

**THE REPUBLIC OF TRINIDAD & TOBAGO**

**IN THE HIGH COURT OF JUSTICE**

**Claim No. CV 2018-00628**

**IN THE MATTER OF THE COMPANIES ACT CHAPTER 81:01**

**IN THE MATTER OF A COMPLAINT PURSUANT TO SECTION 242 OF THE  
COMPANIES ACT  
CHAPTER 81:01 OF OPPRESSIVE OR UNFAIRLY PREJUDICIAL CONDUCT AND  
IN THE  
MATTER OF A FRAUDULENT REMOVAL OF A DIRECTOR**

**BETWEEN**

**KURT LEQUAY**

Claimant

**AND**

**JIAN ENTERPRISES LIMITED**

First Defendant

**KAREN LEQUAY-CHARLES**

Second Defendant

**PETER CHARLES**

Third Defendant

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

Date of Delivery: May 5, 2021.

Appearances:

Claimant: Mr. J. Herrera instructed by Mr. K. Joseph

Defendants: Mr. S. Singh instructed by Mr. K. Alexander

## JUDGMENT

### THE CLAIM

1. This claim for oppression was filed on February 28, 2018. The First Defendant (“the company”) is a security and technology limited liability company operated as a family business. The Second and Third Defendants are married and the Claimant is the brother of the Second Defendant.
  
2. Around September 2011 the Claimant was hired as the General Manager. The Second and Third Defendants approved of his work ethic and invested in his training and qualifications. His role was to obtain profits, manage staff and establish and accomplish business objectives. The Claimant asserts that he operated in the capacity of a Director, Managing Director and shareholder of the company.
  
3. On November 14, 2013 the Claimant was appointed a Director of the company. The Claimant owns 15% of the company’s shares and is therefore a minority shareholder. The issued shareholding is as follows:
  - The Second Defendant- 35%;
  - The Third Defendant- 35%;
  - The Claimant- 15%;
  - Nicholas Charles- 15%.
  
4. The Claimant averred that he performed the following as Managing Director:
  - a. Developed strategic business plans
  - b. Signed as personal guarantor

- c. Negotiated contracts
  - d. Caused revenue to increase by to \$25 million and more
  - e. Develop operational plans to manage the operations
  - f. Made site visits in respect of major contracts (won several and caused the company to receive pecuniary advantages.
  - g. From September 2011 to September 2017 managed and maintained projects through his sole efforts and personal business relationships which resulted in increased revenue.
5. He pleaded several acts of oppression committed by the Defendants and alleged that the Second and Third Defendants continuously disregarded his interests as a shareholder, Director and officer of the family business contrary to section 242 of the Act. That the conduct and acts of the Defendants were in response to the Claimant's demand for explanations in relation to their irresponsible spending of the company's money.
6. According to the Claimant, Karen and Peter deliberately withheld his salaries and benefits in the months of July, 2017 and August, 2017. He was paid in September. The Claimant alleges that during the period of June 2017 to September 2017, he made written and verbal requests to review the accounts of the company and that when he inquired about the accounts he was informed by Karen and Peter that the company experienced cash flow problems which resulted in late payment of management salaries. The Claimant claims that upon further scrutiny of the accounts, he discovered that Karen and Peter made the following payments from the accounts of the company without his knowledge and/or approval as Managing Director, Director and shareholder of the company;

- i. Monies expended for the residential rents of Karen and Peter and their relatives;
  - ii. Monies expended relative to the upgrade of vehicles belonging to Karen and Peter and their relatives;
  - iii. Monies expended on personal credit cards of Karen and Peter and their relatives;
  - iv. Monies expended on moving expenses associated with Karen and Peter and their relatives;
  - v. Monies expended for personal travel and vacations of Karen and Peter to Russia, India, Mediterranean Cruises, Caribbean Resorts and other personal travels and expenses.
7. The Claimant claims that the aforementioned monies expended were not for the benefit of the company and/or its shareholders. That Karen and Peter utilized the company's funds for their personal expenses without the Claimant's knowledge and/or approval. He further claims that certain transactions made with US currency were not in keeping with Trinidad and Tobago Central Bank requirements.
8. By letter dated September 7, 2017 his service as Managing Director was terminated and he was informed that he was removed as Director of the company. A Notice of Change of Directors filed September 7, 2017 shows that he was removed on September 5, 2017. Nicholas Charles who is the son of the Second and Third Defendants was appointed as Director on August 28, 2017 prior to his removal. It is the Claimant's case therefore that the actions of the Defendants were oppressive, unfair, and prejudicial and was tantamount to a disregard for the Claimant's interest. He further asserts that his termination was illegal, unfair and contrary to the company's By-laws and the Companies Act.
9. He therefore seeks;

- a. An order that there be a forensic audit of the accounts of the company to determine its Equity and Shareholding.
- b. A declaration that the business affairs of the company have been carried on in a manner that is oppressive or unfairly prejudicial to, or that unfairly disregards his interests.
- c. A declaration that he was unlawfully removed as a Director of the company.
- d. An order that the First Defendant's monies utilized by the Second and Third Defendants for their private use be remitted to the company.
- e. A declaration that the powers of the Second Defendant as Director has or have been exercised in a manner that is oppressive or unfairly prejudicial to, or that unfairly disregards the interests of the Claimant.
- f. A declaration that the action of the Second Defendant in executing a Notice of Change of Directors dated 18<sup>th</sup> August 2017 to appoint Nicholas Charles as Director was ultra vires and in breach of the Companies Act and Byelaws and constitutes the use of her office in a manner that is, oppressive, unfairly prejudicial and that unfairly disregards the right of the Claimant to be involved in the appointment of Directors.
- g. A declaration that the purported appointment of Nicholas Charles as Director by the Second Defendant is invalid.
- h. A declaration that the action of the Second Defendant in executing a Notice of Change of Directors dated 5<sup>th</sup> September 2017 to remove the Claimant as Director was ultra vires and in breach of

the Companies Act and Byelaws and constitutes the use of her office in a manner that is, oppressive, unfairly prejudicial and that unfairly disregards the right of the Claimant to be involved in the removal of Directors.

- i. A declaration that the purported removal of the Claimant as Director by the Second Defendant is invalid.
- j. An order that the Registrar of Companies do rectify the Register of Directors of the First Defendant by striking out the Notices of Change of Directors dated 18<sup>th</sup> August and 5<sup>th</sup> September 2017.
- k. General damages for unlawful removal as a Director.
- l. General damages for wrongful termination as Managing Director.
- m. An order that the Defendants pay the Claimant the value of his shareholdings in the First Defendant.
- n. An order that the First Defendant pay to the Claimant outstanding monthly emoluments.
- o. An order restraining the First Defendant or any of its affiliates from paying, transferring, pledging any funds or assets to any of the individual Defendants or for their benefit, without obtaining the prior consent of the Claimant or the approval of the Court on notice;
- p. Costs.

