REPUBLIC OF TRINIDAD AND TOBAGO

IN THE HIGH COURT OF JUSTICE

Claim No**. CV2011-03992**

BETWEEN
EVOLVING TECKNOLOGIES AND ENTERPRISE DEVELOPMENT COMPANY LIMITED

Claimant

AND

(1) KENNETH JULIEN

(2) ULRIC MC NICOL

(3) BRIAN COPELAND

(4) RENE MONTEIL

(5) EUGENE TIAH

(6) SONIA NOEL

Defendants

APPEARANCES:

Claimant:	Mr. Israel Khan SC, Mr. Nelson QC, Mr. Gerard Ramdeen instructed by Mr. Varun Debideen
Defendants	Mr. Douglas Mendes SC, Mr. John Jeremie SC, Mr. Stuart Young, Mr. Michael Quamina instructed by Ms. Kahaya Nanhu

Before the **Honourable Mr. Justice Devindra Rampersad**

Dated the 24th July 2012

RULING

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The Defendants' Notice of Application

1. By notice of application filed on 2 March 2012, the defendants applied to this court pursuant to part 26.2 (1)(b) and (c) of the CPR for an order that the claim form and statement of case be struck out as an abuse of the process of the court. The defendants' contention as set out in the grounds of the notice of application is that the claimant's case is based entirely upon decisions of the defendants and the execution of an agreement to invest which took place in excess of four years prior to the filing of this action and is therefore statute barred. Alternatively, the defendants say that the claimant has no grounds for bringing or continuing the claim and/or no real prospect of successfully litigating the claim and, therefore, this matter ought not to go to trial.

2. The application is supported by an affidavit of Michelle Pryce deposed to on 2nd March 2012 and filed on even date. It is also supported by an affidavit of Eugene Tiah and Beverly John – both deposed to and filed on 12 June 2012 as per the request of the defendant's attorneys made on the 29th May 2012.

3. It is the defendants' contention that Cabinet and the Honourable Minister of Finance were always kept abreast of what was transpiring. The factual account as recited in the affidavits was in general conformity with the matters set out in the defence. Also, Beverley John confirmed that she sent to the Ministries of Trade and Finance all of the Board minutes in respect of the claimant for the years 2004, 2005 and 2006 under cover of letters from herself to the permanent secretaries of the Ministries.

4. Mario Edwards deposed to an affidavit in opposition on 9th July 2012. His response was that the provision of the Board minutes did not mean that the respective ministries were aware of the lack of any proper due diligence since the failure to provide the same was not specifically referred to in the minutes and therefore those minutes are incomplete as the deficiencies in the due diligence process was not pointed out and specifically brought to the attention of the relevant decision-makers. Presentations and reports were based on and made with incomplete unaudited accounts and the concerns of Cabinet were not properly and completely addressed so that the requirements set out by Cabinet in May 2005 were completely disregarded and/or unfulfilled. In essence, the claimant's response is that the defendants failed to fully and frankly disclose all of the facts and therefore failed in their duties.

The Case Management Conference of the 29th May 2012

5. On the 29th May 2012, it was agreed that the defendants would be allowed to put in a further affidavit in order to provide "*evidence that is indisputable*." Counsel for the defendants went on to state:

> *" If it turns out that they find a way to dispute it well then it will then be a matter for my lord to determine how you case manage the application in that point in time but we can't get to the stage of you determining whether or how you are to case manage the issue until we are in a position to put that evidence before you. "*

6. As far as this court is concerned, the understanding is that unless that evidence was in fact indisputable, then the court would proceed to trial since the court would not engage in a mini-trial at this stage and would require full evidence at trial.

