IN THE COMMONWEALTH OF THE BAHAMAS

IN THE SUPREME COURT

Commercial Division

2020/COM/com/00026

IN THE MATTER OF s.280 of the Companies Act, 1992

B E T W E E N:

CADOGAN SWISS TRUST & CO. AG

Plaintiff

AND

IPG SECURITIES ASSET MANAGEMENT LIMITED (1)

IPG SECURITIES ASSET MANAGEMENT SA (2)

PRIVATE INVESTMENT BANK LIMITED (3)

CARLOS MOLINA (4)

BANQUE CRAMER & CIE SA (5)

Defendants

Before:	**The Honourable Mr. Justice Neil Brathwaite**
Appearances:	David Lopez-Darquea Pro Se for the Plaintiff
	Attorneys Raynard Rigby KC and Asha Lewis for the Third and Fifth Defendants
Date of Hearing:	10th May, 2023

DECISION

BRATHWAITE, J

INTRODUCTION

[1.] This is an application by the Third and Fifth Defendants, seeking an order to:

1) Remove them as parties to the action on the grounds that they were improperly or unnecessarily joined pursuant to Order 15 Rules 6 & 9 and Order 31A of the Rules of the Supreme Court and under the inherent jurisdiction of the Court; or

2) Alternatively, to strike out the Plaintiff's Originating Summons filed on 19 May 2020 on the grounds that it discloses no reasonable cause of action or is scandalous, frivolous or vexatious or is otherwise an abuse of the process of the Court, pursuant to Order 18 Rule 19 and/or Order 31A of the Rules of the Supreme Court and/or under the inherent jurisdiction of the Court.

FACTUAL SUMMARY

Cadogan/IPG/IPGS SPA

[2.] On 21st December 2018 the Plaintiff entered into a Share Sale and Purchase Agreement with the First Defendant as Seller and the Second Defendant as Guarantor (**'SPA'**) to purchase 23.8% (714,000 shares) of the total issued share capital of the Third Defendant owned by the First Defendant. Under this SPA it was provided that the transfer of the shares to the Plaintiff would be subject to the condition that the Plaintiff obtain the necessary regulatory approvals to own the shares.

[3.] The fixed purchase price for the shares of USD 11.6M was to be paid to the First Defendant on 15th December 2019 (**'Closing Date'**) by way of set off of all amounts or assignment of all claims due to the Plaintiff under the terms of a Loan Agreement entered into on 21st December 2018 (by and between the Plaintiff as Lender and the Second Defendant as Borrower).

Cadogan/IPGS Loan

[4.] By the Loan Agreement entered into on 21st December 2018 between the Plaintiff and the Second Defendant, the Plaintiff granted a loan to the Second Defendant in the total amount of USD 11.6M to be advanced in two installments of USD 8M and USD 3.6M, respectively (**'Loan'**). The Loan was to be used by the First Defendant to settle the First Defendant's debts owed to the Fifth Defendant pursuant to the Share Sale and Purchase Agreement entered into by the First Defendant as Buyer and the Fifth Defendant as Seller on 17th April 2018 (**'IPG/Cramer SPA'**). The Loan was to be repaid in full to the Plaintiff on the Closing Date of the SPA.

PIBL/Cadogan Loan

[5.] The Plaintiff paid the first installment of USD 8M to the Second Defendant in or about March 2019 from the proceeds of a USD 8.5M loan granted to the Plaintiff by the Third Defendant. However, the second installment was withheld by the Plaintiff on discovery of (i) an undisclosed ownership dispute between the shareholders of the Second Defendant (ii) an undisclosed mandatory audit of the Third Defendant by Bahamian authorities and (iii) the indefinite prohibition of the Fourth Defendant from participating in functions related to the Third Defendant by the Central Bank of The Bahamas.

Loan Amendment Agreement

[6.] By a letter dated 29th March 2020 (sic 2019) the Plaintiff notified the First, Second and Fourth Defendants of the discoveries and reasserted the Plaintiff's position that the First, Second and Fourth Defendants were in default of (i) the SPA, (ii) the Cadogan/IPGS Loan and a certain (iii) Option Agreement between the Plaintiff and the First Defendant dated December 21, 2018.The letter was allegedly countersigned by the First and Second Defendants who agreed to keep the Plaintiff informed of (i) the resolution of the Second Defendant's ownership dispute (ii) the outcome of the audit of the Third Defendant and to (iii) postpone the Plaintiff's obligation to advance the USD 3.6M second installment on the Loan until the Second Defendant's ownership dispute was resolved (**'Loan Amendment Agreement'**).

