



In the Supreme Court of Judicature of Jamaica

In the Commercial Division

Claim No. [2014] CD 00052

Between Leon Forte Claimant

And Twin Acres Development Ltd Respondent

Carol Davis for Claimant

Christopher Dunkley, J. Barrett instructed by Phillipson Partners for Defendant

Heard: 5th February 2015 and 9th February 2015

Application for permission to bring Derivative Action-whether ancillary claim permissible- Section 212 Companies Act – Whether good faith – purpose to ensure Company able to pay debt to the Claimant.

Batts, J

[1] On the 9th February, 2015 I indicated my decision to grant permission to bring a derivative Action. These are my reasons for doing so. By Fixed Date Claim Form filed on the 11th April 2014 the Claimant seeks permission to bring a derivative action in the name of the Respondent to the application, Twin Acres Development Company Ltd. The action is intended to be brought against Mr. Horace Manderson and Mr. Michael Gyles, both Directors of the Respondent Company. The jurisdiction to make this Order is found in Section 212 of the Companies Act.

[2] The Application is supported by an Affidavit of Leon Forte filed on the 11th April 2014. He states that he believes his fellow directors acted in breach

of fiduciary duty and that the action is necessary to protect the interest of the Company.

- [3] The Company he said was formed to develop property at 14 Stillwell Road in St. Andrew. The 3 directors were professionals, Mr. Horace Manderson is a Commissioned Land Surveyor, Mr. Michael Gyles, an Architect and the Claimant is a building contractor. They agreed between and among themselves that their professional fees on the project would be paid for from the sale of the completed units.
- [4] The Claimant alleges that since in or about the year 2010 the other directors have excluded him from participation in the management of the Company. He states that in the year 2012 the other directors conspired to sell Apt. A7 of the Stillwell Road development. His other directors paid themselves considerable sums for this sale. These amounts he alleges exceed the fees payable to professionals in the field. He alleges that neither himself nor his Company LDT Services Ltd. were paid for their professional services.
- [5] He alleges also that Apt B6 was sold by Mr. Manderson and that a considerable amount was paid to Mr. Manderson directly. That sale was aborted and a sale of Apt B4 substituted but the amount paid to Mr. Manderson directly was never brought into account. It is alleged that the amount paid was fraudulently converted into a loan which was "paid" to the other directors. By a settlement agreement an amount in the same sum was agreed to be paid to Mrs. Manning by the Company. In effect therefore the Claimant alleges that the Company's assets were used to refund money paid directly to the other directors.
- [6] The Claimant says it is in the interest of the Company that this Claim be brought as the Company's funds are now insufficient to pay its debts including debts owed to himself and his company.
- [7] Notice of his intention to bring this application as required by law, was given by letter dated 5th March 2014. This and other documentation including accounts allegedly prepared by one Lascelles Williams were exhibited in support.

- [8] The intended Defendants and the Company were present before me and represented by Mr. Christopher Dunkley. He commenced his submissions, in the course of which he requested permission to file an Affidavit. This was opposed. I indicated that any adjournment at this stage would result in an Order for Costs. Mr. Dunkley sought and received permission to consult his client and thereafter elected to withdraw his application to adjourn.
- [9] His submission opposing the application focused mainly on the fact that there was already in existence Claim #2011 HCV 0030 of 2011. In that suit the present Claimant and LDT Services Ltd. brought an action against Twin Acres Development Company Ltd. (the Company), Horace Manderson, Garth Williams and Michael Gyles. The Claim and its Particulars had been further amended. Mr. Dunkley contended that the allegation of breach of fiduciary duty is already made in that other suit. He said any relief granted in that action will benefit the Company and the proposed plan of bringing this intended action was to gain for the Claimant an ancillary advantage in the other action. Mr. Dunkley ended by suggesting that if permission were to be granted it should be to allow an ancillary claim in that other action.
- [10] No issue was taken with the procedures adopted or the Law as expounded by Mangatal J and relied upon by Mrs. Davis in ***Claim 2013 CD 00010 Earle Lewis et al v Valley Slurry Seal Company et al [2013] JMSC COMM.21*** unreported judgment dated 27th December 2013.
- [11] Mr. Dunkley, I should add, had filed a Notice of Application for Court Orders seeking a stay of these proceedings until Claim CD 0030 of 2011 had been heard or in the alternative consolidation of the suits. It was in response to the difficulty indicated to him of the Company being both a Claimant and Defendant in the same action, that Mr. Dunkley then suggested an ancillary claim be brought. Each party in addition to their oral submissions also relied on written submissions filed.
- [12] I have carefully perused the authorities cited the submissions and the Further Amended Claim and Particulars of Claim in CL 0030 of 2011.

[13] At this stage I am not deciding the merits of the intended claim. Nothing I say is therefore intended to or should affect the ultimate determination of the issues between the parties and the Company. I am satisfied that Claim HCV 00307 2011 does not seek the same relief in this suit. To the extent the factual allegations overlap in Paragraph 14, it is irrelevant to the issues in that action. That claim is for payment for professional services rendered and loans made by LDT Services Ltd. and Leon Forte. These all relate to the same development at Stillwell Road.

[14] I reject the submissions that the intended claim would amount to an abuse of process or that the intended Claimant is acting in bad faith. It is true that Mr. Leon Forte's primary purpose for seeking permission to bring this claim may be to ensure that the Company will be in a position to pay its debts including the debt he alleges is owed to him. This although a collateral advantage is not one that would amount to an abuse of process. This is because it is not an unlawful benefit nor is it one that can be achieved in any other lawful way. It is in short a benefit to which he is in law entitled. So that if successful in the claim already before the courts, the Claimant will be entitled to be paid by the Company. The Company will only be able to honour that debt if it has its assets intact.

[15] I therefore find that the Applicant before me has satisfied the statutory conditions:

- a. Notice of his intent was given to the Directors of the Company
- b. The Complainant is acting in good faith
- c. It appears to be in the best interest of the Company that the action be brought

[16] More difficult for me has been my consideration of the discretionary orders to be made under Section 213 as to the further conduct of the Claim to be brought. The Orders I propose are as follows:

- a. Permission is granted to bring a derivative action in the name of the Company and to intervene in suit 0030.
- b. The said action and intervention is to be controlled by the Registrar or some other person to which the parties agree

- c. The Company as a Defendant in suit 0030 is directed to commence an ancillary claim against such of its Directors as the person having conduct of the action may be advised.
- d. The Company be represented by independent Counsel in suit 0030 and in the ancillary claim to be brought
- e. All relevant files, documents and instructions are to be delivered to the said independent Counsel on or before
- f. The reasonable legal costs of the independent Counsel are to be paid by the Claimant
- g. Costs of this application and the costs of conducting the derivative action are reserved to be determined by the trial judge

I will however hear submissions from Counsel on these proposed directions before making final this Order.

David Batts
February 9th 2015