

REPUBLIC OF TRINIDAD AND TOBAGO

IN THE HIGH COURT OF JUSTICE

CV 2017 -03422

BETWEEN

TRINIDAD AGGREGATE PRODUCTS LIMITED

Claimant

AND

JEREN LIMITED

First Defendant

CARMEN REID

Second Defendant

Before the Honourable Mme Justice Jacqueline Wilson

Appearances:

Mr. Keith Scotland instructed by Mr. Joel Roper for the Claimant

Mr. Terrance Bharath instructed by Mr. Shiv Sharma for the First Defendant

Mr. Seenath Jairam, SC and Mr. Dharmendra Punwasee instructed by Mr. Antonio Emmanuel for the Second Defendant

RULING

The Application

1. The claimant is a limited liability company that is embroiled in a dispute involving the appointment and removal of its directors.
2. The claimant seeks an injunction, among other things, to restrain the defendants from removing Mr. Peter Permell (chairman) and Mr. Richard Saunders (deputy chairman) as directors of the company.

3. The First Defendant, Jeren Limited, is a shareholder of the claimant. Ms. Renee Zamore is a director and sole shareholder of the First Defendant. The Second Defendant, Ms. Carmen Reid, is a director and shareholder of the claimant.
4. The defendants assert that Messrs. Permell and Saunders were removed as directors at a meeting of A Class shareholders held on 20 September 2017, in which Ms. Zamore and one Mr. Dave Ramkissoo were also appointed as directors.
5. Messrs. Permell and Saunders challenge the legitimacy of both their removal as directors and the appointment of Ms. Zamore and Mr. Ramkissoo and assert that, as the bona fide directors of the claimant, they authorised Attorneys to institute these proceedings for, and on behalf of, the claimant. Messrs. Permell and Saunders are supported by a third director, Mr. Stephan Gift, whose status as director is not in dispute.
6. The claimant's ex parte application for an injunction came on for hearing before me on 28 September 2017. The application was supported by the affidavit of Mr. Permell sworn on 27 September 2017. On 28 September 2017 I gave directions for the claimant's Notice of Application and supporting affidavit to be served on the defendants on or before 4 October 2017 and adjourned the hearing to 11 October 2017 to give the defendants an opportunity to be heard. I also gave directions for the claimant to file and serve a claim form and statement of case on the defendants on or before 6 October 2017.
7. At the hearing on 11 October 2017 the defendants indicated their intention to challenge Mr. Permell's authority to bring proceedings in the name of the company. I gave directions for the defendants to file submissions in support of the preliminary point and for the claimant to file submissions in reply. The hearing of arguments on the preliminary point was adjourned to 23 October 2017.
8. On 23 October 2017 the following affidavits were before the court:
 - a. The affidavit of Peter Permell sworn on 27 September 2017;
 - b. The affidavit of Renee Zamore sworn on 10 October 2017;
 - c. The affidavit of Carmen Reid sworn on 10 October 2017;
 - d. The supplemental affidavit of Carmen Reid sworn on 20 October 2017;
 - e. The affidavit of Richard Saunders sworn on 23 October 2017; and
 - f. The affidavit of Stephan Gift sworn on 23 October 2017.

The First Defendant's Case

9. The First Defendant's evidence is set out in the affidavit of Ms. Renee Zamore.
10. Ms. Zamore deposed that she is a director and shareholder of the First Defendant and a director of the claimant, having been so appointed on 20 September 2017 at a meeting of the claimant's "A" Class shareholders. Ms. Zamore stated that the First Defendant is the registered holder of one "A" class share in the claimant, the other holders of "A" class shares being the Second Defendant in her personal capacity and in her capacity as Executrix of the estate of Mr. Edsel Reid.
11. Ms. Zamore deposed that under the claimant's by-laws, the "A" class shareholders have the exclusive right to appoint and remove its directors and that Messrs. Permell and Saunders were duly removed at a meeting held on 20 September 2017. Ms. Zamore averred that the "A" class shareholders no longer wished to have Messrs. Permell and Saunders serve as directors and that the claimant's board did not authorise the filing of these proceedings by Mr. Permell.
12. Counsel for the First Defendant challenged the validity of the application for an injunction on a number of grounds.
13. Counsel submitted that the filing of the claim form and statement of case subsequent to the application for injunctive relief was fatal to the application. Counsel argued that an interlocutory injunction was not a free-standing cause of action but was ancillary or incidental to a pre-existing claim, and while the Court could entertain an application for an interlocutory injunction before the filing of a substantive claim, this was an exceptional course of action permissible only in circumstances where the originating proceedings were left in the custody of the court for issue or where an injunction was granted subject to conditions requiring their issue: *Supreme Court Practice, 1993, Volume 1, p. 513*; *Atkins Encyclopaedia of Forms in Civil Proceedings (2nd Ed) Vol 22, p.75*; *The Siskina [1979] AC 210 at 256*; and *Re N (Infants) [1967] CHD 512 at 528*.
14. Counsel argued that under Part 17.2 of the Civil Proceedings Rules 1998 (the CPR), where an application for an interim injunction was made before the filing of a substantive claim, directions for the filing of a claim form and statement of case could not properly be given

if the injunction was refused. Counsel argued that as no injunction was granted when the application came on for hearing on 28 September 2017, the application became a nullity that could not be cured by the subsequent filing of a claim pursuant to directions of the court.