7 August Letter

[7.] By a second letter dated 7th August 2019 from the Plaintiff to the First, Second and Fourth Defendants, the Plaintiff demanded that the USD 8M advanced to the Second Defendant be converted into shares of the Third Defendant for the Plaintiff. This demand never materialized.

Pledge Agreement

[8.] As a result of the Plaintiff not advancing the second installment on the Loan of USD 3.6M to the Second Defendant, the First Defendant defaulted on its final payment owed to the Fifth Defendant under the IPG/Cramer SPA. Under the IPG/Cramer SPA the First Defendant accepted the Fifth Defendant's offer to purchase the shares it owned in the Third Defendant (85% or 2.55M shares of the total issued share capital of the Third Defendant) (the **'shares'**). As security for the completion of the First Defendant's payments for the shares, the IPG/Cramer SPA provided that the shares were allowed to be pledged to the Fifth Defendant under the Pledge Agreement entered into by the First and Fifth Defendants on 17th April 2018 (**'Pledge Agreement'**).

[9.] Under the Pledge Agreement, it was provided that in the event of a default by the First Defendant, the voting rights of the First Defendant in respect of the pledged, shares were to be immediately suspended. Additionally, the Fifth Defendant would be entitled to exercise voting

rights on 100% of the share capital of the Third Defendant and have the right to sell 100% of the shares of the Third Defendant to a third party.

[10.] As a result of the First Defendant's default under the IPG/Cramer SPA, the pledged shares became the property of the Fifth Defendant and shortly thereafter on 27 May 2020 the First Defendant sold it's remaining unpledged shares (273,125 shares) in the Third Defendant to the Fifth Defendant (with the required approval from the Central Bank of the Bahamas).

[11.] By a letter dated 25th March 2020 from the Fourth Defendant to the Plaintiff (on behalf of the First and Second Defendants), the Fourth Defendant purported to terminate the SPA due to the Plaintiff failing to meet the share transfer conditions by the Long-Stop Date of 21st March 2020 as stipulated in the SPA.

[12.] The Plaintiff objected to the purported termination attributing it's failure to meet the share transfer conditions to the First, Second, Third & Fourth Defendant's failures to provide the Plaintiff with the necessary documentation.

[13.] In the absence of any prospect of resolution between the parties, the Plaintiff brought an action for the relief specified below:

1) Specific performance of the SPA, including, so far as necessary, an order against the First to Fourth Defendants to provide the necessary documentation to the Plaintiff to enable it to make an application to the Central Bank of The Bahamas, the Securities Commission of The Bahamas and the Bahamas Investment Authority.

Section 280 Companies Act 1992 Claims

2) A Declaration that the 23.8% of the issued shares of the Third Defendant registered in the name of the First Defendant are beneficially owned by the Plaintiff and were at all such times held by the First Defendant as nominee for the Plaintiff's benefit and to the Plaintiff's account;
3) A Declaration that the shares in the First/Fourth and/or Fifth Defendant registered in the name of the First Defendant and/or the Fifth Defendant are held by the First and/or Fifth Defendant on trust for the Plaintiff
4) A Declaration that all dividends, profits, distributions and other payments derived from the Plaintiff's shareholding from December 21st, 2018 to date and paid to the First Defendant which remain undistributed are held by the First Defendant as nominee for and to the account of the Plaintiff;
5) Directions regarding the sale and purchase of the shareholdings in the Third Defendant, by one shareholder to the Plaintiff;

6) An order that the First Defendant and/or the Fifth Defendant cause the Plaintiff's shareholding in the Third Defendant forthwith to be transferred into the name of the Plaintiff;
7) An order that the First Defendant transfer all monies or assets presently held by it as nominee for the Plaintiff to the Plaintiff;
8) A Declaration that the First Defendant, the Fourth Defendant and/or the Fifth Defendant have conducted the business and affairs of the Third Defendant in a way that is unfairly oppressive to and unfairly disregards the interest of the Plaintiff and the interest of the Third Defendant.
9) An order appointing a receiver-manager to manage the affairs of the Third Defendant pending the sale and purchase of the shares of the Third Defendant to the Plaintiff and/or the share register of the Third Defendant to be rectified to reflect that 23.8% of the shares in the Third Defendant are registered in the name of the Plaintiff;
10) Directions regarding the sale or purchase of the shareholding in the Third Defendant.
11) In the alternative, an order that the Third Defendant be wound up and upon such winding up, the First Defendant be ordered to transfer the shares in the Third Defendant received by it upon such winding up to the Plaintiff and that the Plaintiff pay to the First Defendant the balance of the purchase price of the SPA for those share, or alternatively pay a fair value to be fixed.
12) In the alternative, a declaration that the shares in the Third Defendant registered in the name of the First Defendant and/or the Fifth Defendant are held by the First Defendant and/or the Fifth Defendant on trust for the Plaintiff and an order that the First Defendant and/or the Fifth Defendant sell or cause their interest in the shares to be sold to the Plaintiff and that the Plaintiff purchase such interest for the sum at a fair value to be fixed.
13) An order requiring the appointed receiver-manager to conduct an investigation into and produce a report on the financial affairs of the Third Defendant including any and all distributions made, or concessions granted to the First Defendant , the Second Defendant and/or the Fourth Defendant, or their affiliates;
14) Further or other relief as the Court may think fit to grant pursuant to its powers under s 280(3) of the Companies Act 1992 and/or the inherent jurisdiction of the Court.

