns were paid up to date unlike the Claimant. The 4th Defendant pleaded that she indicated to the Claimant that in relation to the previous property sales, the only request made of the Company was that the Company provide a status of the current homeowner's maintenance fee contributions.
17. The 4th Defendant also averred that upon assuming presidency, the Board of Directors were told that it did not have to file taxes as the Company was a non-profit Company and that the Board was unaware at the time that it needed to file annual returns and the implications.
18. The 4th Defendant admitted that in January 2014, the Claimant called her and requested a meeting to discuss monies owed by the Company, after which the Claimant met with the

4th Defendant at her home. The Claimant indicated that the Company was required to pay fees for the Annual Returns. He presented a print out of the penalties owed by the Company. The 1st Defendant and the 4th Defendant indicated that they were surprised since they understood that the Company was a non-profit Company and was not required to pay fees. They concluded the meeting with a view to finding a solution to the matter. Subsequent to the meeting, the 4th Defendant handed over to the Claimant some Company documents that the Claimant said he would take to an accountant. The Claimant mentioned that he would pay the fees himself, however the 4th Defendant indicated to him that that was not an option and that he should not take that course of action.

19. The 4th Defendant contacted an accountant in February 2014 to discuss the issue and she was told that the Company was required to file annual returns. In September 2014, the 4th Defendant was contacted by the 1st Defendant who alerted her that an amnesty or waiver was available for the late filing of the Annual Returns and the Company should take advantage of it by filing the Company returns to bring them up to date, as the Company would not have to pay the penalties, but just the cost of filing.
20. The 4th Defendant contacted the Claimant and asked him to return the Company documents between 8th September 2014 and 27th October 2014 and informed him that the Company was going to take advantage of the amnesty given to file annual returns by year end 2014. However, the Claimant did not give a commitment to return the documents.
21. The Defendants averred that the Claimant was advised not to pay the Annual Returns without getting the relevant approval from the Board. They averred that the Claimant acted against the express wishes of the Board members and by doing so he acted ultra vires his role as a Board member only in an effort to take advantage of a lucrative offer without giving the Company the opportunity to adopt a course of action to treat with huge debt of \$145, 400.00.

The Counterclaim

22. The Defendants filed a counterclaim for an order that: (1) the claim against them be dismissed, (2) a declaration that they are only required to make payments in relation to the Company's indebtedness in accordance with the registered guarantee certificate.

23. The counterclaim is based on the following grounds:
 - i. That the Company is a non-profit Company devoid of any assets limited by a guarantee certificate of \$200.00 per homeowner in the event of a debt which is due and owing.
 - ii. A condition of home ownership was becoming a member of the Company since this condition is attached to the homeowner's Lease and thereby unavoidable.
 - iii. The Company is registered but as a non-profit company it would function as community group and not a commercial business and as such possesses no assets with which to satisfy the debt.
 - iv. When the homeowners volunteered to join the Board this was to help foster community spirit and togetherness among neighbors within the community. No member was paid for his/her services.
 - v. The maintenance fee of \$25.00 being charged by the Company is a token fee.
 - vi. There are no common areas to be maintained by the Company and the streets are being maintained by the Tunapuna/Piarco Regional Corporation, there was never a consideration by the Board of the need to increase maintenance fees.
 - vii. At the material time, the Claimant was a Board member. His period of occupancy on the Board includes the period for which he has now made a claim against the Board members.
 - viii. The Claimant acted *ultra vires* his authority as a member of the Board of Directors.
 - ix. There is no evidence that the Company has acted negligently, maliciously or with bad intent towards the Claimant.

