[2025] JMCC COMM. 09

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN THE COMMERCIAL DIVISION

CLAIM NO. 2018CD00248

IN THE MATTER OF THE COMPANIES ACT

AND

IN THE MATTER OF SECTION 213A OF THE COMPANIES ACT

BETWEEN	**CALISTON GRAHAM**	**CLAIMANT**
AND	**COAST TO COAST QUARRIES LIMITED**	**1ST DEFENDANT**
AND	**COAST TO COAST CONCRETE COMPANY LIMITED**	**2ND DEFENDANT**
AND	**CLIFTON JOHNSON**	**3RD DEFENDANT**
AND	**SHELLYANN SIMPSON**	**4TH DEFENDANT**
AND	**IDEAL S AND J TRUCKING SERVICES COMPANY LIMITED**	**5TH DEFENDANT**

Mr. Hugh Wildman and Mr. Duke Foote instructed by Wildman & Associates, Attorneys-at-law for the Claimant

Mrs. Georgia Gibson Henlin KC, Ms. Stephanie Williams and Ms. Keisha Spence instructed by Henlin, Gibson, Henlin Attorneys-at-law for the 1st, 2nd and 5th Defendants

Mr. Ransford Braham, KC and Ms. Christina Thompson, Attorneys-at-law instructed by Braham Legal for the 3rd and 4th Defendants

Company Law- Section 213A Companies Act- Whether there are instances of mismanagement of the 1st and 2nd Defendants- Whether the Claimant is entitled to recover funds invested in the 1st and 2nd Defendants- Whether the allegations of fraud have been proven- Whether the affairs of the 1st and 2nd Defendants have been conducted in an oppressive and/or unfairly prejudicial manner- Whether the Claimant was improperly removed as shareholder- Appropriate remedies- Winding-up- Investigation- Buyout

IN OPEN COURT

Heard on:

3rd - 6th, 10th- 13th July, 2nd and 3rd November, 2023

17th, 22nd- 25th January, 3rd- 5th April, 8th, 27th May, 27th September, 2024, 27th February and 26th March, 2025

STEPHANE JACKSON-HAISLEY, J.

Table of Contents

Preamble

[The] Oppression remedy 'is beyond question the broadest, most comprehensive and most open-ended shareholder remedy in the common law world. It is unprecedented in its scope'[1].It provides a remedy to a minority shareholder who is of the view that he has been unfairly prejudiced by the actions of a majority shareholder. It provides an avenue for him to approach the Court to enforce his right to fair treatment in the operations of the company in which he holds an interest.

The court's authority to make an order compensating an aggrieved person is broad and can embrace any number of claims and remedies. Even so, the oppression remedy is not a panacea for every disappointing investment or venture, particularly those resulting from a start-up company's commercial failure. The availability of an oppression or similar remedy is fact specific. Whether there is an actual case of oppression turns on the specific facts of each case.[2]

THE FACTUAL MATRIX

[1] This case concerns primarily the joint investment of two businessmen in two companies, one involved in the business of quarries and the other involved in the business of concrete. The two businessmen became shareholders of the two companies, with the minority shareholder being Mr. Caliston Graham and the majority shareholder being Mr. Clifton Johnson. They both invested significant financial resources with a view to reaping significant gains. Mr. Graham's expectations of making returns on his investment have not been realized and his attempts to secure relevant information on the companies' profitability have proven futile and so he is of the view that the majority shareholder has operated the

[1] Beck, Minority Shareholders Rights in the 1980"s (1982) L.S.U.C. Special Lects 311 at 312
[2] McGuiness Canadian Business Corporations Law,3rd Edition Vol 3 paragraph 21.16

companies in a way which has resulted in him being unfairly prejudiced. He has come to the court for a remedy.

THE PARTIES

[2] The Claimant Mr. Caliston Graham and the 3rd Defendant Mr. Clifton Johnson have been involved in businesses both locally and in the United States of America. They met sometime between 2003 and 2005 and recognised that they had similar interests in terms of exploring investment opportunities and so developed a cordial relationship as businessmen. According to Mr. Graham the opportunity to establish the 1st Defendant Coast to Coast Quarries Limited (Quarries), was presented by Mr. Johnson. Mr. Johnson's account is that he incorporated the 1st Defendant on the 16th August 2005 and he was the sole subscriber of Six Million (6,000,000) of its Ten Million (10,000,000) shares. On both accounts Mr. Johnson was the brainchild behind Quarries. Quarries is a company involved in the business of mining aggregates, sand and stone.

[3] It was subsequent to its incorporation that Mr. Graham became one of the shareholders and Directors of Quarries. Sometime later in or around 2009 Mr. Graham and Mr. Johnson commenced discussions and negotiations into forming another company Coast to Coast Concrete Limited ("Concrete"), the 2nd Defendant which was incorporated on the 10th June 2010, which was to be engaged in the business of using sand, stones and cement to make concrete.

[4] Mr. Johnson was the majority shareholder and Managing Director of both Quarries and Concrete whilst Mr. Graham was a Shareholder and Director of both.

[5] The 4th Defendant Ms. Shelly-Ann Simpson is the wife of the 3rd Defendant and is the sole director of the 5th Defendant Ideal S and J Trucking Services Company Limited ("Ideal S & J Trucking). The Claimant's case against the 5th Defendant is

premised on the fact that the assets of the 5th Defendant were acquired using company funds of the 1st and 2nd Defendant companies.

THE CLAIM

[6] By Fixed Date Claim Form filed April 23, 2018, Mr. Graham requested that the following orders be made against the Defendants:

i. *The Court direct that an investigation be conducted with a view of ascertaining the share capital for which the Claimant is entitled in the 1st, 2nd and 5th Defendant companies;*

ii. *The Court direct that an investigation be conducted in the 5th Defendant company to determine if the assets and holdings were acquired through the income of the 1st and 2nd Defendants' companies and cause the register of the 5th Defendant to be amended, to add the Claimant as a Director and shareholder with such shares as determined by this Honourable Court;*

iii. *The Court direct that the register of the 1st Defendant company be amended to assign the Claimant with his true allocation of shares in keeping with his contribution of US$1.25 million in the company;*

iv. *That the Court direct the Defendants whether jointly or severally to pay to the Claimant US$1.25 million with regard to the 1st Defendant company with commercial interest at the rate charged by the Claimant's bankers from November 2007 compounded at daily rests to the date of payment; $7 million and US$10,000 with regard to the 2nd Defendant company, with commercial interest at the rate charged*

by the Claimant's bankers from May 2008 compounded at daily rests to the date of payment; being the moneys paid by the Claimant for his shares in both companies and upon such payment that the Claimant be removed from the register of all companies;

v. *A declaration that the Claimant is entitled to such percentage returns of the Company profits based on his share capital in the 1st, 2nd and 5th Defendant companies in such sums as determined by this Honourable Court from the date of operations of the 1st, 2nd and 5th Defendant business to present with commercial interest at the rate charged by the Claimant's bankers from May 2009 compounded at daily rests to the date of payment and an order directing the Defendants whether jointly or severally to pay to the Claimant such sums prior to the removal of the Claimant from the register of the companies;*

vi. *Damages for mesne profits for the loss of use and utility of the Claimant's monies by the illegal actions of the 3rd Defendant in that he deliberately and/or wilfully and /or spitefully and/or maliciously and/or fraudulently falsified documentation to mislead the Claimant in seeking to prevent him from obtaining a return on his investment into the 1st and 2nd Defendant's companies;*

vii. *Aggravated damages on the footing that the 3rd Defendant, deliberately and/or wilfully and/or spitefully and/or maliciously abused his standing as the Managing Director and Majority shareholder of the 1st and 2nd Defendant companies to mismanage and divert company funds for his own use and did abuse company resources without having due regard to the Claimant's investment and did fail to account properly and did falsify documentation to*

prevent payment of any monies to the Claimant for which he was and is entitled;

viii. *Punitive damages on the footing that any sum awarded for compensatory and aggravated damages will be insufficient both to reflect the gravity of the actions and conduct of the 2nd Defendant and deter the Defendant and any other person, from permitting its officers, servants and/or agents and/or employees from acting similarly in the future and further that the actions of the Defendant's officers amounts to oppressive, arbitrary and unconstitutional actions of a Director of a company who is accountable to his shareholders;*

ix. *That the Court appointed receiver for the 1st, 2nd and 5th Defendant companies to pay to the Claimant, the sum assessed herein;*

[7] Mr. Graham also claims that the 3rd Defendant's malicious actions caused the claim to be brought therefore he is entitled to indemnity costs as well as his legal fees.

[8] The 3rd and 4th Defendants deny that the Claimant invested the sum of United States One Million, Two Hundred and Fifty Thousand Dollars (US$1,250,000.00) in the 1st Defendant but say that the sum invested amounted only to Seven Hundred and Sixty-Five Thousand United States Dollars (US$765,000.00) and aver that Two Hundred and Fifty Thousand United States Dollars (US$250,000.00) was a loan from the National Commercial Bank which was repaid by the 1st Defendant. In relation to the 2nd Defendant they accept that the Claimant paid approximately Seven Million Jamaican Dollars (J$7,000,000.00) but do not admit that the sum of Ten Thousand United States Dollars (US$10,000.00) was paid. They deny that there has been any form of mismanagement of the 1st and 2nd Defendant companies. The 3rd and 4th Defendants have instead countered that

efficient standards of management were employed in the operation of the 1st and 2nd Defendants. However, due to the recession which affected the country in 2010, both companies suffered significant start-up losses.

[9] It is denied that the 3rd Defendant deliberately and/or fraudulently falsified documentation to show losses to mislead the Claimant or fraudulently diverted funds and disguised the true earnings of the 1st and 2nd Defendants.

[10] The 4th Defendant denies that the 5th Defendant's trucks were acquired using funds from the 1st and 2nd Defendants as she used her personal funds to acquire various trucks which were eventually transferred to the 5th Defendant. It is denied that the 1st and 2nd Defendants companies funded the formation of the 5th Defendant and it is denied that the Claimant is entitled to any interest at all in the 5th Defendant.

[11] The 1st and 2nd Defendants filed a Counterclaim in which they sought orders including orders for the return of the sums they admitted were invested less certain deductions. They also sought declarations to include an assessment or account of all amounts paid to the Claimant by the 1st and 2nd Defendants and that those sums be deducted from any sum due to the Claimant and an order that the Claimant resign as director of both companies.