Further Claims

15) Damages against the Defendants jointly or severally, for breach of fiduciary duty and trust, breach of contract, defalcation, embezzlement, misappropriation, conversion, fraud, unjust enrichment, monies had and received, and conspiracy to commit some or all of the foregoing;
16) A declaration that any judgment granted constitutes a debt or liability arising out of fraud, conspiracy, embezzlement, misappropriation or defalcation while acting in the fiduciary capacity;

17) An injunction restraining the Defendants or their agents from disposing of, dealing with, transferring, encumbering, alienating, hypothecating or diminishing the value, in any manner whatsoever, of any of the assets of the Third Defendant, in which they have direct or indirect interest in pending final disposition of this action or further Order of this Honourable Court.
18) An order preventing the Defendants or their agents from altering, defacing , destroying any documents or things of any nature or kind whatsoever related to, arising from or connected with the business and affairs of the Third Defendant; the business and affairs of the Defendants; all banking, business or financial transactions conducted by the Defendant Entities; all banking, business or financial transactions conducted by the Defendant Entities related to the Third Defendant; and particulars of the nature, location and value of all assets of the Defendant Entities, or any one of them, of any nature or kind, wherever situate, in which they have or had direct or indirect legal or beneficial interest;
19) A declaration that the Defendants and each of them are liable to account to the Plaintiff as trustees for sums transferred to the Defendants during the period of 2018 to 2020 or such other sum as the Court shall think appropriate and an order for payment thereof accordingly;
20) Equitable compensation in respect of all payments made in breach of trust and/or fiduciary duty.
21) Restitution of all payments received without lawful authority;
22) An Order tracing and/or a full accounting of all monies obtained by the First, Second, Third, Fourth and Fifth Defendants or the Defendant Entities as the result of the breaches of fiduciary duty and trust, breaches of contract, defalcation, embezzlement, misappropriation, conversion, fraud, unjust enrichment, monies had and received, and conspiracies alleged herein;
23) All necessary and proper account, inquiries and directions'
24) Such consequential and supplemental orders as the Court thinks necessary or expedient;
25) Damages;
26) Interest pursuant to the Civil Procedure (Award of Interest) Act;
27) An order that the Defendants pay the Plaintiff's costs of this action

[14.] The Plaintiff's claims are founded on breach of contract as regards to the First, Second & Fourth Defendants and section 280 of the Companies Act 1992, equity and tort as regards to the Third and Fifth Defendants.

[15.] The Third and Fifth Defendants deny any direct dealings with the Plaintiff at all and submit that as they are not parties to the SPA they have been joined in this action improperly and unnecessarily.

THE PLAINTIFF'S CASE

Improper Parties

[16.] The Plaintiff submits that while the Third and Fifth Defendants were not parties to the SPA, they are proper parties to this action by virtue of s. 280 of the Companies Act 1992 (**'Act'**) (which allows a complainant to apply to the Court for an order against a company or its directors/officers to restrain oppressive action) and the laws of equity and tort.

[17.] In the opposing affidavit of David Lopez-Darquea filed 13th April 2021, the Plaintiff suggests that the First to Fifth Defendants managed the affairs of the Third Defendant in a manner that was unfairly oppressive to and wholly disregarding the interests of the Plaintiff.

The Plaintiff alleges:

1) That the Defendants conspired to frustrate the Plaintiff's efforts to become a shareholder in the Third Defendant, causing injury to the Plaintiff;
2) That the First to Fourth Defendants took active steps to deny the Plaintiffs access to the documentation necessary to make applications for and to obtain the regulatory approvals required under the SPA.
3) That the First to Fifth Defendants induced the Plaintiff to enter into the SPA for the ultimate benefit of the Fifth Defendant and deliberately sought to frustrate the Plaintiff's ability to satisfy the conditions precedent of the SPA so that the Plaintiff would not become a legal owner of the shares in The Third Defendant.
4) That the First to Fifth Defendants deliberately sought to frustrate the completion of the SPA in general by ensuring that the USD 8M paid by the Plaintiff would become subject to a legal dispute and/or be written off by means of fictitious penalties or fines.
5) That the First and Fifth Defendants conducted the business of the Third Defendant in a manner that was oppressive and prejudicial to the Plaintiff.

