

COMMONWEALTH OF THE BAHAMAS

IN THE SUPREME COURT

Commercial Division

Claim No. COM/COM/00032 of 2024

IN THE MATTER of an application by HARBOUR ISLAND VILLAS CONDOMINIUM ASSOCIATION PHASE I AND PHASE II MANAGEMENT COMPANY for leave to institute proceedings against the Defendants pursuant to section 278 (c) of the Companies Act 1992.

AND IN THE MATTER of the Companies Act 1992 (*the Act*).

AND IN THE MATTER of VALENTINE'S RESORT & MARINA LTD., VALENTINE'S ISLAND DEVELOPMENT LIMITED, HARBOUR ISLAND VILLAS LIMITED, AND POTCAKE PROS LIMITED (*the Company*).

BETWEEN

HARBOUR ISLAND VILLAS CONDOMINIUM ASSOCIATION PHASE I AND PHASE II MANAGEMENT COMPANY

***(The Body Corporate formed by the merger of Harbour Island Villas Condominium Association Phase I and Harbour Island Villas Condominium Association Phase II)
(Complainant pursuant to Section 280 of the Act)***

Intended Claimant

AND

**LEE PROSENJAK
STEPHANIE PROSENJAK
THOMAS P. MURPHY JR.
JOHN R. NICHOLS**

(Sued in their capacity as Officers & Directors of the Company)

Intended Defendants

Before: The Honourable Chief Justice Sir Ian R. Winder

Appearances: Kahlil Parker, KC with Roberta Quant for the Intended Claimant
Kenyatta Gibson for the Intended First Defendant
Chizelle Cargill for the Intended Second Defendant
Giahna Soles-Hunt with Nastassia Rigby for the Intended Third and Fourth Defendants

Hearing date(s): 31 March 2025, Submissions (2 May 2025, 15 May 2025 and 29 August 2025)

JUDGMENT

WINDER, CJ

This is an application by the Intended Claimant (Harbour) seeking leave to pursue an oppression action as a *complainant* under Section 278(c) of the Companies Act.

Background

[1.] Harbour is the body corporate operating and managing the Harbour Island Villas Condominium Phase I and Harbour Island Villas Condominium Phase II (*the Condominiums*), which Condominiums, and their respective bodies corporate, were established pursuant to and in accordance with several declarations of condominium. The Condominiums consists of a combined 41 units within a resort property known as ‘Valentine Resort & Marina which is alleged by the Intended Claimant to be owned and operated by a corporate group consisting of three affiliate companies -Valentine’s Resort & Marina Ltd., Valentine’s Island Development Limited, Harbour Island Villas Limited, and Potcake Pros Limited (collectively referred to as “the Company”).

[2.] The Company is also said to operate and maintain the Amenity Areas of the Condominiums, which the Unit Owners use and enjoy pursuant to Leases of Easements with the Company.

[3.] The Company’s right, title, and interest in and to *Valentines Resort & Marina* and the Amenity Areas is subject to a Debenture and Legal Mortgage between the Company and RBC Royal Bank (Bahamas) Limited.

[4.] Unit Owners in the Condominiums have entered into agreements with the Company. The Company has been assigned, and has undertaken, certain management, administrative, and operational functions on behalf of the Intended Claimant with respect to the maintenance of the Condominiums and the rental of units owned by the Unit Owners in the Condominiums. The Company has also been engaged by Unit Owners as their sole and exclusive agent for the purposes of renting their units to others, and the Company duly agreed to act as rental agent for the Unit Owners.

[5.] Harbour complains that:

(a) The Company’s account with Bahamas Power & Light Limited (*BPL*), which also services the Condominiums, went from a balance of approximately \$36,055.00 in September 2023, to \$141,657.00 in January 2024. The Company, despite having collected eighty-five (85%) percent of the said amount billed by BPL by deducting the same from the Unit Owners’ share of their rental revenue generated on a monthly basis, failed to remit payment of the same to BPL. Harbour says that the Company’s conduct constituting a diversion of Harbour’s funds. The Company, Harbour says, repeated this practice of not

paying BPL again in June 2024, with the said account being in arrears of \$90,011.00 as at the 1 September 2024.

(b) It discovered that the Company began, in or about November 2023, to skip monthly premium payments due on the insurance policies covering the Condominiums.

(c) As at 5 October 2024, the Company had not paid Harbour's contingency fund assessment of \$150,000.00, payment of which was duly approved and requested by Harbour from the Company. The Company has already deducted the said \$150,000.00 from the Unit Owners' June 2024 statements, and therefore the Company has collected the money but refuses to pay it over to Harbour in accordance with its contractual and fiduciary duty.