Defence to Counterclaim

24. The Claimant contends that the counterclaim filed by the 4th Defendant is frivolous and vexatious and without a reasonable basis in law.
25. The Claimant pleaded that the 4th Defendant never raised the issue of previous property sales in the meeting they had in January 2014. The Claimant said he called upon the 4th Defendant to take steps to resolve the issue. However since that time no response was forthcoming and no attempts were made to assist him in any way. He said he suggested that all the Directors of the Company meet to rectify the situation amicably, but no attempts were made by the Company to do so. He said he never gave any assurance of finding a solution or to speak with an accountant.
26. The Claimant stated that at no time did the 4th Defendant object to him paying the Annual Returns. He stated that no assurances were given to him, no progress was made in the discussions and many phone calls with the parties were going unanswered. The Claimant said he requested a proper Board meeting be called to address the situation. However no consensus was arrived at between the Claimant and any Board member on the matter.
27. The Claimant refuted the 4th Defendant's statement that an accountant was contacted by her. Instead he stated that no enquiries were made about an amnesty by the Defendants and no special advice was sought by them nor was any decision made.
28. The Claimant sought a refund of his monies after the sale of the property was completed and he was told by the 1st and 4th Defendant that the Company did not have any money.
29. He also claimed that because of the lax nature of the Board and its failures to take steps to enforce the payment of maintenance fees by each homeowner or to remind and update them of maintenance fees, his fees went into arrears to the extent of \$3,300.00.

The Submissions

30. Counsel for the Claimant submitted that the Defence has no realistic prospect of success since it did not dispute that as Directors of the Company the Defendants had a fiduciary duty to act in the Company's best interests and to take prompt and reasonable action to address the Claimant's concerns during the period 2013 to 2014 to pay the outstanding fees ie the Annual Returns owed to the Companies Registry for the late filing of the Annual Returns upon being informed by the Claimant that he was experiencing difficulties in selling the property due to the Company's failure to file the Annual Returns.
31. Counsel also submitted that in the Defence the Defendants admitted that they did not call a special meeting of the Board of Directors to address the Company's outstanding debt to the Companies Registry. In this regard he argued that the Defendants failed to act properly after being informed of the Claimant's inability to sell the property due to the said Company's failure to file the Annual Returns. It was also submitted that the Defendants also failed to take and/ or request and/ or actively pursue an amnesty and/ or waiver and/ or reduction of the debt owed by the Company's failure to file the Annual Returns.
32. Counsel for the Claimant further submitted that the Claimant is entitled to obtain judgment on admission since the Defence failed to deny paragraph 28 of the Statement of Case which sets out the particulars of their breach of their statutory duty and they also did not deny paragraph 29 which is the particulars of damages.
33. Counsel also argued that the Defence and Counterclaim should be struck out since it did not disclose any or any reasonable defence to the claim. In particular the Defendants admitted that in or about December 2013, the 4th Defendant met with the Claimant outside her home and she was made aware of the problems the Claimant was experiencing in selling the property due to the failure of the Company to file the Annual Returns (paragraphs 8 and 9 of the Defence). The Defendants admitted that no meeting of the Board of Directors was held in December 2013 to address the issue of the Company's failure to file the Annual Returns (paragraph 11 of the Defence). The Defendants also admitted that despite being informed by an accountant in February 2014 that the Company had no other alternative and

was required to pay the outstanding penalties to the Companies Registry, no steps were taken to do same.

34. In response Counsel for the said Defendant admitted that the Defence only addressed paragraphs 1 to 27 of the Statement of Case and that it did not address the particulars of statutory breach as set out in paragraph 28 of the Statement of Case and the particulars of damages as pleaded at paragraph 29 of the Statement of Case. However Counsel still resisted the Application on the basis that the Company is a non-profit Company; it was defunct; the directors could not have acted without any resolution; it would be unfair and unjust to make the orders sought in the Application since the Claimant was a director of the Company during the period the annual returns for the Company was not filed and therefore he was equally responsible; and the Claimant was dealing with two directors who are not professionals.

Law and Analysis

35. Rule 15.2(a) CPR, empowers the Court to give summary judgment on the whole or part of the claim if the Defendant has no realistic prospect of success on his Defence or part thereof. In **Western Union Credit Union Co-operative Society Limited v Corrine Amman**² Kangaloo JA was dealing with an application for summary judgment by the Claimant. The learned Judge applied the English approach on applications for summary judgment and gave the following guidance:

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

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.