[18.] Third Defendant, the Plaintiff relies on section 280(1) of the Act, which provides that although relief may be sought specifically against a director or officer of a company, it will invariably be the company itself that is the primary defendant. On that basis, the Plaintiff submits that the Third Defendant is obviously a proper party to be joined in this action as there are a number of orders sought by the Plaintiff, under s 280 of the Act pertaining to the Third Defendant.

[19.] As regards the Fifth Defendant, the Plaintiff submits that the Fifth Defendant is a proper party to this action as it is the current registered owner of the shares of which the claims beneficial ownership.

[20.] In the opposing Affidavit of David Lopez-Darquea filed 13th April 2021, the Plaintiff exhibits the Annual Return of the Third Defendant showing the Fifth Defendant as the majority owner of the Third Defendant at the material time.

[21.] The Plaintiff further submits that the Fifth Defendant was the ultimate recipient of the monies paid by the Plaintiff pursuant to the SPA and at all material times the Fifth Defendant knew that the monies paid to the Fifth Defendant by the First Defendant came from the loan granted to the Plaintiff by the Third Defendant. Therefore, should the Plaintiff proves its case (that the Third Defendant was a party to the alleged fraud effected on the Plaintiff) then the Fifth Defendant holds the shares on trust for the Plaintiff.

[22.] In the second Affidavit of David Lopez-Darquea filed 23th April 2021, the Plaintiff exhibits the minutes of a board meeting held by the Third Defendant where *inter alia* the USD 8.5M loan made to the Plaintiff was approved by the Board of the Directors (**'Board'**) of the Third Defendant. At the material time, the Plaintiff submits that the Vice- Chairman of the Board was Mr. Marco Netzer, who also represented the Fifth Defendant. It is on this basis that the Plaintiff submits that the Fifth Defendant may be liable to pay damages to the Plaintiff if the Fifth Defendant is found to be liable as a co-conspirator against the Plaintiff.

Originating Summons

[23.] As regards the Defendant's application to strike out the Plaintiff's Originating Summons, the Plaintiff submits that the Defendants have failed to disclose any persuasive reason why the Plaintiff's causes of action against the Third and Fifth Defendants are unsound or why the proceedings are otherwise scandalous, frivolous, vexatious or an abuse of process.

[24.] The Plaintiff submits that while the Third and Fifth Defendants contend that the existence of this action is causing them reputational or financial harm, the possibility of suffering reputational or financial harm befalls a defendant to any commercial action and is therefore not an argument unique to this case or a sound basis for striking out a valid claim against those defendants.

[25.] The Plaintiff references the case of ***Drummond- Jackson v British Medical Association (1970) 1 WLR 688*** which provides that a cause of action is reasonable where it has some chance of success when only considering the allegations contained in the pleadings alone and submits that the Court should only exercise its discretion to strike out an action in plain and obvious cases where the case is unarguable. On that basis, the Plaintiff submits that on its bare pleadings alone its claims do have a chance of success at trial and therefore it would be inappropriate and manifestly unjust to prematurely determine any role or liability that the Third or Fifth Defendants may have had in the loss caused to the Plaintiff by removing them as a party or alternatively, striking out the Plaintiff's summons.

THE THIRD AND FIFTH DEFENDANTS' CASE

Improper or unnecessary parties

[26.] It is the Third and Fifth Defendants position that if the Third and Fifth Defendants are dismissed from the action, the Plaintiff will be able to continue to seek relief against the other named Defendants, which is the best course of action for the Plaintiff, as it is doubtful that the Plaintiff can mount any substantiated claim against the Third and Fifth Defendants for breach of contract or any acts or conduct of oppression against the Plaintiff as alleged.

[27.] Specifically as regards the Third Defendant, it is the Third and Fifth Defendants position that the Third Defendant is no longer a going concern and simply no longer exists.

[28.] In the supporting affidavit of Tricia-Cargill Johnson filed 15th September 2022, the Third and Fifth Defendants exhibit a Press Release from the Central Bank of The Bahamas dated 24th November 2021 advising the appointment of a Statutory Administrator, Mr. Igal Wizman to manage the operations of the Third Defendant. At the time of the press release the name of the Third Defendant is styled as Lucayas Bank Limited. Also exhibited is a Tribune newspaper Article dated 19th May 2022 which states that the assets of Lucayas Bank Limited formerly Private Investment Bank Limited (the Third Defendant) were sold to Brittania Bank & Trust as of 29th April 2022. It is on this basis that the Defendants submit that the Third Defendant is improperly and unnecessarily joined to this action and should be removed as a party.

