[2021] JMCA App 4

JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CIVIL APPEAL NO COA2020CV00081

APPLICATION NO COA2020APP00217

BEFORE: THE HON MR JUSTICE BROOKS P
THE HON MRS JUSTICE SINCLAIR-HAYNES JA
THE HON MISS JUSTICE EDWARDS JA

BETWEEN	**MICHAEL DRAKULICH**	**1ST APPLICANT**
AND	**MAX PATCHEN**	**2ND APPLICANT**
AND	**MILVERTON REYNOLDS**	**3RD APPLICANT**
AND	**NORMA CLARKE**	**4TH APPLICANT**
AND	**JOHN DALTON**	**5TH APPLICANT**
AND	**KARIBUKAI LIMITED**	**1ST RESPONDENT**
AND	**RAINFOREST ADVENTURES (HOLDINGS) LIMITED**	**2ND RESPONDENT**
AND	**MYSTIC MOUNTAIN LIMITED**	**3RD RESPONDENT**

Mrs M Georgia Gibson Henlin QC and Ms Nicola Richards instructed by Henlin Gibson Henlin for the applicants

Mrs Sandra Minott-Phillips QC, Mrs Simone Bowie Jones, Ms Stephanie Ewbank and Ms Shaniel May instructed by Myers Fletcher and Gordon for the 1st and 2nd respondents

Mrs Janet Morrison instructed by Hart Muirhead Fatta for the 3rd respondent

25 January and 16 April 2021

BROOKS P

[1] Mr Michael Drakulich, Mr Max Patchen, Mr Milverton Reynolds, Mrs Norma Clarke and Mr John Dalton (the applicants) seek an injunction against Karibukai Limited (KL), Rainforest Adventures (Holdings) Limited (RAL) and Mystic Mountain Limited (MML), (collectively referred to herein as the respondents). The injunction sought includes preventing KL and RAL, from removing the applicants as directors of MML. The applicants also seek to prevent KL and RAL from removing Mr Drakulich from the post of chairman and chief executive officer (CEO) of MML, pending the hearing of the applicants' appeal to this court.

[2] Batts J, in the Supreme Court, refused a similar application by the applicants. A single judge of this court ruled similarly. The applicants are dissatisfied with both rulings. They have filed an appeal against Batts J's ruling and an application to vary or discharge the single judge's ruling. The issue at this stage is whether to grant:

a. an application to vary or discharge the order of the single judge of appeal; and
b. the injunction sought pending the hearing of the appeal.

The issue turns on whether it is obvious that Batts J erred in exercising his discretion to refuse the application for injunction that was before him.

Factual background

[3] Mr Drakulich and Mr Horace Clarke were the first directors of MML, when it was incorporated in or about 2003. They secured equity financing for MML from foreign

investors and the shareholding was reorganised later in 2003. With that reorganisation, the first directors were joined by three directors appointed by RAL. Mr Clarke later died and Mrs Clarke replaced him as a director of MML. Despite the financial interest of the overseas investors, the management of MML remained in the hands of the locally based directors. In or about 2019, KL, a Saint Lucian company, became the sole shareholder in MML. RAL is the majority shareholder in KL, while Mr Drakulich, Mrs Clarke and Mr Dalton, between themselves, hold the rest of KL's shares. The directorship of MML, remained unchanged at that time.

[4] In August 2019, on the recommendation of the Board of Directors of MML, KL amended MML's articles of incorporation, to increase the number of directors from five to 11. This amendment resulted in RAL being able to nominate six directors to MML's board of directors, while the minority shareholders in KL were able to nominate five.

[5] In 2020, the COVID-19 pandemic imposed a dramatic downturn on MML's fortunes. The income dried up, affecting the ability to meet:

a. operating expenses;

b. the financial requirements of an expansion project on which MML had previously embarked; and

c. the financial obligations to holders of bonds that MML had previously issued.

[6] The situation sparked disagreements between the minority-appointed directors, led by Mr Drakulich, and the RAL-appointed directors, headed by Mr Josef Preschel

(who is also MML's company secretary). Mr Preschel asserted that Mr Drakulich and his team had been withholding important information from the other directors.