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

² CA 103/2006 Kangaloo JA

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

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

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.”

36. A Court should be hesitant to shut out a party before the trial. In **Belize Telemedia Limited v Magistrate Usher**³ Abdulai Conteh CJ considered the interaction between striking out under the court’s case management powers in Part 26 and the power to award summary judgment under Part 15 CPR. He stated:

“15. An objective of litigation is the resolution of disputes by the courts through trial and admissible evidence. Rules of Court control the process. These provide for pre-trial and trial itself. The rules therefore provide that where a party advances a groundless claim or defence or no defence it would be pointless and wasteful to put the particular case through such processes, since the outcome is a foregone conclusion.

³ (2008) 75 WIR 138

16. An appropriate response in such a case is to move to strike out the groundless claim or defence at the outset.

17. Part 26 of the powers of the Court at cases management contains provisions for just such an eventuality. The case management powers conferred upon the Court are meant to ensure the orderly and proper disposal of cases. These in my view, are central to the efficient administration of civil justice in consonance with the overriding objective of the Rules to deal with cases justly as provided in Part 1.1 and Part 25 on the objective of case management.”

37. The Court’s power to strike out a pleading or part thereof is set out in Rule 26.2 (1) of the CPR which states:

“26.2 (1) The court may strike out a statement of case or part of case if it appears to the court –

- (a) that there has been a failure to comply with a rule, practice direction or direction given by the court in the proceedings;
- (b) that the statement of case or the part to be struck out is an abuse of the process of the court;
- (c) that the statement of case or the part to be struck out discloses no grounds for bringing or defending a claim; or
- (d) that the statement of case or the part to be struck out is prolix or does not comply with requirements of Part 8 or 10.”

38. Part 14 CPR deals with judgment on admissions. Rule 14.3 CPR provides that:

“14.3 (1) Where a party makes an admission under rule 14.1(2) (admissions by notice in writing), any other party may apply for judgment on admission.

(2) The terms of the judgment shall be such as it appears to the court that the applicant is entitled to on the admission.

(3) An application to determine the terms of the judgment is to be supported by evidence.

39. Part 14.5 provides:

14.5 (1) This rule applies where-

- (a) the only remedy which the claimant is seeking is payment of a specified amount of money;
- (b) the defendant admits the whole of the claim in his appearance or in his defence; and
- (c) the defendant has not requested time to pay.

(2) The claimant may file a request for judgment for the amount claimed, interest and for fixed costs and may specify-

- (a) the date on which the judgment debt is to be paid; or
- (b) the time and rate at which it is to be paid if by instalments.

(3) The court office must enter judgment in accordance with the request.

(Rule 12.6 (3) sets out the circumstances under which a claim for the cost of repairing property damaged in a road accident can be treated as a claim for a specified sum, Part 67 deals with the quantification of costs.”

40. The Claimant’s Application for summary judgment is on the basis that: (i) the Defendants as directors of the Company in 2013 and 2014 failed to comply with their statutory duty under section 99 of the Companies Act after they were informed by him of the exact nature and difficulties he was experiencing when attempting to sell the property due to the Company’s failure to file the Annual Returns; (ii) their failure to take prompt and reasonable action to address the payment of the outstanding fees owed to the Companies Registry for the late filing of the Annual Returns; (iii) as Directors of the Company, they failed to conduct any and/or make sufficient enquiries to ascertain whether the Company was under a legal obligation to file the Annual Returns; (iv) after being informed of the Claimant’s inability to sell the property due to the said Company’s failure to file the Annual Returns they failed to call a special meeting of the said Company’s Board of Directors or any meeting at all to address the Company’s outstanding debt to the Companies Registry;

(v) they failed to take any steps to secure a loan and/ or raise share capital and/or monthly management fees from the other property owners in order to meet the debt owed by the Company to the Companies Registry; and (vi) they failed to take and/ or request and/or actively pursue an amnesty and/or waiver and/ or reduction of the debt owed by the Company's failure to file the Annual Returns.