[29.] Further, in the supporting affidavit of Candice Murton filed 11th May 2021, it is denied that the Third Defendant had any knowledge of the purpose of the USD 8.5M loan granted by the Third Defendant to the Plaintiff as it was a long-standing practice of the Third Defendant to approve/ratify loans to its customers within a certain threshold. The Third Defendant therefore denies having any knowledge that the loan granted to the Plaintiff was for the benefit of the First Defendant or that the transaction was facilitated by the Fourth Defendant. The Third Defendant also denies having conspired with The First, Second and Fourth Defendants at any time to ensure that any agreements made with the Plaintiff were frustrated in any way or at all. This position is repeated in the Second Affidavit of Christine Archer filed 2nd February 2021 where the Third Defendant submits that at no time before or post the issuance of the Loan were the Third of Fifth Defendants made aware of its true purpose.

[30.] As regards the Fifth Defendant, it is the Third and Fifth Defendants position that the Fifth Defendant is not a proper party to this action because it was not subject to any of the respective agreements entered into between the parties.

[31.] In the supporting affidavit of Christine Archer filed 28th October 2020, the Third and Fifth Defendants exhibit the SPA (which is the main subject of the Plaintiff's claim) reflecting that the Parties to the Agreement were the Plaintiff as the Buyer, the First Defendant as the Seller and the Second Defendant as the Guarantor. The Third and Fifth Defendants position is that

while the Share Purchase Agreement between the Fifth and First Defendants is referenced in the SPA, the Plaintiff was at no material time a party to that Agreement.

[32.] In the supporting affidavit of Alain Sierro filed 4th November 2020, the Third and Fifth Defendants submit that in or around January 2019 the Fifth Defendant became aware of the SPA and its provision for the Plaintiff to partially fund the First Defendant's purchase of 2.55M shares in the Fifth Defendant under a subsequent Loan Agreement. However, the Third and Fifth Defendants submit that the Fifth Defendant had (i) no role to play in the negotiation, conclusion or execution of the SPA and (ii) at no material time was the Fifth Defendant a party to the SPA or bound by any of its terms and conditions. The Third and Fifth Defendants further submit in the second affidavit of Alain Sierro filed 24th February 2021 that the Fifth Defendant had no knowledge of how the Plaintiff obtained the funds for the loan to the First Defendant for the completion of the share purchase.

Originating Summons

[33.] As regards the originating summons, it is the Third and Fifth Defendants position that it will be a high hurdle for the Plaintiff to advance that the originating summons can even be heard and determined beyond the scope of the Third and Fifth Defendants application now that the Third Defendant is no longer in existence and subsequently the very corpus of the asset that the Plaintiff seeks to be determined by this Honourable Court (23.8% of the First Defendant's shares in the Third Defendant) is no longer in existence either.

[34.] The Defendants contend that the existence of this action and its continuance against the Defendants has and will likely continue to prejudice the commercial dealings of the Defendants and cause them irreparable commercial, financial and reputational harm.

LAW

Improper Parties

[35.] In considering whether the Defendants are improperly joined, the Court must consider Order 15, Rule 6(1)(2)(a) of the Rules of the Supreme Court which deals with misjoinder of parties and provides that:

> (1) No cause or matter shall be defeated by reason of the misjoinder or non-joinder of any party; and the Court may in any cause or matter determine the issues or questions in dispute so far as they affect the rights and interests of the persons who are parties to the cause or matter.
>
> (2) At any stage of the proceedings in any cause or matter the Court may on such terms as it thinks just and either of its own motion or on application -

(a) order any person who has been improperly or unnecessarily made a party or who has for any reason ceased to be a proper or necessary party, to cease to be a party;

[36.] The court must also consider Order 15, Rule 6(2)(b) of the Rules of the Supreme Court which provides that:

(2) At any stage of the proceedings in any cause or matter the Court may on such terms as it thinks just and either of its own motion or on application —

(b) order any of the following persons to be added as a party, namely —

(i) any person who ought to have been joined as a party or whose presence before the Court is necessary to ensure that all matters in dispute in the cause or matter may be effectually and completely determined and adjudicated upon; or

(ii) any person between whom and any party to the cause or matter there may exist a question or issue arising out of or relating to or connected with any relief or remedy claimed in the cause or matter which in the opinion of the Court it would be just and convenient to determine as between him and that party as well as between the parties to the cause or matter,

but no person shall be added as a plaintiff without his consent signified in writing or in such *other* manner as may be authorised.