[7] A struggle for power apparently ensued. Mr Drakulich asserted that the RAL-appointed directors had relinquished their positions, by failing to attend meetings, and therefore could take no steps in relation to MML. Mr Preschel, on the other hand, contended that the RAL-appointed directors still held those offices. He countered the allegations of non-attendance by asserting that no notice had been given to them, of a September 2020 directors' meeting. The RAL-appointed directors sought to address the situation, as they saw it, by seeking to pass a resolution to amend the articles of incorporation. The amendments would have affected Mr Drakulich's position as MML's chairman and CEO.

[8] The disagreements led to the applicants filing a claim in the Supreme Court, asserting oppression, unfair prejudice and unfair disregard by the majority and seeking orders pursuant to section 213A of the Companies Act. The applicants also applied for an injunction to prevent any interference in the management of MML by KL or RAL, pending the resolution of the case. The application came on for hearing before Batts J, who, refused it. A few days later he gave reasons, in writing, for his decision.

[9] The applicants filed their amended notice of appeal and sought an injunction pending the outcome of the appeal. The application came before a single judge of this court, who refused it, and orally gave her reasons for so doing. No written reasons have been produced for that decision, although the single judge did give some oral reasons.

The parties are not in agreement as to the details of the oral reasons. In the absence of written reasons from the single judge, it is the reasons of Batts J, which will be the focus of this judgment.

[10] There have been further developments since the single judge handed down her decision. At Mr Preschel's instance, on 1 December 2020, a meeting of MML's directors was held. The Drakulich-led directors, save for Mr Reynolds, who resigned that day, objected to the meeting on the basis that it was unconstitutional. The meeting, nonetheless, among other things, passed resolutions calling for a shareholders' meeting to be held on 2 December 2020 and replacing MML's attorneys-at-law. According to Mr Preschel, at the shareholders' meeting, resolutions were passed:

a. amending MML's articles of incorporation; and

b. re-electing eligible directors.

The RAL-appointed directors were re-elected but Mr Drakulich, Mrs Clarke and Mr Dalton were not.

[11] Mr Preschel asserted that Mr Drakulich and Mrs Clarke were not eligible for re-election by virtue of their respective ages, while Mr Dalton was not re-elected, based on a letter that he sent to the meeting. Mr Patchen, although re-elected, was treated as having resigned, when a letter was subsequently received from him. The letters from both Mr Dalton and Mr Patchen indicated that they did not wish to be re-elected. The reason given for their respective positions, is that the December 2020 directors' and shareholders' meetings were invalidly constituted and therefore could neither terminate

or re-elect directors. The letters each insisted that the writer remained a director by virtue of their previous appointments.

[12] In his affidavit in support of the present application, Mr Drakulich also asserts that the December meetings were invalid. He further contends that the resolutions that were purportedly passed then, were therefore, also invalid.

The legal issue

[13] The essence of the issue joined between the parties, both before Batts J and before this court, turns on whether the applicants have shown a sufficient indication of oppression or unfair prejudice to warrant an injunction being granted (this is referred to as the oppression remedy), pending the hearing of an application pursuant to section 213A of the Companies Act (the Act).

[14] The learned judge held that the applicants had failed to meet the required standard. He held, in essence, that the applicants had not shown that there was a serious issue to be tried. He further stated that even if he was wrong on that point, he was confident that, although the issue of whether damages was a sufficient remedy, was evenly balanced between the parties, the balance of convenience lay in favour of refusing the injunction.

[15] Mr Preschel deposed that the single judge of this court gave similar reasons in her oral delivery of her decision. She also ruled, he said, that "the absence of an injunction would not render the appeal or the underlying action nugatory" (paragraph 12 c of the affidavit of Josef Preschel filed on 12 January 2021).