## DEFENCE

10. When the Claimant was employed as the General Manager the Second and Third Defendants were Directors and shareholders of the company. On November 14, 2013 the Claimant was appointed as a Director of the company.
  
11. According to the Defendants, the Claimant's duties were to:
  - a. Develop and implement Company and Staff Employment policies and procedures;
  - b. Develop and implement HSE plans and policies;
  - c. Develop Company forms and procedures;
  - d. Convene and conduct weekly tool book meeting;
  - e. Prepare proposals and quotation for prospective business;
  - f. Manage the technical team; and
  - g. Increase the revenue and profitability of the Company.
  
12. By **Defence**, the Defendants deny that they have acted oppressively, fraudulently and/or unfairly prejudiced the Claimant's rights at any time in the operation of the company's business and/or at all and in particular with respect to the dismissal or termination of the Claimant as a Director of the company.
  
13. According to the Defendants, the Claimant was offered the opportunity to join the company as the General Manager in September 2012 which the Claimant accepted and commenced his duties as the General Manager on October 1, 2012. The Claimant's role and responsibilities as General Manager included but were not limited to focusing on managing the company's existing business and to increase its revenue and profits by securing new customers and larger projects.

14. The Defendants deny that the company's business grew and revenue increased as a result of the Claimant's management. According to the Defendants, the financial results during October 2012 to September 2017 show that the company's revenue flat lined and did not grow as the Claimant had promised it would. The Defendants aver that the only time there was a significant increase in revenue was in 2015 and that this increase was the result of the company securing two major contracts which Peter won for the company.
  
15. The Defendants further deny that the allocation of the 15% shareholding in the company to the Claimant was based on his performance in the company. According to the Defendants, during one of the several conversations Peter had with the Claimant about the Claimant joining the company, Peter promised the Claimant that if he served the company for three years, he would be offered 15% of the company. At the expiration of the three years, the Defendants honoured their promise and the Claimant was given 15% shareholding in the company.
  
16. The Defendants aver that sometime after being appointed as a Director on November 14, 2013 that the Claimant assumed the role and title of Managing Director by changing his designation unilaterally. There was no shareholder meeting to appoint the Claimant as Managing Director and neither his salary nor his role and responsibilities were altered in any way.
  
17. According to the Defendants, during the period of 2016 and 2017 the company experienced critical cash flow challenges. The Defendants claim that Karen and Peter gave Director loans to the company to meet monthly expenses which included salaries for staff and statutory payments. The Defendants further claim because of the US dollar

restrictions in Trinidad and Tobago during the period of 2016 and 2017, the company was unable to make payments to foreign vendors and so Karen, Peter and Nicholas made use of their personal credit cards to liquidate monies due and owing to foreign vendors. As such, it was the claim of the Defendants that any monies paid by the company to Karen and Peter were reimbursements of the loans made to the company and/or repayment of credit card payments made on behalf of the company. Those payments would have been so recorded by the company's accountants.

18. The Defendants aver that as a result of the company's cash flow challenges, Peter, Karen, Nicholas and the Claimant did not receive their salaries for some months. According to the Defendants, the Claimant was well aware of the financial status of the company at all points in time. As such, the Defendants aver that the Claimant's salary and benefits were never deliberately or maliciously withheld.

19. The Defendants aver that the Claimant did not surpass his role and responsibility and in particular the Claimant failed to do the following;

- i. Increase revenue and decrease expenses for the period 2012 to 2017;
- ii. Develop and implement operational plans for TYCO and Visonic products which are two product lines for which the company is the authorized representative in Trinidad and Tobago. According to the Defendants, this was a dereliction of the Claimant's duties which caused financial loss to the company and its shareholders;
- iii. Develop and implement operation and marketing plans to develop new customers and larger projects; and

iv. To provide financial information of the company to Karen in a timely manner in order to secure over draft facilities and/or other facilities to ensure that the company could meet its debts and commitments as same became due which was in breach of the Claimant's fiduciary duty to the company and a further dereliction of his duties as a Director of the company.

20. According to the Defendants, the Claimant also purposely and maliciously refused to submit a proposal for an EDC project on the ground that he had not received two months' salary while being fully aware of the company's cash flow problems and participating in the company's policy and decision to pay creditors and employees before paying management's salaries. The Defendants claim that this action amounted to the Claimant acting in bad faith and to the detriment of the company and its shareholders.

21. The Defendants aver that by virtue of the aforementioned, the company had lost all confidence and trust in the Claimant and was entitled to terminate the Claimant's contract of employment. According to the Defendants, at a meeting held on September 4, 2017 Peter informed the Claimant that his actions amounted to a deliberate attempt to sabotage the company's opportunities in earning substantial revenue and that such behaviour was not acceptable for a Director of the company. The Defendants gave the Claimant the opportunity to resign from the company but he refused to do so.

22. According to the Defendants, the Claimant developed the Human Resources Policies for the company and has terminated employees of the company using the termination notice of one month. As such, the Defendants claim that the Claimant was well aware that the company's notice period is in fact one month. The Claimant was given one month's

salary in lieu of notice upon his termination which is in keeping with the company's termination policy.

### **ISSUES TO BE DETERMINED**

- i. Whether the termination of the Claimant as Managing Director and Director was lawful.
- ii. Whether the actions of the Second and Third Defendants in that regard amount to oppression within the meaning of section 242.

### **EVIDENCE OF THE CLAIMANT**

23. Kurt Lequay was the only witness on the Claimant's case.

#### **Kurt Lequay**

24. The Claimant was the General Manager for different periods during his tenure at the company. He was given the responsibility to manage the business, increase revenue and profits, manage staff and establish and accomplish business objectives. According to the Claimant, he surpassed this role and through his management and diligence, the company's revenue substantially increased.

25. The Claimant testified that he was given, not promised, 15% shareholding in the company. The Second and Third Defendant expressed their desire to reduce their daily involvement in the company and have their son, Nicholas Charles and the Claimant run the company.

26. Thereafter, the Claimant says based on his performance, he was elevated to the post of Managing Director replacing the Third

Defendant who became CEO of the Company.<sup>1</sup> The Claimant explained the duties and functions he undertook as Managing Director. He further stressed that through his effort and business relationships, the company's revenue and overall profitability increased. The Claimant also listed projects from which the company received pecuniary income. Further, it was through his recommendation, that the company was contracted to distribute Tyco Security Products and to represent its product lines in this jurisdiction. He noted that he was copied all email correspondence and the said emails were in the possession of the Third Defendant.

27. The Claimant explained that an opportunity arose to secure a contract with Bhagwansingh's Trincity and he discussed it with the Second and Third Defendants. The parties agreed to develop separate products to determine which one to submit. The Second and Third Defendants would submit a proposal based on a MATRIX product, and the Claimant decided that he would submit a proposal based on the Tyco Securities product through the EDC Consultants. However, he planned a family vacation for late August 2017 and informed the Second and Third Defendants that he could not submit his proposal.