CLAIMANT'S EVIDENCE

[12] The Claimant's evidence was presented by Mr. Graham himself as well as witnesses who were summoned to appear. Mr. Graham stated that on or about November 2007, he paid Mr. Johnson the sum of One Million, Two Hundred and Fifty Thousand United States Dollars (US$1,250,000.00) to acquire a 25% shareholding in Quarries. However, his share percentage was reduced to 19% after Mr. Johnson informed him that there were significant overruns in expenditure to establish the quarry. He stated that as his primary residence was in the United

States of America, with the consent and approval of Mr. Johnson, he appointed his cousin, Ms. Marvia Graham as a Company Director and Operations Manager to represent his interest. He stated further that at the end of 2008, Mr. Johnson gave him Five Million Jamaican Dollars (J$5,000,000.00) indicating that that was his profit share in Quarries.

[13] Mr. Graham asserted that after discussions with Mr. Johnson regarding the acquisition of shares in a concrete company, he took the decision to invest his Five Million Jamaican Dollars (J$5,000,000.00) returns from the 2008 profit and invested that sum in Concrete. This acquisition gave him a 30% shareholding, whilst Mr. Johnson acquired 40%. The remaining 30% remained with Ferdinand Sappleton, the previous owner of the company until the shares were acquired by Mr. Johnson himself through a private arrangement thus making him a 70% shareholder in Concrete.

[14] Mr. Graham indicated that there were numerous challenges with the start-up of Concrete which included expenses to dismantle, transport and reassemble the plant and he took the decision to invest an additional Two Million Jamaican Dollars (J$2,000,000.00) in this new venture. He stated further that before the operations could begin, National Environment Planning Agency (NEPA) intervened and shut down the plant as there was a failure to comply with regulations for the establishment of a concrete plant. As a result of this, he invested an additional Ten Thousand United States Dollars (US$10,000.00) to make the plant operational.

[15] He stated that after the concrete company was acquired, there were other outstanding liabilities for heavy duty equipment and parts amounting to Eight Million Jamaican Dollars (J$8,000,000.00) and it was agreed that monthly payments would be made from the company to liquidate the liability. He also stated that whenever the company incurred liabilities in the United States, he would settle

same from his personal funds and this amounted to over Thirty Thousand United States Dollars (US$30,000.00).

[16] Mr. Graham averred that although he invested millions of dollars to start-up both Quarries and Concrete, at the end of 2009 Mr. Johnson informed him that the company suffered a loss due to the recession and there were no developments necessitating the need for aggregates. He stated that he requested an accounting of the records however, that was never provided. Mr. Graham indicated that in 2011, a meeting was convened and Mr. Johnson reported that the companies were operating at a loss as they were incurring expenses for existing debt, equipment acquisition and servicing, however when he made checks he found out that there were a number of contracts with China Harbour and other smaller contractors.

[17] Mr. Graham indicated that at the end of 2012 and 2013, Mr. Johnson informed him that the companies made no profit and once again, he requested an accounting but received no record of how the monies were spent. He stated that sometime in 2014, he met with Mr. Johnson and entered into discussions to sell his shares in the companies as he was concerned about the management and operations of the companies and at that time, Mr. Johnson made an offer of One Million Seven Hundred Thousand United States Dollars (US$1,700,000.00) to purchase his shares in Quarries however, he requested that the company be valued before accepting that offer. He also stated that Mr. Johnson offered him Seven Million Jamaican Dollars (J$7,000,000.00) for his shares in Concrete however, he expressed his disagreement and ended the meeting.

[18] Mr. Graham asserted that on September 28, 2018, a meeting was convened where an Income and Expenditure Report from the auditors was presented which showed that Concrete made a net profit of Fifty-Six Million, Six Hundred and Thirty-Seven Thousand, One Hundred and Thirty-Three Jamaican Dollars and Sixteen Cents (J$56,637,133.16) for the period January 2018 to September 2018 and this refutes Mr. Johnson's statement that the companies were operating at a loss. He further

stated that the questionable methods being employed to run Quarries and Concrete is of great concern and he has no desire to be associated in the wrong doing. He contends that he invested in both companies in good faith believing that he would receive sound investment however, he was prevented from realizing his entitlement of the profits, has been out of pocket for a number of years and has been unable to have the utility of the monies he invested in both companies.

[19] During cross-examination, Mr. Graham admitted that the sum of Two Hundred and Ninety-Nine Thousand Jamaican Dollars (J$299,000.00) has been applied to his bank account monthly however, he indicated that that sum was for the repayment of the Two Hundred and Fifty Thousand United States Dollars (US$250,000.00) loan he obtained from the bank to assist with the start-up of Quarries. He confirmed that he is currently receiving that payment monthly. He also accepted that his agent made a payment to Mr. Johnson of only Five Hundred and Fifteen Thousand United States Dollars (US$515,000.00) and admitted that there is no evidence of payment of Four Hundred and Eighty-Five Thousand United States Dollars US$485,000.00) to make up One Million United States Dollars (US$1,000,000.00) he alleged to have invested.

[20] Mr. Graham denied King's Counsel suggestion that since the repayment of the loan of Two Hundred and Fifty Thousand United States Dollars (US$250,000.00) he has received the total sum of Thirty-Three Million Jamaican Dollars (J$33,000,000.00). He accepted that the recession during 2008-2011 could have negatively impacted the profitability of both companies however countered that from all indication, Quarries was not affected by the recession.

[21] He asserted that he invested his time and money in the companies, however Mr. Johnson used his influence as managing director to cause reports of losses to be filed each year when that is not the true state of the companies' earnings. Mr. Graham asserted that his ultimate aim is for the companies to be properly audited

and for him to obtain the sums invested in both Quarries and Concrete plus the profit made on his investment.

Evidence of Marvia Graham

[22] Ms. Marvia Graham who appeared as a summoned witness stated that she is currently the Office Manager of Quarries however, at the material time, she was Mr. Graham's agent and held shares in both Quarries and Concrete on his behalf. Interestingly, in Ms. Graham's affidavit in support of the Fixed Date Claim Form filed May 18, 2018, which was tendered into evidence, she asserted that between 2005 and 2008 she gave Mr. Johnson sums totalling One Million United States Dollars (US$1,000,000.00) on behalf of Mr. Graham for the acquisition of 25% shareholding in Quarries. During cross-examination however, she contradicted herself when she said "*I wouldn't say I gave Mr. Johnson all that money because I am told money was given by other people*". When asked by whom, she indicated *"Mr. Graham".* In the affidavit that supports the Fixed Date Claim Form, Ms. Graham stated that an additional sum of Two Hundred and Fifty Thousand United States Dollars (US$250,000.00) was paid to Mr. Johnson around July 2009 and she was issued with a letter from Quarries' accountant indicating that 19% shareholding was allocated to her as the share equity had a value of Eighty-One Million, Two Hundred and Sixty-One Thousand, One Hundred and Eighty Jamaican Dollars (J$81,261,180.00). Ms. Graham stated that she received a Share Certificate indicating that she was the registered shareholder of One Million Nine Hundred Thousand (1,900,000) ordinary shares in Quarries.

[23] Ms. Graham also stated that she was asked by Mr. Graham to be a Director of Concrete and was assigned in her capacity as his agent the sum of Three Million (3,000,000) shares. Ms. Graham asserted that the shares in Quarries and Concrete were transferred to Mr. Graham by Ordinary Resolution on August 11, 2014.

Evidence of William White

[24] Mr. William White who also appeared as a summoned witness averred that he was employed as an Accountant at Quarries between 2012 to 2014 however, he was charged with the responsibility of overseeing the accounts for both Quarries and Concrete to deal with tax and bank related matters. Mr. White stated that he was primarily based at Concrete and he gave an overview of the daily operations when orders are made, how receipts were issued and how records were made on the accounting system called Peach Tree which he described as the "soul" of both Quarries and Concrete. He stated that the way the accounting was done at Concrete made a total mess in terms of accounting and he was never given statements to have bank reconciliation done though he requested them on several occasions.

[25] Mr. White averred that all cash payments were made directly to Mr. Johnson and other than when he was informed by Mr. Johnson what to post on the system, he had no knowledge of what was paid or when funds were collected as he received no documentation. He further stated that although the handling of GCT, payroll tax, statutory deductions and corporate income tax were under his purview, he was blocked from doing them. He refuted the suggestion that customers would visit the office and pay and countered that payments are made directly to Mr. Johnson.

[26] Mr. White averred that he was present at a meeting where Mr. Johnson indicated that the companies were not making any money however, when Mr. Graham requested documents to confirm, the meeting fell through. During cross-examination, Mr. White admitted that he was not Chartered and was unable to sign off on certain accounting documents and that his services were terminated as a result. He denied King's Counsel's suggestion that he was contracted to work at Concrete for only a few hours per week to collect the paperwork and leave and refuted the suggestion that he could not be present for a full work day on a daily basis at Concrete since he was the principal of a fairly successful accounting firm,

without causing any negative impact on his firm. Mr. White stated that he had other staff members who were sufficiently capable to service his other clients.

[27] Mr. White averred that transactions at Quarries were simpler in that customers would place their orders at the office, supplies would be made, an invoice would be prepared, and the customers would leave with their goods. He stated that he is aware that Quarries obtained a loan from Scotiabank to purchase a pump truck for Concrete which was being serviced by Quarries.

Evidence of Kimolee Thomas-Spence

[28] Mrs. Kimolee Thomas-Spence who appeared as a summoned witness testified that she provided accounting and auditing services for Quarries and Concrete. Mrs. Thomas-Spence commented on the type of work she was engaged to conduct during 2013-2017 and indicated that she provided some draft accounting work in 2019 however, she was not prepared to discuss the draft document on the basis that she was not paid for the work.

[29] Mrs. Thomas-Spence further indicated that an incident occurred in 2019 and the company lost information which she was asked to regenerate based on information presented to her. She also stated that she was present at a meeting in the capacity of an Accountant where all the directors were present, however, she was not prepared to give details on what transpired at the meeting because she was also not paid.

Expert Evidence of Peter Lee

[30] Counsel for the Claimant made an application for the expert report of Mr. Peter Lee to be tendered as his evidence in chief, however, King's Counsel for the 3rd and 4th Defendants, Mr. Ransford Braham raised the objection that the documents

that the expert based his report on were not put into evidence prior to his examination. King's Counsel posited that Civil Procedure Rule 32.7(1) and (2) regarding hearsay must be considered and the requirements to comply with the rule must be adhered to. The Court came to the conclusion that although the entire report was not inadmissible, the expert's findings where they relate to Peach Tree would be inadmissible.