[37.] In the case of ***Darnelle Osbourne v The Honourable Thomas Desmond Bannister 2019/CLE/gen/00158*** Justice Charles considered one of the relevant authorities on what constitutes a proper party to an action. It is stated at paragraph 13 that:

13. In the case of ***TSB Private Bank International SA. v Chabra and another (1992) 2 All ER 245*** Mummery J held that:

" Where the presence of a third party before the court was necessary to ensure that all matters in a dispute were effectively dealt with, the court was entitled to join the third party as a proper party to the proceedings pursuant to Order 15 r. (a)(b)(ii), even though there was no cause of action against the third party."

Strike-out

[38.] The law on striking out has long been settled. Striking out is a discretionary power of the Court reserved for those pleadings that are incurably bad. Order 18 Rule 19 of the Rules of the Supreme Court provide in part that:

"(1) The Court may at any stage of the proceedings order to be struck out or amended any pleading or the indorsement of any writ in the action, or anything in any pleading or in the indorsement, on the ground that —

(a) it discloses no reasonable cause of action or defence, as the case may be; or

(b) it is scandalous, frivolous or vexatious; or

(c) it may prejudice, embarrass or delay the fair trial of the action; or

(d) it is otherwise an abuse of the process of the court, and may order the action to be stayed or dismissed or judgment to be entered accordingly, as the case may be.

(2) No evidence shall be admissible on an application under paragraph (1) (a)."

No reasonable cause of action

[39.] The Defendants rely on the ground that the Plaintiff's originating summons (**'Summons'**) discloses no reasonable cause of action. In ***Drummond-Jackson*** Lord Pearson stated that a reasonable cause of action is "...a cause of action with some chance of success, when... only the allegations in the pleadings are considered. If when those allegations are examined it is found that the alleged cause of action is certain to fail, the statement of claim should be struck out". It must be irrefutably clear from the pleadings itself that the action is certain to fail. Crane-Scott JA in ***Sandy Port Homeowners Association Limited v Bain [2015] 2 BHS J. No. 102*** made it clear that a pleading so bad that no legitimate amendment can cure the defect should be struck out. At paragraph 18 of the case, Her Ladyship stated that:

> "18. The authorities in the Annual Practice also show that so long as the statement of claim or the particulars disclose some cause of action, or raise some question fit to be decided by a Judge or a jury, the mere fact that the case is weak, and not likely to succeed, is no ground for striking it out, See Wenlock v Moloney [1965] 2 All ER 871 discussed below"

Scandalous, frivolous or vexatious

[40.] The Defendants also rely on the grounds that the Summons is scandalous, frivolous or vexatious or is an abuse of the court's process.

[41.] In relation to whether or not the Originating Summons ought to be struck out as being scandalous, frivolous or vexatious, Justice Fraser in ***Doris Thompson v Stephen J. Albury 2023/COM/com/00035*** sheds light on authorities relevant to what is meant by "scandalous, frivolous or vexatious". It is stated beginning at paragraph 43 that:

> 43. In Attorney General of the Duchy of Lancaster v London and North Western Railway Company [1892] 3 Ch. 274 provides:

"It appears to me that the object of the rule is to stop cases which ought not to be launched – cases which are obviously frivolous or vexatious, or obviously unsustainable....(emphasis added)"

44. Further, though only persuasive, the Singaporean High Court decision of Tan Swee Wan v Johnny Lian Tian Young [2016] SGHC 206 provides a helpful discourse on what is meant by "scandalous frivolous or vexatious". George Wei J opined:

" ...I shall briefly set out the below:

> (a) O 18 r 19 (1)(a): "it discloses no reasonable cause of action", this involves an action which does not even have "some chance of success when only the allegations in the pleading are considered": Gabriel Peter & Partners (suing as a firm) v Wee Chong Jin and others [1997] 3 SLR® 649 (" Gabriel Peter") at [21].
>
> (b) 018 r 19 (1)(b): "it is scandalous, frivolous or vexatious".
>
> (i) A matter is "scandalous" where it does not even have a "tendency to show" the truth of any allegation material to the relief sought: Law Swee Lin Linda v AG [2006] 2 SLR(R) 565 at [67], citing Christie v Christie (1872)-1973) LR 8 Ch App 499 at 503.
>
> (ii) "Frivolous or vexatious" means "obviously unsustainable" or "wrong", A case that is "plainly and obviously unsustainable" is one which is either legally or factually unsustainable. A case is legally unsustainable if "it may be clear as a matter of law at the outset that even if a party were to succeed in proving all the facts that he offers to prove he will not be entitled to the remedy that he seeks". A case is factually unsustainable if it is "possible to say with confidence before trial that the factual basis for the claim is fanciful because it is entirely without substance, [for example, if it is] clear beyond question that the statement of facts is contradicted by all the documents or other material on which it is based": The " Bunga Melati 5" [2012] 4 SLR 546 at [39](emphasis added)"

Abuse of the court's process.