28. According to the Claimant, the company submitted the MATRIX option and the EDC Consultants chose another provider. The Claimant also pointed out that he has always actively worked towards improving the operations, marketing and profitability of the company.

29. The Second and Third Defendants are responsible for the mismanagement of the company's accounts. The Claimant expressed concerns that the Second and Third Defendants withdrew monies from the company's accounts for their own use and benefit and without

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<sup>1</sup> See the exhibit "K.L.3" namely a notice of Directors dated November 14, 2013 appointing the Claimant as General Manager and Director.

disclosing same to the Claimant. The Claimant conducted his own investigation and discovered numerous personal payments and withdrawals by the Second and Third Defendants. Therefore, the Defendants engaged in activities that were contrary to good corporate practice and governance. A further example of this was a spreadsheet that revealed building materials for the personal home of the Second and Third Defendants according to the Claimant.

30. Additionally, according to his evidence, the Second and Third Defendants transferred monies from the company's accounts to their personal and foreign accounts for their own personal gain. From June 2017 to September 2017, the Claimant made a request to review the accounts of the company and was informed by the Second and Third Defendants that the company was experiencing cash flow problems. Upon his review of the company's accounts, the Claimant found that the monies expended did not benefit the company or its shareholders. When the Claimant addressed these issues with the Second and Third Defendants, they fabricated false allegations against him and unlawfully terminated him.<sup>2</sup> They also withheld his salary for July and August 2017 and his monthly emoluments. Since his termination, the Claimant has not received any dividends or benefits.

31. The Claimant testified that his termination was in breach of Section 242 of the Companies Act in that no meeting was held to make the decision to remove him as Director and to include Charles.<sup>3</sup>

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<sup>2</sup> See the exhibit "K.L.6" namely the termination letter dated September 5, 2017 from Peter Charles addressed to the Claimant that states sets out that the Claimant failed to increase business activity and revenue and the company therefore lost confidence in him as Managing Director.

<sup>3</sup> See the exhibit "K.L.4" namely a notice of change of Directors dated August 28, 2017 appointing Nicholas Charles as a Director. Also a notice dated September 5, 2017 that state that the Claimant ceased to hold office as a Director.

32. After his termination, the Claimant formed his own company, Keystone Universal Research and a past client of the company is now a client of the Claimant's company.
33. Importantly, the Second and Third Defendants failed to provide financials which were required for mediation proceedings between the parties.

#### Cross-examination

34. The Claimant accepted that when the company started, it was operated from the home of the Second and Third Defendants and no formal notices were given to him when meetings were called.
35. When he was employed as a General Manager, in September 2012, the Claimant testified that he signed a contract with the company. However, this document was not exhibited to his pleadings. It was expected that the Claimant would assist in the growing of the company and increase its profit margin. The Claimant also testified that when he was appointed as Managing Director, there was no formal resolution of the shareholders making him the Managing Director. In addition, the Claimant explained that when an issue arose with the company there would be shareholders and sometimes managerial meetings.
36. In reference to the Claimant's evidence in chief that he developed and presented strategic plans to Republic Bank, the Claimant accepted under cross examination that the Second Defendant, Karen Lequay-Charles was in charge of securing facilities and communicated directly with Republic Bank.<sup>4</sup> The Claimant also accepted that as a Director he was required to sign off on the said facilities.

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<sup>4</sup> See p. 303, para. 15 of the trial bundle.

37. According to the Claimant, through his sole effort the company acquired a contract from Tyco Security Products. Thereafter, the Third Defendant travelled to Las Vegas and negotiated the contract with Tyco Security Products to become its business partner.<sup>5</sup>

38. Attorney for the Defendants questioned the Claimant along the lines of his input in acquiring major contracts and sub-contracts for the company for the period October 2014 to September 2015.<sup>6</sup> The Claimant testified that it was on account of his relationship with Innovative Securities Technologies that the said contracts were acquired. However, he accepted that the Third Defendant was involved in the negotiations of these contracts.

39. The Claimant also accepted that a review of the emails would show that negotiations took place between Peter Charles and Tyco Security Products of the type of services to be provided.<sup>7</sup>

40. The Claimant denied the assertion that he did not provide an operational plan to develop Tyco/Visonic business in Trinidad and Tobago. It was his evidence that he submitted the said plan and the company was able to receive the bank facilities.<sup>8</sup>

41. Attorney for the Defendants questioned the Claimant on another proposal to PCS Nitrogen that he ought to have submitted to secure a contract for the company in light of the cash flow problems the

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<sup>5</sup> See p.136 of the trial bundle exhibit 3, namely email correspondence dated April 8 and 9, 2013 between a representative of Tyco Security Products and Peter Charles.

<sup>6</sup> See p. 304, 305, para. 15 (e) of the trial bundle.

<sup>7</sup> See p.138 of the trial bundle, exhibit 3, namely email correspondence dated April 20 and 22, 2013 between a representative of Tyco Security Products and Peter Charles.

<sup>8</sup> See p.148 of the trial bundle, exhibit 4, namely email correspondence dated February 24, 2017 from Peter Charles to the Claimant).

company was experiencing. The Claimant testified that he did not prepare and submit the said proposal, refused to sign-off on the Republic Bank facilities and denied that as a result the company suffered financially. The Claimant explained that the company's financial records were questionable hence his refusal to sign the documents.

42. He accepted that the Second Defendant would have used her personal credit card to cover certain legitimate company expenses and equipment for certain projects. In addition, the Claimant made no objections when the Second and Third Defendants loaned the company monies to cover expenses. Further, the Claimant was aware that the Second Defendant would be required to be reimbursed.

43. The Claimant maintained that he failed to submit the operational plans for EDC Consultants as certain financial transactions were questionable and that he did not breach his fiduciary duty.

#### **EVIDENCE OF THE DEFENDANTS**

44. The Defendants called two witnesses namely Karen Lequay-Charles and Peter Charles.

#### **Karen Lequay-Charles**

45. The Second Defendant is a Director and responsible for the company's finances, administration and human resources. She outlined her experience in Administration with the United Nations Development Programme and Hi-Tech Security Limited later known as CarSearch. During her time at Hi-Tech Security Limited, the third Defendant was

the Managing Director. Sometime in 1994, he employed the Claimant as the Operations Manager until he left in 2001.

46. During the early stages of the business, the Second and Third Defendants operated the company from their home at No. 3 Schneider Gardens, Petit Valley and made the decision to have the company pay the rent for same. The Claimant joined the company in 2001 as head of sales and marketing but left in 2005.

47. The Second Defendant states that the company continued to operate from Schneider Gardens despite the fact that in 2012, the company opened an office at 8 Belmont Circular Road, Port of Spain. The offices were connected by data link and Karen rarely worked from the Belmont office. This continued up to 2017, when the Defendants moved from Schneider Gardens to 68 Palmiste, Drive, Victoria Gardens.

48. The Second Defendant listed the loans she made to the company from 2010 to 2014 to cover operating expenses, equipment, salaries and other expenses. The company never possessed a company credit card.