The Pleadings

7. It is necessary to look at the pleadings in the proceedings to determine what the parties' respective positions are.

The Statement of Case

8. These proceedings were commenced on 18th October 2011. In the proceedings, the claimant alleges that the defendants, who were the directors of the Board of directors of the claimant, during the period first of July 2004 to June 2005, and thereafter, made a decision to invest US$5 million in Bamboo Networks Limited (Cayman Islands) ("BNL") for the development by the claimant through BNL of an information technology (IT) industry in Trinidad and Tobago. This decision was made despite the following facts, amongst others:

    8.1. The Minister of Finance advised the claimant on or about 30th December 2004 that it should not invest in BNL;

    8.2. On 18th January 2005, and 28th April 2005, the claimant requested from BNL the following information prior to the execution of a Cooperation Agreement (the "Agreement") namely;

        8.2.1. A purported Tiger Technologies share evaluation;

        8.2.2. Documentation on BNL;

        8.2.3. Unaudited accounts for 2004 - 2005;

8.2.4. Percentage of shareholding in BNL that the claimant would receive for its investment;

8.2.5. An understanding of the corporate governance of BNL;

Yet, this information was not obtained prior to the execution of the Agreement.

8.3. On 12th May 2005, Cabinet directed the claimant's Board of Directors i.e. the defendants, to carry out a due diligence on BNL prior to any investment in BNL but no such due diligence was carried out;

8.4. On 1st June 2005, the claimant advised the Ministry of Trade and Industry that reliance was being placed on a valuation of BNL by Tiger Technologies when in fact there was no such valuation since Tiger Technologies had been wound up in the year 2000;

8.5. Consequently, the defendants did not have sufficient information which would have been able them to make a prudent decision whether or not to make the investment. If they had the information, no prudent director would have resolved to make the Investment and/or execute the Agreement or remit the funds to BNL.

9. The said funds amounting to US$5 million was remitted to BNL on or about 23rd June 2005. However, BNL has failed to perform any of its obligations set out in the Agreement and has failed and/or refused to return the investment to the claimant despite repeated requests.

10. Consequently, the claimant says that the defendants were in breach of their duty to exercise the care, diligence and skill that a reasonably prudent person would exercise in comparable circumstances pursuant to section 99 of the Companies Act chapter 81:01 and the common-law and it therefore seeks damages in the sum of US$5 million, interest, costs and further and/or other relief.

The Amended Defence filed on 2nd March 2012

11. In defence, the defendants rely on the Limitation of Certain Actions Act Chapter 7:09 of the laws of Trinidad and Tobago and also claimed that section 99 of the Companies Act was not actionable by the claimant and the duty under section 99 of the Companies Act does not exist at common law.

12. The defendants admitted the directive of the Minister of Finance dated 30 December 2004 but went on to say that, along with that directive, it considered assurances from the claimant's staff, a report by Dunn and Bradstreet and the claimant's own due diligence exercise to form

the view that the investment was still worth pursuing by way of a resolution passed on 18 January 2005 by the defendants as the Board of Directors of the claimant.

13. On 9th May 2005, the claimant made a presentation to the Finance and General Purposes Committee (F & GP) of Cabinet which imposed conditions which the State needed to be satisfied before proceeding with the investment. The defendant goes on to say that on 12th May 2005, Cabinet agreed in principle to the investment and agreed further that the claimant should continue to hold discussions with BNL to resolve the following concerns:

    13.1. Whether US$5 million was a fair value for the shares in the company;

    13.2. Legal and accounting matters including the latest audited financial statements and information, and that the shareholders agreement be submitted to Cabinet for its approval.

14. On 16th May 2005, the defendants say that the claimant's company secretary prepared a note for the Board on the proposed investment and cooperation agreement and the Board understood from the appendices to the note that the requirements of the F & GP committee had been satisfied.

Discussion

14.1. A perusal of the relevant note which is annexed to the amended defence and marked "E" reveals an unsigned document with several attachments – which, presumably, amount to the appendices to the note – as follows:

    14.1.1. Attachment A – a detailed curriculum of the training program;

    14.1.2. Attachment B – a schedule for training and employing the local management team;

    14.1.3. Attachment C – a summary of the court matters filed against BNL;

    14.1.4. Attachment D - a projected improvement in BNL's profitability. It is important to note that this final document purports to be a summary of BNL's financial reports, including unaudited accounts for 2004 (it's financial year for the period 2004 – 2005 ended in March 2005) and no audited reports, whether for 2001, 2002, 2003 or 2004 were annexed.

14.2. There is no mention of this note being forwarded to the F & GP committee.

15. By letter dated the 18th May 2005, the defendant says that the chairman wrote to the Secretary to the Cabinet seeking approval of the Shareholders' Agreement and drawing to the attention of the Secretary that the proposed agreement addressed/took into consideration all the expressed concerns of the F & GP committee and included stringent conditions, that the agreement had been legally vetted and, subject to the final approval of the Cabinet, it would be executed. No copy of that letter was attached to the defence.