[42.] Justice Stewart in ***Romona Farquharson–Seymour v Carolyn Vogt Evans (in the capacity as Stipendiary and Circuit Magistrate) 2018/CLE/gen/00203*** sheds light on authorities relevant to an abuse of the court's process. It is stated beginning at paragraph 54 that:

> 54. "In Note 18/9/9 of The Supreme Court Practice 1976 abuse of process of the court is discussed as follows:
>
> "Abuse of the Process of the Court. — Para. (1) (d), supra, confers upon the Court in express terms powers which the Court has hitherto exercised under its inherent jurisdiction where there appeared to be "an abuse of the process of the Court". This term connotes that the process of the Court must be used bona fide and properly and must not be abused. The Court will prevent the improper use of its machinery,

and will, in a proper case, summarily prevent its machinery from being used as a means of vexation and oppression in the process of litigation"

55. In Willis v. Earl of Beauchamp (1886) 11 P. 59, Bowen L.J stated at pg. 63 of the judgment that:

"the Court has the inherent power to prevent the abuse of its legal machinery which would occur, if for no possible benefit, a party is to be dragged through litigation which must be long and expensive."

56. In West Island Properties Limited v. Sabre Investment Limited et al 22 November 2012 CA SC No. 119 of 2010, Allen P stated,

"30. Concerning Order 18; rule 19(1)(d) R.S.C. both Bramwell B. and Blackburn J. in the cases of Castro v. Murray Law Rep. 10 Ex. 213'218 and Dawkins v. Prince Edward of Saxe-Weimar 1 Q.B.D. 499; 502 respectively, underscored the fact that the court possessed a discretion to stop proceedings which are groundless and an abuse of the court's process. The discretion, as Mellor, J. in Dawkins v. Prince Edward of Saxe-Weirmar indicated, must be exercised carefully and with the objective of saving precious judicial time and that of the litigant."

ANALYSIS

[43.] In considering this matter, it is appropriate in my view to deal firstly with the contention by the Third and Fifth Defendants that they are improper parties to this action and as such ought to be removed.

[44.] As set out above, Order 15, Rule 6(2)(b) of the RSC provides that a party is properly joined to an action if (i) their presence is required to enable the Court to effectively and completely adjudicate upon and settle all matters in dispute; or (ii) the Plaintiff has a cause of action against them.

[45.] As regards the Third and Fifth Defendants, no evidence has been provided to this court of the existence of any agreement/contract between the Third and/or Fifth Defendants and the Plaintiff that connects the parties in a direct way to the causes of action raised by the Plaintiff. Therefore, it is clear to the court that no claim/cause of action can be brought against them by the Plaintiff as relates to the relief sought by the Plaintiff for Specific Performance of the relevant SPA. It cannot then be contemplated that in relation to the matter of Specific Performance the presence of the Third or Fifth Defendants is required to enable the Court to effectively and completely adjudicate upon the dispute

[46.] Further, in any event, considering the evidence provided to this Court, it is indisputable that the Third Defendant was sold to a Third Party on 29th April 2022 and therefore no longer exists. Accordingly, from the date the sale was completed, any obligations or liabilities of the Third Defendant were either assumed or extinguished according to the terms of the sale to the

Third Party. In my view the appropriate course of action would have been for an application to have been made to join that third party, if it was felt that the presence of that third party as the successor to the Third Defendant was necessary to properly adjudicate the issues raised in this matter. No such application has been made. The Court therefore finds that at this juncture, the Third Defendant lacks the capacity to be a party to these proceedings as it is no longer an established legal entity capable of being sued, and therefore accedes to the application to have the Third Defendant removed from this action.

[47.] As regards the Fifth Defendant, in the instant action, the Plaintiff contends that it has an additional cause of action against the Fifth Defendant to be considered pursuant to s 280 of the Companies Act 1992. On careful consideration of this section , the Act highlights that:

> 280. ...
>
> (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;
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> (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
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> (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 (emphasis added) .

[48.] In my view, the determination of the cause of action (oppressive conduct) raised against the Fifth Defendant by the Plaintiff must necessarily involve a protracted examination of the evidence beyond the contemplation of the applications before this court. Further, the Fifth Defendant contends that they were not parties to any agreement with the Plaintiff, and therefore are not proper parties to these proceedings. However, in accordance with the principles expressed by the learned Charles J in ***Darnelle Osbourne v The Honourable Thomas Desmond Bannister 2019/CLE/gen/00158,*** the court must consider whether the presence of Fifth Defendant is necessary to properly adjudicate upon the issues raised in these proceedings. Given the allegations that have been raised in the pleadings, I am of the view that the presence of the Fifth Defendant is so required. Further, at this juncture, I do not find that this is a plain and obvious case such as to render the exercise of the jurisdiction to strike out appropriate at this stage.