The applicants' grounds of appeal

[16] The applicants contend that Batts J misinterpreted section 213A of the Act. They filed numerous grounds of appeal contesting his findings of fact and findings of law. It would be tedious to set them out in this judgment, considering that this is not the appeal. The applicants, in their amended notice and grounds of appeal, among other things, essentially assert that the learned judge;

a. erred in finding that there was no serious issue to be tried;

b. improperly made findings of fact at a stage where he ought not to have;

c. failed to have sufficient regard to Mr Drakulich's position in MML;

d. erred in his assessment of the balance of convenience;

e. failed to:

i. properly consider section 213A of the Companies Act in determining whether the injunction should be granted;

ii. consider that legal expectations need not be in writing but can be by words or conduct;

iii. acknowledge that the *status quo* favoured the grant of the injunction;

iv. appreciate that KL's and RAL's powers were exercisable at general meetings while the applicants were responsible for the daily management of MML;

v. recognise that the six RAL-appointed directors were not proper directors of MML; and

f. erred in awarding costs at that interlocutory stage of the case.

The claim for relief from oppression

[17] The relief provided by section 213A of the Act is aimed at correcting or preventing oppression and unfair prejudice in the conduct of a company's affairs. The section sets out the remedies the court may grant in cases where there has been, among other things, oppression of minority shareholders. It is important to note that those remedies are also available to directors and former directors, who qualify as complainants for the purposes of the section. It states:

> "(1) A complainant may apply to the Court for an order under this section.
>
> (2) If upon an application under subsection (1), the Court is satisfied that in respect of a company or of 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;

(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, any shareholder or debenture holder, creditor, director or officer of the company, the Court may make an order to rectify the matters complained of.

(3) The Court may, in connection with an application under this section make any interim or final order it thinks fit, including an order-

(a) restraining the conduct complained of;

(b) appointing a receiver or receiver-manager;

(c) to regulate a company's affairs by amending its articles or by-laws, or creating or amending a unanimous shareholder agreement;

(d) directing an issue or exchange of shares or debentures;

(e) appointing directors in place of, or in addition to, all or any of the directors then in office;

(f) directing a company, subject to subsection (4), or any other person to purchase the shares or debentures of a holder thereof;

(g) directing a company, subject to subsection (4), or any other person to pay to a shareholder or debenture holder any part of the moneys paid by him for his shares or debentures;

(h) varying or setting aside a transaction or contract to which a company is a party, and compensating the company or any other party to the transaction or contract;

(i) requiring a company, within the time specified by the Court, to produce to the Court or an interested person, financial statements or an accounting in such forms as the Court may determine;

(j) compensating an aggrieved person;

(k) directing rectification of the registers or other records of the company;

(l) liquidating and dissolving the company;

(m) directing an investigation to be made; or

(n) requiring the trial of any issue.

(4) …" (Emphasis supplied)

[18] Mr Andrew Burgess (now a judge of the Caribbean Court of Justice), in his work, Commonwealth Caribbean Company Law, at page 330, explains that the provisions of the section "are not a codification of the common law; rather, they are intended to confer upon individual shareholders and other complainants a remedy which removes the impediments of the rule in *Foss v Harbottle* [(1843) 67 ER 189; (1843) 2 Hare 461] and ensures that they are insulated from conduct that is oppressive or unfairly prejudicial or that unfairly disregards their interests".

[19] The learned author adopts the description of the oppression remedy as "a broad and flexible tool designed to protect the interests of corporate stakeholders in a variety of corporate circumstances" (see page 330). The term "oppressive conduct" has been interpreted by Lord Simonds in **Scottish Cooperative Wholesale Society Ltd v Myer** [1959] AC 324 as connoting "burdensome, harsh and wrongful conduct" (see page 334 of Commonwealth Caribbean Company Law). "Unfair Prejudice" has been held to be less stringent than oppression (see page 335 of Commonwealth Caribbean Company Law). It can include removal from a board, exclusion from an office or the

denial of a legitimate expectation. Section 213A however, unlike the statutes in Canada and Antigua and Barbuda, to which counsel for the applicants referred, does not mention the term, "unfair disregard". The effect of its absence may be considered at the appeal.

