

REPUBLIC OF TRINIDAD AND TOBAGO

IN THE HIGH COURT OF JUSTICE

H.C.A. No. CV 1372 of 1998

BETWEEN

JOSHUA HENRY AND GEORGE ABOUD
Suing on their own behalf and on behalf of the
Holders of 49% of the issued share capital of the
National Flour Mills Limited

PLAINTIFFS

AND

NATIONAL FLOUR MILLS LIMITED
AND BRIAN KUEI TUNG
Sued as the Minister of Finance (Corporation Sole)

DEFENDANTS

Before the Honourable Mr. Justice N. Bereaux

Appearances:

C. Denbow S.C. and A. le Blanc for the Plaintiff.
S. Maharaj S.C. and T. Bharath for the first Defendant.
R. Martineau S.C. and D. Peake for second Defendant.

RULING

THE APPLICATION:

The application before me is brought pursuant to Order 21 Rule 3 of the R.S.C. and pursuant to section 243(2) of the Companies Act 1995. It is an application by the plaintiffs for leave to discontinue the proceedings.

Order 21 Rule 3 provides:

- (1) *“Except as provided by rule 2, a party may not discontinue an action (whether begun by Writ or otherwise) or counterclaim or withdraw any particular claim made by him therein, without the leave of the Court and the Court hearing an application for the grant of such leave may order the action or counterclaim to be discontinued or any particular claim made therein to be struck out, as against any or all of the parties against whom it is brought or made on such terms as to costs, the bringing of a subsequent action or otherwise as it thinks just”.*

Section 243(2) provides that an application, such as this, which is brought under section 243(1), may not be discontinued without the approval of the Court given upon such terms as the Court thinks fit.

THE HISTORY

These proceedings were commenced by the plaintiffs by an originating summons of the 26th June 1998 pursuant to section 242 of the Companies Act 1995. The plaintiffs claim that the second defendant as controlling shareholder (being the holder of the remaining 51% shareholding in the first defendant) is carrying on the business and affairs of the first defendant in a manner which was oppressive or unfairly prejudicial to, or in unfair disregard of, their interests.

The plaintiffs sought the following reliefs:

1. A declaration that the actions of the Second Defendant in calling for the resignations of all the directors of the First Defendant (save and except Dr E. Commissiong and Mr. J. Jardim) on 6th February 1998 and immediately

requisitioning an Extraordinary General Meeting of the First Defendant to remove the aforementioned individuals without giving any reasons therefore was oppressive, unfairly prejudicial and in unfair disregard of the interests of the Plaintiffs and the minority shareholders holding 49% of the issued capital of the First Defendant who they represent.

2. A declaration that the conduct of the Second Defendant in nominating a slate of 12 individuals for election to the Board of Directors of the First Defendant at its Annual General Meeting on 29th June 1998 wholly ignoring the request of the Plaintiffs acting on their own behalf and on behalf of the minority shareholders as holders of 49% of the issued capital of the First Defendant for representation on the said Board of Directors is oppressive, unfairly prejudicial and in unfair disregard of the interests of the Plaintiffs and the holders of 49% of the issued share capital of the First Defendant whom they represent.
3. An injunction to restrain the Second Defendant whether acting by himself, his servants or agents or otherwise from using the voting rights conferred by his 51% shareholding in the issued capital of the First Defendant to elect more than 7 individuals nominated by him as directors of the First Defendant at the Annual General Meeting of the First Defendant on 29th June 1998.
4. An injunction to restrain the Second Defendant whether acting by himself, his servants or agents or otherwise from using the voting power conferred on him by his 51%

shareholding in the issued capital of the First Defendant to vote against any individuals nominated as directors by the Plaintiffs or the holders of the remaining 49% of the issued capital of the First Defendant at the Annual General Meeting of the First Defendant on 29th June 1998.

5. An order that the following individuals be appointed as directors of the First Defendant to represent the minority shareholders holding 49% of the issued capital of the First Defendant:- Joshua Henry, George Aboud, Mary King, Edward Commissiong and Anthony Elias.

