IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN THE COMMERCIAL DIVISION

CLAIM NO. 2018CD00260

BETWEEN	**GLORIA CHUNG**	**1st CLAIMANT**
	AMANDA CHUNG	**2nd CLAIMANT**
	MARK CHUNG	**3rd CLAIMANT**
AND	**MICHAEL CHUNG**	**1ST DEFENDANT**
	MIKOL INVESTMENTS LIMITED	**2ND DEFENDANT**

Application for directions - Liberty to apply – Companies Act - Unfair prejudice claim- Costs order - Whether 2nd Defendant company to pay for expert forensic audit report and valuation – Whether Claimants to share costs - Whether costs to follow the event.

Steve Shelton QC and Stephanie Eubank for Claimants instructed by Myers Fletcher & Gordon

G. Gibson Henlin QC and Stephanie Williams for Defendants instructed by Henlin Gibson Henlin

Heard: 7th January 2019, 11th January 2019 and 1st February, 2019

In Chambers

Coram: Batts J

[1] On the 8th August, 2018 I delivered a written judgment in favour of the Claimants. I made orders for the valuation and sale/purchase of shares in the 2nd Defendant Company. Unfortunately, and notwithstanding that both parties were afforded the

opportunity to participate in the framing of the detailed terms of the order, my order did not say who should pay for the expert valuations and reports. This reminds us that even Homer nodded.

[2] The Claimant therefore brought an application, filed on the 30th October 2018, for further directions. I treat with it as an application pursuant to the liberty to apply granted in my original order. Affidavits in support were filed. The Defendants also filed affidavit evidence. It is urged upon me that both the Defendants, or either of them, should be ordered to pay the costs of the forensic audit and the valuation of the shares. I am also asked to vary the timelines stipulated. The Defendants contend that the costs should not be borne by the 2nd Defendant Company, but should be shared equally between the Claimants and the 1st Defendant.

[3] I am grateful for, and have carefully considered the written and oral submissions. They were as concise as they were erudite. I will not, in this judgment, set out the detailed terms of the Order, to be varied. It is to be found in ***Gloria Chung et al v Michael Chung et al [2018] JMCC Comm 28*** (unreported judgment delivered 8th August, 2018). The amended Order will, for the convenience of all concerned, be set out in full at the end of this short judgment.

[4] The Claimants' counsel submitted that costs should follow the event and that, as the Claimants were successful in the substantive litigation, the Defendants should be ordered to pay the costs. The substantive claim involved allegations of irregularities having to do with the assets of the 2nd Defendant and will result in restitution. Mr. Shelton QC cited several authorities. He submitted that even the authorities cited by the Defendant demonstrate that, where the Company stood to benefit from the Order, it was appropriate to have the Company pay for the

expert reports. The Claimants also asserted that they were unable to afford the cost of the said expert reports.

[5] Mrs. Henlin QC submitted that the issue did not turn on ability to pay. Rather the question was, who stood to benefit from the order. The claim, she asserted, was in the nature of an "unfair prejudice" claim. It was a contest between shareholders. In such a circumstance the company was only formally a defendant. The costs to be borne should be a matter between and among the shareholders. This was not a derivative action and the 2nd Defendant Company ought not to be asked to bear any cost. Queen's counsel relied on ***Malata Group (HK) Limited v Henry Chi Hang Jung (2008) ONCA 111*** and ***Alexander Naneff v Con-Crete Holdings Limited et al [1993] OJ No. 1756,11 BLR (2d) 218*** . The Defendants also pleaded financial hardship and submitted that, if the Company was to bear such costs, an order allowing a loan would be appropriate.

[6] I agree with the Defendants' counsel that the issues in this claim were in substance, if not entirely in form, a contest between the shareholders of the 2nd Defendant Company. The claim was brought pursuant to Section 213A of the Companies Act and alleged oppression and/or unfair prejudice. It was in a context where the 1st Defendant operated, or was alleged to operate, the 2nd Defendant to the exclusion of the others. Deadlock and a total breakdown in trust resulted. The orders made allow for a forensic audit of the affairs of the 2nd Defendant. The audit will, or is intended to, determine the extent to which the 2nd Defendant's assets were diverted. It will facilitate a determination of any amounts due to the 2nd Defendant.

[7] The order further provides that, upon completion of the forensic audit, a valuation of the shares in the 2nd Defendant will be commissioned. This will facilitate the purchase of one party's shares by the other. In determining the purchase price adjustments will be made having regard to the recommendations and/or findings of the forensic audit.

