**<u>THE REPUBLIC OF TRINIDAD AND TOBAGO</u>**

IN THE HIGH COURT OF JUSTICE

Claim No: CV2015-02591

**BETWEEN**

**CLIVE PIERRE**

First-Named Claimant

**ANN BOWEN**
**(by her duly Constituted Attorney Clive Pierre)**

Second-Named Claimant

**ROGER PIERRE**
**(by his duly Constituted Attorney Clive Pierre)**

Third-Named Claimant

**JOEANN RAMNAUTH**

Fourth-Named Claimant

AND

**ANTHONY PIERRE**

First-Named Defendant

**JOHN PIERRE**

Second-Named Defendant

**SANITANK LIMITED**

Third-Named Defendant

**CARL PIERRE**

Fourth-Named Defendant

**AUGESTE SIMON PIERRE also called SIMON PIERRE also called AUGUSTE PIERRE also Called AUGESTE PIERRE**
**(by his duly Constituted Attorney Clive Pierre)**

Fifth-named Defendant

**Before the Honourable Mr. Justice R. Rahim**

**<u>Appearances:</u>**

Mr. S. Marcus S.C. instructed by Ms. D. James for the Claimants

Ms. L. Lucky-Samaroo instructed by Ms. S. Nath for the First, Second and Third Defendants

Ms. J. Hosein for the Fourth Defendant.

**DECISION ON APPLICATION OF FOURTH NAMED DEFENDANT**

1. This claim is for a declaration that all allotment of shares and appointments of officers of the Defendant company, Sanitank Limited, made after the death of Henry Pierre are null and void and of no effect. The claimants also seek relief pursuant to section 498 of the Companies Act Chap 88:01 that an investigation be conducted into the affairs of the company, an account be provided including the production of all books, bank records, bank accounts and other documents of the company. A declaration is sought that the business affairs of the company were being conducted in a manner that unfairly disregarded and continues to disregard the interests of the claimants. This is essentially relief pursuant to section 242(2)(b) of the Companies Act, namely restraint of oppression (although section 242 is not specifically set out either in the Claim Form or the Statement of case). The claimants also seek on order that the First Claimant or any of them be appointed directors of the company. Several other injunctive orders have also been sought restraining the defendants from dealing with the company. The claimants and the defendants save and except the company are siblings and all children of Henry Pierre deceased.

2. The instant application is one filed on the 14th March 2018, in which the fourth defendant seeks an order that the claim against him be dismissed. The fourth defendant was originally a claimant but by way of affidavit filed on the 6th November 2015, he deposed that he never gave permission to anyone to file this claim on his behalf. As a consequence, he was removed as a claimant and by way of order of the 19th September 2017, was made a defendant.

3. By further affidavit in support of the instant application, he deposed that he in fact attended a meeting at Instructing Attorney's office in relation to probate of the will of his father Henry. That at no time was it indicated to him that the subject matter of the meeting included litigation. He admits to being a shareholder in the company but has no role whatsoever in its running and has never received a dividend. He in fact holds some 1,000 ordinary shares. Further, he deposed that he has no issue with the manner in which the company is being run and he consents to the continued management of the company by the

First and Second defendants. Further, he has set out that there are no allegations made against him in the claim and there therefore exists no cause of action against him. Finally, he deposes that he has no means to defend the claim which has caused him great distress. See affidavit sworn to on the 13th March 2018 and filed on the 14th March 2018 in support of the Notice of Application of the 14th March 2018.

4. The fourth defendant relies on the authority of ***Khaima Persad v Stephen Bail*** CV2009-01304, 01305 and 01306, the judgment of the Honourable Madame Justice Jones. Without setting out the facts in full, it is sufficient to say that this case concerned two shareholders of one company who parted ways and who each brought suit against the other personally. Bail's action against Persad (Persad himself having brought three actions against Bail) in the main, sought that an account be taken and that Persad compensate Bail pursuant to section 242(3)(j) of the Companies Act. That section prescribes the remedies available in the event that a complainant is able to prove the matters set out in any of the subsections of 242(2).

5. Jones J had this to say;

> *"35. The onus of proof is on Bail. In order to satisfy the requirements for relief Bail is required to satisfy me that (a) he has met at least one of the critera set out in section 242(2), and (b) such an order is necessary in order to rectify the matters complained.*
>
> *36.In my opinion Bail is not entitled to such an order. In the first place it would seem to me that the action ought to have been commenced against the company. The section in my view, seeks to address a wrong relating to the conduct of the corporation itself, albeit as a result of the actions of an officer, director or shareholder of the company. There is nothing in this section or the case law spawned from the section which suggest that that relief under section 242 is available against an individual as opposed to the company.*
>
> *37. In this regard the statement of McGuinness in the Law and Practice of Canadian Business Corporations is of some assistance. According to McGuinness*

*the oppression remedy provides: "the courts with the power to intervene in the affairs of the corporation at the behest of the complainant where it is necessary to prevent or protect the complainant from, or to stop, or oppressive, or unfairly prejudicial or similar conduct of the corporation." : Paragraph 9.219, page 949.*

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

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

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

6. The fourth defendant therefore submits that he having absolutely no part to play in the running of the company, he is not a proper defendant to the claim. Further, not only can it be reasonably expected that there will be no evidence against him upon which the claimants can rely in proof of their case, as pleaded, there is absolutely no allegation made against him. Therefore, the claim should be dismissed as disclosing no ground for bringing a claim.

