IN THE SUPREME COURT OF THE
TURKS AND CAICOS ISLANDS

Case No.: CL 7/08

BETWEEN

1. KIMBERLY JUNE COX BAKER
(suing on her own behalf and as the minority
Shareholder of the Second Defendant)

Plaintiff

-AND-

1. **JIMMY CHARLES BAKER**
2. **JUNE BUGGING ME LTD.**
3. **CHARLES BAKER**

Defendants

Heard: 27th October 2009
Circulated: 20th November 2009

For the Plaintiff: Ms T. Muhammad
For the 1st Defendant: Mr J. Katan
For the 3rd Defendant: Mr J. Katan

RULING

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THE APPLICATIONS

1. I am dealing with a Summons filed by Kimberly June Cox-Baker, the Plaintiff on 29th October 2008 applying for:

(a) an order pursuant to Order 15 Rule 12A that the Plaintiff do have leave to continue the derivative action CL 07/08.

(b) for an order to indemnify the Plaintiff for costs incurred and/or to be incurred in the action out of the assets of the company.

THE BACKGROUND

2. The background of this matter up to and including the 24th April 2009 is fully set out in this Court's Ruling circulated on 26th May 2009 concerning an application contained in the same Summons for an extension of time for the continuation of the application. Although I will herein set out some of that detail I do not intend to fully rehearse the same.

3. On 18th January 2008, the Plaintiff filed a Writ and Statement of Claim which was issued on 21st January 2008. The Plaintiff is a minority shareholder in June Bugging Me Ltd, the Second Defendant, and has brought this derivative action in her own name and on behalf of the Company. The First Defendant, the Plaintiff's former husband, is the majority shareholder of the Company. The Third Defendant is the father of the First Defendant. The Plaintiff, the First and Third Defendants are all directors of the Second Defendant company. The Plaintiff claims that the First and Third Defendants acted in breach of their fiduciary duties to the Company and "perpetrated an equitable fraud on the Company."

4. In the Ruling circulated on 26th May 2009, I found that there had been "some delays and shortcomings on the Plaintiff's side" in the way that the proceedings had been conducted. I also stated that it appeared "that some criticism may be 'laid at the door' of the Plaintiff's attorneys rather than of the Plaintiff herself." I did not accept

that the default had caused the First Defendant any prejudice which could not be compensated by an award of costs. Accordingly I granted the Plaintiff an extension of time to make the application which I am now considering, namely to apply for leave to continue the action. It was agreed by the Parties at the hearing on 27th October 2009 that the Plaintiff pay the First Defendant's costs of that application.

5. On 13th August 2009 the Learned Registrar sent out the Notice of hearing for the matters to be heard on 27th October 2009.

6. On 13th October 2009 a Notice of Change of Attorney to the firm of Miller Simons O'Sullivan was filed on behalf of the Third Defendant.

7. On 21st October 2009 the First Defendant filed his affidavit sworn on 20th October 2009. On 26th October 2009 an affidavit sworn by Edwin Dickinson on 21st October 2009 was filed by the First Defendant.

8. Ms Muhammad and Mr Katan provided the Court with written skeleton arguments and I have carefully considered the same.

THE PLAINTIFF'S SUBMISSIONS

9. The Plaintiff brings this action in her personal capacity and as a derivative action on behalf of June Bugging Me Ltd ("the Company"), the Second Defendant. Mrs Baker is a 49% shareholder and a director of the said Company. Ms Muhammad submits that the Plaintiff can establish, having regard to the "factual matrix," a prima facie case and therefore the Court should grant leave to Mrs Baker to continue the derivative claim. It is submitted that, if the Court were to deny the minority the right to bring proceedings, "their grievance could never reach the court because the wrongdoers themselves being in control, would not allow the company to sue."[1]

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[1] Prudential Assurance Co Ltd v Newman Industries Ltd (No.2) [1982] 204, 210-211, CA