[31] Mr. Lee was pressed with the suggestion that there is no evidence that Mr. Graham paid One Million United States Dollars (US$1,000,000.00) as his capital injection in Quarries. He however responded that although the receipts evidenced a payment of only Five Hundred and Fifteen Thousand United States Dollars (US$515,000.00), an inference can be drawn from the evidence of the letter from D & D Ogarro Associates, Management & Consultants which showed that Mr. Graham received 19% share ownership of Quarries and that would be based on the value of his contribution.

[32] He was also taxed about his knowledge of the Peach Tree accounting software as well as the documents provided to him as a result of the search and seizure to enable him to prepare his report. He admitted that 50% of all documents were not returned after the search which would have impacted the companies' ability to provide financial information. Mr. Lee also stated that he did not use raw documents in preparing his report as only numbers were provided to him.

[33] On October 19, 2024, Counsel for the Claimant Mr. Hugh Wildman filed a Notice of Application for Court Orders to re-open the Claimant's case to re-call the Claimant and accountant Mr. White as well as other witnesses, however, after hearing strenuous objections from King's Counsel for the Defendants, the Court was of the view that the Claimant had not established sufficient reason to re-call Mr. White and opined that the interest of justice required that the matter proceed as scheduled. However, though the application to allow Mr. White to give further

evidence was refused, the Claimant was allowed to reopen his case to give evidence surrounding documents he obtained from the Company's office.

[34] Mr. Graham testified that subsequent to the commencement of proceedings, he visited the Company's Office and obtained copies of the Annual Returns for the years 2018-2022 which revealed that Three Million (3,000,000) shares were assigned to Shelly-Ann Johnson during that period and he was not listed as a Director on any of the companies during those years. These documents were tendered and admitted as exhibits 25(a) - (e). He averred that this was all done without his consent, approval or knowledge.

[35] Evidence was also led to show that the amended Annual Returns were lodged at the Companies Office on May 22, 2023 and October 19, 2023 respectively and a Status Letter dated January 9, 2023 evidenced the true composition of the companies. The amended Annual Returns for the period 2015-2020, 2021 and 2023 were tendered and admitted as exhibits 26(a) - (c) and the Status Letter admitted as exhibit 27.

DEFENDANTS' EVIDENCE

Evidence of Clifton Johnson

[36] The evidence on behalf of the Defendants was presented by the 3rd and 4th Defendants as well as Mrs. Donna Thompson-Watt, Chartered Accountant who provided an expert report to the Court. King's Counsel Mrs. Gibson Henlin made an oral application to tender an affidavit sworn to by Mr. Johnson to be a part of his evidence but this was refused as the Court was of the view that the witness who was present should give *viva voce* evidence.

[37] Mr. Johnson gave a detailed background of the acquisition and start-up of Quarries in 2005 prior to meeting Mr. Graham. He stated that he had a discussion with Mr.

Graham regarding acquiring shares in Quarries and agreed to sell him a 25% shareholding for an amount equivalent to the investments or outlay for the business. He indicated that Mr. Graham's first investment of Five Hundred and Fifteen Thousand United States Dollars (US$515,000) received sometime in 2006 and the second payment of Two Hundred and Fifty Thousand United States Dollars (US$250,000) received in 2007, could only give him 18.2 percent stake in the business which was rounded up to 19 percent. He further indicated that apart from these initial investments, Mr. Graham made no further investments despite indications that the business was capital intensive and required further capital in order to be profitable.

[38] Mr. Johnson asserted that the total start-up capital for Quarries was approximately Three Hundred and Seventy Million Jamaican Dollars (J$370,000,000.00) however, he contradicted himself during cross examination when he said *"we didn't have a start-up capital, not even a million"* when Counsel suggested that by 2017 he spent up all the start-up capital.

[39] Mr. Johnson indicated that Mr. Graham agreed to participate in the acquisition of shares in Concrete and made an investment of Six Million Jamaican Dollars (J$6,000,000.00) towards the venture in May 2010 which gave him a 30 percent shareholding and apart from that initial investment, all other costs to dismantle, transport and reassemble the plant from Clarendon to Harbour View were borne by him solely. He further indicated that Concrete entered into arrangements to purchase three (3) trucks from CEMEX for the sum of Eleven Million, One Hundred and Eighty-Nine Thousand, One Hundred and Fifty-Two Jamaican Dollars and Thirty-Seven Cents (J$11,189,152.37) of which he made a deposit of Five Million Jamaican Dollars (J$5,000,000.00) from his personal funds. He stated that the 2nd Defendant made monthly payments towards settling the debts, however in some instances, the monthly payments would come from his personal funds when the 2nd Defendant was unable to make the payments due to financial difficulties. He asserted that Mr. Graham informed him that he was not concerned or interested in

the management or affairs of the 2nd Defendant, therefore he acquired an additional 40% shareholding without Mr. Graham's knowledge or approval making him a 70% shareholder in Concrete.

[40] During cross-examination, Mr. Johnson denied that a Special Resolution was done after Mr. White told him he could not use the company's resources to buy shares in his name. He also denied the suggestion that he gave instructions to remove Mr. Graham's name from the company's register and add his wife as a shareholder and stated that he was not aware that Mr. Graham's name was added back as a Director after the proceedings commenced as he did not read the Annual Returns before executing them. Several suggestions were put to Mr. Johnson regarding his running of the companies without due regard or due diligence. Counsel suggested that Mr. Johnson lied to the Company's Office when changes were made to the Annual Returns without the knowledge and/or approval of Mr. Graham who was the other director, however Mr. Johnson stated that though changes were made, he was not made aware as he didn't read the documents before executing them. He instead laid blame on the Accountant and in some instances, the Attorney-at-law who prepared the Annual Returns.

[41] Mr. Johnson averred that both the 1st and 2nd Defendants are operated in an open and professional manner and have complied with all its regulatory, government and safety regulations and since the inception of both companies to 2019, financial statements have been prepared by qualified independent auditors whose audited reports disclose that the 1st and 2nd Defendants have continuously been making losses. He stated further that the financial position of the 1st and 2nd Defendants was so bad that monthly payments for bank loans could not be made in a timely manner and he had to supplement same using his personal funds. During cross-examination, he denied that he had extensive discussions with Mr. William White about the running of the company and further denied any form of mismanagement or fraudulent manner in the way both companies were operating. He denied the

assertion that he has been withdrawing massive sums of money bringing both companies into a state of almost bankruptcy.

[42] He stated that Mr. Graham was informed that the 1st and 2nd Defendants have consistently been making losses of which he should be well acquainted since his nominee was the financial controller and he encouraged Mr. Graham to get an independent accountant to verify the accuracy of both companies' financial position. Mr. Johnson stated that he offered Mr. Graham the sum of Seven Million Jamaican Dollars (J$7,000,000.00) to purchase his shares in the 2nd Defendant however, it was refused and he agreed to transfer Mr. Graham's shares in the 1st Defendant and informed him to locate a purchaser however nothing was forthcoming.

[43] Mr. Johnson provided information regarding the acquisition, ownership and operation of Ideal S & J Trucking and stated that it is not a subsidiary or related company of Quarries or Concrete. He admitted in evidence in chief that Concrete gave the 5th Defendant a loan of Twenty-Seven Million Jamaican Dollars (J$27,000,000.00) it obtained from the bank which is being repaid monthly by Ideal S & J Trucking however during cross-examination he denied that assertion when pressed by Counsel. Mr. Johnson however admitted that the trucks owned by Ideal S & J Trucking currently do work for Concrete.

[44] Mr. Johnson gave evidence that as a result of a search and seizure order obtained by Mr. Graham in June 2018, all documents, computers and the companies' telephones were seized. He stated that some of the documents in filing cabinets and money taken from the property were not returned and that during that period, the 1st and 2nd Defendants' bank accounts were inoperable and were unable pay employees or purchase cement which impacted upon the companies' operation.

Evidence of Shelly Ann Simpson

[45] Prior to commencing *viva voce* evidence, Counsel for the Claimant submitted that most of the evidence in Ms. Simpson's witness statement is inadmissible due to self-corroboration and/or hearsay. The Court was of the opinion that in some instances, the evidence contained hearsay evidence and where such instances arose, the evidence was struck out.

[46] Ms. Shelly Ann Simpson commenced her evidence by speaking about her affiliation with Mr. Johnson and how she came to know Mr. Graham. She however asserted that she had no business dealings with Mr. Graham. Ms. Simpson averred that since the inception of Quarries in 2005, she has been its Company Secretary however, she did not play an active role in its management or operation as that was handled solely by Mr. Johnson. During cross-examination, Ms. Simpson stated that Mr. Johnson made her a Director of Concrete in 2015, however she denied being aware that she was also made a shareholder. This assertion that she became a Director in 2015 is inconsistent with the Commitment Letter from First Global Bank dated October 9, 2007 which was tendered into evidence which Ms. Simpson executed as a Director alongside Mr. Johnson.

[47] Counsel for the Claimant sought to ascertain whether any efforts were made to contact Mr. Graham who was the other Director prior to being appointed at which point Ms. Simpson indicated "no as he was overseas".

[48] Ms. Simpson averred that the 1st and 2nd Defendants were using overdraft on a regular basis as there was no cash flow and on occasions, she assisted in using her personal funds to make bank loan payments and agreed with Mr. Johnson to sell her property registered at Volume 1068 Folio 874 for the sum of Five Million Seven Hundred Thousand Jamaican Dollars (J$5,700,000.00) to settle the company's indebtedness at the bank.

[49] Ms. Simpson indicated that she started playing an active role in both companies in 2019 and around the summer of that year, a meeting was held where the Directors discussed the financial status of Quarries and Concrete. She stated that Mr. Graham was reluctant to accept the financial position of the companies and he was encouraged to get an independent accountant to verify the accuracy.

[50] Ms. Simpson gave a synopsis of all her business ventures prior to her acquiring Ideal S & J Trucking and stated that around November 2014, she purchased two trucks for the sum of Two Million, Four Hundred Thousand Jamaican Dollars (J$2,400,000.00) which commenced doing haulage work for the 2nd Defendant. She also stated that in 2015, she acquired additional trucks which were used to do haulage, pumping of concrete and delivery work for the 2nd Defendant and invoices were submitted in her name. Ms. Simpson stated that when Ideal S & J Trucking was incorporated in September 2016, she decided to expand the business and obtained a loan of Twenty-Seven Million Jamaican Dollars (J$27,000,000.00) from Concrete to purchase additional trucks. She averred that though the loan was serviced by her, the maintenance and servicing of the truck was done by Concrete.

[51] In cross-examination, Ms. Simpson admitted that the assets of Concrete were used to secure the loan since Ideal S & J Trucking was young and Mr. Johnson's assets were tied up with the bank. She contradicted herself when pressed by Counsel for the Claimant and stated that the company did not use any of its assets because Mr. Johnson used his personal assets as security.