49. In 2012 when the Claimant was hired as the company's General Manager, he was aware that the company operated its office from Schneider Gardens and was paying a rent. The Claimant also signed the official change of address for the company to Belmont Circular Road.<sup>9</sup>

50. The Second Defendant did not dispute that through the Claimant's business relationship the company was introduced to new clients. However, the Claimant failed to address the issue of accounts receivables that were not paid. In addition, the Second Defendant listed instances in which the Claimant shirked his responsibilities as

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<sup>9</sup> (See exhibit "K.L.C.2" namely a notice of change of address dated April 28, 2016.)

Managing Director and was reckless towards the company's interests. One of those occurred in July 2017 when the company's overdraft facility with its bank became due for renewal. At that time, the company was experiencing critical cash flow challenges. As the only other Director of the company, the Claimant refused to sign the document to facilitate same because he was not paid a salary for two months.

51. For the period of 2016 to 2017, the Second and Third Defendants gave Director's loans to the company to pay monthly expenses and pay salaries. These loans were eventually repaid by the company but during that period the Claimant, the Second and Third Defendants experienced salary delays. (See para. 23 of the witness statement). The Claimant was always aware of the company's policy to pay creditors and employees before Directors.

52. There is no company vehicle and the Second Defendant utilized her personal vehicle. As no vehicle allowance is given to her, the company pays the annual insurance and maintenance for the said vehicle. She explained that she, the Third Defendant and Nicholas used their personal credit cards to pay foreign vendors. Further, their personal credit cards were used to pay service providers and for equipment for projects. She further maintained that the Claimant was fired as he did not fulfil his duties as the Managing Director.

#### Cross-examination

53. The Second Defendant was familiar with and has experience working in a corporate environment. She was in charge of all the company's finances. She confirmed that the company's Byelaws remained the same since its incorporation in 2002.

54. On September 4, 2017 a meeting was held with management to discuss the actions of the Claimant following his meeting with Peter and the failure to prepare a proposal for EDC nor PCS Nitrogen. Present at that meeting at which the decision to terminate the Claimant was taken were the Second and Third Defendants and Nicholas.
55. In her opinion, the Second Defendant did think that the Claimant as a shareholder, ought to have been present at the meeting as the meeting concerned his actions. She was referred to the company's Byelaws that prescribe the procedure to remove a Director from the company.<sup>10</sup> She explained that the Claimant was removed as a Director by the shareholders of the company pursuant to Article 473. However, this was not stated in her witness statement nor was it stated in the termination letter.
56. Further, there was no written resolution or notice given to the Claimant. The Second Defendant accepted that the meeting held on September 4, 2017 did not comply with clause 13.4 of the company's Byelaws to give notice to the Claimant and explained that the circumstances at that time warranted that the shareholders had to act quickly.<sup>11</sup> She accepted that the Claimant was not given an opportunity to speak on his behalf. These facts were not mentioned in the Defence.
57. She was referred to the financial statements of the company and accepted that there was an increase in sales and profits from 2013 onward. In addition the loans taken by the company were also considered in the profit and loss account.<sup>12</sup>

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<sup>10</sup> See p.343 of the trial bundle, para. 4.7.4 namely when a Director cease to hold office.

<sup>11</sup> See p. 352 of the trial bundle namely the Byelaws and a notice for shareholders.

58. The Claimant did not produce invoices for outstanding payments but gave instructions to an administrative assistant to prepare same through a Peachtree program. During re-examination, the Second Defendant confirmed that the Claimant would have provided the information to enter in the said program.
59. She went on to explain that despite the making of a profit, there was an issue with cash flow. As such, she paid monies for salaries from her personal account and considered such payments as loans to the company.
60. Attorney for the Claimant referred Karen to the lease agreements and she testified that the company paid the rent for the premises situate at No. 68 Palmiste Drive, Victoria Gardens, Diego Martin and No. 3 Schneider Gardens, Petit Valley.<sup>13</sup>
61. The Second Defendant accepted that the termination letter to the Claimant failed to include other issues about his lack of performance as Managing Director relied on in the claim.

### **Peter Charles**

62. The Third Defendant similarly stated that at the inception of the company, he and Karen agreed that the company would pay the rent for the premises situate at No. 3 Schneider Gardens. The Belmont Circular property belonged to the estate of the Third Defendant's father and the Third Defendant operated business from that office.

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<sup>12</sup> See exhibit "P.S.5" namely the financial statements as at September 30, 2013, September 30, 2015 and September 30, 2016, profit and loss account.

<sup>13</sup> See exhibit "P.C.2" namely the tenancy agreements dated February 22, 2017 between the company and Elenora Ferreira and April 1, 2003 between the company and Frederick Lawrence Massiah.

63. He highlighted the monies loaned to the company over the years to meet the financial shortfalls the company experienced.

64. Sometime in 2012, he made the sole decision to issue a 15% shareholding to the Claimant over three years. The Third Defendant contends that the Claimant developed a relationship with Innovative Security Limited and was compensated accordingly. However, under the Claimant's tenure, the company's revenue did not increase.<sup>14</sup> Meetings were held from January to April 2017 with the Claimant to address the importance of acquiring new business but the Claimant made no improvement. As such, the Claimant along with other members of management agreed to meet the statutory and salary commitments before the payment of management salaries.

65. In January 2017, the Claimant failed to develop and implement an operational plan for Tyco Security Products and failed to provide financial information in a timely manner.

66. In February 2017, the Claimant refused to submit an operational plan to EDC Consultants that was critical to the company's financial future. According to the Third Defendant, the Claimant informed him that the reason for not submitting the proposal was because he the Claimant was not paid his salary for two months.

#### Cross-examination

67. At the inception of the company and prior to 2013, the Third Defendant held the position of Managing Director, General Manager and CEO of the company.

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<sup>14</sup> See para. 14 of the witness statement namely a table with the operating expenses of the company for the period 2009 to 2017.

68. In 2017, the company paid a commercial rent for the Belmont Circular Road office in the sum of approximately \$5000.00 to the account of the Third Defendant's deceased mother. The Third Defendant explained that the company paid the rent for premises situate at No. 68 Palmiste Drive, Victoria Gardens, Diego Martin. The premises is part commercial and part residential and the company paid the commercial rent for the benefit of the CEO. However, this was not stated in his witness statement. Further, the 2017 financial statement is not before the court so that there is no documentary evidential support in that regard.
69. The Third Defendant denied that the Claimant attracted other companies to Jian Enterprises. When questioned further, he admitted that the Claimant did attract Bristow, Excellent Stores, Resonance Nestle and Innovative Security Technologies. The Claimant had a relationship with Innovative Security Technologies which provided the company with opportunities to receive projects from other companies. In relation to Tyco Security Products, the Claimant suggested that it could be a potential integrator for the company and to date it is still a supplier for the company.
70. Attorney for the Claimant guided the Third Defendant through the financial statements and he admitted that the company was a profit making company save and except for the financial year of 2010. Despite this, he maintained that the Claimant attempted to ruin the company.
71. He also accepted that the Claimant had no input in the decision to increase rent at the premises situate at Belmont Circular Road and Schneider Gardens due to usage space. However, he further testified that although the company had no issue with its overall profit and loss, there were cash flow reserve issues. In 2015, the company generated a significant profit in sales. However, the Third Defendant denied this was as a result of the Claimant.