The Companies Act, 1995 under which this action is founded was brought into operation on 15th April, 1997. Section 343 thereof provides for companies which operated under the old Ordinance to be continued under the new Act by the publication of articles of continuance. The first defendant was continued under the 1995 Act on 14th April, 1998.

The originating summons was accompanied by the affidavits of Anthony Elias Chairman, Edward Commissiong and Joshua Henry, in which they make a number of allegations against the second defendant and set out examples of what they allege to be the oppressive conduct of the second defendant. On 12th December 1998 pursuant to the order of *Stollmeyer J.* the originating summons was amended to include a third declaration seeking to invalidate the election of Winston Connell, Ross Alexander and Leroy Mayers as directors of the first defendant at an Extraordinary General Meeting on 6th July 1998 which was requisitioned by the first defendant and a finding that the circumstances surrounding the election, constituted conduct of the affairs of the first defendant by the second defendant in a manner oppressive to the plaintiffs.

On 18th May 1999 the originating summons was re-amended to include a declaration that the election of Clarry Benn and Edward Bayley as directors of the first defendant at a special meeting on 26th October 1998 and that the circumstances surrounding the election constitute conduct of the affairs of the first defendant by the second defendant in a manner which was oppressive, unfavourably prejudicial to and in unfair disregard of, the interests of the plaintiffs and the minority shareholders whom they represent. That re-amendment was granted by *Smith J.* after hearing arguments. The plaintiff was ordered to pay the costs occasioned by the re-amendment.

The two additional reliefs sought were supported by supplemental affidavits of Joshua Henry of 10th July 1998 and 1st December 1998 respectively.

The July 15th affidavit of Mr. Henry was filed to bring to the Court's attention the events occurring at a special shareholders meeting of the first defendant on Monday 6th July 1998. The December 1st affidavit was filed to bring to the Court's attention the facts and circumstances surrounding the Special Meeting of the first defendant held on 26th October 1998.

The originating summons was opposed by affidavits of Kamal Mankie and Leroy Mayers. I shall say that having read the affidavits in the entire proceeding it is apparent to me, and I so find, that the actions of the second defendant which the defendant contends to be oppressive conduct including reliefs at (1) and (2) of the originating summons, all relate to attempts by the second defendant to exercise his voting rights as majority shareholder.

SUBMISSIONS OF COUNSEL:

Dr. Denbow for the plaintiffs contended that the Court in granting leave to discontinue, should be guided by two principles:

- (1) No injustice will be caused to the defendant.

- (2) The defendant will not be deprived of some advantage gained in the litigation.

He submitted that these two conditions were satisfied and cited the decisions in *Covell Matthews and Partners vs French Wools Ltd.* [1977] 2 All E.R. at 594 and *J.T. Stratford & Son Ltd. vs Lindley & Others* (No. 2) [1969] 3 All E.R. 1122.

The appropriate order, he submitted, was one of discontinuance rather than dismissal, because the essential merits of the cause of action - the acts of oppressive conduct - remain the same. What has changed is the appropriate remedy to be granted under section 242 of the Companies Act. He added that the Annual General Meeting of the first defendant on 8th June 1999 had rendered the continuance of the proceedings academic and pointless and that whereas at the commencement of these proceedings there were only three directors on the Board of the first defendant out of a maximum of twelve, that was no longer so.

The first defendant had its Annual General Meeting on 8th June 1999 and at that meeting, the directors who were originally installed by the second defendant at the meeting of 26th October 1998, were re-elected. As a result, the main remedy which was originally claimed by the plaintiffs, that is to say, the appointment of five directors to represent the minority shareholders, is no longer attainable because it would require the Court to remove some members of the existing Board in order to do so.

Given that the Court would have to remove five directors duly elected at the Annual General Meeting this new reality has led the plaintiffs to seek to discontinue these proceedings.

Dr. Denbow also submitted that the appropriate order was that each party should bear its own costs. He cited the *Stratford* decision. In that case, the plaintiff has

sought an injunction to restrain the defendants from enforcing an embargo on the plaintiff's barges. The House of Lords granted an interlocutory injunction and ordered costs in both the Court of Appeal and the House of Lords to be "*costs in the cause.*" A similar order had been made in the High Court. The action never came up for trial, neither side wanting to go on. The defendants took out a summons to dismiss for want of prosecution asking that all costs be paid by the plaintiff. The plaintiffs then sought leave to discontinue with costs to be paid by the defendant or such other order as might be proper.

