THE REPUBLIC OF TRINIDAD AND TOBAGO

IN THE HIGH COURT OF JUSTICE

Claim No. CV2022-00512

IN THE MATTER OF AN APPLICATION OF THE COMPANIES ACT, 1995 (AS AMENDED) CHAPTER 81:01

AND

IN THE MATTER OF THE SUPREME COURT OF JUDICATURE ACT, CHAPTER 4:01

Between

LUISA FERNANDES
(also known as "Luisa Chapman" and "Luisa Fernandes Chapman")
First Claimant

DOMUS TRUST CO. LIMITED
Second Claimant

A.M. INVESTMENTS LIMITED
Third Claimant

POUI INVESTMENTS LIMITED
Fourth Claimant

AND

JOSEPH E. FERNANDES
First Defendant

CHAMPS ELYSEES LIMITED
(formerly known as Trinidad Country Club Limited)
Second Defendant

Before the Honourable Madame Justice Margaret Y Mohammed

Date of Delivery 20 May 2022

APPEARANCES

Mr Om Lalla and Mr Dereck Balliram instructed by Ms Sue Chin Hing Ramdhanie Attorneys at law for the Claimants.

Mr Stephen Singh instructed by Ms Amanda Adimoolah Attorneys at law for the Defendants

RULING

1. The First Claimant ("LF") and the First Defendant ("JF") are siblings. It is not in dispute that JF is the majority shareholder in the Second Defendant ("CEL") personally and or through Aquila Limited ("Aquila") and the Claimants hold approximately 21% shares of CEL and that those shares are classed as non-voting B shares[1]. There is a dispute of 138 B shares which LF claims she is entitled to.

2. The Claimants applied on 25 March 2022 ("the Application") seeking the following interim relief:

    (a) An interim declaration that the 138 B shares held by Rathbones Trust Company, now Hudsun Trust Company Limited, in CEL be registered and/or be issued in the name of LF in accordance with section 242(a), 242(k) and 245 of the Companies Act[2] ("the Companies Act");

    (b) A declaration that the business or affairs of CEL have been carried on and conducted in a manner that is unfairly prejudicial and/or unfairly disregards the interest of the Claimants as defined in Section 242(2) of the Companies Act;

[1] The other shareholders are LF who has 51 B class non- voting shares, the Third Claimant has 98 B class non-voting shares, the Fourth Claimant has 61B class non- voting shares.
[2] Chapter 81:01

(c) An order that independent auditors be appointed to audit the books, records and accounts of CEL and produce an interim report to the Court on its findings;

(d) An order that an independent firm be appointed to examine and review the unaudited accounts of CEL for the period 2011 – 2021 and produce audited accounts and its findings to the Court;

(e) An Interim Order that all proceeds received from the sale of land to the United States of America Embassy ("USG") situate in Maraval in the ward of Diego Martin being portions of the lands known as "Champs Elysees Estate" described in the Deed of Conveyance dated 11 May 1932 registered as 2306 ("the property") be held in escrow and paid into the Court pending the determination of this matter;

(f) An Order that the Board of CEL be replaced with directors appointed by the Court.

3. The Application was supported by the affidavits of LF filed on 18 February 2022 and 10 March 2022, as well as the affidavits of Ana Maria De Meillac ("AMM") ("the AMM Affidavit") filed on 1 April, 2022, a sibling of JF and LF and a Director of the Third Claimant; John Paul Fernandes ("JPF") filed on 1 April, 2022, another sibling of LF and JF and the Managing Director of the Fourth Claimant; the affidavit of Mr Hafeez Ali, Attorney at law for LF and one of the directors of the Second Claimant filed on 25 March 2022 and his supplemental affidavit filed 28 March 2022. The Defendants' position opposing the Application was set out in the affidavits of JF filed on 10 March 2022 ("the First JF Affidavit"), 11 March 2022 (this copy included the exhibits which were omitted in the First JF Affidavit), 25 March 2022 and 14 April 2022.

Principles of law - Interim Relief

4. The legal principles which the Court must consider in granting an injunction were not in dispute by the parties. Aboud J (as he then was) in **Niquan Energy Trinidad Limited v World GTL Trinidad Limited and others**[3] considered the principles in **Jetpak** and **National Commercial Bank v Olint Corp Ltd**[4] and described the approach of a Court to interim relief applications at paragraph 81 as:

> "81. In applying these principles, as I understand them, to the facts of this case I must first evaluate the relative strengths of each party's cases as disclosed on the affidavits, paying particular regard to the evidence against which there is no credible dispute, and being cautious, where there is such dispute, to void a mini-trial on untested affidavit evidence. All the authorities agree that this first step is a threshold test and a "fail" here on the relative strengths of each party's cases will certainly be fatal. The question to be asked is whether there is a serious issue to be tried. As Lord Hoffman said in Olint, echoing his earlier words in Films Rover that were approved by Chief Justice de La Bastide in Jetpak (page 370), the court must feel a "high degree of assurance" that the injunction sought at the interlocutory stage will be granted at the trial. I am also guided by the way Sir Robert Megarry V.C put it in Mother Care Ltd v Robson Books Ltd [1979] FSR 466:
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> > "The prospects of the plaintiff's success are to be investigated to a limited extent, but they are not to be weighed against his prospects of failure. All that has to be seen is whether the plaintiff has prospects of success

[3] CV2013-02699
[4] [2009]UKPC 16

> which, in substance and reality, exist. Odds against success no longer defeat the plaintiff, unless they are so long that the plaintiff can have no expectation of success, but only a hope. If his prospects of success are so small that they lack substance and reality, then the plaintiff fails, for he can point to no question to be tried which can be called 'serious' and no prospect of success which can be called real."