[20] Mr Burgess explains that the purpose of the oppression remedy is "to give relief for thwarted [reasonable] expectations of persons in the protected category" (see page 332). Although the term "reasonable expectations" is usually the preserve of public law, the term has also been used in this context as well. An alternative term, the learned author suggests, would be "equitable consideration". In most cases, the learned author contends, the expectation is based on the Company's Act, the company's constituent documents, and, occasionally, agreements, whether in writing or made orally, which give rise to equitable considerations. All these statements are accepted as being consistent with the provisions of the section and the relevant case-law.

[21] **Ebrahimi v Westbourne Galleries Limited** [1973] AC 360 is one of the earlier cases that confirmed the reliance on equitable principles in providing a remedy for expulsion from office. Their Lordships in the House of Lords agreed with Lord Wilberforce, who ruled that "a limited company is more than a mere legal entity, with a personality in law of its own: that there is room in company law for recognition of the fact that behind [the company], or amongst it, there are individuals, with rights, expectations and obligations [between themselves] which are not necessarily submerged in the company structure" (see page 379).

[22] That case involved the expulsion of a director who was also a minority shareholder. Lord Wilberforce ruled that, in cases of expulsion, the director so affected, may only successfully challenge that action if he can prove:

> a. fraud;
>
> b. bad faith; or
>
> c. "some special underlying obligation of his fellow member(s) in good faith, or confidence, that so long as the business continues he shall be entitled to management participation, an obligation so basic that, if broken, the conclusion must be that the association must be dissolved" (see page 380).

[23] The application of equitable considerations, their Lordships ruled, enables "the court to subject the exercise of legal rights to equitable considerations; considerations, that is, of a personal character arising between one individual and another, which may make it unjust, or inequitable, to insist on legal rights, or to exercise them in a particular way" (see page 379).

[24] Section 212(3) of the Act qualifies these applicants as "complainants" to approach the court for the oppression remedy. Whether they satisfy the other requirements of section 213A is for analysis at the substantive hearing, when it comes on in the court below.

The principle against disturbing the result of the exercise of a judge's discretion

[25] It is now well-established that this court will not lightly disturb the exercise of a discretion exercised by either a single judge of this court or a judge of the court below

(see **The Attorney General of Jamaica v MacKay** [2012] JMCA App 1). The court is also guided by the principles concerning the grant of injunctions pending appeal, as set out in **Novartis AG v Hospira UK Ltd – Practice Note** [2014] 1 WLR 1264. Floyd LJ, at paragraph 41, summarised the principles relating to the grant of an interim injunction, pending appeal, where a claimant was unsuccessful at first instance, as follows:

> "… (1) The court must be satisfied that the appeal has a real prospect of success. (2) If the court is satisfied that there is a real prospect of success on appeal, it will not usually be useful to attempt to form a view as to how much stronger the prospects of appeal are, or to attempt to give weight to that view in assessing the balance of convenience. (3) It does not follow automatically from the fact that an interim injunction has or would have been granted pre-trial that an injunction pending appeal should be granted. The court must assess all the relevant circumstances following judgment, including the period of time before any appeal is likely to be heard and the balance of hardship to each party if an injunction is refused or granted. (4) The grant of an injunction is not limited to the case where its refusal would render an appeal nugatory. Such a case merely represents the extreme end of a spectrum of possible factual situations in which the injustice to one side is balanced against the injustice to the other. (5) As in the case of the stay of a permanent injunction which would otherwise be granted to a successful claimant, the court should endeavour to arrange matters so that the Court of Appeal is best able to do justice between the parties once the appeal has been heard."

The analysis

[26] Bearing those principles in mind, as well as 213A of the Act, the applicants cannot succeed in this application. Batts J, as is his wont, approached his task in a careful, methodical manner. He identified the principles relating to an application for

injunction and also identified the critical areas of the applicants' complaints, and analysed those complaints.

Did the learned judge err in finding that there was no serious issue to be tried?

[27] Batts J took the view that the applicants had no reasonable expectation that the RAL-appointed directors would permanently remain "silent" in respect of MML's operation. The learned judge found that the shareholders' subscription agreement did not justify the applicants' claim to such an expectation. He found, mainly on this basis, that there was no serious issue to be tried.