10. The Plaintiff contends that the Company sold property (20306/53 Cockburn Harbour, South Caicos) to Caicos Pride Products Ltd ("Caicos Pride") , a company in which it was initially contended that the First Defendant had a beneficial interest. At the hearing, Mrs Baker conceded for the first time that the First Defendant did not have a legal or beneficial interest in Caicos Pride. It is submitted that the Company was acting at the direction of the First Defendant and his nominee director, the Third Defendant, who was acting under the First Defendant's control. It is contended that not only was there an equitable fraud but this was compounded by the fact that the First Defendant and Third Defendant allowed the property to be sold at an undervalue despite a better offer to purchase from the Plaintiff. It is submitted that a reasonable board of directors acting as prudent businessmen would have given some consideration to her offer. It is contended that the proceeds of sale were used for non-company purposes and without a resolution being passed. The derivative action has been brought as it is contended that the First Defendant, as the majority shareholder of the Company, is able to have resolutions passed in his capacity as director with the complicity of the Third Defendant and the Company is not in a position to make the application to the Court for relief. The Plaintiff submits that the First Defendant has acted to the detriment of the company.

11. The Plaintiff submits that the First and Third Defendants' exercise of their power as directors without consultation or authorisation from the Plaintiff constituted a wrong committed by the directors beyond the powers of the company, and as such constitutes an exception to the rule in Foss v Harbottle (1983) 2 Hare 461.

12. Ms Muhammad contends that the action has been brought in good faith and "the benefit of the action will inure to the company and only indirectly to the Plaintiff in her capacity as a member." It is further contended that, having regard to Wallersteiner v Moir (No.2) [1975] QB 373, a reasonable Board would have brought the action in the company's name and therefore the court should order the company to indemnify the Plaintiff for her costs.

THE FIRST AND THIRD DEFENDANTS' SUBMISSIONS

13. The Defendants submit that the Plaintiff's application should be dismissed and leave should not be given to continue the action. The Defendants submit that, if leave is given, there should be no indemnity for her costs from the company.

14. Mr Katan invites the Court to have regard to the nature of the relationship between the Plaintiff and the First Defendant. Mr Katan submits that the Company is a quasi- partnership as the sole owners have a special relationship between them.[2] During her oral submissions Ms Muhammad accepted this stating: "She does agree is a quasi-partnership, dispute arises as to how to resolve disputes between parties in those circumstances." Mr Katan contends that the approach in the circumstances of this case, where the relationship of the parties has broken down and they are the sole owners of the company, should be that the company is wound up as its existence serves no purpose. Having regard to this and relying on the approach of Peter Gibson J in Barrett v Duckett [1995] 1 BCLC 243, [1995] BCC 362, Mr Katan forcefully argues that winding up the company constitutes an alternative remedy available to the Plaintiff and Second Defendant, and that the appointed liquidator could then pursue any cause of action if he felt them to be in the interests of the Company. In light of this and the approach of Judge Robert Reid in Mumbray v Lapper and another [2005] EWHC 1152 (Ch d) at para 5, Mr Katan submits that the availability of this alternative remedy is an extremely important factor when the Court is considering whether to give leave to continue the action. Mr Katan rightly accepts that an alternative remedy is not an absolute bar to a derivative action continuing. However, Mr Katan contends that, "there is no authority that the Defendants are aware of that supports the continuation of a derivative action where (a) the Company is a quasi partnership (b) it has ceased trading and (c) it has relatively modest remaining assets."

15. Ms Muhammad argues that winding up should not be viewed as an appropriate alternative remedy in this case, as the Company is not insolvent and also the costs incurred by the appointment of a liquidator would be to the detriment of the

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[2] Ebrahimi v Westbourne Galleries Ltd. and others [1972] 2 All ER, 492 HL

Company. Mr Katan contends that, having regard to the Plaintiff's approach to litigation involving this Company, as highlighted by her conduct to wrongly contest Action No. 43/06 right up to the end, that "liquidation and the independent oversight of the liquidator is likely to be quicker, cheaper and at the end of the day in the interests of the Company."