5. Subsequently, Kokaram J (as he then was) in **Tricia Brown v Elroy Julien and Anor[5],** provided a useful check list which guides the Court when exercising its discretion in granting interim orders, namely :

   (a) The Court's freedom to do justice at the trial;

   (b) Whether there is a serious issue to be tried is determined upon an evaluation of the relative strength of the parties' case;

   (c) The weaknesses of a party's case must be taken into an account;

   (d) The Court should consider the prejudice the Claimant may suffer if no injunction is granted or the Defendant may suffer if it is;

   (e) The likelihood of such prejudice actually occurring;

   (f) The extent to which a party may be compensated by an award of damages or enforcement of the undertaking in damages. However, there is no general rule that if damages are an adequate remedy an injunction will not be granted;

[5] CV2019-00550

(g) The likelihood of whether a party is able to satisfy such an award. However, the indigent ought not to be penalised where there are merits in their claim or in the balance it is just to grant interim relief;

(h) Where the balance of convenience lies;

(i) The likelihood that the injunction will turn out to have been wrongly granted or withheld i.e. the court's view of the relative strengths of the parties' case. This last matter should only be considered if the other matters are evenly balanced or where it is possible to form such a view on facts which are clear or not in dispute;

(j) The overriding objective, which is relevant in the exercise of the power to grant injunctive relief.

6. One of the orders sought in the Application concern the oppression remedy available to minority shareholders of a company. In this regard, the first instance judgment of **Went and Ors v Cable and Wireless (Barbados) Ltd and others**[6] from the High Court of Barbados which dealt with an application for interim relief where the nature of the substantive claim were based on the oppression remedy also provides useful guidance. In **Went** the Court took into account the failure by the applicant to give an undertaking in damages and the disruption of ongoing business as sufficient enough to constitute irreparable harm to the rights of the shareholders who brought the application for the interim relief and which was set out in the Companies Act.

[6] Cv1779 of 2017

Analysis and Findings

7. In deciding whether to grant the interim orders sought in the Application, I have to decide what order would result in the least risk of irremediable prejudice, while allowing the Court to do justice to the parties at the end of the trial. I have decided against granting the interim orders sought by the Claimants for the following reasons.

8. First, at this stage of the action the Defendants have a stronger case based on the issues to be tried. In the substantive claim, the Claimants contend that by an irrevocable Declaration of Trust dated 28 November 1994 ("the DOT"), Rathbone Trustees Limited at the time and now known as Hudsun Trust Company Limited ("the Trustees"), became the Original Trustees of the Fernandes Family Trust ("the Trust"). The DOT stated that the dispositions therein are intended to be irrevocable and sets out terms by which the Trust was to be distributed and governed. Mrs Maria Manuela Fernandes ("MMF") the mother of JF, LF, AMM and JPF, was the settlor of the Trust, whereby she created a Trust into which she placed certain assets and appointed the Trustees. MMF was the beneficial owner of the 388 B non-voting shares in CEL (formerly Trinidad Country Club "TCC") and placed these shares into the Trust to be held by the Trustees. In recognition of the Trust, the 388 B non-voting shares were transferred to the Trustees and Share Certificate No. 4 was issued in its name in 2005.

9. By Deed of Appointment and Indemnity made on 28 January 2003, LF became the beneficiary of 2000 shares in Fernandes Industrial Centre Limited ("FIC") and 138 B non-voting shares in TCC, now known as CEL and held in an irrevocable trust by the Trustees. In June 2008, by Declaration of Completion by Transferor, the Trustees transferred 138 B non-voting shares to LF. In

2010, JF transferred his 250 B shares in CEL to himself but refused to register LF's 138 B non-voting shares into CEL's share register reflect LF's ownership.

10. The Trustees repeatedly requested that JF register LF's interest in CEL and recognize her as the sole owner of the said shares. Neither JF nor the CEL has formally challenged LF's entitlement to the 138 B non- voting shares and there has been no order from any Court of competent jurisdiction setting aside her entitlement. Moreover, LF has been declared the beneficial owner of the 138 B non-voting shares by virtue of the Form 41 Declaration of Beneficial Ownership completed by the Trustees, dated 11 August 2020 and which ought to be recognized by the Companies Registry of Trinidad and Tobago.

11. By a Shareholders' Agreement of 1995 ("the 1995 SA"), JF, LF, AMM, JPF and MMF agreed to enter into 'shareholders' agreements regarding the Fernandes Group of Companies ("the FGC"). The 1995 SA also set out the rights and restrictions of shareholders and directors which were to be confirmed by further agreement.

12. In 2005, the Third Claimant commenced legal action against CEL ("the 2005 action") to compel it to enter into its register of members the name of A.M. Investments Limited as the registered holder of 98 non-voting B shares, to issue the Share Certificate in favour of A.M. Investments Limited and to exchange the Transfer of Shares by Assent. In 2007, CEL's name was changed from TCC and none of the minority shareholders received an invitation to this meeting and were only informed of the name change thereafter.