72. In relation to the repayment of the loans to himself, he explained the reason he was paid differently was that upon attaining the age of sixty he was retired and no longer on the company's payroll. However, he was still the CEO of the company. In his witness statement, however the Third Defendant did not state that he retired from the company nor did he give the date he retired. He also did never informed the Claimant that he retired from the company.<sup>15</sup>

73. He further explained that through a verbal understanding, he was contracted by the company as a Consultant. The court can only infer this to mean that he was hired as CEO by way of a consultancy. In any event there is no supporting evidence of same before this Court.

74. The Third Defendant was referred to the termination letter and confirmed that the Claimant was terminated as Managing Director. The said letter was written on behalf of the majority shareholders. He also testified that the shareholders meeting held on September 5, 2017 was an emergency meeting. During re-examination, the Third Defendant testified that an emergency arose because the Claimant failed in his fiduciary duties to the company by not presenting the proposal to EDC.

75. He denied that the Claimant was removed as a Director in contravention of the company's Byelaws and confirmed that he presently holds a 15% shareholding in the company. However, he accepted that the Claimant was not consulted when he was removed as Director and replaced with Nicholas Charles.

### **Section 239 of the Companies Act, Chapter 81.01**

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<sup>15</sup> See p. 523, 525 of the trial bundle namely a cheque vouchers for 2016 (salary) and 2017 (Consultant) paid to the order of Peter Charles

76. Section **239** reads:

*239...“complainant” means— (a) a shareholder or debenture holder, or a former holder of a share or debenture of a company or any of its affiliates;*

*(b) a Director or an officer or former Director or officer of a company or any of its affiliates;*

*(c) the Registrar; or*

*(d) any other person who, in the discretion of the Court, is a proper person to make an application under this Part.*

77. Section **242** deals with complaints brought to restrain oppression under subsection 1. sub-section 2 reads:

*(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<sup>16</sup>.*

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<sup>16</sup> Note that Jones JA ruled in *Bobby Marajh* (below) that in interpreting the section it must be understood that there is a typographical error in the formatting of the section and it should be read as herein set out.

78. In **Bobby Marajh and ors v Francis Daniel and ors**,<sup>17</sup> the Court of Appeal affirmed the decision of this Court that the appellants were not complainants as defined by section 239 of the Act. This Court made the point that while the Claimants may have had *locus standi* to bring an action under section 239, oppression of the persons listed under section 242 of the Companies Act was a critical feature which was patently absent in that case. As such, the Court opined the following in its first instance judgment;

*136. This Court is in complete agreement with the findings and erudite decision of Jamadar J, in **Eugene Lopez V Telecommunications Services of Trinidad and Tobago and RBTT Trust Limited**. As such, in this case the Claimants, even if found to be proper persons under section 239 of the Companies Act, they, the members of the Village Council do not fall within the specified persons outlined in section 242 of the Companies Act whose interests must be affected by the alleged oppression if relief is to be granted. Therefore, while the Claimants may have locus standi to bring an action under section 239, oppression to the persons listed under section 242 Companies Act is a critical feature which is patently absent in this case.*

79. At paragraph 33 of the Judgment of the Court of Appeal Jones JA stated the following;

*33. Section 242 of our Act deals with restraining oppression. It provides a means by which certain persons, complainants, can challenge the actions of a company, its Directors or affiliates on the basis that those actions have resulted in oppression, unfair prejudice or unfairly disregarded the interests of certain classes*

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<sup>17</sup> Civil Appeal P343/2014

*of persons, namely shareholders, debenture holders, creditors, Directors or officers of the company. The section permits a complainant, as defined by section 239, to bring an application seeking any or all of the remedial orders set out in section 242(3) once the complainant satisfies the conditions set out in section 242(2).*

80. Attorney for the Claimant submitted that the Claimant holds 15% shares and was the Managing Director of the company and that qualifies him as a complainant pursuant to the Act. The Claimant also falls within the category of persons under Section 242 (2) of the Act and there is authority that supports the extent of the Court's discretion under the section.

81. It is clear to the court that the Claimant is qualified under section 239 to bring the claim under section 242 as he is in fact a shareholder and a former Director. This is not an issue in this case as the Defendants have not objected to the locus standi of the Claimant.

**Issue 1- Whether the actions of the Defendants in terminating the Claimant as Managing Director and Director was unlawful and/or amounted to oppression within the meaning of section 242 of the Act.**

Submissions of the Claimant

82. According to the Claimant, he is entitled to relief for oppression as his legitimate expectation from the Defendants were not met and his termination was itself an act of oppression.

83. In *Demerara Holdings Limited and others v Demerara Life Assurance Company of Trinidad and Tobago Limited and others*<sup>18</sup>, a case cited by the Claimant, Moosai J, as he then was considered the issue of oppression.

*35. Section 242, like its Canadian counterpart [section 234 (CBCA)], as remedial legislation ought to be given a liberal and purposive interpretation. In First Edmonton Mc Donald J articulated the principle at pp.50-51:*

*“The introduction of a statutory remedy against oppression is a deliberate departure from the policy of judicial non-intervention in corporate affairs. Section 234 “casts the Court in the role of an active “arbiter of business policy”. It is drawn in very broad terms and as remedial legislation should be given a liberal interpretation in favour of the complainant.....*

*The addition of “unfairly prejudicial” and “unfairly disregards” gives the Court a broad basis on which to apply notions of equity and fairness to the conduct of the Directors and the majority ... Clearly, the addition of “unfairly prejudicial” and “unfairly disregards” puts the Court in a position to judge the fairness of the actions of management ..... In view of the broad discretion in s.234, each case will turn on its facts.”*

84. The Claimant relied on paragraph 8 of the decision which reads:

*38. In determining whether oppression exists, the court would therefore have regard to, among other matters, the reasonable expectations standard of a shareholder in the position of the applicant. Thus in the Canadian case of Walker v Betts<sup>6</sup> Mr Justice D. M. Smith propounded the following:*

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<sup>18</sup> HCA No. 3015 of 2000/CV 2006-00099

*87. The essence of oppressive and unfairly prejudicial conduct is the abrogation of the reasonable expectations of a shareholder in the position of the applicant. The “reasonable expectations” standard is also applicable to a finding that it would be “just and equitable” to grant an oppression remedy.*

*88. In determining a shareholder’s reasonable expectations, the court must apply a modified objective test. This test requires objectivity identifiable expectations that a shareholder in the applicant’s position reasonably would expect to have. Identifying those reasonable expectations is the starting point in determining if conduct was oppressive or unfairly prejudicial.*

85. Attorney for the Claimant argued that the Claimant’s termination was in breach of clause 4.7.2 and 13.4 and 19 (giving notice) of the company’s Byelaws. Further, during cross-examination, the Defendants revealed that the decision to remove the Claimant was made one day prior, in the absence of the Claimant and without affording him the opportunity to be heard. Importantly, the Third Defendant, having retired, had no authority to sign the said letter.