[8] The question as to which party will ultimately bear the costs of litigation is a matter of discretion for the court, **Re:*Elgindata Ltd. (No.2) [1993] 1 All ER 232***.

The discretion must however be exercised judicially and in accordance with established principles. These may be conveniently summarised as follows:
(1) Costs should follow the event, except when in the particular circumstances some other order is appropriate; (2) The mere fact that a successful party fails on a particular issue or issues does not prevent rule one applying unless those issues caused a significant increase in the cost of proceedings. In that event the successful party may be deprived of part, or the whole, of his costs (3) Where the successful party raised issues or made allegations improperly he may not only lose his costs but be asked to pay a part, or the whole, of the unsuccessful party's costs (4) Where a successful party neither improperly nor unreasonably raises issues or makes allegations on which he has failed, he ought not to be ordered to pay any part of the unsuccessful party's costs; see generally the **Civil Procedure Rules (2002) Order 64.6** and **Re: *Elgindata Ltd***. (cited above).

[9] The general principle, in matters of the sort before me today, is that where the litigation is a contest between and among shareholders the company ought not to be burdened with costs or expenses **Re: Elgindata Ltd. (No. 2**) (cited above) at page 240 (a) and ***Clark v Cutland [2003] All ER D 228, [2003] EWCA Civ 810*** per Arden LJ @ Para 35. The rationale being that in such actions the benefit to be obtained will go to the shareholders and, if made by the company, the payment of costs will reduce its assets. The position is contrasted with claims brought derivatively that is in the name of the company, against shareholders or directors or others. In such claims the benefit of the claim will go to the company. In derivative actions it is therefore appropriate to order the company to pay the costs as the action will directly benefit the company. In ***Wallersteiner v Moir (No 2) [1975] 1 All ER 849 the*** English Court of Appeal ordered that the petitioner's costs be paid by the company which was a defendant. This was on the basis that the litigation was in nature, though not in form, a derivative claim.

The entire fruits of the litigation would be going to the publicly listed company. The petitioner's only benefit was a possible increase in share value.

[10] In this case the company is the 2nd Defendant. The 1st Defendant and the 2nd Defendants were at no time separately represented. In matters of this nature it is often advisable to have the court appoint independent legal representatives to speak to the interest of the company whilst the shareholders have other attorneys. Often the company's participation is passive, that is, related to discovery and attendance at judgment, see for example **Re: *A Company (No 1126 of 1992) [1994] 2 BCLC 146***. This was not so in this case. The 1st Defendant has conducted the matter in a manner which saw no distinction being made between his interest, in defending the claim, and that of the company. That has, in a sense, underscored the allegations in the claim that the 2nd Defendant was at all times operated by the 1st Defendant as his personal fiefdom to their exclusion.

[11] It is a fact that the results of the forensic audit will likely benefit the 2nd Defendant. Any money wrongfully appropriated or any assets wrongfully depleted will be restored, notionally by accounting, if not actually. The ultimate beneficiary will of course be the Claimants whose share value will be determined based on, among other things, the restitutionary impact of the forensic audit. An order that the 2nd Defendant pays the costs may reduce the value of its shares insofar as it impacts the asset base. I am mindful of the words of Hoffman J in **Re a *Company (Case No. 005136 of 1986) [1987] BCLC page 82 @ 84 h***

> **"Professor Gower in his Principles of Modern Company Law (4th Edition, 1979) pp 647- 656 distinguishes between the derivative action and the member‟s personal action. The former is brought when – „a wrong has been done to the company and action is brought to restrain its continuance, or to recover the company‟s property or compensation due to it? In such a case, says Professor Gower, the company is the „only‟ true plaintiff. In the members personal**

action the dispute is an internal one between those interested in the company."

In that case Hoffman J refused an advance order indemnifying the petitioner's costs from the Company's assets.

[12] I am nevertheless of the view that the fair just and appropriate order in this case is one which makes provision for the costs to be borne by the 1st and 2nd Defendants. The Defendants are the unsuccessful parties to this litigation because of their failure to comply with disclosure orders. It was really the 1st

Defendant's failure as the 2nd Defendant was not separately represented or controlled .There was no trial on the merits. Although a total breakdown in trust and confidence was apparent, and there was evidence supporting oppression and unfair prejudice, diversion of assets has not been found by the court or quantified. The forensic audit will determine if this occurred and if so in what amount. The diverted sums ought then to be restored to the 2nd Defendant and/or taken account of in the share valuation exercise.