16. Mr Katan submits that an independent board of directors would not sanction the proceedings which the Plaintiff now seeks leave to continue. It is evident that the partnership between the sole owners has irretrievably broken down, the Company is no longer trading, serves no purpose and has assets of only $78,000. It is submitted that the only person seeking to benefit from these costly and time consuming proceedings might be the Plaintiff and not the Company, and is therefore an abuse. Mr Katan rightly contends, especially having regard to the total breakdown in the personal and professional relationship between the parties, the evident inability of them to separate the two and reach any 'common ground' and act jointly in the interests of the Company, that a liquidator, "would be able to assess, objectively, the merits and the value of the claim and make an independent assessment- with all the relevant facts before him/her and consider whether the claims should be made on behalf of the company."

17. Mr Katan argues that, even if the Court felt that the alternative remedy was not sufficient reason for dismissing the Plaintiff's action, then it should find that she has failed to present evidence of a prima facie case. The Plaintiff withdrew at the hearing her assertion that the sale for the Company's assets to Caicos Pride Products was a sale to a Company in which Mr Baker had an interest.

18. Mr Katan submits that the Plaintiff has not challenged the sale of the assets of the Company in an objective manner, as she does so only for her, rather than the Company's, benefit. The Plaintiff contends that the sale of the assets for $610,000 was at an undervalue, as she offered $650,000 for them. Mr Katan rightly contends that one has to look at the history of the offers made by the Plaintiff to enable the purported offer of $650,000 to be put into context. Mr Katan contends that his client had a responsibility not only to try to get the best available price but, when doing so,

had to have regard as to whether any offer being made was genuine. It is contended that a board of directors might be criticised for rejecting a firm reasonable cash offer due to an uncertain outstanding greater offer that might fail to actually materialise. Mr Katan highlights that, on 18th April 2006, the Company's land and building were valued by Construction Advisory Services Ltd at $575,000.[3] At paragraph 10 of Mrs Cox-Baker's Statement of Claim in CL 43/06, she pleaded that she was "willing to purchase the First Defendants' shares in the second Defendant for the same price the First defendant was willing to sell the property to 'related third parties' namely US$575,000."[4] The Plaintiff told the Court in her affidavit in CL 43/06, "I make this Affidavit bona fide and in support of my Application that a full and complete accounting of the First and Second Defendants be ordered and because I am the other partner in the Second Defendant, that I be given first choice to be allowed to buy the Company and its assets for the same $575,000 that Jimmy was so willing and eager to sell it for to another entity."[5] At paragraph 9(b) in the Statement of Claim in the matter before me the Plaintiff pleaded "the Plaintiff had offered prior to the sale to pay, and was willing to pay, US$610,000 for the Property." Ms Muhammad, when this was drawn to her attention at the hearing by the Court, stated that this was a typographical error. Regrettably, the Plaintiff failed in her affidavits in the matter before me to give full and frank disclosure by drawing the Court's attention to the lower offer she had made. It is clear that the Plaintiff was aware that the property and chattels were to be sold for $610,000. That being the case, one would have expected the Plaintiff to have again applied for an injunction to prevent sale, if she felt it was being sold at an undervalue. The Plaintiff did not make such an application.

19. The Court has to consider the detail of the allegations forming the Plaintiff's case to see if they establish a prima facie case. This hearing is not a full dress rehearsal for the trial. However the Plaintiff must show that the action falls within the proper exception to the rule in Foss v Harbottle. One of the factors is whether the Plaintiff has produced evidence of a prima facie case. On the evidence before the Court, the Plaintiff has indicated to the Supreme Court in earlier proceedings an offer

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[3] Tab 7 – Pages 65-67 Trial bundle CL 43/06