[52] Ms. Simpson averred that in July 2017, Concrete purchased an additional Mack Mixer truck using funds that were outstanding for the rental of the 5th Defendant's truck. She also indicated that currently, Ideal S & J Trucking has a total of 25 vehicles including pump trucks, trailers, tippers, vans and concrete mixers. In cross-examination Ms. Simpson admitted that she was a Director of Concrete as well as Ideal S & J Trucking when the trucks were purchased, however, even though she executed the Annual Returns for the period 2017-2022, there was no

benefit to gain as she was not a shareholder of Concrete. Ms. Simpson denied the suggestion that she gave instructions to have her name included in the Annual Returns as a shareholder and further stated that it only came to her attention in 2022 when shown to her in Court.

[53] Ms. Simpson admitted that no Annual General Meeting was held during her tenure as a Director however, accepted that a meeting was held at Eden Garden Restaurant. She denied Counsel's suggestion that she and her husband were taking advantage of the company and made a deliberate attempt to run the Claimant out of the company. Ms. Simpson also denied Counsel's suggestion that the Claimant was removed as a Director but replaced after the case at bar commenced.

[54] She denied that Mr. Johnson transferred funds or utilized money from Quarries and Concrete to finance Ideal S & J Trucking but contradicted herself and stated that where that is done it is fully documented in accordance with good fiscal policy. She also stated that the 1st and 2nd Defendants' investments or profits were never used to establish Ideal S & J Trucking and that Mr. Graham is not entitled to any shares in her company.

Expert evidence of Donna Thompson-Watt

[55] In her expert evidence, Mrs. Thompson-Watt concluded that Concrete made cumulative losses as a result of the crisis during the period 2008 to 2010 when a number of companies went under with low or no sales, reduction in investment and a number of projects being put on hold. She indicated that there were some improvements in 2011 and up to 2012 Concrete was still struggling as it was a period where sales were less than projected. During cross-examination, Mrs. Thompson-Watt admitted that she did not receive the financial statements for 2012 which could have impacted her assessment, however she indicated that since the financial statements are prepared comparatively, the difference between 2011 and

2013 would reflect 2012 figures. Mrs. Thompson-Watt also admitted that a figure of over Thirty-Four Million Jamaican Dollars (J$34,000,000.00) in 2015 for Director's loan would be a substantial sum however, she indicated that that figure was for loans from commencement of the company and not just for 1 year.

[56] Mrs. Thompson-Watt averred that based on her observation, there were some profitable years for Concrete however, the losses were more than profit and there were extreme cash flow problems. She denied that she was the Accountant who assisted Mr. Johnson with the filing of the Annual Returns at the Company's Office and stated that her duty was only in relation to being an expert witness.

CLAIMANT'S SUBMISSIONS

[57] Counsel for the Claimant, Mr. Hugh Wildman submitted that the Court should exercise its powers under Section 213A of the Companies Act to protect the interest of the Claimant who is a minority shareholder and appoint a receiver to administer the affairs of the companies.

[58] Mr. Wildman posited that the claim alleges massive fraud on the 3rd Defendant's part in collusion with the 4th Defendant and contended that the 3rd Defendant conducted the affairs of the companies in a dishonest fashion to prevent the Claimant from realising his investment as a shareholder in both companies. He stated that it is a fact that in 2007, Quarries had a total capital of Three Hundred and Sixty-Two Million Jamaican Dollars ($362,000,000.00) which has since been depleted through mismanagement or significant sums written off as bad debt. He went further to state that the 3rd Defendant's acquisition of Mr. Sappleton's shares in Concrete was fraudulently obtained as the evidence shows that Concrete's resources were used to purchase the shares in the 3rd Defendant's name. Mr. Wildman averred that by 2017, the Director's equity in Quarries had depleted to

Zero Dollars ($0.00) and the Claimant's shares in the company were transferred to the 4th Defendant without his knowledge or consent.

[59] He advanced that the 3rd and 4th Defendants have conducted themselves as husband and wife in a manner to deprive the Claimant of his true benefits as a shareholder of the 1st and 2nd Defendant companies resulting in the Claimant suffering significant loss in equitable earnings.

[60] Mr. Wildman contended that the authorities relied on by King's Counsel on behalf of the Defendants do not assist them as those authorities demonstrate that there was no evidence that those Defendants were guilty of any prejudicial conduct towards the petitioner and that the common thread that runs through the authorities is the want of evidence to support a finding of oppressive conduct which must be established under section 213A of the Companies Act. He placed heavy reliance on **Karen Stewart v Bobby Seepersaud and Others**[3] which interpreted section 213A of the Companies Act and states:

> *[35] "The Act, therefore, provides relief for conduct that is oppressive or unfairly prejudicial, concepts which may overlap to some extent. Oppressive conduct was described in Scottish Cooperative Wholesale Society Ltd v Meyer and another [1959] AC 324 as "burdensome, harsh and wrongful conduct". Unfairly prejudicial conduct is usually of a type that is less offensive and does not give rise to the level of oppressive conduct. It is difficult to identify all the conduct that might be determined to be unfairly prejudicial to shareholders, but common examples include the dilution of a minority shareholder's shareholding or the exclusion of someone who is both a director and shareholder who has a legitimate expectation to be involved in its management as in the case of very small companies or quasi partnerships (see re a Company (No 00709) of 1992); O'Neil v Phillips [1999] UKHL 24; [1999] 2 All ER 961). For purposes of our analysis; no emphasis is being placed on the distinction between oppressive conduct and unfair prejudice, and the term 'the oppression remedy' is being used herein to include claims for relief in respect of both categories of conduct."*

[3] [2022] JMCA Civ 40

[61] Counsel quoted **Re Five Minute Car Wash Service Ltd**[4] and **CW Shareholdings Inc. v WIC Western International Communications Ltd.**[5] but relied heavily on **O'Neil and Another v Phillips and Others**[6] which he submitted laid down the metes and bounds of the oppressive/prejudicial conduct which must be established under the unfair prejudice test which is required under section 459 of the English Companies Act which he submitted is similar to Section 213A of the Companies Act of Jamaica. Mr. Wildman stated that in **Karen Stewart**, the Court of Appeal was guided by the principles enunciated by Lord Hoffman in **O'Neil v Phillips** which has striking similarities to the instant case. He advanced that the Court of Appeal found that in all circumstances, the learned trial judge was correct on his own initiative, having regard to the evidence before him to appoint a Receiver to carry on the affairs of the company, having found that there were egregious breaches committed by the Appellant in the management of the affairs of the company to the prejudice of the Respondent.

[62] Counsel argued that it is clear that the conduct of the 3rd and 4th Defendants towards the Claimant as a shareholder is manifestly oppressive and prejudicial, and that the position is unassailable which, he submitted, is evident in the Agreed Bundle of Documents. He further submitted that the 3rd and 4th Defendants' action suggest a lack of probity towards the Claimant in his capacity as a shareholder and director. He expressed that it is a clear example of dishonesty on the part of the 3rd Defendant being a majority shareholder and director, taking advantage of his position in the companies to the detriment and prejudice of the Claimant who was severely prejudiced by the act of dishonesty. Mr. Wildman submitted that the act of removing the Claimant as a shareholder of Concrete from 2017-2023 was a clear act of dishonesty which suffices to invoke the Court's discretion pursuant to section 213A of the Companies Act to appoint a Receiver to protect the interest of

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[4] [1966] 1 All ER 242
[5] **39 O.R.** (3d) 755 [1988] O.J. No. 1886
[6] (No. 00709 of 1992) HL 961

the Claimant while the business of the Companies continues, which he submits was the approach taken in **Karen Stewart**.

[63] Mr. Wildman pointed to the testimony of the 4th Defendant who denied that she was a shareholder of Concrete during 2017-2023, however, the Annual Returns for the period evidenced that both the 3rd and 4th Defendants were the only two shareholders of Concrete, which Counsel submits shows a gross act of dishonesty and a want of probity by the 3rd and 4th Defendants in taking away the shares of the Claimant. Counsel contended that there is no greater act of dishonesty than to take away the shares of a shareholder behind his back only to have the shares returned after he had commenced proceedings for oppressive and prejudicial conduct. He added that to deprive the Claimant of his shares is a gross act of prejudice which warrants the intervention of the Court in having a Receiver appointed to carry out the affairs of the company and relieve those persons who demonstrated dishonesty in continuing the management.

[64] Counsel pointed out that the 3rd and 4th Defendants negotiated a Twenty-Seven Million Dollars ($27,000,000.00) loan on behalf of the 5th Defendant using the Claimant's 30% interest in the 2nd Defendant to secure the loan without his knowledge or approval and by misrepresenting that the 4th Defendant was the owner of the Claimant's shares. Further, that this is a very serious act of dishonesty which calls for the intervention of the Court to appoint a Receiver in keeping with the principles in **Karen Stewart**.

[65] Mr. Wildman further submitted that having regard to the clear abuse of powers by the 3rd Defendant in managing the affairs of the 1st and 2nd Defendants, that the Claimant is entitled to damages and aggravated damages in keeping with the principles in **Rookes v Barnard**[7].

[7] [1964] UKHL 1

DEFENDANTS' SUBMISSIONS

Submissions on behalf of the 1st, 2nd and 5th Defendants

[66] King's Counsel for the 1st, 2nd and 5th Defendants, Mrs. M. Georgia Gibson Henlin commenced her submissions by examining the terms oppressive and unfairly prejudicial conduct pursuant to Section 213A Companies Act and suggested that a useful starting point for determining whether the conduct of the Defendants is oppressive and/or unfairly prejudicial is as described by Lord Hoffman in **O'Neil v Phillips** which was quoted with approval by Briggs J commencing at paragraph 82 in **Weatherly v Weatherly**[8]. The essence of this is that in order to satisfy the test of unfair prejudice the acts or omissions have to be unfair and prejudicial and that the concept of fairness ought not to be considered in a vacuum but an assessment should be made against the legal background of the corporate structure under consideration. Reference was made to Lord Hoffmans' words in his assessment of unfairness as consisting "in a breach of the rules or in using the rules in a manner which equity would regard as contrary to good faith".