Strike out – Originating Summons

[49.] I now turn to the Third and Fifth Defendant's further contention that the Plaintiff's Originating Summons should be struck out.

No reasonable cause of action

[50.] The Originating Summons outlines the Plaintiffs position that (i) specific performance should be required of the First and Second Defendants in respect of the SPA and (ii) relief is owed to the Plaintiff due to the Defendants alleged oppressive conduct by way of collectively conspiring to frustrate the Plaintiff's ability to become a shareholder in the Third Defendant, causing it to suffer injury and loss.

[51.] As framed, there is real doubt as to whether the Plaintiff will have a real prospect of success at trial for the following reasons:

1) The Plaintiff is seeking Specific Performance of the SPA. The purpose of the SPA was for the purchase of the First Defendant's shares in the Third Defendant. There are two issues with this. Firstly, that the First Defendant no longer owns the shares that were to be sold to the Plaintiff and secondly, the Third Defendant no longer exists. There are also questions raised by the Third and Fifth Defendants as to the validity of the SPA in question due to the failure of the Plaintiff to meet the conditions precedent and the failure of the First Defendants to obtain the necessary approvals.

2) The Plaintiff also seeks various reliefs from the Defendants pursuant to s 280 of the Companies Act 1992. However, it is noted that s 278 of the same Act defines a "complainant" as:

(a) a shareholder or debenture holder or a former holder of a share or debenture of a company;

(b) a director or an officer of former director or officer of a company or its affiliates; or

(c) any other person, who in the opinion of the court is a proper person to institute an action under this Part (emphasis added).

[52.] On first review, a question on whether or not the Plaintiff meets the relevant criteria to be considered a complainant is raised. However, whether or not the Plaintiff meets the relevant criteria and will have a cause of action under this Act is not a matter for this Court. What this Court will consider is confined to whether or not the Plaintiff's pleadings on their face are at least arguable.

[53.] In ***Wenlock v Moloney***, supra, the authorities in the Annual Practice show that so long as the statement of claim or the particulars disclose some cause of action, or raise some question fit to be decided by a Judge or a jury, the mere fact that the case is weak, and not likely to succeed, is no ground for striking it out. Therefore, based on the foregoing, the Court is not prepared to strike out the Originating Summons as disclosing no reasonable cause of action.

[54.] Further, while the Defendants argue that specific performance is no longer possible, as the shares have been sold, I note that the Plaintiff also seeks directions regarding the sale or purchase of the shareholdings, which will in itself only be determined once the rights of the various parties have been determined, which can only be done following the trial process. I therefore do not consider it appropriate to strike out for this reason at this stage of the proceedings.

[55.] In relation to whether or not the Originating Summons should be struck out as being scandalous, frivolous or vexatious, the Court must consider if there is a tendency in the Originating Summons to show the truth of the allegations that are material to the relief sought. It is my view that the Originating Summons does detail the particulars of the claims which are material and which the Court will have to consider at the trial of this action. The Court therefore finds that the Summons should not be struck out as scandalous, frivolous or vexatious.

[56.] In considering whether the Originating Summons is an abuse of process of the court, the court must focus its attention on whether or not, in all the circumstances, a party is misusing or abusing the process of the court. In this instance, the Plaintiff has submitted its case in the belief that there are real questions to be tried as regards the Plaintiff's alleged causes of action. Further, the Plaintiff has represented that its pleadings have a real chance of success. Therefore, in considering that the Plaintiff has incurred a substantial loss of USD8M that has neither been returned to the Plaintiff nor converted into shares as was expected by the Plaintiff, and in light of the allegations that the actions of the Defendants lead to the failure to complete the requisite agreements, it is my view that the Summons does not amount to an abuse of the process of the court. I therefore refuse to strike out the Summons.

CONCLUSION

[57.] I hereby grant the Third and Fifth Defendant's application for the removal of the Third Defendant as an improper party on the basis that the Third Defendant is no longer in existence. However, I am not satisfied that the Fifth Defendant should be removed as an improper party nor that this is an appropriate case to justify the exercise of the Court's discretion to strike out, as it is not clear and obvious that the claim must fail, (save as against the Third Defendant) for the aforementioned reasons. I find ultimately that the issues raised are fit for determination at trial where the Court can benefit from an examination of the evidence following the process of

discovery, the examination of witnesses, and legal submissions. As I have dismissed the Third and Fifth Defendants summons only in part, I order that each party bear their own costs.

Dated this 23rd day of July, A.D. 2025

Neil Brathwaite

Justice