(d) The Bahamas Out Island Promotion Board (*BOIPB*), has not received funds apparently charged by the Company to guests commencing in July 2023 through to March 2024, with respect to payments due to the *BOIPB*. Harbour is advised that the Company has failed to respond to the *BOIPB*'s request for information on the said payments, which Harbour estimates for this period in the amount of \$140,000.00.

[6.] The Intended First Defendant (Lee) contends that the assessment referred to at paragraph 5(c) above was paid in full on 3 January 2025, since the commencement of this action.

The Application

[7.] Harbour filed a Notice of Application for leave to institute proceedings and seeks an Order in the following terms:

- (1) The Intended Claimant is declared a proper person pursuant to section 278 (c) of the Act to pursue an action against the Intended Defendants.
- (2) The Intended Claimant is granted leave to file and serve a Standard Claim Form along with a Statement of Case on the Intended Defendants within 28 days;
- (3) The Intended Defendants shall serve their Defence within 28 days from the date of service of the Standard Claim Form and Statement of Case.
- (4) Once this Order has been complied with, the matter will move to case management and progress accordingly.
- (5) The costs of and occasioned by the application to be costs in the cause.

[8.] Section 278 and 280 of the Companies Act provides:

278. In this Part —

“action” means an action under this Act;

“complainant” means —

- (a) a shareholder or debenture holder or a former holder of a share or debenture of a company;
- (b) a director or an officer or former director or officer of a company or its affiliates;
- (c) any other person, who in the opinion of the court is a proper person to institute an action under this Part.

...

280.(1) A complainant may apply to the court for any order against a company or a director or officer of that company to restrain oppressive action.

(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 oppressive to, or that unfairly disregards the interest of any shareholder or debenture holder, creditor, director or officer of the company, the court may make an order to rectify the matter complained of.

[9.] Harbour says that it wishes to pursue an oppression action as a complainant by virtue of Section 278(c) of the Companies Act. It submits that as “a creditor and significant stakeholder of the Company, seeks a declaration of the Court pursuant to s.278 (c) of the Act that it is a proper person to institute an action as a claimant under Part IX of the Act in relation to the Company.”

[10.] Paragraphs 3, 4 and 5 of Harbours submissions provides as follows:

[3.] It is important to note that a company’s current and former debenture holders (*creditors in their own right*) are included in the first category of persons automatically given standing as complainants under s.278 (a) of the Act, alongside a company’s shareholders. This acknowledges that creditors can be, and indeed are oftentimes, equally as invested in the success of a company as its shareholders, both groups bearing the risk of corporate failure.

[4.] Section 280 (2) of the Act confirms the *prima facie* entitlement of a company’s creditors to standing to institute proceedings under s.280 of the Act as complainants, providing that: “*if upon 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 affairs of the company or any of its affiliates are or have been carried on 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 oppressive 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 matter complained of.”

[5.] It is a fundamental principle that the law does not afford a right without a remedy, *ubi jus ibi remedium*, and it is equally true that the law does not afford a remedy without a means of enforcement. Therefore, as the Act has clearly afforded creditors, like the Intended Claimant, a statutory remedy when faced with oppressive or unfairly oppressive conduct or conduct that unfairly disregards their interests displayed by a company or its directors or officers, creditors are clearly a class of persons to be properly designated as complainants under the Act. If a creditor did not have the right to seek and secure designation by the Court as a complainant pursuant to and in accordance with s.278 (c) of the Act, then creditors would be left without the means of seeking and securing the statutory relief and remedies available to them under s.280 of the Act.

[11.] Harbour says that:

“The Company, which is managed, operated, and controlled by the Defendants, has to the date hereof failed and/or refused to satisfy its said indebtedness to the Claimant or any part thereof, the Claimant’s repeated demands for payment notwithstanding. The relationship between the parties requires open, honest, timely, and transparent communication and accounting by the Company to the Claimant with respect to his handling the affairs and funds of the Claimant and the Unit Owners. The Company’s failures in this regard, under the Defendant’s operation and management, continues to expose the Claimant and the Unit Owners, as creditors and stakeholders of the Company, to unfair prejudice, unfair disregard, oppression, loss, damage, and undue risk.”

[12.] It does not appear that there is a serious dispute that a creditor is a person who could be the subject of Section 278(c). Indeed, the decision of Hepburn J in the case of **Zachary James Galantis v. Antony & Alexander Alexiou** 2009/COM/COM/00004 is quite determinative on this point. She states at paragraphs 22 – 25 as follows: -

“22. A similar provision is to be found in section 239 of the Companies Act of Trinidad and Tobago. In that Act: ‘Complainant means – (a) a shareholder or debenture holder, or a former holder of a share or debenture holder 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; (d) any other person who on the discretion of the Court is a proper person to make an application under this part.’