86. Therefore, the actions of the Defendants were oppressive and the Claimant was wrongfully dismissed. The decision to replace the Claimant with Nicholas Charles without the Claimant’s approval was unfair and injurious to the interests of the Claimant.

87. Attorney for the Claimant submitted that the decision of the Defendants to make a decision on behalf of the Claimant as Managing Director was oppressive. Further acts of oppression included:

- a. Payments to the Second and Third Defendants without the knowledge of the Claimant;
- b. The Defendants' expenditure of rent (that increased throughout the years) that includes the residential address of the Second and Third Defendants; and
- c. The failure to inform the Claimant of the Third Defendant's retirement and return to the company as a Consultant.

### **Submissions of the Defendants**

88. The Defendants submitted that in accordance with the Second Defendant's fiduciary duty as Director and the Third Defendant's fiduciary duty as the CEO they at all material time acted in the best interest of the company, its employees and shareholders. In addition, the use of the Second and Third Defendant's credit cards and foregoing management salaries were in accordance with their fiduciary duties as Directors thus their actions were not oppressive or prejudicial.

89. The Defendants cited the decision of **Aubrey Garcia v. AIC Financial Group Ltd. and others**<sup>19</sup>, an oppression action in which the Court held that the procedural breaches by the Claimant did not amount to oppressive and unfair conduct under the Act. Boodoosingh J, as he then was, stated:

*23. To make a claim the Claimant must show a visible departure from the standards of fair dealing with him. Reasonable behaviour will rarely amount to oppression. As stated in Mc Guinness, The Law and Practice of Canadian Business Corporations (1999) at para 9.234:*

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<sup>19</sup> CV2010-05231

*“the courts recognise 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 interests or wishes of some group or individual concerned in the corporation. A degree of give and take, coupled with reasonable compromise, is inherent in the use of corporate structure and the conduct of collective enterprise.”*

90. The conduct of the Second and Third Defendants were in no way a departure from standards of fair dealing or an abuse of their powers.

#### **The termination as Managing Director and removal as Director**

91. The company's internal management is regulated by its Byelaws. The relevant clauses read:

##### *Vacation of Office*

*4.7.1 A Director who is also an officer ceases to be a Director if he ceases to be an officer.*

*4.7.2 Every Director and officer of the Company in exercising his powers and discharging his duties shall:-*

*(a) act honestly and in good faith with a view to the best interest of the Company; and*

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

*Every Director and officer of the Company shall comply with the Act, the Regulations, the Company's articles and by-laws and any unanimous shareholder agreement.*

*4.7.3 The shareholders of the Company may, by ordinary resolution passed at a special meeting or, on due notice, an annual meeting of the*

*shareholders, remove any Director from office and may elect any person in his stead for the remainder of his term.*

*4.7.4 A retiring Director shall cease to hold office at the close of the meeting at which his successor is elected unless such meeting was called for the purpose of removing him from office as a Director in which case the Director so removed shall vacate office forthwith upon the passing of the resolution for his removal.*

## **12. OFFICERS**

### **12.1 Appointment:**

*The Directors shall as often as may be required appoint a Secretary and, if deemed advisable, may as often as may be required appoint any or all of the following officers; a Chairman, a Deputy Chairman, a Treasurer, one or more Assistant Secretaries or one or more Assistant Treasurers, a Managing Director. A Director may be appointed to any office of the Company but none of the officers except the Chairman, the Deputy Chairman, the Managing Director, need be a Director. Two or more of the aforesaid offices may be held by the same person. The Directors may from time to time appoint such other officers and agents as they deem necessary who shall have such authority and shall perform such duties as may from time to time be prescribed by the Directors.*

### **12.7 Managing Director:**

*The Directors may from time to time appoint any one or more of their body to be Managing Director or Managing Directors for such period and upon such terms as they think fit. The remuneration of the Managing Director may be by way of salary or commission or participation in profits or by one or all of these modes as the Directors may determine.*

*A Managing Director shall exercise such powers and have such authority as may be delegated to him by the Directors in accordance with the provisions of Section 84 of the Act.*

92. The Defendants submitted that clause 4.7.3 does not require a unanimous decision of the shareholders and also granted them the discretion to apply or exercise in the removal and replacement of a Director. The Defendants referred to clause 13.12 of the Byelaws under the rubric 'Quorum' which reads:

*Subject to the Act and except in the case of the company having only one shareholder the quorum for the transaction of business at any meeting of the shareholders shall be two persons present in person, each being either a shareholder entitled to vote there at or a duly appointed proxy holder or representative of a shareholder so entitled*

93. By clause **4.7.3** removal of the Claimant as Director could have occurred at either a special meeting or an annual meeting of shareholders. Further, a Director would cease being a Director if he ceased being an Officer under clause 4.7.1 (see above). The Notice of Change of Directors filed September 7, 2017 demonstrates that the Claimant was removed as a Director on September 5, 2017. The evidence of the Defendants is that a meeting was held on September 4, 2017 to which the Claimant was not issued notice or invited. It is at that meeting the decision was taken to terminate his services both as Managing Director and remove him completely as a Director. The evidence is pellucid that a notice of the meeting either as a special meeting or an annual meeting was not given to the Claimant. Further, there is no evidence that the meeting was either a special meeting or an annual meeting. It follows therefore that the decision to remove the Claimant as a

Director was one which occurred by virtue of clause 4.7.1 and not by 4.7.3. and the court so finds.

94. Further, it must be noted that clause 13.7 of the Byelaws sets out that the accidental omission to give notice to or the non-receipt of notice of a meeting by a Shareholder does not invalidate any resolution passed or proceedings taken at the meeting. It reads;

SHAREHOLDERS' MEETING

*13.7 Omission of Notice:*

*The accidental omission to give notice of any meeting or any irregularity in the notice of any meeting or the non-receipt of any notice by any shareholder, Director or the auditor of the Company shall not invalidate any resolution passed or any proceedings taken at any meeting of the shareholders.*

95. In this case it is the evidence of Karen that the Claimant was not invited to the meeting whether it occurred by telephone or otherwise. The decision not to give him notice as a Shareholder was therefore not accidental but intentional. Further, it is not that a notice was sent and he did not receive it (which is the position also set out in 13.7 but none was in fact sent to him intentionally. The evidence of the defence is that they were of the view that he should not be invited as the discussion was to be about his performance. In the court's view therefore the Defendants cannot avail themselves of the protection afforded by Byelaws 13.7.