7. The fourth defendant also relies on the case of ***Shobha Narine Dookeran v Winston Dookeran*** CV2008-00287, a judgment by Kokaram J. In that case, the claimant, the widow of the deceased brought a claim against the executor of her husband's estate on the basis that the deceased failed to make reasonable provision for her by his will dated the 11th January 2007. The learned judge considered the issue of when and in what circumstances a court should join a party to proceedings, the beneficiaries having applied to be joined as parties to the claim. The following paragraphs of the judgment are instructive, and the court endorses the approach set out therein;

*"9. Although there is a wide discretion to order the joinder of parties under rule 19.2 CPR, the Court must still ensure that the joinder is necessary or desirable having regard to the tests set out in rules 19.2 (3) CPR. The Court can in this regard still obtain guidance from the learning under the RSC in making its assessment of what is "desirable" in the circumstances. In* ***United Film Distribution Limited v Chabria3*** *the Court of Appeal examined the nature of the court's discretion to join parties under rule 19.2 CPR (UK) which is similar in terms to the local rules:*

> *Although the Rules of the Supreme Court have been replaced by the Civil Procedure Rules, it is not suggested that ... the circumstances in which a person may properly be joined as a defendant to a claim are narrower under rule 19.2(2) of Civil Procedure Rules than under its relevant predecessors, namely Order 15 rules 4(1) and 6(2) (b) of the Rules of the Supreme Court. Rule 19.1(2) of the Civil Procedure Rules provides that the court may order a person to be added as a new party if (a) it is desirable to add the new party so that the court can resolve all the matters in dispute in the proceedings; or (b) there is an issue involving the new party and an existing party which is connected to the matters in dispute in the proceedings, and it is desirable to add the new party so that the court can resolve that issue. The court's power to add or substitute a party is wide. Although the expression "necessary or proper party" to the claim does not appear in that rule, it can scarcely be supposed that the court would order a person to be added or substituted as a party on the ground that it is "desirable" to do so if that person were not either a necessary or a proper party to the claim in question.*
>
> *10. Simply giving the Court the power to order a joinder where it is "desirable" therefore did not remove from the Court's consideration of whether the proposed party is a "necessary or proper party" or whether the joinder is "necessary" or "just and convenient" to determine the issues in the main claim. It can hardly be argued that the Court will order the joinder of a party because it is "desirable" even though it is not necessary or just and convenient to determine the issues or matters in dispute that fall for determination between the intervening party and the other parties in the action. These are simply considerations that are to be*

*taken into account by the Court in dealing with the case justly to give effect to the overriding objective.*

8. In opposition, the claimants submit that the application of the fourth defendant is wholly misconceived. Firstly, they argue that the claim was in fact brought against the company itself Sanitank, the third defendant. Secondly, the claim is one for redress under both sections 498 and 242 of the Companies Act. Thirdly, it makes no difference that the fourth defendant is only a shareholder and not a director like the other defendants. As far as the law is concerned, so long as the claimant claims a remedy to which some other person is jointly entitled with him, that other person must be made a party, if not a claimant then a defendant.

**Analysis and ruling**

9. Part **19 CPR** reads as follows;

*Claim not to fail by adding or failing to add parties*

*19.3 The general rule is that a claim shall not fail because*
*(a) a person was added as a party to the proceedings who*
*should not have been added; or*
*(b) a person who should have been made a party was not*
*made a party to them.*

*Provisions applicable where two or more persons are jointly entitled to a remedy*

*19.4 However—*
*(a) Where a claimant claims a remedy to which some other*
*person is jointly entitled with him all persons jointly*
*entitled to the remedy must be parties to the proceedings,*
*unless the court orders otherwise.*
*(b) If any person does not agree to be a claimant, he must*
*be made a defendant, unless the court orders otherwise.*
*This rule does not apply in probate proceedings.*

10. It follows that the proceedings before this court not being that of probate proceedings but that of proceedings for oppression and other matters under the Companies Act, this rule is applicable in these circumstances. This is the distinguishing feature between the ***Dookeran*** case supra and the circumstances of this case. Firstly, that claim was one in probate. Secondly, in the ***Dookeran*** case, the court had to determine whether there was merit in the application by parties to be joined to proceedings in which they were not originally joined. In that case the court held that in all of the circumstances, the joinder was not necessary for the determination of the issues in the claim as the estate was properly represented by the executor and the intervention of the beneficiaries could add nothing to the issues to be decided among other things.