15. Counsel added that the claim form and statement of claim did not, in any event, support the grant of an injunction in the broad terms sought by the claimant. Counsel elaborated that the grant of a declaration under section 135 of the Companies Act (the Act) sought in the statement of claim was inconsistent with the injunctive relief sought by the claimant, which included orders relating to access to the company's premises. Under section 135 of the Act, the Court, upon application by a company, a shareholder or director, may determine any controversy regarding the appointment of a director or auditor. Counsel argued that section 135 made a distinction between a company and its shareholders and directors and did not permit a director or shareholder to bring an application on behalf of a company. Counsel argued further that there was no board resolution authorising the proceedings, which were no more than a personal grievance by Messrs. Permell and Saunders challenging their removal as directors in circumstances which they disputed.
16. Counsel relied on *Mitchell v Hobbs (UK Ltd) v Mill* [1996] 2 BCLC 102 as authority for the proposition that, in the absence of a resolution of a company's board of directors or an appropriate delegation of powers, a single director of a company had no authority to instruct solicitors to institute proceedings on behalf of the company.
17. Counsel submitted that Mr. Permell had not demonstrated how his alleged wrongful removal as chairman and director adversely affected the best interests of the company and that it was untenable to suggest that the company had a right for him to remain as chairman.

The Second Defendant's Case

18. In her affidavit evidence Ms. Carmen Reid affirmed her status as director and "A" class shareholder of the claimant. She deposed that on 24 August 2017 the "A" class shareholders requested the board of directors to convene a meeting for the purpose of removing Messrs. Permell and Saunders as directors. Ms. Reid stated that upon receiving notice from the then directors that the meeting was scheduled for 2 November 2017, the "A" class shareholders agreed that the meeting should be brought forward to 20 September

2017, on which date they passed a resolution to remove Messrs. Permell and Saunders as directors and to appoint Ms. Zamore and Mr. Ramkissoon. Ms. Reid deposed that a notice of change of directors was duly registered on the said 20 September 2017 and that the new board of directors had since passed a resolution confirming that no approval was granted for the institution of these proceedings by Mr. Permell on behalf of the claimant.

19. Counsel for the Second Defendant raised similar objections to the application for an injunction as the First Defendant and submitted that the application should be struck out as an abuse of the process of the Court.
20. Counsel for the Second Defendant submitted that the filing of an application for an injunction prior to the issue of a claim form and statement of case was incurably bad as there was no cause of action on which the application for an injunction could attach, contrary to the requirements Parts 8 and/or 17 of the CPR.
21. Counsel argued that the onus was on the claimant to establish that its board of directors had given the required approval for the commencement and conduct of the proceedings and that the Second Defendant's evidence refuted the grant of such approval.

The Claimant's Case

22. Mr. Permell deposed that he is the chairman and director of the claimant, the other bona fide directors being Mr. Richard Saunders, Mr. Terence Boswell Inniss and Mr. Stephan Gift. Mr. Permell stated that at a meeting on 11 August 2017 with Ms. Zamore and Ms. Reid, at which Mr. Saunders and Mr. Gift were also present, Ms. Zamore indicated that she and Ms. Reid wanted him and Mr. Saunders to resign as directors so that the shareholders could better negotiate the sale of their shares.
23. Mr. Permell stated that pursuant to Ms. Zamore's request a special meeting of the board of directors was scheduled for 16 August 2017 but he received an email from Mr. Inniss the day before indicating that the "A" class shareholders had passed resolutions removing him and Mr. Saunders as directors and appointing Ms. Zamore and Mr. Ramkissoon. The email also stated that the meeting scheduled for the following day was cancelled.
24. Mr. Permell stated that upon receiving legal advice that the meeting giving rise to his purported removal was not duly convened, he wrote to Mr. Inniss requesting him to

withdraw the notice of his removal as director and the cancellation of the directors' meeting, failing which the claimant would institute legal proceedings to declare the resolutions invalid. Mr. Inniss did not accede to the request and, as a result, the directors' meeting proceeded as scheduled on 16 August 2017.