41. The Defendants defence was that the Company was a non-profit Company, the 1st and 4th Defendants were making enquiries into obtaining a waiver of the fee for the Annual Returns and the Claimant was not authorized to pay the Annual Returns fee.
42. The Court has to determine whether the Defendants have put forward a defence with reasonable prospect of success against the allegations by the Claimant to obtain summary judgment.
43. Section 99 of the Companies Act sets out the duty of directors and officers of a Company as:

“DUTY OF DIRECTORS AND OFFICERS

99. (1) Every director and officer of a company shall in exercising his powers and discharging his duties-

(a) act honestly and in good faith with a view to the best interests of the company; and

(b) exercise the care, diligence and skill that a reasonably prudent person would exercise in comparable circumstances.

(2) In determining what are the best interests of a company, a director shall have regard to the interest of the company's employees in general as well as to the interests of its shareholders.

(3) The duty imposed by subsection (2) on the directors of a company is owed by them to the company alone; and the duty is enforceable in the same way as any other fiduciary duty owed to a company by its directors.

(4) No information about the business or affairs of a company shall be disclosed by a director or officer of the company except-

- (a) for the purposes of the exercise or performance of his functions as a director or officer;
- (b) for the purposes of any legal proceedings;
- (c) pursuant to the requirements of any written law; or
- (d) when authorised by the company.

(5) Every director and officer of a company shall comply with this Act and the Regulations, and with the articles and Bye-laws of the company, and any unanimous shareholder agreement relating to the company.

(6) Subject to section 137(2), no provision in a contract, the articles of a company, its Bye-laws or any resolution, relieves a director or officer of the company from the duty to act in accordance with this Act or the Regulations, or relieves him from liability for a breach of this Act or the Regulations.”

44. In my view the Defence has no realistic of success and it is bound to fail for the following reasons.

45. Firstly, they have failed to dispute material facts which have been pleaded by the Claimant.

46. Rule 10.5 of the CPR sets out what a Defendant must include in his defence. In **M.I.5 Investigations Ltd. v Centurion Protective Agency Ltd**⁴ Mendonca JA, explained at paragraph 7 of the judgment how a defence should be drafted pursuant to the stipulations of Rule 10.5 CPR in the following way:

“In respect of each allegation in a claim form or statement of case therefore there must be an admission or a denial or a request for a claimant to prove the allegation. Where there is a denial it cannot be a bare denial but it must be accompanied by the defendant’s reasons for the denial. If the defendant wishes to prove a different

⁴ Civ. App. No. 244 of 2008

version of events from that given by the claimant he must state his own version. I would think that where the claimant sets out a different version of events from that set out by the claimant that can be a sufficient denial for the purposes of 10.5 (4) (a) without a specific statement of the reasons for denying the allegation. Where the defendant does not admit or deny an allegation or put forward a different version of events he must state his reasons for resisting the allegation (see 10.5 (5)). The reason must be sufficiently cogent to justify the incurring of costs and the expenditure of the Court's resources in having the allegation proved."

47. In paragraphs 8 and 9 of the Defence the 4th Defendant did not dispute that she met with the Claimant in December 2013. The 4th Defendant also admitted at paragraph 11 of the Defence that no meeting of the Board of Directors of the Company was held to address Company's failure to file annual returns which the 4th Defendant admitted the Claimant had brought to her attention in December 2013. The 4th Defendant admit that despite being informed by an accountant in February 2014 that the said Company had no other alternative and was required to pay the outstanding penalties to the Companies Registry, no steps were taken to do same. Therefore based on the Defence it was not in dispute that the Defendants were aware that the Claimant had problems completing the sale of the property due to the failure by the Company to file the Annual returns. Further based on the Defence the Defendants admitted that the Claimant told them of the problems he was encountering and that between February 2014 to September 2014 they took no steps to address the Claimant's concerns. In my opinion, in light of the admission there is no evidence which they can put before the Court to demonstrate that their failure to act was not in breach of their duties under section 99 of the Companies Act.