[28] The applicants complain that the learned judge erred in so finding, as he failed to note that the shareholders' subscription agreement was not with RAL, but rather with RAL's predecessor, Rainforest Tram Limited. They stress that the shareholders' subscription agreement was executed prior to the incorporation of KL.

[29] Whether or not the learned judge is correct on this point will be a matter for the appeal. He was, however, entitled to take the view that he did, at the stage that he was considering the matter. Countering the applicants' complaint is the fact that the shareholders' subscription agreement states, at clause 9.7.1, that it is "binding on the parties hereto and their respective assigns". Clause 9.7.2 states, in part, that permitted assigns, include "permitted transferees of that party's shares".

Did the learned judge make findings of fact?

[30] The applicants' complaint that Batts J made findings of fact at an interlocutory stage fails in the face of a specific statement to the contrary by the learned judge. Two

statements made by the learned judge indicate that he appreciated his role at that stage of the proceedings. Firstly, he said, at paragraph [8] of his judgment:

> "In the matter at bar I am satisfied that there is no serious issue for trial. **In arriving at this determination I bear in mind that at this interlocutory stage I am required to make no findings of fact**. There has as yet been no opportunity to test witnesses and therefore the determination of issues of fact is reserved for a trial. Bare assertions, unsupported by credible evidence and contradicted by undisputed documentation, may not however suffice to create a triable factual issue." (Emphasis supplied)

[31] Secondly, he said, in part, at paragraph [24]:

> "…There is nothing placed before the court at this interlocutory stage to demonstrate either, that such changes [in respect of voting rights and the separation of the roles of Chairman and CEO] would lead to disadvantages to the [applicants] which amount to the oppression or unfair prejudice contemplated by the statute or, that [MML] will necessarily be harmed. **In this regard I make no findings one way or the other**. However, as the [respondents] are exercising rights given by the Articles of Association and by law, this court is reluctant to interfere with their exercise." (Emphasis supplied)

Did the learned judge fail to have sufficient regard to Mr Drakulich's position?

[32] In respect of the removal of Mr Drakulich from the post of director by virtue of his age, the learned judge pointed out that MML's articles of association prohibited the election, as directors, of persons who are 70 years and older. Batts J noted that Mr Drakulich would have achieved that age in December 2020 and thus he would have been ineligible for re-instatement to the post, even if the court, at the hearing of the substantive matter, was of the view that he was improperly removed. A similar situation

now applies to Mrs Clarke. His approach in this regard, whether or not it is proved to be incorrect on appeal, cannot be said to be unreasonable.

[33] The applicants' complaint that Batts J put too much emphasis on Mr Drakulich in considering the matter, is misplaced. The learned judge's point was relevant. The applicants are being selective in the articles that they wish to stress. Mr Drakulich, himself, stressed his importance at this time in the company's affairs, especially as it had challenges with finances and satisfying the demands of its bondholders. The learned judge considered that importance in the context of his reasoning concerning the matter of the adequacy of damages. He said, at paragraph [18]:

> "It is true that, assuming that the appointments to the board and the removal of [Mr Drakulich] as CEO will have the effects alleged, damages would be difficult to assess. It will for example be impossible to quantify a loss of reputation or to know how many opportunities, which otherwise may have been offered, were lost because of the new composition of the Board. Damages as a remedy will not suffice if the [applicants] are ultimately successful at trial. It will be therefore necessary to consider whether it is just in all the circumstances to grant an interim injunction."

It cannot be said, at this stage, that he was plainly wrong.

Did the learned judge err in assessing the balance of convenience?

[34] The applicants complain that the actions of the RAL-appointed directors constitute unfair disregard, oppression, or unfair prejudice to the minority-appointed directors. They allege that one of the main examples of the alleged oppression is the passing of resolutions at the shareholders' meeting on 2 December 2020. At that meeting a resolution was passed confirming the appointment

of the six RAL-appointed directors. The meeting also passed a resolution altering the articles of incorporation. The amendments mainly concern:

(a) limiting the powers of the management, without the approval of the directors and the shareholder, in respect of, among other things;
    (i) borrowing;
    (ii) changing MML's trademarks;
    (iii) taking steps to have MML wound-up;
    (iv) varying contracts;
    (v) making investments; and
    (vi) delegating duties;

(b) removing the chairman's casting vote in the event of an equality of votes at a meeting;

(c) making a person ineligible to simultaneously hold both the posts of chairman and CEO;

(d) requiring notice of a directors' meeting to be given to directors who are overseas;

(e) increasing the quorum for directors' meetings; and

(f) allowing for the appointment of alternate directors without the approval of the other directors.