The Court of first instance granted leave to discontinue with each party to bear their own costs. That order was affirmed on appeal. *Lord Denning M.R.* at page 1123F commented:

"The action has never come to trial. Nobody has lost, nobody has won, but neither side wants to pay the costs of the other side."

At page 1124E, *Lord Denning* added:

"Finding that neither side wishes to go on with this action, I think that the Master and the Judge exercised their discretion wisely in giving leave to discontinue on the footing that each side is to bear its own costs, including costs in the cause."

At page 1125 *Cross L.J.* stated:

"I have no doubt that the order which was made here did justice between the parties because, although each side was prepared to go on with the fight rather than pay the other side's costs neither side wanted the issue to be determined for its own sake."

In my judgment, the facts of Stratford are distinguishable, since, in this case, it is the plaintiffs who are not willing to proceed, while the defendants are, even now, ready and willing to do so.

Mr. Martineau, whose submissions were largely adopted by Mr. Maharaj, submitted that the re-election of the directors to the Board in the Annual General Meeting did not render academic the relief sought at relief 5. The declarations sought at reliefs (1) and (2), he added, were very much alive and could be pursued. Section 242, he submitted, is expressed in very wide terms, giving the Court power to make any order it thinks fit and the oppression remedy can be granted even where a full Board is in place. He added that, even if relief 5 could not be realistically pursued there are six other reliefs sought, two of which were added after applications to the Court and one of which took place after the meeting of 26th October 1998.

Mr. Martineau submitted further that the declarations sought at paragraphs (1) and (2) of the reliefs were bound to fail because the related events took place prior to the continuance of the company under the 1995 Companies Act. The fact that the Act was brought into operation on 15th April 1997 does not mean that it governs companies that were not continued under it.

It seems to me that one of the purposes of providing for continuance under the 1995 Act is to draw a clear distinction between companies which are governed by the old Companies Ordinance and companies which are not. Companies which are not continued under the new Act continue to be governed by the old Ordinance with the result that the reliefs and remedies of the new Act are not available to them and any oppressive acts then occurring cannot subsequently be the subject of relief when the company is continued under new Act. However, in my judgment, previous acts which occurred prior to its continuance may be taken into account by the Court in concluding whether any subsequent action may amount to oppression under the 1995 Act.

Mr. Martineau submitted further that the claims under reliefs (1) and (2) will fail because (i) they did not amount to conduct of the business or affairs of the company and (ii) the conduct complained of was not oppressive, unfairly prejudicial or unfair as it constituted a legitimate and legal exercise of the rights and powers of the second defendant. He cited the decision of *Jonathan Parker J. Re Astec (BSR) plc* (1998) 2 BCLC 556.

RULING:

While there is merit in Dr. Denbow's submission that in the granting of leave to discontinue the Court should consider whether there would be injustice to the defendant and whether the defendant would be deprived of an advantage, I do not believe that these are the only considerations. Order 21 Rule (3) gives the Court a discretion to grant leave and to do so on such terms as to costs and as to the bringing of a subsequent action or otherwise, as it thinks fit. To the extent that I may grant leave on terms, particularly as to costs, the merits of the plaintiffs' claim must be taken into account.

Having examined the plaintiffs' originating motion and having read all the affidavits filed on behalf of both parties in the entire proceedings, it is apparent that the plaintiffs' case has always been about the exercise of the second defendants' voting rights. The thrust of the plaintiffs' complaints is at the efforts of the second defendant to exercise his voting rights pursuant to his 51% shareholding in the company so as to elect as directors, persons who are his nominees.

In this regard reliefs 3, 4, 6 and 7 are clear but it seems to me that even reliefs (1) and (2) relate to the exercise of voting rights by the second defendant.

I do not agree with counsel for the plaintiff that the re-election of the directors to the Board by the Annual General Meeting rendered academic, the pursuit of the

reliefs sought in the summons. Reliefs (1) and (2) are quite independent reliefs which still can be pursued. The conduct of the second defendant is in no way cured by the voting process at the AGM. Indeed, if such conduct as alleged did in fact occur and is in fact oppressive conduct, then it is likely to recur and ought to be adjudicated upon.