23. In the case of *Five Star Medical and Ambulance Service Limited v Telecommunications Services of Trinidad and Tobago Limited* and Samuel Martin H.C.A. No. 1539 of 2001, Ventour J in considering the scope of section 239, had this to say at page 14: ‘Section 242 of the Act was enacted with that liberal approach in mind. That section empowered the Complainant to apply to the Court for an order to rectify the conduct of a

company which was oppressive or unfairly oppressive or unfairly prejudicial to, or unfairly disregards the interests of any shareholder or debenture holder, creditor, director or officer of the company.’ Then, after setting out the provisions of section 239, the learned judge went on to say at pages 15 and 16: ‘It is interesting to note that the word creditor is not mention in section 239 of the Act which defines the word ‘complainant’ for the purpose of section 242. Section 239 makes reference to shareholder, debenture holder, director, officer and even Registrar. While it is true that a debenture holder is a creditor, it is arguable that a creditor is not necessarily a debenture holder. So in effect what the Legislature had in mind when drafting section 242 was the possibility that a normal creditor (as distinct from a secured creditor) whose interests have been affected by the company’s conduct could be elevated to the status of a complainant for the purpose of section 242. In my view that explains the very wide discretion given to the Court under section 239(d) of the Act which states that a person may be a ‘complainant’ if he is a person ‘who, in the discretion of the Court, is a proper person to make an application under this part.’ (My emphasis.) A very wide discretion indeed! The Court is allowed to determine, who, in the circumstances of the particular case, is a proper person to be elevated to the status of a ‘complainant’ for the purpose of section 242 of the Act.”

24. In The Bahamas, the Court has a similarly wide discretion under section 278(c) to determine who in the circumstances of the particular case is a proper person to make an application under Part IX of the Act. Counsel for the defendants sought to place a very narrow construction upon the provisions of [278(c)] of the Act. Words in a statute are to be given their ordinary meaning. There is no ambiguity in the words of the section or the intent of Parliament. Parliament clearly intended that in exercising the jurisdiction given to it under section 278(c), the Court should have a very wide discretion so as to ensure that persons who would not come within subsections (a) and (b) of section 278 but whose interests have been unduly affected by the conduct of the company or its directors could obtain relief from the court under Part IX of the Act. In the words of McDonald J, the Court has a broad power to do justice and equity in the circumstances of a particular case. It is clear that the term ‘complainant’ is not limited to shareholders of the Company and can include ordinary, unsecured creditors of the Company. There is nothing in the Act to prohibit the Court from declaring that the complainant, to whom the Company owes a debt, is a proper person to institute an action under Part IX.

25. Having regard to the provisions of section 278(c) of the Act and the authorities from the Commonwealth jurisdictions referred to above, I am satisfied that a creditor can be a complainant and that the Claimant is a proper person to institute this action under Part IX of the Act. (emphasis ours)”

[13.] The Second, Third and Fourth Intended Defendants do not oppose the application for leave. The Third and Fourth Intended Defendants support Harbours application for substantive relief in the action. They both say, in filed affidavits, that “*the Company’s failure under [Lee’s] operation*

and management, continues to expose [Harbour] and the unit owners, creditors and stakeholders of the Company to unfair prejudice, unfair disregard, oppression, loss damage and undue risk”.

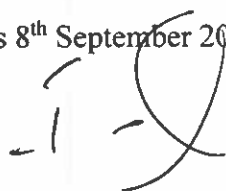
[14.] Lee opposes the application on the basis primarily that Harbour is not a creditor as the \$150,000 assessment was paid, since the commencement of the action, and that there is no case of oppression by the Company. Harbour correctly points out that the oppression regime contemplates that past actions can constitute oppression, as it speaks to situations where affairs and/or powers *inter alia* “have been” conducted or exercised in a manner offensive to the Act.

[15.] I accept that Lee has advanced potential arguments as to why relief for, or claim of, oppression ought not to be granted. It cannot be the task of the Court, however, at this preliminary stage, to determine the viability of Harbour’s claim to oppression. I therefore agree with Harbours submissions that the court ought heed the warning of Hepburn J in **Galantis v. Alexiou**, to be careful that the application does not descend into a hearing of the case on the merits.

[16.] Respectfully, the task at this filtering stage is simply whether Harbour finds itself in the stakeholder class sufficient to be a person “who in the opinion of the court is a proper person to institute an action under this Part”. In my opinion, Harbour was, at the time it commenced the action such a person. Harbour is a true stakeholder, not merely because of the assessment issue but also because of its position in the structure of the Valentines Resort and Marina and the affect that the functioning and operation of the Company has on it.

[17.] In the circumstances I grant the Order in the terms set out in the draft Order submitted on behalf of Harbour.

Dated this 8th September 2025

A handwritten signature in black ink, appearing to be 'I. Winder', written over a faint circular stamp or seal.

Sir Ian R. Winder
Chief Justice