13. The Claimants contend that the 1995 SA is not valid as Clause 3 provides that the parties agreed to enter into a formal shareholders' agreement confirming their duties and rights, however, no such shareholders' agreement had been executed. They also contend that based on clause 11 of the 1995 SA, if any FGC shareholder serves legal proceedings on any other FGC shareholder in

connection with the 1995 SA then the whole 1995 SA shall be deemed null and void and that the effect of the 2005 action was to make the 1995 SA null and void.

14. The Claimants also assert that over the past 26 years, JF has repeatedly failed and/or refused to provide the bye laws of CEL, previous minutes of shareholders meetings, chairman's reports for meetings, audited financial reports for CEL, the agreement for acquisition by the State for a portion of land belonging to CEL which was compulsorily acquired in 2007 and 2010 and valuations of the property of CEL despite multiple requests from the Claimants. However, given that the minority shareholders are all family members with JF, they have avoided litigation and sought to resolve matters out of Court until present.

15. At the Annual General Meeting of CEL held on 28 December 2021, when questioned about the discrepancies in CEL's accounts neither JF nor the Accountant for CEL could offer any reasonable explanation as to the state of finances of CEL.

16. Prior to the Annual General Meeting of CEL held in 2021, JF repeatedly demanded that a Deed of Rectification for the property be signed by all shareholders but failed and/or refused to provide a copy of it to enable the shareholders to obtain independent legal advice.

17. The preliminary financial report of Gravitas Business Solutions Limited dated 2 March 2022 revealed glaring discrepancies in CEL's financial reports regarding failed investments by JF in Queens Park Hotel, salaries paid to himself as director, advances of CEL's funds to Aquila and bank overdraft positions. The Claimants also allege that dividends have not been paid to the shareholders from the acquisition of CEL's land by the State in 2015/2016.

18. On 17 March 2022, the accountants and auditors of CEL were given an opportunity to explain the discrepancies in CEL's accounts to Gravitas Business Solutions Limited. However, they were unable to provide any satisfactory explanation for the discrepancies.

19. According to the Claimants, in or around April 2021, and possibly even earlier, JF was fielding offers from the USG for the sale of the property. Prior to the Special General Meeting in March 2022, the Claimants were only provided with a redacted copy of the agreement for sale with redacted portions as to the Option Fee, Option Exercise Fee and sale price. They were only provided with this information in March 2022 after a Pre-Action Protocol Letter was issued to JF. At the Special General Meeting in March 2022, the votes of the shareholders were improperly recorded despite their statements that there were not objecting to the sale, but were merely requesting the documents for their review and a short adjournment before voting.

20. Based on the aforesaid allegations, the Claimants contend that JF and the Board of CEL have conducted the affairs of CEL in an unfairly prejudicial manner which endangers the rights and entitlement of the Claimants. In addition to the orders in the Application they also seek the following orders in the substantive claim :

    (a) A declaration that the Claimants are proper complainants and Claimants within the meaning of Sections 239 (b) and/or 245 of the Companies Act ;

    (b) An Interim Order that JF disclose to the Claimants, the banking institution at which the Option and Exercise Fee are held;

(c) An Interim Order that the Second Claimant be declared a consenting shareholder to the resolution passed on 9 March 2022 for the disposal and sale of the property;

(d) An Order that the Minutes of the Meeting and Resolution passed on 9 March 2022 be amended to reflect the Second Claimant as a consenting shareholder to the disposition and sale of the property;

(e) In the alternative, an Order that the Resolution passed on 9 March 2022 be declared null, void and of no effect;

(f) In the alternative, an Order that a Special Meeting Resolution be reconvened to obtain the vote of the shareholder for the disposition and sale of the property;

(g) An inquiry into damages and/or compensation including aggravated and/or exemplary damages;

(h) Interest pursuant to the Supreme Court Judicature Act;

(i) Costs; and

(j) Such further or other relief the Honourable Court deems fit.

21. The Defendants response to the aforesaid allegations made by the Claimants can be summarised as follows. The Claimants are not proper complainants in law as they are non-voting shareholders of CEL and cannot complain about the conduct of the meetings and accounts of CEL, as those are matters which can only be properly be raised by voting shareholders. As non-voting shareholders the Claimants are not entitled by law to accounts or audited financial information of CEL. They also do not have any right to CEL's

property. They are only entitled to the declared dividend from realized profits which in the instant case is approximately 20%.

22. The Defendants also assert that the 1995 SA is not an agreement to agree, but is in fact a valid agreement for which there has been part performance after its execution and the 2005 action. In particular, the Defendants assert that the Claimants have benefitted from the 1995 SA as they have received dividends from FIC up to 2021.

23. In response to the allegations of oppressive conduct by the Claimants, the Defendants contend that they are without any basis as they are non-voting shareholders who have no right to have any input in the management of CEL. The Defendants asserted that the failure by CEL to provide accounts for the first 10 years can be explained; there have been accounts and AGM's for the last ten years; and the proceeds from the acquisition of the land of CEL by the Government of Trinidad and Tobago is accounted for in the accounts.