[13] The situation is not unlike that in **Clark v Cutler** (cited above).In that case the successful Claimant who was ordered to acquire the other party's shares was "provisionally" entitled to have his costs paid by the company. In the case at bar either party may purchase the shares of the other, or the company may purchase the Claimant's shares. In these circumstances it is appropriate that the costs of the expert reports be shared by the company and adjustments made as necessary consequent on the findings of the forensic audit. The litigation is in form a contest between shareholders but, to the extent that sums diverted are brought to account, it will benefit the company. This distinguishes this case from the case of **Alexander Naneff** relied on by the Defendants. There it was a contest between shareholders and family members, no benefit flowed to the company from the result.

[14] I have noted the evidence with regard to the timelines necessary for completion of the requisite reports and will adjust the time frames accordingly. No complaint

has been made about my order that the costs of the litigation be borne by the 2nd Defendant and so I will not adjust that part of the order.

[15] The Amended Order will, with changes underlined, now read as follows:

1. The Defendants Application for Relief from Sanctions is refused.

2. Judgment is entered for the Claimants against the Defendants pursuant to Section 213A of the Companies Act.

3. The 1st Defendant is permitted to make an offer to purchase the shares of the Claimants within sixty (60) days of the delivery of a valuation of the shares, including adjustments, to his attorneys at law.

4. In the event the 1st Defendant fails to make an offer as aforesaid the 1st and 2nd Claimants or either of them is/are at liberty to make an offer to purchase the shares of the 1st Defendant within 60 days of the 1st Defendants failure to make an offer.

5. An offer to purchase pursuant to paragraphs 3 and 4 shall be at a price determined in accordance with paragraph <u>10</u> of this Order.

6. In the event neither the 1st Defendant nor the 1st and 2nd Claimants or either of them makes an offer pursuant to paragraph 3 or 4 above, or in the event the offers made are not accepted then, notwithstanding Article 3 of the Articles of Association of the 2nd Defendant, the 2nd Defendant shall purchase the Claimants' shares within thirty (30) days of the expiration of the time limited for the Claimants to make an offer to purchase the shares pursuant to paragraph 4 above. The purchase by the 2nd Defendant shall be at a price determined in accordance with paragraph <u>10</u> of this Order.

7. An independent chartered accountant, specialising in forensic accounting, shall be agreed upon by the parties on or before the 29th day of August, 2018 and instructed to

carry out a forensic audit of the financial affairs of the 2nd Defendant from the 1st January 2003 to the 9th August 2018 and to prepare a report to the shareholders accordingly specifying all adjustments, if any, which are required.

8. In the event of a failure to agree the Registrar of the Supreme Court shall select the said independent chartered accountant specialising in forensic accounting from a list or lists to be filed by the parties on or before the 5th September 2018.

9. The costs of the said forensic audit shall be borne by the 1st and 2nd Defendants.

10. An independent chartered accountant, specialising in the valuation of shares, shall be agreed upon by the parties on or before the 29th August 2018 and instructed to determine the fair value of the shares of the 2nd Defendant, after considering the forensic audit and adjustments mentioned in paragraph 7 of this Order.

11. In the event of a failure to agree the Registrar of the Supreme Court shall select the said independent chartered accountant specialising in the valuation of shares from a list or lists to be filed by the parties on or before the 8th September 2018.

12. The cost of the said valuation of shares shall be borne by the 1st and 2nd Defendants .

13. The said independent auditors (forensic) report is to be completed as soon as reasonably practicable and in any event no later than six (6) months after the receipt of instructions and delivered to the attorneys for the Claimants and the Defendants respectively.

14. The said independent accountant's (valuation) report is to be completed as soon as practicable and in any event no later than four (4) weeks after the completion of the forensic report and delivered to the attorneys for the Claimants and Defendants respectively.

15. The Claimants attorneys shall have carriage of sale of the shares being sold by the Claimants to the 1st and 2nd Defendants, or, if the shares are being sold by the 1st Defendant to the Claimants, the 1st Defendants attorneys at law shall have carriage of sale of the said shares.

16. Any and all outstanding sums certified by the independent (forensic) accountant as being due to the Claimants, pursuant to Loan Agreements dated the 31st January 2010 between the 2nd Defendant and the 1st and 2nd Claimants and Loan Agreements dated 7th November 2011 between the 2nd Defendant and the 1st Claimant, shall be repaid by the 2nd Defendant within 30 days of the delivery of the said forensic auditor's report to the Defendants' attorney at law.

17. Costs to the Claimants to be taxed if not agreed and to be paid by the 2nd Defendant.

18. Permission is hereby granted to the Defendants to appeal if necessary.

19. Stay of execution of this Order granted until the 24th August 2018.

20. Liberty to Apply.

David Batts
Puisne Judge