48. Secondly, the Defence only addressed paragraphs 1 to 27 of the Statement of Case. The Defendants have not disputed the Claimant's allegation at paragraph 27 of his Statement of Case where the Claimant pleaded the particulars that the Defendants was in breach of their statutory duties under section 99 of the Companies Act. The Defendants also did not in their Defence deny the Claimants particulars of loss pleaded at paragraph 30 of the Statement of Case and that the Claimant sent a pre-action protocol letter dated the

16thSeptember 2016 calling upon each of the Defendants as directors of the Company to satisfy the judgment debt in the Rahim Order and the documents which the Claimant pleaded at paragraph 31 of the Statement of Case which he stated he intended to rely on. In my opinion having failed to deny those material paragraphs the facts which the Claimant has pleaded are uncontested and therefore from the pleadings this is not an issue to be determined.

49. Thirdly, the Defendants pleaded in the Defence that they obtained information of a tax amnesty or a waiver of the penalty fee for the later filing of the Annual Returns. However, they did not annex any document to verify the reference to a tax amnesty. All that was pleaded was a conversation in March 2014. In my opinion, this is not sufficient to demonstrate that they have a realistic prospect of success given the other admissions in the Defence.
50. Fourthly, the Defendants plea that the Company was a non-profit Company does not in any way diminish their responsibilities under section 99 of the Companies Act and no exceptions are made in the said section for the directors of a non-profit Company.
51. Having found that the Defence has no realistic prospect of success I now turn to the judgment on admission request. In my opinion the Defendants having failed to deny paragraphs 29 and 30 of the Statement of Case in the Defence and they have failed to put alternative facts for the Court to consider on these matters they have in effect admitted that the Claimant is entitled to the sum pleaded at paragraph 30 of the Statement of Case. On this basis even if the Claimant had failed to obtain summary judgment he is still entitled to obtain judgment on admission.
52. With respect to the striking out of Defence and Counterclaim I have already found that the Defence has no realistic prospect of success. Further the Counterclaim raises the issue of whether the Claimant acted ultra vires his authority as a member of the Board when he paid the Annual Returns. This was raised by the Company in the first action and it was addressed by Rahim J. In any event in my opinion it is irrelevant since the issue is whether the

Defendants acted as required under section 99 of the Companies Act which they failed to address. For these reasons the Defence and Counterclaim is struck out.

Order

53. It is declared that the Defendants are jointly and/or severally are in breach of their statutory duties under the Companies Act particularly the duty to act honestly and in good faith with a view to the best interest of the Company and in failing to exercise the care, diligence and skill that a reasonably prudent person would exercise in comparable circumstances.
54. It is declared that the Directors of the Company failed to act in the best interest of the Company in relation to the outstanding debt incurred by the failure to file the Annual Returns.
55. It is declared that a special fiduciary duty was owed to the Claimant by the Defendants to ensure that the issue of outstanding annual returns was dealt with in an appropriate and timely manner.
56. The 2nd, 3rd, 4th and 8th Defendants to pay to the Claimant Damages for breach of statutory duty and/or negligence.
57. The 2nd, 3rd, 4th and 8th Defendants are jointly and or severally liable for the sums due to him in the first action namely:
 - (a) Damages for breach of contract in the sum of \$162,900.00 interest at 3.5% per annum on the sum of \$152,900.00 from the 2nd October 2014 until 3rd June 2016;
 - (b) Costs in the first action in the sum of \$33,626.29;
 - (c) Statutory interest on the judgment debt inclusive of interest and costs at a rate of 12% per annum from the 3rd June 2016 until the date of payment.
58. The 2nd, 3rd, 4th and 8th Defendants to pay the Claimant's costs of the Application and 70% of the prescribed costs of the action.

59. The Court will hear the parties on quantum.

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Margaret Y Mohammed
Judge