24. With respect to LF's claim to the 138 B non-voting shares, the Defendants contend that this Court has no jurisdiction to deal with this issue as the terms of the Trust clearly states that the laws of the British Virgin Islands ("BVI") is the proper forum to deal with any dispute concerning any issue arising from it. The Defendants also contend that the actions of the Protector, Mr Robert A D Urquahart ("Mr Urquahart") who signed as approving and ratifying the Deed of Appointment and Indemnity dated 28 January 2003, raises question relative to the administration of the Trust and the 138 B non-voting shares which are to be dealt with by the BVI Court. They also challenged the validity or legality of the appointment of Hudsun Trust Company Limited as the Trustees of the Trust, as it is a separate entity from Hudsun Trustees Limited and no incorporation documents were provided for the former.

25. Based on the positions adopted by the parties thus far the issues to be determined in the substantive claim are: (a) whether the Claimants are proper complainants to bring the instant claim: (b) whether the 1995 SA is still valid and legally binding; (c) whether the Claimants have made out a prima facie case of oppression by the Defendants; and (d) whether the Court has the jurisdiction to deal with any issue concerning the 138 B non-voting shares.

26. In assessing the strength of each party's case at this early stage of the proceedings, I am mindful that it is not my role to resolve any disputes of facts. Nevertheless, I am guided by the learning of **Phipsons on Evidence**[7] where the authors stated the following on assessing evidence overall at paragraph 45-10 as:

> "In the context of commercial disputes, Legatt J's approach in **Gestmin** is often cited as to how evidence in such cases should be treated. After noting the fallibility and unreliability of human recollection he concluded[8]:
>
> "In light of these considerations, the best approach for a judge to adopt in the trial of a commercial case is, in my view, to place little if any reliance at all on witnesses' recollections of what was said in meetings and conversations, and to base factual findings on inferences drawn from the documentary evidence and known or probable facts. This does not mean that oral testimony serves no useful purpose - though its utility is often disproportionate to its length…"

[7] Sweet and Maxwell and Thomson Reuters 20th ed
[8] Gestmin SGPS SA v Credit Suisse (UK) Ltd [2013] EWHC3560 (Comm) at [22]

27. Are the Claimants the proper complainants under the Companies Act to bring this claim? It is not in dispute that the Claimants have no more than 21% of the non-voting shares in CEL at the inception of the instant action. Section 242 of the Companies Act sets out who can approach the Court seeking relief under the oppression remedy. Section 242(1) states that a complainant may apply to the Court to seek such relief. Section 239 of the Companies Act defines a "complainant" as :

> "(a) a shareholder or debenture holder or a former holder of a share or debenture of a company or any of its affiliates;
>
> (d) any other person who, in the discretion of the Court, is a proper person to make an application under this Part."

28. Section 107(1) of the Companies Act defines a "shareholder" as:

> "(a) a person who is a member of the company under section 349(3);
>
> (b) the personal representative of a deceased shareholder and the trustee in bankruptcy of a bankrupt shareholder;
>
> (c) a person in whose favour a transfer of shares has been executed and delivered but whose name has not been entered in the register of members of the company or, if two or more such transfers have been executed and delivered, the person in whose favour the most recent transfer has been made, provided that in the case of a company other than a public company in respect of the persons mentioned in paragraphs (b) and (c), this section shall take effect subject to the provisions of its articles or Bye-laws."

29. The Companies Act in Trinidad and Tobago much like the Companies Act of Barbados was modelled on the Canadian Business Corporations Act. In this

regard, the Court of Appeal judgement from Barbados**, Ansa McAL (Barbados) Ltd v Banks Holdings and anor**[9] is instructive. In that judgment Burgess JA referred to the Canadian cases of **Michalak v Biotech Electronics Ltd**[10] and **Royal Trust Corp of Canada v Hordo**[11] which established that despite the express inclusion of 'shareholders' in the definition of complainant, it does not necessarily follow that a person who is a shareholder automatically has standing as a 'complainant'. According to these cases, the court retains a discretion to deny such status to a 'shareholder' in any case where the interests of equity and justice so requires.

30. Prima facie, the Claimants' ownership of 21% of the non-voting shares in CEL satisfies the criteria in sections 107 (1), 239 and 242 of the Companies Act that they are complainants. However, they still bear the burden to demonstrate that it is in the interest of equity and justice to permit them to pursue the action based on the evidence that they have put forward. In my opinion, the Claimants' position that they are proper complainants at this stage of the action is weak as they are not shareholders with voting rights. Instead their powers and rights as non-voting shareholders limit the very nature of the complaints which they can raise with respect to CEL.

31. I now turn to the validity of the 1995 SA. It was accepted by the respective Counsel for both parties that they have a diametrically opposite view on this issue and that both parties relied on different conduct to prove the credibility of their respective assertions. At this stage of the proceedings the facts which are not in dispute are: the distribution of the FGC was based on the 1995 SA which bound LF, JF, AMM, JPF and MMF; clause 3 provides for the parties to enter into a formal shareholders agreement confirming their rights and duties

[9] Civ Appeal No 21 of 2015
[10] (1986) 35 BLR 1 (Que SC)
[11] (1993) 10 BLR (2d) 86 (Ont Gen Div)

but no such agreement was executed; the distribution of profits shall be based on 60% profits which is subject to the availability of funds after board agreement of programme for investments ; Clause 11 states that "If any FGC shareholder serves legal proceedings on any other FGC shareholder in connection with this Agreement then the whole Agreement shall be deemed null and void".