25. Thereafter a series of events, the full details of which are given in Mr. Permell's affidavit, precipitated the further degeneration of the relationship between the parties culminating with the removal of Messrs. Permell and Saunders as directors on 20 September 2017.
26. The affidavits of Mr. Stephan Gift and Mr. Richard Saunders are in similar terms and assert that at a meeting of the claimant's board of directors on 7 September 2017 the quorum for decisions of the board was changed from four to three, and given the urgency of the events surrounding the removal of Messrs. Permell and Saunders, three of the four directors granted approval for the institution of these proceedings.
27. Counsel for the Claimant submitted that the unlawful removal of Messrs. Permell and Saunders as directors lies at the heart of the proceedings and that the illegality arises by virtue of the defendants' breach of the claimant's by-laws and their contravention of section 133 of the Act. Section 133 of the Act sets out the procedures under which the shareholders of a company with the right to vote may requisition a meeting of directors to transact the business stated in the requisition. Section 133 is supported by paragraph 12.2 of the claimant's by laws which requires the directors to convene a meeting of shareholders upon receipt of a requisition.
28. Counsel for the Claimant argued that in bringing these proceedings Mr. Permell was acting for and on behalf of the company and not in his personal capacity and that, as a bona fide director of the company he is duty bound to act in its best interests. Counsel submitted that the absence of a board resolution authorising the proceedings did not affect the validity of the approval, as the board's decision could be ratified at a subsequent meeting.
29. Counsel submitted that the defendants' course of conduct was causing the claimant to carry on business in a manner prejudicial to the interests of the company, its ordinary shareholders and employees and was in breach of the principles of good corporate governance and the requirements of the Act.

30. Counsel submitted that the defendants failed to provide any authority to support the proposition that the filing of a claim form and statement of case after the application for an injunction vitiated the application and that, even if the defendants were correct in that regard, the Court had a general power under Part 26.8(4) of the CPR to rectify the procedural defect.

Analysis and Conclusion

Want of Authority

31. The defendants' assertion that Mr. Permell lacked the authority of the claimant's board of directors to bring these proceedings is strongly contested by the claimant. The claimant asserts that the required approval was granted by Messrs. Permell, Saunders and Gift, as the bona fide directors of the company, whereas the defendants contend that Messrs. Permell and Saunders had no authority to grant such approval, having been duly removed by the "A" class shareholders.
32. It is not in dispute that the "A" class shareholders have a statutory right to remove a director by ordinary resolution, subject to the provisions of section 133 of the Act and the company's by-laws regarding the convening and conduct of a duly requisitioned meeting. However, there is a fundamental dispute between the parties surrounding the validity of the meeting of 20 September 2017 at which the decisions to remove Messrs. Saunders and Permell were made.
33. In order to determine whether Messrs. Permell and Saunders had authority to grant approval for the claimant to bring these proceedings, their status as directors must first be established and their continued appointment in that regard must be confirmed. These matters lie at the heart of the proceedings and are the very issues upon which the Court is required to adjudicate.
34. In my view, the objections raised by the defendants, being fundamental to the determination of the claim, require full ventilation at a substantive hearing and should not be resolved summarily on the basis of untested evidence at this preliminary stage of the proceedings.

Non-compliance with Part 17.2 of CPR

35. The defendants contend that the application for an injunction is fatally flawed for non-compliance with Part 17.2 of the CPR. Part 17.2 provides that:

Time when an order for an interim remedy may be made

17.2(1) *An order for an interim remedy may be made at any time, including –*

(a) before a claim has been made; and

(b) after judgment has been given.

(2) *However –*

(a) paragraph (1) is subject to any rule which provides otherwise;

(b) the court may grant an interim remedy before a claim has been made only if –

(i) the matter is urgent; or

(ii) it is otherwise necessary to do so in the interests of justice; and

(c) unless the court otherwise orders, a defendant may not apply for any of the orders listed in rule 17.1(1) before he has entered an appearance under Part 9.

(3) *Where the court grants an interim remedy before a claim has been commenced, it must require an undertaking to issue a claim.*

36. As indicated above, Counsel for the First Defendant posited that under Part 17.2 of the CPR, where an application for an interim injunction was made before the filing of a substantive claim and no injunction was granted at the time the claim was issued, the injunction application was a nullity and could not be revived by the later filing of a claim form and statement of case. Counsel did not provide any authority in support of this proposition.

37. I do not accept Counsel's submissions on the interpretation of Part 17.2 of the CPR. Part 17.2 (1) of the CPR makes it clear that an application for an interim injunction may be made *before* the filing of a substantive claim and that an injunction may be granted on such application *only* if the matter is urgent or the interests of justice so require *and* subject to an undertaking to issue a claim. In my view, there is nothing in the above provision to suggest that if the hearing of the application for an injunction is deferred for any reason,

including for the purpose of giving the defendant a right to be heard, the application immediately ceases to have life and cannot subsequently be revived.

38. While Counsel is correct in stating that an application for an interlocutory injunction is not a free-standing cause of action but is ancillary to a substantive claim and while it is also correct that the court, in exceptional circumstances, may grant an application for an interlocutory injunction before the filing of a substantive claim, it does not *ipso facto* follow that the failure to grant an injunction at the outset of such a hearing serves to automatically invalidate the application.
39. In light of the foregoing, the preliminary objections raised by the defendants are not sufficient to warrant the summary dismissal of the claimant's application and are dismissed. The costs of the defendants' application are costs in the cause.

Dated this 8th day of February 2018.

Jacqueline Wilson
Judge