[4] Tab 5 - Paragraph 10 (a) Particulars of Claim CL 43/06

[5] Tab 10 – Paragraph 32 Third affidavit Kimberly Cox-Baker sworn 5th September 2006

to buy the assets for only $575,000. The First Defendant contended at paragraph 16 of his affidavit sworn on 20th October 2009 that he believed the Plaintiff's offer for $575,000 to include the chattels and therefore it was $35,000 less than the eventual sale price. This assertion has not been evidentially challenged by the Plaintiff. The sale was not at undervalue to the offer of $575,000 which the Plaintiff had informed this Court in 2006 to have been a genuine offer. The First Defendant contends that the differing offers were evidence of a delaying tactic by the Plaintiff. The First Defendant stated that he did not view the offers as being genuine due to his knowledge about the Plaintiff's financial circumstances and her inability to inform the Board about how the necessary finances would be raised. It is submitted that, as a consequence, the First Defendant decided that it was appropriate to sell to the cash buyer for a sum close to the Construction Advisory Services Ltd's expert valuation.

20. The First Defendant challenges the Plaintiff's allegation that there has been an equitable fraud by using the proceeds of the sale for non company purposes. The Plaintiff has failed to file any helpful evidence detailing why she states that these payments were improper. The absence of such evidence is surprising having regard to the fact that the Plaintiff was the person who was primarily responsible for keeping the Company's accounts when the liabilities met by some of these payments arose. The First Defendant in his affidavit has set out explanations concerning the payments. All the Plaintiff has done in her pleadings, including her affidavit, is refer to the payments in general terms. The Plaintiff has filed no evidence to challenge these explanations. The Court is therefore left with evidentially unchallenged evidence of what appears, from the First Defendant's explanations contained in his affidavit, to be appropriate company related expenditure.

21. Having regard to the above, the First Defendant contends that the Plaintiff does not have a case at all, let alone a good arguable case. It is contended the alternative remedy is that the Company should be wound up and the Liquidator then administer the balance of the proceeds of sale, $78,000. The Plaintiff could then request the liquidator to investigate any of the legislation which she may wish to raise on a proper evidential basis. If the liquidator decided that the allegations merited investigation

then that would be a quicker and cheaper way rather than pursuing ongoing litigation in the Courts.

THE LAW

22. Rules of Court were introduced in England and Wales in 1994 regulating the prosecution of derivative actions. These were originally contained in RSC Order 15 Rule 12A which mirror Order 15 Rule 12A The Supreme Court Turks and Caicos Islands Civil Rules 2000.The Rules require the plaintiff to apply to the court for leave to continue. The application should be supported by written evidence.[6]

23. The derivative action developed as an exception to the rule in Foss v Harbottle to the effect that a shareholder could not sue in respect of a wrong done to a company. Generally the pursuer in the action had to be the company. The exception to this rule was first spelled out in cases where a fraud on the company was committed by one or more directors who were then able to use their power to prevent the company bringing proceedings against them. In such cases the minority shareholder or shareholders were allowed to sue on behalf of the company. The exception was expanded to cover cases of equitable fraud where directors benefited themselves in breach of fiduciary duty. Templemen J in Daniels v Daniels [1978] Ch. 406 at p. 414 summarised the principle as follows:

"The principle which may be gleaned (from the cases) is that a minority shareholder who has no other remedy may sue where directors use their powers, intentionally or unintentionally, fraudulently or negligently, in a manner which benefits themselves at the expense of the company."

24. The obvious rationale for allowing the aggrieved minority to bring an action on behalf of themselves and other shareholders when the wrongdoers are in control of the company was stated in Prudential Assurance Co. Ltd v Newman Industries Ltd [1982] 1 Ch. 204 at p.211: "if they were denied that right, their grievance could never reach

[6] Order 15 Rule 12A (3)

the court because the wrongdoers themselves, being in control, would not allow the company to sue."