32. According to the contemporaneous documents[12], the 2005 action was resolved by a consent order dated 14 December 2005 before Smith J (as he then was) whereby it was ordered that TCC would enter AM Investments Limited into its register of members as the registered holder of 98 non-voting B shares within 7 days of the order. Time was also extended to 14 December 2005 for AM Investments and TCC to issue the Share Certificate Transfer and for the parties to exchange the signed transfer of shares by Assent in favour of AM Investments.

33. JF's evidence was that LF, AMM and JPF as shareholders of FIC have benefited from the 1995 SA as they have received dividends from FIC, with the dividends in 2021 in excess of TT $20 million. Notably, the Claimants did not depose that they have not been able to receive dividends from FIC due to the non-compliance with Clause 3 of the 1995 SA. Neither have they deposed that after the 2005 action they were unable to receive dividends from FIC. In my opinion, this silence by the Claimants has strengthened the Defendants' case that the Claimants have received dividends pursuant to the terms of the 1995 SA and therefore they have still treated it as being valid. For these reasons, the Claimants' contention that the 1995 SA is not valid is weaker than the Defendants position.

[12] Exhibit "ADM 2" to the AMM Affidavit

34. I will now deal with the allegations of oppressive conduct. Section 242(2) of the Companies Act sets out the types of matters a complainant can seek an oppression remedy for. It states:

> "(2) If, upon an application under subsection (1), the Court is satisfied that in respect of a company or any of its affiliates –
>
> (a) any act or omission of the company or any of its affiliates effects a result;
>
> (b) the business or affairs of the company or any of its affiliates are or have been carried on or conducted in a manner; or
>
> (c) the powers of the directors of the company or any of its affiliates are or have been exercised in a manner that is oppressive or unfairly prejudicial to, or that unfairly disregards the interests of, any shareholder or debenture holder, creditor, director or officer of the company, the Court may make an order to rectify the matters complained of."

35. The oppressive conduct which the Claimants have complained of are mismanagement of CEL's funds, non-disclosure of material information, failure to declare and pay dividends and profiting from CEL while operating as one of its Director. Both parties have diametrically opposite positions on these allegations.

36. The cumulative acts of oppression detailed by the Claimants and which they contend JF as the Managing Director of CEL has committed over the past 26 years are that: he abused his fiduciary position in CEL by authorizing

significant and material payments to related parties in particular, advanced monies and or loans to himself in the sum of $2,000,000.00, and to his wife, a director in CEL, Ms Cynthia Bacchus in the sum of $2,000,000.00 without any collateral. Further, he advanced the sums of $2,000,000.00 to Aquila which were funds derived from the acquisition of the land in 2015 and 2016 by the State which ought to have been distributed as dividends to the Claimants and which was never done; he has invested a total sum of $19,000,000.00 in Queens Park Holdings since 2016, an investment which has not realised any profit; he has deprived the shareholders on many occasions of the right to review financial statements of CEL, although the Claimants have individually and collectively made repeated request for same orally and in writing from 2014 to present; he has delayed in providing financial statements and refused and or failed to provide audited financial statements for CEL; when the Claimants were provided with financial statements moments before the 2021 Annual General Meeting neither JF nor the accountant for CEL were able to explain expenses for works such as rebuilding CEL's roof, internal repairs, restoration works, administrative fees, legal expenses incurred in a high court action, payments to Aquila, salaries and wages.

37. It was common ground by the parties that the leading Canadian case of **BCE Inc v 1976 Debentureholders**[13] is instructive on the factors to be considered in assessing whether conduct was oppressive or unfairly prejudicial. The Court held:

> "The oppression remedy focuses on harm to the legal and equitable interests of a wide range of stakeholders affected by oppressive acts of a corporation or its directors. This remedy gives a court a broad jurisdiction to enforce not just what is legal but what is fair. Oppression is also fact specific: what is just and equitable is judged

[13] 2008 SCC 69

by the reasonable expectations of the stakeholders in the context and in regard to the relationships at play. [45] [58-59]

In assessing a claim of oppression, a court must answer two questions: (1) Does the evidence support the reasonable expectation asserted by the claimant? and (2) Does the evidence establish that the reasonable expectation was violated by conduct falling within the terms "oppression", "unfair prejudice" or "unfair disregard of a relevant interest? For the first question, useful factors from the case law in determining whether a reasonable expectation exists include: general commercial practice; the nature of the corporation; the relationship between the parties; past practice; steps the claimant could have taken to protect itself; representations and agreements; and the fair resolution of conflicting interests between corporate stakeholders. For the second question, a claimant must show that the failure to meet the reasonable expectation involved unfair conduct and prejudicial consequences under s. 241. [68] [72] [89] [95]

Where conflicting interests arise, it falls to the directors of the corporation to resolve them in accordance with their fiduciary duty to act in the best interests of the corporation. The cases on oppression, taken as a whole, confirm that this duty comprehends a duty to treat individual stakeholders affected by corporate actions equitably and fairly. There are no absolute rules and no principle that one set of interests should prevail over another. In each case, the question is whether, in all the circumstances, the directors acted in the best interests of the corporation, having regard to all relevant considerations, including — but not confined to — the need to treat affected stakeholders in a fair manner,

commensurate with the corporation's duties as a responsible corporate citizen."(Emphasis added)

38. In determining the strength of the aforesaid allegations against the Defendants the guidance of Jamadar J (as he then was) in **Lalla v Trinidad Cement Limited et al** [14]is appropriate. At page 11 he stated:

> "It must be that it is essentially a question of fact whether or not there has been oppression. Therefore each case must turn on its own particular circumstances. To do so, clearly, the courts must consider both the nature of the acts complained of and the method by which they were carried out, in the context in which they arise. Oppression must necessarily be, in my opinion, context specific."