[35] Without making any definitive finding in this regard, none of those provisions plainly prefer one group of directors, or other interested parties, over the others. The amendments seem to be aimed at broadening MML's decision-making base, encouraging inclusivity and restricting borrowing powers, without consultation. They therefore do not obviously smack of oppression or unfair prejudice. In the event that they are found, at a trial, to be so, then they may be reversed, without the risk of interim harm to MML. The learned judge cannot be said, at this stage, to have been plainly wrong in carrying out the balancing act that he sought to perform.

Did the learned judge fail to consider important aspects of the law and the facts?

[36] The applicants have identified a number of areas, which, they say, Batts J did not address. The more precise complaints cannot be supported, at this stage, as they were addressed by the learned judge. No finding is made at this stage as to whether or not he is correct in his analysis. It is sufficient to state, at this stage, that Batts J did consider the usual practice of the parties in terms of the local directors having sole control of MML. He found that it was not a reasonable expectation that that situation should continue indefinitely. That finding, which affects the issue of maintaining the *status quo*, cannot be said to be unreasonable in light of the allegations of borrowing by MML without consultation with the overseas directors.

[37] It is a question of fact as to whether the overseas directors had abandoned their posts. Mr Preschel, in his affidavit, vividly pointed out that notices of directors' meetings

purportedly sent to the overseas directors, were sent to incorrect email addresses. Those are matters to be considered at the substantive hearing.

Did the learned judge err in respect of the award of costs?

[38] This is the sole issue that the single judge found had any real prospect of success. Batts J's award of costs at the interlocutory stage, would have been consistent with his view, as he expressed it, of the case. Whether he is correct in that view is a matter for the appeal. That issue, however, does not have any significance in the context of whether an injunction should be granted at this stage by this court.

Conclusion

[39] Based on the reasoning set out above, the learned judge cannot be said to have been plainly wrong in his approach or his conclusions. There is no basis at this stage, therefore, on what was before him, to disturb his findings. The developments that have occurred since his decision are not sufficient to affect that decision. They are consistent with the proposed steps that the RAL-appointed directors had previously indicated that they wished to take. Batts J was cognisant of those intentions.

[40] The application to vary the orders of the single judge, at this stage, should therefore be refused.

[41] Costs should be awarded to KL and RAL as the successful parties. MML should not be awarded costs as it appeared as a nominal party.

[42] Should any party have any contrary view as to costs, they are entitled to file and serve their submissions in that regard within 14 days of the date hereof, failing which the order as to costs should stand.

[43] In the event that submissions are filed within the time allowed, the other parties may file submissions in response within 14 days of being served with the submissions of the objecting party. The court will thereafter consider the submissions.

SINCLAIR-HAYNES JA

[44] I have read, in draft, the judgment of Brooks P. I agree with his reasoning and conclusion.

EDWARDS JA

[45] I too have read the draft judgment of Brooks P and agree with his reasoning and conclusion.

BROOKS P

ORDER

1. The application to vary or discharge the orders of the single judge of appeal is refused.

2. The injunctions sought, pending the hearing of the appeal, are refused.

3. Costs of the application to the first and second respondents to be agreed or taxed.

4. Should any party disagree with the order as to costs, that party is entitled to file and serve written submissions in that regard within 14 days of the date of this judgment, failing which the order as to costs shall stand.

5. Should submissions in opposition to the order as to costs, be filed and served in accordance with order 4 hereof, the parties served with the submissions in opposition are entitled, within 14 days of being served with those submissions, to file and serve submissions in response.

6. The court will thereafter consider and rule on the submissions.