96. In that regard, the submission made by the Defendant above on the issue of quorum appears to the court respectfully to be misconceived. The issue of Quorum becomes relevant where only a particular number

of the whole membership attends. To apply the reasoning of the submission would lead to the absurd result of it being lawful under the Byelaws to give notice of the meeting only to the exact number of persons set out as a quorum as the attendance criteria for the validity of decisions. This is not the intention of the quorum clause. That clause provides for validity of decisions in cases where despite being notified of a meeting some persons absent themselves. This clause must lie separate and apart from the provisions of 4.7.3.

97. However, in the court's view it matters not in any event as the removal from office of a Director has the automatic effect of the removal as a Director so that no resolution or meeting of shareholders would have been necessary to remove the Claimant as a Director once the decision was taken by the majority of Directors to terminate his appointment as Managing Director.

98. The court therefore finds as follows:

- a. That the meeting at which the decision was taken to terminate the services of the Claimant was in fact a Director's meeting and not a shareholder's meeting under the Byelaws.
- b. That notice to the Claimant of a Director's meeting was not a requirement under the Byelaws therefore failure to give notice to him in his capacity as Director was not unlawful.
- c. The process used to remove the Claimant as a Director was not an unlawful one.

### **Was the removal of the Directorship of the Claimant an act of oppression**

99. The court finds that the Claimant could only have a reasonable expectation that the process set out in the Byelaws for removal of a

Director would be adhered to. The Byelaws set out that once removed as Officer the Director ceases being a Director. There is no other process of removal at that stage save and except the filing of the Notice of Change of Directors having notified the Claimant of the decision. This is what in fact took place in this case so to that extent it cannot be said that the removal of the Claimant as Director was an act of oppression unless his removal as Managing Director itself was an act of oppression which is the next sub issue discussed.

### **Was the termination of the Claimant as Managing Director lawful and/or an act of oppression**

#### **Process of removal**

100. According to the Claimant, his termination breached the company's Byelaws and the proper procedure was not followed. Further, Peter did not have any authority to sign the termination letter as he confirmed in his testimony that he resigned from the company and was rehired as a Consultant.

101. The Defendants submitted that the Claimant repudiated his contract of employment by failing to carry out or fulfilling his fiduciary duty as General Manager which warranted his termination as both General Manager and by application of clause 4.7.1 (*A Director shall cease to be a Director if he ceases to be an officer*) as a Director of the company simultaneously.

102. The evidence clearly demonstrates that the Claimant was hired as General Manager sometime in 2012. No specific date is given. On November 14, 2013 he was appointed Director. This appointment must have been a preliminary qualifying step to his appointment as

Managing Director. Equally no resolution was passed making the Claimant Managing Director. It must mean however, and the court finds, that the appointment of Director was made to facilitate his appointment as Managing Director. As set out above, Byelaws 12 deals with Officers and lists the Managing Director as an Officer of the company. 12.1 also mandates that the only a Director can be appointed Managing Director. 12.7 sets out that the Directors (not the shareholders) may from time to time appoint one or more of their body to be Managing Director.

103. In the court's view, 12.7 permits the Directors to appoint from amongst their number for such period and upon such terms as they see fit. That is a matter solely within their discretion. The power to appoint a Managing Director carries with it the power to remove a Managing Director and appoint another Director in his stead. The ambit of the power to remove and appoint is a wide one under clause 12.7.

104. Further, such a decision can validly be taken by a majority of Directors so that the absence of the Claimant in his capacity as Director is of no moment to the decision to terminate his services as Managing Director. Further, the action of excluding the Claimant from the meeting may have been a reasonable one taken purely on the basis of business efficacy.

105. In relation to the argument that Peter did not possess the authority to sign the letter of termination the court finds that this argument is highly unsustainable as Peter was not the decision maker and was simply performing a function of communicating the decision to terminate to the Claimant. The submission must therefore fail.

106. The court therefore finds that there was no unlawfulness in the process used to terminate the Claimant as Managing Director.

## **Oppression**

### **Whether the Claimant breached the duty of care and fiduciary duty to the First Defendant**

107. The Defendants have given the breach of duty of care and fiduciary duty as the reasons for the termination. An examination of these reasons must be conducted to determine whether they were justified when determining the issue of oppression. The scope of a Director's general duties is set out in section 99 of the Act. A Director's statutory duty under the Act are the fundamental duty to manage, a fiduciary duty to act honestly, in good faith and in the best interests of the company and the duty of care to perform their duties with the care, skill and diligence of a reasonably prudent person.

108. Section 99 reads:

*99. (1) Every Director and officer of a company shall in exercising his powers and discharging his duties—*

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

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

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

*(3) The duty imposed by subsection (2) on the Directors of a company is owed by them to the company alone; and the duty is*

*enforceable in the same way as any other fiduciary duty owed to a company by its Directors.*

109. A Director that acts against the company's interests, can have a significant impact on the company's confidence. Pursuant to section 75(1) of the Act Directors of a company can be removed by ordinary resolution at a special meeting.

*75. (1) Subject to section 73(g), the shareholders of a company may—*

*(a) by ordinary resolution at a special meeting, remove any Director from office; or*

*(b) where a Director was elected for a term exceeding one year and is not up for re-election at an annual meeting, remove such Director by ordinary resolution at that meeting.*

110. Further Section 76 of the Act reads:

*76. (1) A Director of a company is entitled to receive notice of, and to attend and be heard at, every meeting of shareholders.*

111. The Defendants submitted that the Claimant did not fulfil his duty by acting in the best interest of the company. They cited the case of ***Bristol and West Building Society v Mothew***<sup>20</sup>, where per Millet LJ at p.16 defined the term fiduciary duty. At p.18, Millet LF went on the state:

*A fiduciary is someone who has undertaken to act for on or behalf of another in a particular matter in circumstances which give rise to a relationship of trust and confidence. The distinguishing obligation of a fiduciary is the obligation of loyalty. The principal is*

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<sup>20</sup> [1998] Ch 1

*entitled to the single-minded loyalty of his fiduciary. The core liability has several facets. A fiduciary must act in good faith; he must not make a profit out of his trust; he must not place himself in a position where his duty and his interest may conflict; he may not act for his own benefit or the benefit of a third person without the informed consent of his principal. This is not intended to be an exhaustive list, but it is sufficient to indicate the nature of fiduciary obligations. As Dr Finn pointed out in his classic work Fiduciary Obligations (1977), p 2, he is not subject to fiduciary obligations because he is a fiduciary; it is because he is subject to them that he is a fiduciary.*

112. As such, the Claimant as a Director and General Manager failed to put the interest of the company first when he refused to provide an Operational Plan to develop the TYCO/Visonic business in Trinidad and Tobago and not to submit proposals for EDC and PCSN limiting the company's opportunity to gain business.

113. Therefore, his breach warranted his termination as well as the Claimant being an employee and officer of the company. It is the obligation of the employee to conduct himself/herself in the best interest of the business. The obligation of faithful service is a fundamental obligation and any serious or persistent course of conduct which is inconsistent with that obligation can amount to a breach of contract.