39. In **Ansa Mc Al (Barbados) Ltd** Burgess JA explained at paragraph 104:

> "The kernel of the oppression remedy provisions is that the conduct complained of must be actionable conduct, in the sense that is "oppressive or unfairly prejudicial, or that unfairly disregards the interests of a shareholder, or debenture holder, creditor or director or officer of the company". Therefore, the two central foci in determining entitlement to the remedy are the "interests" of the protected category and the conduct that is "oppressive", "unfairly prejudicial" or "unfairly disregards" in light of these "interests"".

40. In my opinion, the strength of the Claimants allegations of oppressive or unfairly prejudicial conduct of the Defendants are inextricably linked to the rights the former have as non-voting shareholders. Sections 31 and 32 of the Companies Act set out the rights attached to different types of shares as:

[14] HCA S852/98

"31. When a company has only one class of shares, the rights of the holders are equal in all respects, and include —

(a) The right to vote at any meeting of shareholders;

(b) The right to receive any dividend declared by the company;

(c) The right to receive the remaining property of the company on dissolution.

32. The articles of a company may provide for more than one class of shares; and, if they so provide —

(a) the rights, privileges, restrictions and conditions attaching to the shares of each class shall be set out in the articles; and

(b) the rights set out in section 31 shall be attached to at least one class of shares, but all of those rights need not be attached to the same class of shares."

41. What are the rights of non-voting shareholders in law and under the 1995 SA? Under section 128 of the Companies Act each shareholder has one vote, but this is subject to the articles of incorporation. In the instant case, until the 1995 SA is declared null and void and set aside, it is still valid and it clearly states that the shareholders with "B" shares have no voting rights.

42. Under section 138(4) of the Companies Act the non-voting shareholders are entitled to vote on the sale of property of a company. Section 138 (2) sets out the information which is to be provided for such a vote, namely the notice must include or accompany a copy or a summary of the agreement for sale;

and indicate the entitlement of a dissenting shareholder to be paid the fair market value of his shares.

43. Both parties have different positions surrounding the disclosure made by the Defendants to the Claimants regarding the sale of the property to the USG. In this regard, the contemporaneous documents are instructive. The Notice of the Special General Meeting dated 17 February 2022[15] to the shareholders including the Claimants stated that the said meeting would be held on 9 March 2022. It also stated that the meeting was being held to: discuss the exercise of the option held by the USG which was made on 4 February 2022 to acquire the property; disclose the agreed sale price; to obtain the consent or dissent of the shareholders with regard to the sale of the property; and to approve a resolution concerning the sale of the property which would authorise the directors to do all things necessary to finalise the said sale. The notice also informed the shareholders that under section 138(b) of the Companies Act, a dissenting shareholder is entitled to and will be paid the fair value of their shares in accordance with section 227 of the Companies Act and it requested shareholders to pay particular attention to and respect to the confidentiality and non-disclosure requirements of the Option agreement. The Option Agreement was dated 18 May 2020 and the Supplemental Option Agreement was dated 8 March 2022[16].

44. JF's evidence was that the shareholders were initially provided with the original redacted copy of the Option Agreement for Sale on 16 February 2022 with the intention to disclose the purchase price at the Special General Meeting. The letter from the Defendants' Attorneys at law dated 28 February 2022[17] stated the reason the information in the Option Agreement provided

[15] Exhibit JF 18 and part of bundle of documents in JF 19
[16] Exhibit JF 11
[17] Exhibit JF 19

to the Claimants was redacted. It referred to the confidentiality clause in the said Agreement and it disclosed that the purchase price is TT$316 million which equated to TT $659 per square foot.

45. In my opinion, although there are different positions by the parties on the circumstances surrounding the disclosure of the sale of the property to USG, at the time of the Special General Meeting on 9 March 2022, the Defendants had complied with the requirements as set out in section 138(2) of the Companies Act. In this regard, the Defendants' case on the allegations of prejudicial conduct concerning the said sale appears to be relatively stronger than the Claimants at this stage.

46. Under section 55 (2) of the Companies Act shareholders are entitled to realized profits. In **"Shareholder Actions" by Andrew Charman and Johan Du Toit, SC** at paragraph 1.31 the learned authors said:-

> "A member's proprietary rights are proprietary rights in relation to the shares he holds and are thus a right to have a share of the profits of the company <u>when realized</u> and divided amongst its members, whether on the declaration of a dividend or pro rata on the winding up of a company. To the extent that the declaration of a dividend is based on the profits generated by a company, the profits are only released to the members as of right upon such declaration". (Emphasis mine).