25. It is not necessary for present purposes to look at the many cases dealing with derivative actions, except to note certain procedural questions that arise. In Prudential Assurance Co. Ltd the Court of Appeal stated at pages 221 to 222:

".... we have no doubt whatever that Vinelott J....ought to have determined as a preliminary issue whether the plaintiffs were entitled to sue on behalf of Newman by bringing a derivative action. It cannot have been right to have subjected the company to a 30-day action (as it was then estimated to be) in order to enable him to decide whether the plaintiffs were entitled in law to subject the company to a 30-day action. Such an approach defeats the whole purpose of the rule in Foss v Harbottle and sanctions the very mischief that the rule is designed to prevent.....

.... The second observation which we wish to make is merely a comment on Vinelott J's decision that there is an exception to the rule in Foss v Harbottle whenever the justice in the case so requires. We are not convinced that this is a practical test, particularly if it involves a full-dress trial before the test is applied. On the other hand we do not think that the right to bring derivative action should be decided as a preliminary issue upon the hypothesis that all the allegations in the statement of claim of "fraud" and "control" are facts, as they would be on a trial of a preliminary point of law. In our view, whatever may be properly defined boundaries of the exception to the rule, the plaintiff ought at least to be required before proceeding with his action to establish a prima facie case (i) that the company is entitled to the relief claimed, and (ii) that the action falls within the proper boundaries of the exception to the rule in Foss v Harbottle."

26. In Barrett v Duckett [1995] BCC 362 the defendants applied to strike out the action on the grounds that the plaintiff had an alternative remedy. A winding up petition had been presented so that the liquidator (if a winding up order was made) could decide whether it was in the interests of the company to pursue the action. There was also a challenge to the plaintiff's bona fides in bringing the action. The Court of Appeal, reversing the judge at first instance, struck out the action on both

grounds. Peter Gibson J at page 367 summarised what had by then become established as the general principles governing derivative actions:

"The general principles governing actions in respect of wrongs done to a company or irregularities in the conduct of its affairs are not in dispute:
(1) The Proper plaintiff is prima facie the company.
(2) Where the wrong or irregularity might be made binding on the company by a simple majority of its members, no individual shareholder is allowed to maintain an action in respect of that matter.
(3) There are however recognised exceptions, one of which is where the wrongdoer has control which is or would be exercised to prevent a proper action being brought against the wrongdoer; in such a case a shareholder may bring a derivative action (the rights are derived from the company) on behalf of the company.
(4) When a challenge is made to the right claimed by a shareholder to bring a derivative action on behalf of the company, it is the duty of the court to decide as a preliminary issue the question whether or not the plaintiff should be allowed to sue in that capacity.
(5) In taking that decision it is not enough for the court to say that there is no plain and obvious case for striking out, it is for the shareholder to establish to the satisfaction of the court that he should be allowed to sue on behalf of the company.
(6) The shareholder will be allowed to sue on behalf of the company if he is bringing the action bona fide for the benefit of the company for wrongs to the company for which no other remedy is available, the court will not allow the derivative action to proceed."

27. The matter before me, similar to Barrett v Duckett, may be termed "a most unhappy case." It is evident that the circumstances in which the action is brought and pursued includes a bitter matrimonial dispute between the Plaintiff and First Defendant. It is apparent that this bitterness has similarly "infected decisions" taken in relation to this and other proceedings. Unlike Barrett v Duckett, no winding up petition has to date been presented and the assets are greater. In Barrett the Court concluded that an independent liquidator would be best placed to assess any claims. Peter Gibson LJ said:

"Hoffmann LJ in giving leave to appeal said: "As a matter of common sense, it seems arguable that the parties should not be subjected to lengthy and costly proceedings exacerbated by family hostilities when an independent liquidator might decide that the action could be settled on reasonable terms." I entirely agree with such argument. I hope that even now Mrs Barrett will agree to a voluntary winding up to save costs and she will promptly give the liquidator the benefit of all the work that has been done in this case on her behalf to facilitate any proceedings which he may wish to pursue."