114. The Defendants cited the case of **Secretary of State for Employment v. Associated Society of Locomotive Engineers and Firemen**<sup>21</sup> in Roskill LJ held that it was an implied term that each employee would not, in obeying lawful instructions, seek to carry them

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<sup>21</sup> [1972] 2 QB 443

out in a manner which had the effect of disrupting the employer's business. The Defendants argued that a fiduciary duty can be implied to the Claimant in his role as General Manager. As a senior employee, the Claimant breached an implied duty of fidelity and fiduciary duty owed to the First Defendant and breach of his contract of employment.

115. The Defendants cited the decision **Roger Carrington v The University of Trinidad and Tobago** CV2016-03482 a wrongful dismissal claim. At 141, Kokaram J, as he then was stated the following:

*The recognition of duties of trust and confidence and good faith similarly is simply a means of humanising employment contracts and to underscore the importance of the partners in production. The Court must continue to strike the right balance between preserving the dignity and value of employees with the demands for profit or achieving targets by employers.*

116. The Defendants submitted that Directors have a two-fold duty and the Claimant failed in his duties. They made the point that the fiduciary relationship is in the best interest of the company. The Claimant's actions in not submitting the EDC Consultants proposal and the Tyco/Visonic proposal were clear breaches of his fiduciary duty. As such, the Claimant breached the implied duty of trust and confidence and committed a repudiatory breach of his contract.

117. The Claimant testified as to the reasons for not submitting the proposals of the EDC Consultants and the Tyco/Visonic proposals, proposals that could have led to considerable earnings on the part of the company. According to him, the Second and Third Defendants would submit a proposal based on a MATRIX product, and the Claimant was to submit a proposal based on the Tyco Securities product through the EDC Consultants. However, he planned a family vacation for late

August 2017 and informed the Second and Third Defendants that he could not submit his proposal. It is clear that this decision not to submit the proposal became a major issue both in terms of loss of opportunity and loss of the client.

118. According to the Defendants, the Claimant maliciously refused to submit a proposal for the EDC project on the ground that he had not received two months' salary while being fully aware of the company's cash flow problems and participating in the company's policy and decision to pay creditors and employees before paying management's salaries. The Defendants claim that this action amounted to the Claimant acting in bad faith and to the detriment of the company and its shareholders so that the company lost all confidence and trust in the Claimant. This ultimately is not an unreasonable assertion having regard to what appears to be the paucity of the reason given by the Claimant for the failure and the assertion by the defence that the real reason for non-submission of the proposal was the issue of salary. In her evidence Karen has set out the cash flow problems experienced by the company in detail for the period 2014 to 2017. As a consequence, salaries were sometimes delayed. In the circumstances, loans were given to the company by the Second and Third Defendants to meet financial obligations and salaries from time to time. All these matters have been set out in great detail and there is no need to set them out here as the records remain unchallenged by the Claimant<sup>22</sup>. In the end this was a matter that fell within the discretion of the Directors who appointed the Managing Director and their decision would have taken into consideration all of the facts.

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<sup>22</sup> See paragraphs 22 to 26 of the witness statement of the second Defendant.

119. In that regard also, the evidence of Karen is that the EDC proposal was not the only performance issue. She referred to the Hookmally Ali project in which the contractor failed to make payments as scheduled and to the fact that pressure had to be exerted on the Claimant to enforce the agreement against the Hookmally Ali. It is her evidence that the Claimant failed to follow through with other matters so that this was an ongoing issue of performance with the Claimant. These included failing to follow through on accounts receivables. Further, he took an advance on his salary in the absence of the second and third Defendants.

120. In the end these were matters that fell within the discretion of the Directors who appointed the Managing Director and their decision would have taken into consideration all of the facts as they have set out in their evidence. The failure to submit the proposals and the reason supplied for same do not derogate from the fact that is more likely than not that in so doing the Claimant has in fact breach his duty to the company and the court so finds. It must be noted once again that the Claimant has failed to produce his contract of employment to the court and to that end the court is deprived of any argument he may have been able to make thereon.

**Other actions that may constitute oppression, unfairness or disregard for the Claimant's interest**

121. There are facts that are not in issue in this case. Firstly, it is not an issue that no shareholder's meetings (either annual or special) were held at which the Claimant was invited by way of notice to attend. This is a clear breach of the Byelaws of the company and the statutory obligation to hold such meetings. Secondly no dividends have ever been declared and paid out to shareholders or at least none have been

paid to the Claimant. Even if there were none to declare the fact remains that no annual meeting was ever held so that there has been no accountability to the Claimant as shareholder.

122. In that regard the evidence is that the Claimant benefited by way of the payment of his vacation expenses on at least one occasion. Be that as it may, this of course cannot and does not fulfil the statutory obligation on the company and its controlling Directors to call meetings and declare and pay dividends if applicable. Therein lay another set of breaches of both the Byelaws and the Act.

123. In relation to the rental of the premises owned by the second and third Defendants by the company, in the absence of any fraudulent intention it appears to the court that these decisions were purely financial ones taken in the best interest of the company. So too have been the decision to grant loans to the company by the second and third Defendants for continued expenses such as salary which redounded ultimately to the benefit of the company as a whole by ensuring its survival in times of financial hardship. The difficulty is however that those decisions would have been taken without the input of the Claimant either as shareholder or Director due to the failure to call meetings.

124. Finally, there are the expenses for personal travel and vacations of the Second and Third Defendants to Russia, India, Mediterranean Cruises, Caribbean Resorts and others out of company funds. Of course there is on the face of it nothing wrong should the company agree to pay such expenses. However once again the failure of the company to hold required meetings translates to a failure of the company to approve such expenses. It is clear that the Claimant as Managing Director was not made aware of those expenses.

125. Therefore, the court finds that generally when all is considered, some of the business affairs of the company have been carried out in a manner that was oppressive and unfairly disregarded the interest of the Claimant as shareholder.

### **Disposition**

126. The court therefore makes the following order;
- a. It is declared that the business affairs of the First Defendant have been carried on in a manner that unfairly disregards the interests of the Claimant.
  - b. It is declared that the business of affairs of the First Defendant have been carried on in a manner that is oppressive in so far as the controlling Directors have failed to hold annual meetings and have failed to declare and pay dividends to the Claimant where applicable.
  - c. The parties shall agree a forensic auditor and there shall be a forensic audit of the accounts of the First Defendant to determine the true value of the shareholding of the Claimant, the said audit to be commissioned within 30 days of the date hereof and paid for by the First Defendant.
  - d. The report issued on the said forensic audit shall be disclosed to all shareholders within 14 days of the issuance of the report.
  - e. The First Defendant shall pay to the Claimant the full value of his shareholding as set out in the forensic audit within 30 days of the issuance of the report.
  - f. Should the parties be unable to agree an auditor one shall be appointed by the court upon application by either party.
  - g. In all other respects the claim is dismissed.

- h. The Defendants shall pay to the Claimant the prescribed costs of the claim based on the value of the claim being the sum payable to the Claimant for his shareholding.

Ricky Rahim

Judge