47. Section 60 of the Companies Act empowers the directors of a company to exercise the powers of the company directly or indirectly through the employees and agents of the company and to direct the management of the business and affairs of the company. This includes the decision to pay dividends or realized profits to shareholders. The failure by the directors to

declare a dividend is not oppressive conduct. At page 279 paragraph 21.77 of **Canadian Business Corporations Law**"[18] the learned author states:

> "The Courts recognize that corporate managers must make decisions on issues facing the corporation and that in many cases the practical effect of any decision will be contrary to the intent or wishes of some groups or individuals concerned in the corporation…
>
> The failure of a company is not evidence that its business or affairs have been conducted in an oppressive manner. The general rule is that it is not oppressive for a corporation not to declare and pay a dividend on shares when there are sound business reasons for not doing so, but it may be oppressive to refrain from paying dividends on the unusual facts of a particular case".

48. What rights the non-voting shareholders do not have in law? According to the authors in **Shareholders Actions** at paragraph 1.32: -

> "A company's contracts are personal to itself. Members have no personal or proprietary rights in relation thereto, or for that matter, in relation to any assets of the company. The distribution of a company's assets to a shareholder can only be effected lawfully in accordance with statutory precepts. Not even a shareholder has a proprietary interest in the company's assets. It is accordingly possible for a shareholder even a sole shareholder to steal from the company in which it holds shares. Misappropriation of company assets by the directors constitute a loss for the company and is primarily recoverable by the company from

[18] 3rd edition Volume 3 – Kevin P. McGuinness Lexis Nexis 2017

aberrant directors. If the company does not pursue the claim, a derivative action is available to the shareholders."

49. It was submitted on behalf of the Claimants that as non-voting shareholders they have a reasonable expectation to be paid dividends, to be provided with financial information of CEL on an annual basis and the right to inspect the books and records of CEL. In my opinion, the shareholders of CEL have a reasonable expectation to be paid dividends, but this is subject to the expectation that it would be based on realized profits. The shareholders of CEL also have a reasonable expectation that they would be provided with the financial information of CEL, but this expectation does not extend to audited financial information and there is there is no legal basis bestowing a reasonable expectation to the shareholders to inspect the books and records of CEL. In this regard, the Claimants reasonable expectations are relatively weak as compared to the Defendants' position on this issue.

50. When I apply the aforesaid rights of the Claimants as non-voting shareholders at this stage of the proceedings, to the test set out in **BCE Inc** the Claimants' case is weak as it is not the general commercial practice for non-voting shareholders to be provided with the information which they have alleged amounts to oppressive conduct. The nature of the business of CEL as stated by JF and not disputed by the Claimants is of a philanthropic nature which expanded into other businesses. The relationship of the parties is governed by the 1995 SA which remains valid until it is set aside and it appears that that LF, JF, AMM and JPF have all benefitted from the 1995 SA.

51. In the circumstances, the overall relative weaknesses of the Claimants' case at this early stage of the proceedings have failed to convince me that there are strong grounds to make the orders sought in the Application, namely a declaration that the business or affairs of CEL have been conducted in an

unfairly prejudicial manner and/or unfairly disregards the interest of the Claimants as defined in section 242(2) of the Companies Act; an order that independent auditors be appointed to audit the books, records and accounts of CEL and produce an interim report to the Court on its findings; an order that an independent firm be appointed to examine and review the unaudited accounts of CEL for the period 2011 – 2021 and produce audited accounts and its findings to the Court; and an order that the Board of CEL be replaced with directors appointed by the Court.

52. On the issue of the jurisdiction of this Court to deal with the 138 B non-voting shares, at the first hearing of the Application, I indicated to Counsel for the Claimants that my preliminary view was that the order which the Claimants were seeking with respect to the said shares was in the nature of a substantive order and not an interim order. Having heard the arguments on behalf of both parties, I have not been swayed by the Claimants to alter my position.

53. Further, I am of the opinion that the Defendants have the relatively stronger case as paragraph 29 of the Trust clearly states that the proper law and forum of administration for disputes arising from the Trust is the BVI. Paragraph 29 states:

> "THIS Settlement is established under the laws of The British Virgin Islands and the rights of all parties and the construction and effect of each and every provision hereof shall be subject to the exclusive jurisdiction of and construed only according to the law of the said British Virgin Islands which shall be the forum for the administration of this Settlement."

54. In my opinion, the dispute concerning the 138 B non-voting shares falls squarely within paragraph 29 of the Trust. In deciding the dispute of the ownership of the 138 B non-voting shares, the BVI Courts will have to address

the issues regarding the propriety of the conduct of the Protector when he approved and ratified the Deed of Appointment and Indemnity dated 28 January 2003, the validity of the various Letters of Wishes from MMF and the validity of the change of trustees.

55. Second, damages are an adequate remedy. One of the orders sought in the substantive action is damages. The Claimants have not stated that damages would not be an adequate remedy. Their position is that if they are successful at the trial, they may not be able to reap the fruits of their judgment. The fruits which they are seeking to secure were clarified at the hearing of the Application where in response to questions posed by the Court, Counsel for the Claimants, accepted that the Claimants' best case is that they are entitled to 21% (the undisputed shareholding) with a maximum of 34% of the proceeds of the sale of the property to the USG. This is with the assumption that there are no expenses or investments which are to be deducted prior to the declaration for the payment of dividends by CEL. Based on the Claimants' argument, the anticipatory monetary loss is 21% of the purchase price which is TT$316 million[19] and if the Claimants are successful at the trial this loss could be equated to a monetary value. However, the Claimants did not assert that any of the Defendants would not be able to satisfy any award for damages which may be made at the trial if they are successful. In my opinion this is important as the action is against JF and CEL and the Claimants have not deposed that JF and CEL would not be able to satisfy any order for damages if they are successful.