[67] King's Counsel also relied on paragraph 90 of **Weatherley v Weatherley** and suggested that the "something more" referred to in the previous paragraphs arises in cases where the Court finds that the company operated as a "quasi-partnership". She further relied on **Durose et al v Tagco BV et al**[9] as well as **Isaac v Tate**[10] and submitted that the approach of the UK Courts is consistent with the approach of the Canadian courts in determining whether conduct complained of is oppressive and/or unfairly prejudicial. She posited that the decision of **BCE Inc. v 1976 Debenture Holders**[11] sets out the framework for oppression remedy proceedings, as well as the appropriate factors to be considered by a Court in its analysis as follows:

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[8] [2019] BCLC 520,
[9] [2022] EWHC 3000 (Ch)
[10] [2022] EWHC 2023 (Ch)
[11] [2008] S.C.R. 560

> *[56] In our view, the best approach to the interpretation of s.241(2) is one that combines the two approaches developed in the cases. One should look first to the principles underlying the oppression remedy, and in particular the concept of reasonable expectations. If a breach of a reasonable expectation is established, one must go on to consider whether the conduct complained of amounts to "oppression", "unfair prejudice" or "unfair disregard" as set out in s.241(2) of the CBCA.*

[68] King's Counsel contended that a review of the evidence over the course of the lengthy trial demonstrates that the Claimant's assertions of mismanagement were unsupported by the evidence adduced and in fact were baseless and fuelled by suspicion and mistrust of the 3rd and 4th Defendants. She also submitted that the Claimant failed to establish his particulars of mismanagement and that there is no evidence that the companies were being conducted in an ad hoc manner and no evidence that the financials have no regularity or formality.

[69] She further submitted that there is no evidence that the company avoided regulatory, government and safety legislation exposing the company to significant liability and legal consequences. She pointed out that the Claimant's reliance on Mr. Lee's evidence does not offer any assistance as a substantial part of the evidence is based on inadmissible evidence that was obtained during a search order where the probity of the information cannot be tested as to its accuracy.

[70] She advanced that there is no evidence of any falsification of documentation to show losses or any evidence of fraudulent diversion of funds and instead stated that the assertions that the companies' credit accounts have fallen into bad debt due to inadequate maintenance, personal expenses written off as expenses of the 1st and 2nd Defendants and that equipment were not properly serviced are unsubstantiated. She urged the Court to accept that the expert evidence of Mrs. Donna Thompson-Watt which is unchallenged, details the true financial position of the companies.

[71] As it relates to the 5th Defendant, King's Counsel contended that the Claimant is not entitled to any shareholdings in the entity as he has not adduced any evidence to support the assertion that the evidence of Peter Lee was spurious and could not substantiate the claim. She further stated that the Claimant does not fall within the category of complainant under section 213A Companies Act. Therefore, he has no standing to bring a claim against the 5th Defendant.

[72] King's Counsel submitted that the Claimant has failed to establish his claim for aggravated damages and contended that to successfully claim aggravated damages, the Claimant must establish on a balance of probabilities:

a. An exceptional or insulting motive on the part of the 3rd Defendant in committing the wrong that is, in mismanaging and diverting funds from the 1st and 2nd Defendants for his own use; and
b. Injury to his feelings/personality.

[73] As it relates to punitive and exemplary damages, King's Counsel relied on **Rookes v Barnard** and suggested that the Court should consider an award for exemplary damages only if the sum considered for damages is inadequate to punish the wrongdoer for his outrageous conduct, to mark their disapproval of such conduct and to deter a repeat of the said conduct. It is submitted that the Claimant has not established any wrongdoing on the part of the 1st, 2nd and 5th Defendants and is not a victim of any punishable behaviour.

[74] King's Counsel submitted that there is nothing peculiar in the conduct of the 1st, 2nd and 5th Defendants' conduct of the claim that warrants an award of indemnity costs and as such the application should be dismissed. She relied on **Michael Distant and Charmaine Distant-Minott v Nicroja Limited, Nicholas Grant and Roxborough Management Services Limited**[12] where Brooks J (as he then was) stated that costs should be paid on an indemnity basis, is inappropriate in this

[12] (unreported decision of the Supreme Court of Jamaica, Claim No. 2010HCV1276)

jurisdiction given the guidance related to the quantification of costs under Part 65. She suggested that in determining whether to grant an application for indemnity costs the Court should be guided by the principles in the Judgment of Coulson J in **Noorani v Calvert**[13]

Submissions on behalf of the 3rd and 4th Defendants

[75] Mr. Ransford Braham, King's Counsel for the 3rd and 4th Defendants commenced by considering the categories of conduct that give rise to the oppression remedy and highlighted pages 333-334 of the text from Andrew Burgess in Commonwealth Caribbean Company Law which stipulated that:

> *"The provisions in the Acts in Anguilla, Antigua, the Bahamas…. Jamaica… expressly stipulate that the oppression remedy is available where there is conduct that is oppressive or unfairly prejudicial to, or that unfairly disregards the interests of shareholders or debenture-holders, creditors, directors or officers of the company. There are therefore three categories of conduct that can give rise to the oppression remedy. These are 'oppressive' conduct, 'unfairly prejudicial' conduct and conduct which 'unfairly disregards' the interests of shareholders or debenture-holders, creditors, directors or officers of the company. Each of these categories introduces a separate category of conduct, which may overlap in any case, but each of which, if proven, can constitute oppression as encoded in the provisions of these Acts."*

[76] King's Counsel emphasized that notwithstanding the fact that there are three categories of conduct, the Claimant has based his claim only on oppressive and unfairly prejudicial conduct and considered dicta in the Canadian case of **BCE Inc v 1976 Debentureholders** [14] which states that oppression has been described by the Court in **Scottish Cooperative Wholesale Society Ltd. v Meyer and Anor**[15] as conduct which is *"burdensome, harsh and wrongful."*

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[13] [2009] EWHC 592 (QB).
[14] [2008] SCR 560
[15] [1959] AC 324

[77] King's Counsel submitted that in considering the oppression remedy, the two questions a Court must answer as outlined in **BCE Inc v 1976 Debentureholders** are;

(1) does the evidence support the reasonable expectation asserted by the Claimant; and

(2) does the evidence establish that the reasonable expectation was violated by conduct falling within the 'terms' oppression, "unfair prejudice" or "unfair disregard" of a relevant interest.

[78] He submitted that the burden of proof rests with the Claimant to establish all the elements of oppression on a balance of probabilities which he has failed to do. He pointed out that the Claimant must identity the expectations he claims have been violated and establish that those expectations were reasonably held.

[79] King's Counsel relied on **Re G & G Properties Ltd; Re Bankside Hotels; Griffiths v Gourgey et al**[16] which highlights the fact that unfair prejudice claims must be fully and properly pleaded and the facts which support the claim are to be clearly set out and submitted that the Claimant has failed to properly plead his case. Further, that though Counsel for the Claimant sought to paint a picture that the Defendants conspired to take the Claimant's shares in the 2nd Defendant, this is not a part of the pleadings. He highlighted that the issues regarding the Annual Returns that the Claimant's Counsel brought to the fore have been rectified and it is clear that the 3rd and 4th Defendants did not derive any benefit from the error in the Annual Returns.

[80] He contended that the 3rd and 4th Defendants did everything in their power to keep the 1st and 2nd Defendants afloat as the operations of the companies were managed solely by the 3rd Defendant. He stated that all loans procured by the 1st

[16] [2019] EWCA Civ 2046

Defendant were secured by the personal assets of the 3rd Defendant to include his dwelling house and life insurance policy. He argued that the Claimant has failed to show that there has been poor management of the 1st and 2nd Defendants and has not established that he suffered any loss from the alleged "poor management" of the said companies.

[81] It was argued that little weight ought to be given to the expert report of Peter Lee as he relied heavily on inadmissible evidence that is not before the Court and his evidence lacks credibility and is unreliable given that he conducted independent research and prepared models representing expected production which was not provided to the Defendants.

ISSUES

[82] The main issues in the case can be summarised as follows:

(i) Whether the Claimant has sufficiently established a claim for oppression pursuant to the provisions of section 213A of the Companies Act?

(ii) Whether the Claimant is entitled to any remedy against the 1st and 2nd Defendants?

(iii) Whether the assets of the 5th Defendant were acquired using funds or income from the 1st and 2nd Defendants and if the Claimant has established that he is entitled to an interest in the 5th Defendant?

(iv) Whether the Defendants are entitled to succeed on the Counterclaim?

(v) Whether there is a basis to make an award for Damages, Aggravated Damages and/or Punitive Damages or Mesne Profits?

(vi) Whether the Claimant is entitled to Indemnity Costs?

Whether the Claimant has sufficiently established a claim for oppression pursuant to the provisions of section 213 A of the Companies Act?

The Law

[83] There is no dispute that the Claimant is a shareholder of the 1st and 2nd Defendant companies and is entitled to bring an action pursuant to Section 213A of the Companies Act. The Claimant's right to apply under section 213A is embedded in the provisions of section 212(3) which define a complainant to include "(a) a shareholder or former shareholder of a company or an affiliated company and (c) a director or officer or former director or officer of a company or an affiliated company.

[84] Section 213A of the Act provides that a complainant may make an application to the Court and sets out the criteria that should be satisfied as follows:

> (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 or unfairly disregards the interest of, 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.

[85] Although there is no definition for what is oppressive and unfairly prejudicial conduct under section 213A or any other section in the Act, a definition can be gleaned from a number of judicial pronouncements dealing with section 213A.

[86] Section 213A is not novel. It is modelled on section 241(2) of the Canadian Business Corporations Act. It came under focus in the Supreme Court of Canada decision of **BCE Inc v 1976 Debenture Holders**, relied on by all the Defendants. I agree with the Defendants' submissions that it provides invaluable guidance to the court in interpreting the provisions of section 213A. Paragraph 56 of the judgment is worth setting out. It reads as follows:

> *"In our view, the best approach to the interpretation of section 241(2) is one that combines the two approaches developed in the cases. One should look first to the principles underlying the oppression remedy, and in particular the concept of reasonable expectation. If a breach of a reasonable expectation is established, one must go on to consider whether the conduct complained of amounts to "oppression", "unfair prejudice" or "unfair disregard" as set out in s 241(2) of the CBCA."*

[87] The Court referred to this approach as the twin pronged approach and at paragraph 58 noted that:

> *"First oppression is an equitable remedy. It seeks to ensure fairness- what is "just and equitable". It gives a court broad, equitable jurisdiction to enforce not just what is legal but what is fair:…It follows that courts considering claims for oppression should look at business realities, not merely narrow legalities".*

At paragraph 59 the court continued:

> *"Second, like many equitable remedies, oppression is fact specific. What is just and equitable is judged by the reasonable expectations of the stakeholders in the context and in regard to the relationships at play. Conduct that may be oppressive in one situation may not be in another"*

[88] The Court in **BCE** added that the concept of reasonable expectation is objective and contextual. The central question is what stakeholders including a shareholder and director would be entitled to reasonably expect. Emphasis was placed on the fact that directors owe their duty to the corporation not to stakeholders, and that

the reasonable expectation of stakeholders is simply that the directors act in the best interest of the corporation. The Court set out more precisely the two enquiries that should be made: 1. Does the evidence support the reasonable expectation asserted by the claimant? and 2. Does the evidence establish that the reasonable expectation was violated by conduct falling within the terms “oppression”, unfair prejudice” or unfair disregard of a relevant interest?