Further, the fact that the Court may be required to remove five directors does not render unattainable the remedy sought by the plaintiff at relief (5). It is true that at the time of action there were only three members of the Board, but relief 5 is consequential to a finding of oppressive conduct by the second defendant. If such conduct is found, then it would be imperative that relief should be granted to the minority shareholders irrespective of the composition of the Board.

As to the merits of the plaintiffs' action, the declarations sought at paragraphs (1) and (2) are bound to fail. In my judgment since the events complained of took place prior to the company's continuance under the 1995 Act, the Act did not govern the company's operations at the relevant time. The Act does not have retrospective effect, but, as I have stated earlier, prior acts of oppression occurring before the continuation, can be taken into account in considering whether subsequent action may be.

I have derived much assistance from the decision of *Jonathan Parker J.* and the number of authorities cited therein by him in *Re Astec (BSR) plc* (supra). At page 584g he states:

“the right of a shareholder to vote his shares is a right of property which the shareholder is free to exercise in what he regards as his own best interests. He is not obliged to cast his vote in what others may regard as the best interests of the general body of shareholders or in the best interests of the company as an entity in its own right”.

I refer also to the dictum of *Harman J.* in *Re Unisoft Co. Ltd.* (No. 3) [1994] 1BCLC 609 at page 622 which was quoted with approval by *Jonathan Parker J.* at page 585g as follows:

“ . . . a shareholder by exercising his own private right to vote his shares may cause the company to act, by the passing of some resolution in general meeting, in a matter alleged to be unfairly prejudicial to some members. Again, it is not the act of the shareholder on voting that will fund a petition but the result of that act if it produces action or inaction, by the company. In my judgment the vital distinction between acts or conduct of the company and the act or conduct of the shareholder in his private capacity must be kept clear.”

Finally at page 586 b *Jonathan Parker J.* adds:

“The exercise by a majority shareholder of his right to vote at a general meeting for the removal or appointment of directors is the exercise of his private right, which is neither conduct of the affairs of the company nor an act of the company. In my judgment it is only in exceptional cases where some special circumstances exist that the resolution which results from the exercise of such private voting rights can give rise to any complaint”

As to the doctrine of legitimate expectation which the plaintiff seeks to assert in his initial affidavit, the learned judge having referred to the decisions in *Ebrahimi vs Westbourne Galleries Ltd.* [1972] 2 All E.R. 492 and *Re Saul D. Harrison & Sons plc* [1995] 1 BCLC 14 expressed the following view:

“Thus as I read these two authorities, in order to give rise to an equitable constraint based on legitimate expectation, what is required is a personal relationship or personal dealings of some kind between the party seeking to exercise the legal right and the party seeking to restrain such exercise, such as will affect the conscience of the former. In my judgment, in the absence of a personal relationship or personal dealings of that kind a shareholder can reasonably and legitimately expect no more than that the board of the company will act in accordance with its judiciary duties and that the affairs of the company will be conducted in accordance with its articles of association and with the Act”.

He goes on to say (at page 589 a – b) that the concept of ‘legitimate expectation’ was inappropriate to publicly listed companies and that to apply it to such companies would *“in all probability prove to be a recipe for chaos”*.

Applying the principles of law expressed in that case to the facts of the present, the actions attributed to the second defendant at paragraphs (1) and (2) do not amount to the conduct of the business or the affairs of the company, rather they were a proper and legal exercise of the rights and powers of the second defendant.

To the extent that Mr. Henry sought to rely on the doctrine of legitimate expectation, as that term is used in company law, that reliance was also misplaced. There was no promise to the plaintiffs that the second defendant would exercise these rights and powers differently. Moreover as the dictum of *Jonathan Parker J.* indicates it does not appear that that doctrine is applicable to public listed companies such as the first defendant.

Dr Denbow submitted that the decision in *Re Astec (BSR) plc* is distinguishable because in the instant case the plaintiffs' complaint is about the manner in which the defendant sought to remove the Board and no complaint is made about the exercise of a voting right. I have already opined to the contrary and will reiterate that the substance of the plaintiffs' complaint is directed at the second defendant's exercise of his voting rights based on his 51% shareholding in the first defendant and that the remedy sought at relief 5 is entirely consequential to a finding of oppressive conduct based on the exercise of those voting rights.