16. The defendants also rely upon a letter dated 1st June 2005 written to the Permanent Secretary in the Ministry of Trade and Industry by the president of the claimant company, Mr. Hassanali, explaining why the claimant was obtaining fair value for the proposed $5 million US investment in BNL. That letter refers to a valuation by Tiger Technologies having been done prior to the signing of the original Memorandum of Understanding (MOU). No copy of that valuation was produced (more will be said on that later).

17. Consequently, the defendants say that the letters of 18th May 2005 and 1st June 2005 addressed Cabinet's concerns raised at its meeting on 12th May 2005.

18. On 16th June 2005, Cabinet, as evidenced by letter dated 27th June 2005, authorized the raising of the sum of US$5 million by the claimant and this was done and remitted to BNL on 22nd June 2005.

19. The defendants say that BNL did not return the investment yet they do not admit paragraph 9 of the statement of case which says that BNL has failed to perform any of its obligations set out in the Agreement. This was not expanded upon in the defence on this pleading at paragraph 31 of the defence and that plea is inconsistent with the CPR and may very well have to be struck out at the appropriate time. The CPR calls for parties to not just say that they do not admit an allegation, but must also go on to state why they do not admit it and this the defendants have failed to do.

20. Curiously, the defendants denied paragraph 10 of the statement of case without dealing head-on with the allegations particularized at paragraph 10 and, more particularly at paragraphs 10 (d) (iv), (v) and (vi). Again, this is contrary to the provisions of the CPR and may very well have far-reaching consequences for the defendants.

Discussion

20.1. In the defence, the defendants referred to a letter dated 1st June 2005 without exhibiting it. That letter is exhibited later on in the proceedings and is annexed to an

affidavit of Eugene Tiah which will be discussed later on. Despite the very pointed and direct allegation made by the claimant that Tiger Technologies was not in existence after the year 2000 and therefore could not have done an evaluation, the defendants have chosen not to respond even though it is an evaluation which they have purportedly relied upon.

20.2. To this court, this allegation is a very serious one as it formed the basis for the response to one of the concerns raised by the F & GP committee in relation to the valuation of the shares. To my mind, this would have been a most important issue to deal with. The issue of the value of the shares was reiterated in the Reply and therefore this issue maintains its importance in the matter before this court.

21. In conclusion, the defendants placed their dependence upon reports presented to them by several of the claimant's employees at the time and a report from Dunn and Bradstreet to assert their good-faith and so negate any liability under section 99 of the Companies Act or the common-law.

The Reply

22. In reply, the claimant reasserted its allegation that the defendants had failed to ensure that a proper due diligence inquiry into BNL's business affairs was carried out before executing the Agreement and/or remitting the sum of US$5 million. The respective due diligence reports which ought to have been done were particularized and the claimant went on to particularize other vital information which was missing including the purported valuation by Tiger Technologies.

23. In response to the allegation that the claim was statute barred, the claimant said that the claimant's Board of directors controlled and directed the claimant's affairs so that the breaches were not discoverable until new directors and/or Board of directors were appointed and legal advice given. In that regard, it was only as a result of a legal audit into the operation of the claimant which was conducted as a result of an authorization by Cabinet on the 1st July 2010 which resulted in the dismissal of the defendants from the claimant's Board and the appointment of a new Board of Directors on 20 October 2010. On 9th July 2011, the findings of the legal audit were presented to the claimant's new Board of Directors and the claimant asserts that the date of knowledge of the defendants breach of duty is that date. Consequently, the limitation point does not apply.