[89] The factors that must be considered are set out in paragraph 72 of the judgment and include factors such as what is the general commercial practice for a business of this nature, the nature of the corporation, the relationship between the parties, past practice, steps the Claimant could have taken to protect himself, representations and agreements and the fair resolution of conflicting interest between corporate stakeholders.

[90] The Court in **BCE** also noted that not every failure to meet reasonable expectation will ground the action. The court must be satisfied that the conduct falls within the concepts of oppression, unfair prejudice and unfair disregard. The Court also noted that a Claimant must identify the expectations he claims have been violated and establish that those expectations were reasonably held and he must establish this on a balance of probabilities.

[91] King’s Counsel Mrs. Gibson Henlin brought to my attention the decision of **Weatherly v Weatherly** and suggested that it is similar to the instant case, in particular as it relates to small corporations and family businesses where the company operated as a “quasi-partnership”. The Defendants herein contend that as the Claimant’s relative Ms. Marvia Graham was the financial controller and a company director and integrally involved in the running of the company, the Claimant through her would be privy to all the information that he needed as director.

[92] It is also prudent to explore judicial decisions in Jamaica and the Region to see how the Courts have applied the principles set out in **BCE** in reference to the provisions of section 213A. In **Rickie Davis and Dorma Davis v Wellesley Stokes et al**[17], also relied on by the Defendants, my sister Palmer-Hamilton J dealt with an application under section 213A. The Claimants were shareholders in the company however their shareholding was significantly diluted by the Defendants' act of increasing the share capital in the company and then allocating the majority shares to themselves. The first Claimant also complained that he was removed as a director without notice. The circumstances of the increase of share capital took place at a meeting with only the 1st and 2nd Defendants being present. The Claimants were not given notice of the meeting in which the first Claimant was removed as director or the meeting in which the share capital was increased and allotment done.

[93] The Court found that the Claimants in their capacity as shareholders reasonably expected that they would receive notices of meetings in particular those that sought to increase share capitals and issue and allot new shares which would have the effect of reducing their percentage of shares in the company. The Court determined that the reduction of their percentage was unfair and prejudicial and concluded that the business affairs of the company have been conducted in a manner that is unfairly prejudicial to the interests of the company. The Court proceeded to make consequential orders reversing what had been done.

[94] In that case the Court cited the case of **Benkley Northover v Eric Northover, Rohan Northover, Godfrey Dixon and Winston G. Northover Associates Limited** [18] where Edwards J (as she then was) at paragraph 121 said:

> *"If we adopt the definition in the cases, then the conduct must not only be prejudicial but unfairly so. Conduct will not be considered unfairly prejudicial to the claimant where the claimant has it in his*

[17] [2023] JMCC COMM 01
[18] 2014] JMCC Comm 14

own powers the means or the method or the power to stop or prevent it. Carey J in Butler v Butler defined oppressive conduct as a situation where shareholders having a dominant power in a company exercise or procure a state of affairs in a manner which cause the oppressed to submit to something unfair to them as a result of some overbearing act or attitude on the part of the oppressor. The defendants submitted that the conduct complained of only required strong management and internal control mechanisms to deal with them. I will therefore, consider the complaints in the form in which they have been made."

[95] Edwards J at paragraph 132 examined the dicta of the Court in **Re Legal Costs Negotiators Limited**[19] where it was held that section 459 of the English Act was concerned with the company's affairs and not with the affairs of individuals. Edwards J found that the cases demonstrate a reluctance by the court to act where the petitioner is able to control the relevant conduct by his own powers and that the cases where relief was granted were concerned with situations in which the petitioner is otherwise powerless to stop that conduct by powers which he has under the company's constitution. She also held that this was consistent with the section being generally regarded as being for the protection of minorities although the majority could also petition as the provision referred to "any member".

[96] The Court went through a careful analysis of all the actions of the defendant and the impact on the company even considering whether the actions were on behalf of the company or otherwise. Similar to the Claimant herein one of the complaints was that the Claimant was not removed as director by any proper procedure. At paragraphs 147 and 148 Edwards J said:

[147] Eric's explanation for removing the Claimant from the records at the Companies Office as director was that the Claimant, acting in concert with his son Kaon Northover (whom the majority had made company secretary to replace the 3rd Defendant) had submitted an application to the Companies Office to effect an unauthorized change to the structure of the company. He claimed that as a result of the Claimant's actions he was forced to file multiple statutory declarations to prevent the unauthorized changes.

[19] [1999] 2 BCLC 171

> *[148] However, the filing of documents at the Registrar of Companies by an individual director acting with ostensible authority to remove the Claimant as director and shareholder and thus effecting a freeze on the company's accounts is oppressive and unfairly prejudicial to that Director. In Re Piccadilly Radio PLC [1989] 5 BCC 692, it was held that the wrongful registration of new members was unfairly prejudicial. The action of Eric and Mr. Dixon in regard to the JMMB accounts is also unfairly prejudicial to the Claimant.*

Edwards J further expressed:

> *"[161] The court may grant relief in a form not sought or desired by the petitioners: see Hawks v Cuddy [2009] EWCA Civ 291 and may order the majority to cede control to the minority. Where the conduct of the affairs of the company and especially mismanagement of the company leads to a breakdown of trust and confidence in small private companies such as the 4th Defendant, resulting in oppression and unfair prejudice to some members, this may be the only solution"*

[97] Among the issues considered in **Marcia Bellgarde v Donovan Lewis and Ideal Betting Ltd.**[20], were the actions undertaken by the shareholder. Wint-Blair J in extracting established principles from several authorities reiterated the following principles at paragraphs 216 of the judgment:

> *"In deciding whether conduct is unfairly prejudicial, the court may take a number of factors into consideration. For instance, although there is no requirement that the complainant should come with clean hands, the conduct of the complainant may be a factor taken into account. The court may also look at such things as whether any offer was made to buy out the complainant, the motive of the wrongdoer, any delay in bringing the complaint, and any other relevant factors. It is clear from the cases that there are no set categories of what constitutes unfairly prejudicial conduct."*

[98] Wint-Blair J went on to cite a number of scenarios which were held to be unfairly prejudicial, some of which are relevant to this case and include controlling stakeholders making adverse changes to an existing shareholder's rights and the

[20] [2024] JMCC Comm 35

failure to hold annual general meetings and to have financial statements prepared in accordance with the Act, thus depriving shareholders of their right to information on the company's affairs.

[99] In the decision of **Sharma Persad Lalla v Trinidad Cement Limited & TCL Holdings Limited and Andy J. Bhajan Others**[21] Jamadar (as he then was) said that the determination of what is oppression is case specific:

> "*It must be that it is essentially a question of fact whether or not there has been Oppression. Therefore, each case must turn on its own particular circumstances. To do so, clearly, the courts must consider both the nature of the acts complained of and the method by which they were carried out, in the context in which they arise. Oppression must necessarily be, in my opinion, context specific (Smith v. first Merchant Equities Inc. 50 D.L.R. (4th) 369 at 373).*"

[100] In recognition of the fact that the oppression remedy is a peculiar creature of statute, the English High Court in **Universal Project Management Services Ltd v. Fort Gilkicker Ltd & Others**[22] emphasized the need for the court to engage in a fine balancing act. On the one hand it must protect the legitimate interest of the minority shareholder, but at the same time, it must take care not to usurp the function of the board of directors.

[101] King's Counsel for the 1st, 2nd and 5th Defendants in the submissions set out the oppressive and unfairly prejudicial conduct as alleged by the Claimant. Similarly, King's Counsel on behalf of the 3rd and 4th Defendants set out the limbs of the Claimant's expectations and so I will adopt them in setting out the limbs on which the Claimant's case for oppression is based and then proceed to apply the established law in determining whether the Claimant's case has merit.

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[21] Unreported decision HCA No. S-852 of 1998, delivered 30th November 1998
[22] [2013] All ER 313

[102] The Claimant's basis for claiming oppression has been summarized into seven categories as follows:

1. Mismanagement of the 1st and 2nd Defendants
2. Failure to provide financial information
3. De minimis return on the Claimant's investment in the companies
4. Undesirable conduct exhibited by the 3rd Defendant
5. Fraud, falsification of documents, false declaration to the Companies Office, double entries across both companies
6. Disregard for regulatory, government and safety guidelines
7. The removal of the Claimant as director and shareholder

[103] Before I delve into these categories, there is a point I must consider. On behalf of the Defendants, it was contended that the Claimant has failed to properly plead his case in contravention of the principle set out in **Re G & G Properties Ltd** that unfair prejudice claims must be fully and properly pleaded and the facts which support the claim are to be clearly set out in the same.

[104] I do not agree that the claim is not properly pleaded. It may be that Counsel for the Claimant attempted to introduce new material in cross-examination, but that does not form a significant part of the case with which this Court should be concerned as the focus of this Court is to examine the pleadings and the evidence in support.

Mismanagement of the 1st and 2nd Defendants

[105] The Claimant complained that the 3rd Defendant mismanaged the 1st and 2nd Defendants to the extent that the Claimant's interest as shareholder and director was prejudiced. He cited a number of instances that he asserted amounted to mismanagement which included:

- That the 3rd Defendant managed the companies in an ad hoc manner
- That the 3rd Defendant caused the credit accounts to fall into bad debt due to inadequate maintenance

- That the 3rd Defendant failed to pay over sums collected on behalf of the companies
- That the 3rd Defendant poorly managed the finances of the companies resulting in constant losses
- That personal expenses were written off as expenses of the 1st and 2nd Defendants
- That company funds were diverted to pay personal expenses
- That there were instances of micromanagement and diversion
- That material received from the 1st Defendant is entered in the books of the 2nd Defendant as purchasers
- That heavy duty equipment was purchased using company funds and then privatised by the 3rd Defendant
- That maintenance fuel and licensing for the trucks and equipment were paid by the company as company expenses
- That equipment was not properly serviced causing the company to incur significant expenses
- That the financials have no regularity or formality
- that company funds were used to purchase assets in another company such as the 5th Defendant

[106] The acts listed above are acts that a company that is properly managed would not be expected to be engaged in. It is accepted that the 3rd Defendant was the managing director of both companies and that he was in charge of the day to day operations of both companies. He would therefore be responsible for ensuring that the company is properly managed. The Claimant therefore expected that the 3rd Defendant, as managing director, would properly manage the 1st and 2nd Defendants and not engage in any of the acts above.