In the result the plaintiffs' action is bound to fail and costs should normally follow the event. But Dr. Denbow bolstered his submission on costs by citing the very compelling dictum of *Lord Denning M.R.* in *Wallersteiner vs Moir* (No. 2) [1975] 1 All E.R. at pages 858 – 859. He submitted that costs should not be awarded against the plaintiffs because their cause of action was brought in the best interests of the company and in good faith.

In *Wallersteiner*, one of the issues was the indemnification of a minority shareholder for costs reasonably incurred by him while acting as agent for the company. *Lord Denning* stated at page 858C:

“ . . . the principle is that, where the wrongdoers themselves control the company, an action can be brought on behalf of the company by the minority shareholders, on the footing that they are its representatives, to obtain redress on its behalf.”

At 858 h to 859 b he added:

“Now that the principle is recognised, it has important consequences which have hitherto not been perceived. The first is that the minority shareholder, being an agent acting on behalf of the company, is entitled to be indemnified by the company against all costs and expenses reasonably incurred by him in the

course of the agency. This indemnity does not arise out of a contract express or implied, but it arises on the plainest principles of equity Seeing that, if the action succeeds, the whole benefit will go to the company, it is only just that the minority shareholder should be indemnified against the costs he incurs on its behalf. If the action succeeds, the wrongdoing director will be ordered to pay the costs: but if they are not recovered from him, they should be paid by the company.”

At page 859 b – c he continues:

“But what if the action fails? Assuming that the minority shareholder had a reasonable ground for bringing the action – that it was a reasonable and prudent course to take in the interests of the company – he should not himself be liable to pay the costs of the other side, but the company itself should be liable, because he was acting for it and not for himself. In addition, he should himself be indemnified by the company in respect of his own costs even if the action fails. It is a well known maxim of the law that he who would take the benefit of a venture if it succeeds ought also to bear the burden if it fails.”

The action in Wallersteiner was a derivative action, the equivalent sections of which under the 1995 Act are sections 240 and 241. An application thereunder is made on behalf of the company after first obtaining the Court’s leave. Once leave is granted, the applicants would have surmounted the initial threshold of establishing a reasonable basis for the action.

In this case the application was brought under section 242 (2)(c) by the plaintiffs in their own right. Mr. Martineau submitted that *Wallersteiner* was, for those reasons, distinguishable.

But I do not agree that a section 242 application even though initiated by a minority shareholder in his own right cannot fall within the ambit of the philosophy espoused by *Lord Denning* in *Wallersteiner*. An action under section 242 may also be in the best interests of the company but because no leave of the Court is required, the plaintiff, in order to be indemnified in costs, will bear a heavier burden of showing that his application was founded on a reasonable basis. In my judgment, the plaintiffs' case here is not reasonably well founded.

In the result, I shall make the following orders:

- (1) The plaintiffs are hereby granted leave to discontinue the proceedings on terms that they shall bring no other action based on facts and allegations relied upon in this action and shall pay the costs including the second defendant's costs of this application fit for Senior and Junior Counsel.
- (2) In addition the plaintiffs shall pay the costs of the second defendant with respect to the discharge of the ex-parte injunction before *Jamadar J.* on 29th June 1998 fit for Senior Counsel and shall also pay the costs in relation to the application for an injunction before *Stollmeyer J.* on 29th October 1998 fit for Senior and Junior Counsel.

I have paused long on whether the plaintiffs should pay the first defendants' costs.

Mr. Maharaj made several submissions on behalf of the first defendant. However I am persuaded by Dr Denbow that the plaintiffs' actions were directed at the actions of the 2nd defendant and that the first defendant was nominally joined and had no active part to play in those proceedings. Thus while I am

grateful for the very helpful submissions of Mr. Maharaj it seems to me that those submissions were entirely gratuitous and I shall make no order with respect to the costs of the first defendant.

Dated this 31st day of March, 2000.

Nolan P.G. Bereaux,
Judge.