The Law

24. Part 26.2 (1) (b) and (c) of the Civil Proceedings Rules (CPR) provides as follows:

> *"(1) The court may strike out the statement of case or part of the statement of case if it appears to the court –*
>
> *(b) that the statement of case or the parties to be struck out is an abuse of the process of the court;*
>
> *(c) that the statement of case or the parts to be struck out discloses no grounds for bringing or defending a claim;"*

25. Section 3 (1) of the Limitation of Certain Actions Act Chap 7:09, upon which the defendants rely to base their contention that the claim is statute barred provides:

> ***"3.** (1) The following actions shall not be brought after the expiry of four years from the date on which the cause of action accrued, that is to say:*
>
> *(a) actions founded on contract (other than a contract made by deed) on quasi-contract or in tort;*
>
> *(b) actions to enforce the award of an arbitrator given under an arbitration agreement (other than an agreement made by deed); or*
>
> *(c) actions to recover any sum recoverable by virtue of any enactment."*

26. On the other hand, the claimant relies upon section 14 (1) of the said Act to refute the contention on the basis of fraud which was perpetrated and which they claim was not discovered until 2011. That section provides:

> ***"14.** (1) Subject to subsection (3), where in the case of any action for which a period of limitation is prescribed by this Act, either—*
>
> *(a) the action is based upon the fraud of the defendant;*
>
> *(b) any fact relevant to the plaintiff's right of action was deliberately concealed from him by the defendant; or the*
>
> *(c) the action is for relief from the consequences of a mistake,*
>
> *the period of limitation shall not begin to run until the plaintiff has discovered the fraud, concealment or mistake (as the case may be) or could with reasonable diligence have discovered it."*

27. Reliance was also placed on section 14 (2) of that Act for the interpretation of what was meant by "deliberately concealed".

28. In ***Bridgeman v Mc Alpine-Brow*n** (2000) WL 363, the English Court of Appeal considered Rule 3.4(2) of the English CPR which provided, similarly to the local provisions of Part 26.2, that the court may strike out a statement of case if it appears to the court:

28.1. That the statement of case discloses no reasonable grounds for bringing or defending the claim;

28.2. That the statement of case is an abuse of the courts process or is otherwise likely to obstruct the justice disposal of the proceedings; or

28.3. That there has been a failure to comply with a rule, practice direction or court order.

29. The Court of Appeal decided that the essence of a strike out is that one does not look at the evidence on the claim and that a learned judge could only dispose of a claim after a decision had been taken on the factual issue.

30. In ***Bay View Proprietors v Phillipe Chalano and ors*** SLUHCV 200910592 the Court of Appeal in Eastern Caribbean considered Part 26.3(1) of the Civil Procedure Rules (CPR) which stated that:

"In addition to any other power under these Rules, the court may strike out a statement of case or part of a statement of case if it appears to the Court that -

(a) There has been a failure to comply with a rule, practice direction, order or direction given by the Court in the proceedings;

(b) The statement of case or the part to be struck out does not disclose any reasonable ground for bringing or defending the claim;

(c) The statement of case or the part to be struck out is an abuse of the process of the Court or is likely to obstruct the just disposal of the proceedings; or

(d) The statement of case or part to be struck out is prolix or does not comply with the requirements of Part 8 or 10."

31. The Court of Appeal concluded that on an application to strike out, a court must be satisfied that *"a party is unable to prove allegations made against another party or that the statement of case is incurably bad or that it discloses no reasonable ground for bringing or defending a case, and has no real prospects of succeeding at trial."* Further they agreed that *"When a party seeks to strike out all or parts of a statement of case the burden rests on him to show that there is no possibility of a cause of action."*

32. In ***Hughes and others v Richards (trading as Colin Richards & Co)*** [2004] EWCA CIV 266 the Court of Appeal when considering whether the claim should be struck out stated matter of factly that *"The correct approach is not in doubt: the court must be certain that the claim is bound to fail."*

33. In ***Monecor (London) Ltd v Ahmed and others*** [2008] All ER 22 the Court in considering the nature of a striking out claim stated that there must be a *"prospect of success that is to say not fanciful, false or imaginary. It would, of course, be entirely inappropriate to conduct some form of mini-trial."* The Court further stated that *"the court must be certain that the claim is bound to fail. Unless it is certain, the case is inappropriate for striking out"*.

The Court's Findings and Ruling

34. Having reviewed the exhibits to the defendants' affidavits, and Mr. Tiah's affidavit in particular, it seems to this court that the issue of whether and when the Minister of Finance and the Minister of Trade and Industry were made fully aware and were fully informed of the failure to perform the due diligence and to meet the requirements referred to in the letter dated 27 June 2005 is far from unequivocally decided. Definitely, this date is not indubitably set out in the defence.