[107] The Claimant's expectations are consistent with the provisions of section 174 of the Companies Act which set out the duties that every director and officer of a

company should exercise in discharging their powers. Section 174 states as follows:

> *174.(1) Every director and officer of a company in exercising his powers and discharging his duties shall—*
>
> *(a) act honestly and in good faith with a view to the best interest of the company; and*
>
> *(b) exercise the care, diligence and skill that a reasonably prudent person would exercise in comparable circumstances, including, but not limited to the general knowledge, skill and experience of the director or officer.*
>
> *(2) A director or officer of a company shall not be in breach of his duty under this section if the director or officer exercised due care, diligence and skill in the performance of that duty or believed in the existence of facts that, if true, would render the director's or officer's conduct reasonably prudent.*
>
> (3) *For the purposes of this section, a director or officer shall be deemed to have acted with due care, diligence and skill where, in the absence of fraud or bad faith, the director or officer reasonably relied in good faith on documents relating to the company's affairs, including financial statements, reports of experts or on information presented by other directors or, where appropriate, other officers and professionals.*
>
> *(4) In determining what are the best interests of the company, a director or officer may have regard to the interests of the company's shareholders and employees and the community in which the company operates.*
>
> *(5) The duties imposed by subsection (1) on the directors or officers of a company is owed to the company alone.*
>
> *(6) Where pursuant to a contract of service with a company, a director or officer is required to perform management functions, the terms of that contract may require the director or officer in the exercise of those functions, to observe a higher standard than that specified in subsection (1).*

[108] The expectations were within the ambit of what would be expected of a managing director being that he would act with due care and diligence and skill considering what is in the best interest of the company. The expectations are consistent with what would be expected if the companies were managed in accordance with the law and general commercial practice and so I find that his expectations were reasonably held.

[109] The question for the court is whether these expectations were violated. According to the Defendants, the Claimant's assertions are unsupported by the evidence adduced, are baseless and are fuelled by suspicion and mistrust of the 3rd and 4th Defendants. The Court must therefore consider the nature of the acts complained of and how they were done in the context of the circumstances of this case.

[110] The cases have demonstrated that the court should engage in a balancing act and that if context is not everything in oppression cases, it is almost everything[23]. In conducting this balancing act, the Court should take into account the context within which the parties operated, the law and practice governing commercial practice, the size, nature, structure of the company and any agreements they had regarding how the affairs of the companies were to be run. Therefore, the agreement whether implicit or otherwise that the Claimant would not be involved in the day to day operations of the company and that initially Ms. Graham would represent his interest would be a relevant factor for this Court.

[111] In conducting a balancing act, the Court must also examine carefully the conduct of the 3rd Defendant taking into account the fact that the Claimant was not only shareholder but also a director and as director would have certain inherent responsibilities.

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[23] Page 577 of Canadian Business Corporations Law 3rd Edition Vol 3

[112] In the case of **Five Minute Car Wash** relied on by the parties, it was pointed out that although the allegation suggested that the Defendant was unwise, inefficient and careless in the performance of his duties as managing director, the conduct alleged did not amount to oppressive conduct within the meaning of the law. At page 246 the court set out the criteria to succeed in obtaining relief for oppression to be as follows:

> *"To succeed in obtaining relief under section 210 of the Companies Act, 1948, a member of a company must have established that at the time when his petition was presented the affairs of the company were being conducted in a manner oppressive of himself, or of a part of the members including himself, and unless a petitioner in his petition alleges facts capable of establishing that the …*
>
> *First, the matters complained of must affect the person or persons alleged to have been oppressed in his or their character as a member or members of the company. Harsh or unfair treatment of the petitioner in some other capacity, as, for instance, a director or a creditor of the company, or as a person doing business or having dealings with the company, or in relation to his personal affairs apart from the company, cannot entitle him to any relief under section 210.*
>
> *The mere fact that a member has lost confidence in the manner in which the company's affairs are conducted does not lead to the conclusion that he is oppressed; nor can resentment at being outvoted; nor mere dissatisfaction with or disapproval of the conduct of the company's affairs, whether on grounds relating to policy or to efficiency, however well founded. Those who are alleged to have acted oppressively must be shown to have acted at least unfairly towards those who claim to have been oppressed."*

[113] Buckley J. came to the conclusion that allegations that the chairman and managing director of a company had been unwise, inefficient and careless in the performance of his duties could not without more amount to oppressive conduct. The Claimant must therefore show how these acts affected him in his capacity as not only

director of the company but in his capacity as shareholder. King's Counsel on behalf of the 1st, 2nd, and 5th Defendants has emphasized in reliance on **Five Minute Car Wash Service** that "Generally, it has been found that a court should differ to the expertise and business judgment of management unless it is patently clear that management is abusing some dominant power, resulting in significant harm to the corporation."

[114] The case of **Re CW Shareholdings Inc v WEC Western International Communications Ltd** et al also provides useful guidance. Blair J at paragraph 27 put it this way:

> *The directors'' actions are not to be judged against the perfect vision of hindsight and should be measured against the facts as they existed at the time the impugned decision was made. In addition, the court should be reluctant to substitute its own opinion for that of the directors where the business decision was made in reasonable and informed reliance on the advice of financial and legal advisors appropriately retained and consulted in the circumstances.*

[115] The burden therefore rests on the Claimant to prove the violation of his reasonable expectation. The Claimant's assertions about how the 1st and 2nd Defendants were mismanaged and how the 3rd Defendant mismanaged the company affairs has been challenged by the 1st, 2nd, 3rd and 4th Defendants. In the 1st and 2nd Defendants' Defence it was averred that they operated in an open and professional manner including the hiring of professional staff or third parties. In the 3rd Defendant's Defence he averred that he employed proper and efficient standards of management in his operation and employed competent staff to operate the businesses. Further, that he has not mismanaged the businesses and at all times acted in keeping with his fiduciary duties to the companies in their best economic and financial interest. The evidence in support of these averments came from both

the 3rd and 4th Defendants and their expert witness. This therefore brings the question of credibility into focus.

[116] The Claimant's evidence was not without inconsistencies, the most significant one being his account of how much money he invested which during cross-examination was determined to be less than he stated in his pleadings and witness statement. Although this was a significant issue, I did not find that it eroded his credibility. The 3rd Defendant's evidence was replete with inconsistencies. He has initially asserted that the total start-up for Quarries was approximately Three Hundred and Seventy Million Jamaican Dollars (J$370,000,000.00) but during cross-examination he indicated that the company did not even have a start-up capital, not even a Million dollars. He at first vehemently denied removing the name of the Claimant from the company register in favour of his wife but the evidence that unfolded proved this to be untrue. Although he admitted that Concrete provided a Twenty-Seven Million Jamaican Dollar (J$27,000,000.00) loan to the 5th Defendant he sought to deny this during cross-examination. I found the evidence of the 3rd Defendant to be inconsistent and generally found him to be evasive in his answers. The 4th Defendant was also found to be evasive and inconsistent on the issue regarding the removal of the Claimant's name as shareholder and director. I therefore found the Claimant for the most part to be more credible than the 3rd and 4th Defendants.

[117] However, the Claimant was unable to give a direct account of this alleged mismanagement as he was not involved in the day to day running of the 1st and 2nd Defendants. He therefore relies on other witnesses to prove this, in particular the expert witness Mr. Peter Lee and Mr. William White. The Claimant's attempt to rely on the evidence of Ms. Marvia Graham did not bear much fruit. At the time of giving the evidence Ms. Graham was still employed by the Defendant companies and so the fact that she was conflicted was evident in the way she responded to the questions posed. Her affidavit evidence was tendered into evidence and from that can be deduced certain facts relative to the sums she said she received from Mr. Graham and handed over and the position she held in the company on Mr.

Graham's behalf from 2008 up to 2014 after which Mr. Graham took custody and control of his shares in the company, and she resigned as director. Her evidence was unhelpful to the Claimant in terms of how the 3rd Defendant managed company affairs.

[118] On behalf of the Claimant, Mr. White gave evidence about his responsibilities as accountant with the 1st and 2nd Defendants and about instances of mismanagement observed by him. Although he said he worked primarily at Concrete and was able to oversee the daily operations at Concrete first hand, his evidence to some extent related also to Quarries.

[119] He gave evidence citing several irregularities that he observed. He spoke of overseeing a bank loan to assist with the purchase of a pump truck for Concrete but pointed out that this loan was done through Quarries to purchase the truck for Concrete. He explained that Mr. Johnson wanted him to make an accounting entry regarding this loan to book it as an investment from him which is something he explained could not be done. Through him a letter dated September 16, 2014 was tendered and admitted into evidence which served to explain to Mr. Johnson why this was not proper, pointing out that 'any notion that these funds were from personal investment is not only false but misleading'.

[120] Mr. White pointed out that the way Mr. Johnson operated was problematic and cited by way of example instances when he would give him company funds without proper accounting. He said Mr. Johnson would come in the office and ask him to prepare a receipt for a million dollars and then a million dollars is paid in cash and then he would come back to him with that same million dollars to post that as funds being injected in the company. Mr. White said that as an accountant it was his responsibility to ascertain where these funds came from but the problem he was having was that sometimes the funds that he was instructed to post as Directors' loan or investment was the same funds from the receipts that were drawn resulting in duplication.

[121] He commented that there is no policy or rules in accounting that allows for those kind of actions to be done. He explained how the Peach Tree system operates in that when you do an invoice it automatically does the invoice and the other side of the accounting entry by sending it to income and it automatically sends it to receivables and that it would stay in receivables until you draw the receipt and post that receipt to clear the receivables. Further that, regarding the next side of the entry you would send that money to the bank. He said there is no way that entry could have been made and that would be a total mess in terms of accounting.

[122] He noted other irregularities to include that cheque payments were not exclusively done in the name of the company as sometimes it was done in the name Clifton Johnson. Further that the transactions that Mr. Johnson wanted him to enter as director's investments he said he did not do those because he did not know how to make those entries, and those entries would also be contrary to accounting. From his experience as an accountant, he found these acts to be highly irregular and expressed that that became the norm in the company.