11. In the Privy Council decision of ***Pegang Mining Company Limited v Choong Sam*** and Others, PC Appeal number 5 of 1968, (a case relied on by the claimants), Their Lordship considered the test to be applied on the addition or substitution of a party., At page 8, paragraph three Lord Diplock stated;

> *"It has been sometimes said as in Moser v Marsden (1892 1 Ch.487) and In re1.G. Farbenindustrie A.G. (1944 Ch. 41) that a party may be added if his legal interests will be affected by the judgment in the action but not if his commercial interests only will be affected. While their Lordships agree that the mere fact that a person is likely to be better off financially if a case is decided one way rather than another is not sufficient ground to entitle him to be added as a party, they do not find the dichotomy between "legal" and "commercial" interests helpful. A better way of expressing the test is: will his rights against or liabilities to any party to the action in respect of the subject matter of the action be directly affected by any order which may be made in the action."*

12. It must of course be borne in mind that the case set out above was decided pre-CPR. The test for this court is whether the fourth defendant is jointly entitled to the remedies claimed by the claimant. If he is so entitled then his refusal to remain a claimant must mean that he is to be made a defendant. In the present claim, the fourth defendant is a shareholder. He

is the owner of 1,000 ordinary shares. He has participated in no way in the affairs of the company and has no intention of so doing.

13. In ***Foss v Harbottle (1843) 2 Hare 461***, the leading English precedent in corporate law, the rule was that in any action in which a wrong was alleged to have been done to a company, the proper claimant was the company itself ("the rule in Foss and Harbottle"). The rule in Foss and Harbottle however, has now been largely displaced because of several recommendations made in relations to the UK legislation on Company Law. The rationale for those changes provide assistance and bears highlighting. In ***LS Sealy, Cases and Material in Company Law, Fourth Edition, page 487,*** the following was stated;

*"…the law ought to be amended to provide a remedy for a minority shareholder who was a victim of 'oppression', and who did not wish to take the drastic step of petitioning to have the company wound up…As a result s210 of the Companies Act 1948 was enacted, providing a discretionary remedy which was expressed to be available only where the facts would justify winding-up order on the 'just and equitable' ground… the remedy was enacted in its new form as s 15 of the Companies Act 1980 (now CA 1985, s459).*
*Among the changes which s459 has made from the old s210 are the following:*
*…*
*Section 459(2) makes it clear that the personal representatives of a deceased member and other persons upon who shares have devolved by the operation of law shall have the same remedy as a member. This was not expressed to be so under the former section, but the courts had construed the section in the same sense anyway."*

14. The UK position does not appear to be entirely at odds with the Canadian position, on whose system our company law is based. The text Corporate Law in Canada: The Governing Principles, third edition, pages 521 & 522 provides as follows;

> *"Under the typical civil procedure rules, the plaintiff will seek permission to bring the action on behalf of himself, the corporation, and all other shareholders except perhaps a few known to oppose the motion and thus named as defendants. Those shareholders who do not support the claim may, if they wish, bring motions to have*

*their names stricken from the plaintiff's side, whereupon they will be moved to the defendant's side or deleted as parties… the result is that the shareholder's motion may, on paper, be One Lone Shareholder v The World. It is now clear that this labelling process is a paper tiger and that the shareholder is asking to represent the corporation, not the other shareholders."*

15. In the case before this court the fourth defendant is a shareholder and is entitled to the very remedies to which the claimants are entitled as members. It follows that should he not wish to avail himself of the same remedies or relief he may be removed as a claimant and joined as a defendant. This was of course done by the order of this court (supra), he having deposed that he did not wish to bring a claim and gave no such instructions. He has now applied to be removed as a party (defendant) altogether, a move that he is equally entitled to make. The fourth defendant has made it abundantly clear that he has no difficulty with the manner in which the company is being run and he takes no issue with the company or the defendants in that regard. He therefore wants and needs no remedy against them despite his entitlement. Further and in any event, he is in no way form or shape involved in management of the company or in profit sharing. In those circumstances it would be manifestly unfair to keep him as a party to the proceedings and so the court will strike out the claim against him in keeping with the principles set out above.

Disposition

16. The court will make the following order;

    a. The claim against the Fourth Defendant is struck out.
    b. The Claimants shall pay to the Fourth Defendant the costs of the application to strike to be assessed by a Registrar in default of agreement.

Dated the 17th day of May 2018

Ricky Rahim
Judge