35. It seems necessary for this matter to proceed to trial for the determination of the factual matrix including, amongst other things, what was known to whom and when in respect of this investment in Bamboo Networks Limited. On the face of it without more and without further explanation, the correspondence does not seem to clearly decide the issue either way. For instance, emphasis is placed by the defendants upon a valuation which is referred to in the letter dated 1 July 2005 written by the claimant's president at the time which confirms reliance upon the purported valuation by Tiger Technologies. As mentioned before, that issue seems to be crucial in that Cabinet was concerned, as it should be, that the share price was fair. The fact of the existence of the said valuation would, to my mind, be a crucial cog in the wheel of the Cabinet approval process in light of the unanswered allegations with respect to the veracity of the information contained in the said letter of 1 July 2005. Specifically, as mentioned above, there is no direct response in the defence or in the affidavits, for that matter, in respect of the legal existence of Tiger Technologies post-2000. Nor is there any evidence of the production of all of the required **audited** accounts for BNL as requested by Cabinet. Nor is there any immediately identifiable correspondence from the claimant confirming that the audited accounts were not available or were not relied upon or that comprehensive due diligence reports were not done.

36. On the face of it, there is no unequivocal evidence confirming that all of the concerns raised by Cabinet were fully and properly addressed. It may very well be that they were. It may very well be that the parties' understanding was that all requirements were met. There seems to be a

suggestion of that when Cabinet authorized the raising of the $5 million US but, respectfully, this court cannot say that that is definitively so.

37. In those circumstances, it is only after informed and deliberate cross examination pointed toward that issue, along with the others raised in the pleadings, that the court would then be in a position to properly understand the respective assertions of the parties in light of a tested factual matrix. The lines and flow of communication and information to the respective parties would then become clearly and brightly defined without the need for assumptions. Only then would it become clear whether the defendants are entitled to rely upon the provisions of the Limitation of Certain Actions Act in support of their allegation that this action is statute barred against them. Had there been a piece of correspondence or communication which unequivocally stated that despite Cabinet's concerns, no order to the accounts were prepared or secured, no detailed due diligence was presented and had the valuation from Tiger Technologies been provided, then the bright line definition of what was known to whom at the relevant time may have become clearer. But, as it stands, this court is of the respectful view that the presentation of evidence at a trial is necessary.

38. The court also has to bear in mind the allegation raised in the reply that all of the information in relation to the process reposed in the hands of the defendants until they were dismissed in 2010 and that it was not until 2011 that an audited report, conducted after the defendants were no longer in office, that certain concerns were discovered and raised. Quite obviously, the claimant, which was being managed by the defendants until 2010, would not have pursued any claim(s) against the defendants since it is quite unlikely that the defendants would have directed claims to be filed against themselves.

39. At present, to rely only upon the untested evidence on affidavits which are before this court - exhibiting several documents which are prima facie inadmissible hearsay documents e.g. the 1 July 2005 letter from Mr. Hassanali, the uncertified Cabinet notes - would be an unsafe step. It may very well be at the end of the day that deficiencies, if any, were well known and yet the whole process was approved. In that case, the assertion of the claim being statute barred may be well-founded.

40. In essence, this court is not of the view at this time that the claim is certain to fail based on ly upon the untested and unofficial evidence before it on affidavit.

The Order

41. Consequently, this court decided that, in light of the authorities raised by both sides, the following order was made:

    41.1. The Defendant's notice of application for the dismissal of the action on the ground of the matter being statute barred is deferred to be dealt with at the trial due to the fact that there is no unequivocal statement evincing the issue and the court has to hear evidence on the point.

    41.2. The parties to make standard disclosure by the 28th of September 2012 and mutual inspection by the 5th of October 2012.

    41.3. The claimant to file and serve a joint list of agreed and unagreed documents cosigned by attorney at law for the defendants by the 2nd of November 2012.

    41.4. The claimant to file and serve a joint list of agreed and unagreed issues again cosigned by attorney at law for the defendants by the 2nd of November 2012.

    41.5. The CMC is adjourned to 14 November 2012 at 9:30 AM in POS 20

Devindra Rampersad
Judge