56. Third, the Claimants did not give any undertaking in damages. It is not in dispute that the sum of money which the Claimants are asking the Court to order to be paid into Court is substantial. In my opinion, the effect of making

[19] See Exhibit JF 19 Letter dated 28 February 2022

this order would deprive CEL of having access to those funds in circumstances where the Claimants have not been able to establish that they are entitled to the entire proceeds of the sale.

57. The Court in exercising its discretion to award an interim injunction may consider whether the Claimant has given an undertaking in damages or is able to provide any meaningful undertaking in damages. The award of an interim injunction is normally conditional upon the Claimant undertaking to pay damages to the Defendant for any loss sustained by reason of the injunction, if it should be held at the trial that the former had no right to restrain the latter from acting in the way specified. This is the 'price' the Claimant must 'pay' for the grant of the injunction.[20] The Court cannot compel an undertaking to be given, **Halsbury's Laws of England**[21] states that:

> "On making an order for an injunction, the court cannot compel the claimant to give an undertaking as to damages, but it can refuse to grant an injunction unless he does. The court may dispense with the undertaking, but will only do so in very special circumstances, such as when the order is in the nature of a final order and is not intended to be open to review at any time afterwards."

58. Notably absent from all the affidavits filed in support of the Application is any undertaking in damages which the Court may award if it is later found that the granting of the interim relief was wrong. Counsel for the Claimants submitted that there was no undertaking in damages as there was no evidence of the loss of CEL or that the sums claimed would affect the business of CEL. Counsel for the Defendants argued that the onus was not on the Defendants to state the reasons an undertaking is required by the Claimants.

[20] Tort: The Law of Tort (Common Law Series), 3rd Edition (December 2014), para 8.32
[21] Volume 12 (2020), para 604.

59. In my opinion, there are no special circumstances for me to dispense with the requirement for the Claimants to given an undertaking in damages. I am strongly of the view that based on the nature of the order sought with respect to the payment into Court of the proceeds of the sale of the property which is in the sum of TT$316 million, this is a case where the failure to provide an undertaking in damages is fatal to the Application. Indeed if I am to make the order to deposit the sum into Court and the Claimants are not successful at the end of the trial, the Defendants would have been deprived of access to substantial funds required to run its business and make investments.

60. Fourth, there is no reason to deviate from the status quo. At the time of the hearing of the Application, the status quo is that CEL is the owner of the property to be sold to the USG; it is an operating company with two wine shops one at West Mall and the other at the property, a restaurant/wine bar (which is closed), administrative offices; and it is in the process of developing land in Tobago. The Claimants as non-voting shareholders of no more than 34% are only entitled to dividends on realised profits and have no rights to the property of CEL. In my opinion, to grant the order to deposit the proceeds of the sale of the property into Court will not preserve the status quo, as it would deprive CEL of the proceeds of the sale of one of its important assets which would adversely impact its ability to continue to conduct its business. Likewise, to remove the directors at this early stage of the action is not prudent as the Claimants have not even suggested persons to replace the existing directors.

61. Fifth, the greater prejudice will be the Defendants if the injunction is granted. In **Went** at paragraph 103, Scott J (Ag) quoting from **Halsbury's Law of Canada – Interim Preservation of Property Rights**[22] which stated at paragraph 4 that:

[22] (2013 reissue)

> "Financial considerations are far from irrelevant. Disruptions of ongoing business is usually regarded as sufficient to constitute irreparable harm…"

62. Scott J (Ag.) referred to **Yim v Ink Research Corp**[23] where the court regarded an injunction which would freeze the business plan of the defendant as "irreparable harm".

63. The prejudice to the Defendants is greater as it would prevent it from having access to the proceeds of the sale of one of its main assets, to continue the business of CEL by operating its wine shops, its restaurant and developing land in Tobago. It would also deprive CEL of funds to meet its administrative expenses. In my opinion, placing all or any of the sums received from the sale into escrow would cause irreparable damage.

64. The prejudice to the Claimants if the injunction is refused is that they may not obtain dividends from the proceeds of the sale of the property. However, the Claimants could still be compensated in damages for any loss they suffered if successful at the trial.

65. Sixth, part payment into Court of the proceeds from the sale of the property is unworkable. There is no basis in law to support an order for the payment of 34% of the proceeds of the sale of the property as this is not the declared dividend. Even if the Court was to make such an order it would be difficult to supervise and if CEL is to invest the remaining 66% of the proceeds of the said sale and declare a dividend, then the issue which would arise is whether the Claimants would be entitled to receive a part of that dividend.

[23] (2007) 31 BLR (4th) 28,

ORDER

66. The Amended Notice of Application filed 25 March 2022 is dismissed.

67. The Claimants are to pay the Defendants' costs of the said application to be assessed by a Registrar in default of agreement.

/s/ Margaret Y Mohammed

Judge