28. In Mumbray v Lapper [2005] EWHC 1152 (Ch d) it was held that the availability of liquidation as an alternative remedy was an important albeit not necessarily decisive factor when considering permission to proceed. Mumbray, although it is a case dealing with the English Civil Proceedings Rules, is relevant as it is dealing with the same type of application. In Mumbray the company, similar to June Bugging Me Ltd, was a quasi-partnership. In Mumbray, similar to the case before me, the Company appears to have been run informally with a co-mingling of the income and expenditure of the Company. In Mumbray, similar to the case before me, we have a "deadlocked company" which "does not appear to be carrying on any trade or business." Judge Robert Reid stated at paragraph 5 in Mumbray:

"In my judgement the true position is that, while the availability of an alternative remedy is a factor, and may well be an extremely important factor, it is not an absolute bar and the fact that it is possible to point to some other alternative method of achieving the desired result does not mean that it inevitably inappropriate for permission for a representative action to be continued. The central question in any case such as this is, "Would an independent board sanction pursuit of the proceedings?""

CONCLUSION

29. The company is a quasi-partnership and is no longer trading. The two business 'partners' have been embroiled in a bitter matrimonial dispute. The parties are unable to work together in the interests of this company and this has resulted in almost continuous expensive litigation in recent years. The circumstances that this company finds itself in is similar to that of the company in Mumbray v Mumbray. In the circumstances of this case, winding-up proceedings would clearly be a suitable alternative remedy and would ensure that an independent person, the liquidator, would be at the helm. Although there would be costs associated with a liquidator's appointment, the affairs of this company in liquidation would not be complex. The liquidator could be approached by the Plaintiff and invited to investigate the concerns she appears to have. The liquidator would then be best placed to calmly make a decision in the interests of the Company, unfettered by the emotions of the Plaintiff or First Defendant.

30. When deciding whether leave should be granted, any alternative remedy is an important factor but may not conclusive. Having regard to the circumstances of this case, I am satisfied that it gives sufficient reason why it is in the interest of this Company to refuse leave to continue this action. However, if I am wrong in that, I have gone on to consider whether the Plaintiff has reached the required threshold for the granting of leave. I find that the Plaintiff has failed to show that there is a prima facie case for granting leave. In assessing whether or not a prima facie case has been made out, I have had regard not only to the Statement of Claim but also the evidence produced in support of it. The Plaintiff at the hearing conceded that First Defendant did not sell the property to an entity in which he has an interest. The Plaintiff's Pleadings have not raised an arguable case that the Company is entitled to the relief claimed as they have not adequately dealt with the potential issue of the sale price of the Company's assets. Regrettably, in her affidavit evidence, the Plaintiff presented a misleading and incomplete picture about the history of the purported offers made to purchase the assets. On the evidence presented by the Plaintiff, in light of the all of the circumstances of the case, I am not satisfied that there is an arguable case that the property was sold at an undervalue. In her affidavit evidence, the Plaintiff simply

raised a bare concern, based on the fact that she was not consulted, about payments made out of the proceeds of sale and did not seek to address the full explanations and background to the payments given by the First Defendant. The detail contained in the First Defendant's affidavit is, on the evidence before the Court, unchallenged. I am not satisfied, on the evidence presented by the Plaintiff, that an arguable case for a breach by the First and Third Defendant of their director's duties to the Company has been established arising from the said payments and sale of the property.

31. When considering whether the action appears to be in the interests of the company I have found that an arguable case has not been shown to subsist. In order to ascertain if there is a serious question to be tried, I have not entered into the merits of the action to any great degree. I have been cognisant that there is a relatively low threshold for the Plaintiff to pass before being allowed to continue her action. It seems to me that the warnings given in Wallersteiner v Moir (No 2) against letting the application escalate into a full trial is very much in point. So are the remarks on Prudential Assurance Co Ltd v Newman Industries Ltd.

32. Accordingly, I refuse leave to the Plaintiff to continue the derivative action and, for the avoidance of doubt, the application for a declaration. It follows also that the question of whether a Wallersteiner v Moir order should be made does not arise.

33. The Plaintiff is to pay the Defendants' costs.

Richard Williams (J)