[123] Mr. Johnson in his evidence accepted that Mr. White was his employee and came to help with accounts. When questioned about these irregularities, he denied that Mr. White spoke to him about these matters. He denied that Mr. White said he was using the companies' assets to purchase shares and put in his name. It was suggested to him that when Mr. White was negotiating the loan for Ten Million Jamaican Dollars (J$10,000,000.00) on his behalf, he wanted it to be recorded as a loan that he gave to the company, but he denied this. It was suggested that Mr. White even wrote him a letter informing him why it could not be done, and he denied this but that letter having been tendered into evidence reflected this position. It was suggested that he and Mr. White had extensive discussions about how he was running the company, and he told him that what he was doing about trying to represent companies' assets as his own was wrong but he denied this too. His denial in the face of the exhibit added to my finding Mr. Johnson's evidence to be less than credible.

[124] On behalf of Mr. Johnson, it was suggested that Mr. White was a disgruntled employee and that his evidence was untrue, however when I compare the evidence of Mr. White with that of Mr. Johnson, I found him to be more credible. From Mr. White's account which I found to be credible, there can be deduced that there were in fact some irregularities in how Mr. Johnson managed the company affairs including irregularities from an accounting standpoint.

[125] The question whether the actions of Mr. Johnson amount to mismanagement which is tantamount to unfair or oppressive conduct on the part of the 1st Defendant however has to be looked at in the context of not only the evidence of these witnesses but also the evidence of the expert witnesses.

[126] Mr. Peter Lee, on behalf of the Claimant gave two reports and a note of his findings. He accepted that he relied on the information from Peach Tree financials. This Peachtree Accounting Software was not available to be placed before the Court. The Court ruled that the report would be accepted as evidence subject to the fact that any findings based on the Peach Tree Accounting Software would not be admissible. The court would have to determine what weight to place on the report as a whole in light of the absence of the Peachtree Accounting Software.

[127] It is accepted that some of his report findings were based on his assessment of the Peach Tree accounting system which was not a part of the evidence before this Court. The Defendants have submitted that this renders his evidence and report useless and that the Court should not act on it. I agree that it would certainly have an impact on the weight to be placed on certain aspects of his report but it doesn't render all of his reports useless. The weight to be placed on his reports would be determined by the extent to which Peach Tree impacted the particular findings.

[128] During the course of the cross-examination of Mr. Lee it became quite evident that there are some aspects of his findings that do not necessarily relate to the Peach Tree system and I am prepared to consider them. He also gave evidence of examining the financial statements, so it was clear that the financial statements had some bearing on the findings in his reports and that his findings were not based solely on Peach Tree. He also spoke about independent research but said that only provided a guide.

[129] Ultimately, the question of how much weight to attach to the evidence of an expert is a matter for the court. In the judgment of Wint Blair J in the **Marcia Belgarde** case she said at paragraph 175:

> *"There is therefore a duty on this court to scrutinize the viva voce evidence as well as the reports produced by the expert witnesses. A judge or a jury is not obliged to accept the views of an expert. The duty of the experts called by either side is to furnish credible information in order that the court can make an independent assessment by applying the information presented by the expert to the facts found in the case".*

[130] I found it necessary to assess the credibility of Mr. Lee. There were some discrepancies with his evidence and that of Mr. White in particular, and he agreed during cross-examination that he didn't see any evidence that the companies were bearing the personal expenses of Mr. Johnson and Ms. Simpson.

[131] However, his findings that the financials of both companies have been maintained in a very informal, haphazard and irregular manner is supported by the evidence of Mr. White. There were instances where his findings did not support the Claimant's case and he supplied them anyway. I found that despite the fact that he was engaged by the Claimant, he was frank enough to say that some of the Claimant's assertions against the Defendants cannot be adequately addressed with any particularity due to the unavailability of banking, accounting and other records due to the manner in which the operations of the companies are

maintained. On my assessment of Mr. Lee, in terms of the nature of his findings, I found that he was fair in conducting his review and that he was objective and that he was a credible witness who is competent in his discipline of accounting.

[132] I accept his finding that due to the poor manner in which the accounts were kept, he could find little evidence to determine if the personal expenses of both the 3rd and 4th Defendants were written off as company expenses and that the banking records and an actual review of the ledgers of the companies would be necessary before an answer can be provided.

[133] I accept that he was not able to say with any certainty that any credit accounts have fallen into bad debt due to inadequate maintenance and monitoring. I accept his finding that based on the disclosures by the 3rd and 4th Defendants that the banks were calling their loans there is reason to believe that an entity which has such significant income to be in a position to use company funds to loan to a third party being the 5th Defendant company, should not have its creditors imposing penalties for poor maintenance of its accounts, and that the only inference that can be drawn is bad management.

[134] I accept his finding that there was insufficient data to make a finding as to whether equipment was properly serviced and further to determine if significant expenses were incurred in keeping them operational. He pointed out that there has been a lot of leasing of private equipment especially from the 4th and 5th Defendants but that with the data provided there is no way for any verification or audit to be done without a forensic team being appointed to conduct such a review.

[135] I place no weight on his finding regarding the effect of the highly informal accounting from the ledger as that was directly from Peach Tree. He concluded that in order to provide any definitive findings as to the liability of the Defendants to the Claimant a comprehensive forensic audit would be necessary and appropriate and I find that conclusion to be of value.

[136] In his supplemental report Mr. Lee indicated that the bank statements supplied in relation to Quarries were incomplete and renderered him unable to determine if the cash remitted from cash sales is in fact being deposited which hindered his work as a significant portion of the sales are transacted in cash. He said it is necessary to have the complete bank statements for each month for each year as then it may be possible to ascertain if sales as reported in the audited financials are reasonable or not.

[137] He said no bank statements were supplied from Concrete. He distinguished the position of Concrete from Quarries by indicating that the customers of Concrete tend to have large orders in cheque or bank transfers as opposed to cash. The provision of the bank statements would have allowed for a closer inspection to determine whether deposits bear any relationship to the sales reported in the audited financials and sales ledger. Their unavailability makes it difficult to ascertain the true state of the financials.

[138] On the Defendants' case, the 3rd Defendant testified that being a businessman for many years, he is familiar with the do's and don'ts in the operation of a business and he has not engaged in any illegal methods to operate the 1st and 2nd Defendants, that the companies do not pay his personal expenses or those of Ms Simpson and he does not book double entries across the 1st and 2nd Defendant companies. He said that each company would pay respectively for any items that were purchased from that company and that there were separate books for each company.

[139] Ms. Simpson also gave evidence in respect of the general management of the 1st and 2nd Defendant companies. She gave evidence that the management of the 1st and 2nd Defendants was handled solely by the 3rd Defendant. She pointed out that the companies were in overdraft on a regular basis as there was no cash flow and that on occasions, she had to assist in making loan payments from her personal

funds. Further that in or around 2013, business was so bad that she even sold her property to cover loan payments and she paid the sum of Five Million and Thirty-Five Thousand and Fifty Jamaican Dollars (J$5,035,050.00) to the bank to settle the outstanding amounts. Loans were secured by the personal assets of Mr. Johnson. She gave evidence that the 3rd Defendant employs proper and efficient standards of management and employed competent staff to operate the businesses.

[140] Mrs. Donna Thompson-Watt on behalf of the Defendants provided her expert opinion on the financial position of both the 1st and 2nd Defendant company from her review of the audited financial statements for the years 2008-2017. This was necessary in an attempt to substantiate the Defendants' position that they had not made profit as alleged by the Claimant. It was her opinion that both companies made loses at the commencement of their operations. She pointed to the fact that Quarries made financial losses for seven of the first ten years of trading.

[141] She identified that in the first three years the company accumulated losses amounting to Twenty-Eight Million, Six Hundred and Eighty-Three Thousand, Six Hundred and Twenty-Two Jamaican Dollars and Ninety-Nine Cents (J$28,683,622.99) and a loss of Thirty-One Million, Three Hundred and Sixty-Seven Thousand, One Hundred and Ninety-Five Jamaican Dollars (J$31,367,195.00) in 2013. She indicated that sales increased in 2014 which resulted in the company making a net profit of Forty-Seven Million, Nine Hundred Thousand Jamaican Dollars (J$47,900,000.00). In 2015 to 2016 sales fell to approximately Two Hundred and Fifty Million Jamaican Dollars ($250,000,000.00) and Two Hundred and Sixty Million Jamaican Dollars (J$260,000,000.00) but by 2017 sales increased to over Three Hundred and Sixty-Nine Million Jamaican Dollars (J$369,000,000.00).

[142] In respect of Concrete, she identified that during the first four years of trading the company accumulated losses amounting to Eighty-Nine Million and Seventy-

Seven Thousand, Eight Hundred and Fifty-Three Jamaican Dollars ($89,077,853.00). She did not identify any profits. In fact, when the report is carefully analysed the focus seemed to be more on the losses made than on the profits.

[143] She accepted that there were no financials for the year 2012 although she requested them from Mr. Johnson. She accepted that she saw a figure for director's loan in the sum of Thirty-Four Million, Three Hundred Thousand Jamaican Dollars (J$34,300,000.00). In cross-examination she was evasive about the number of years the company made a profit, but she affirmed that the company had more years of losses than years of profit. In relation to the payments made to Mr. Graham she suggested that the payments made to him subsequent to the repayment of the loan in the sum of Thirty-Three Million, Eight Hundred and Sixty-Five Thousand, Six Hundred and Ninety Jamaican Dollars and Fifty-Four Cents ($33,865,690.54) should be treated as returns. She however did not seek to identify in light of the losses and profits made, what would be the total of profits if any.

[144] With respect to the allegation of misappropriation of company funds by Mr. Johnson, she was unable to give an opinion on this due to the unavailability of the documents which were seized.

[145] When both experts are compared, I found Mr Lee to be more of an independent witness who was more objective in his findings than Mrs. Thompson Watt and so I preferred him. Although, Mr. Lee did not attempt to arrive at any findings in respect of the scope of the profits if any that would be due to the Claimant he made certain recommendations. One of the most significant findings made by Mr. Lee that the Court must give due consideration to is his recommendation that a forensic audit be carried out. The court now has to consider whether the circumstances herein merit this and what value would be derived from so doing.

[146] In order for mismanagement by itself to be a ground for oppression, it would depend on how severe the mismanagement is. The deficiencies and irregularities identified in relation to the 3rd Defendant's management of company affairs may not in and of itself be decisive in determining the question of oppression however they must be considered in the context of the other acts complained of. The cases have stressed that in deciding whether the reasonable expectation has been breached that regard must be had to the facts of the specific case, the relationships between the parties and the entire context as well as considerations of general commercial practice. I will now consider the allegations of mismanagement in the context of the alleged failure to provide financials.

The financials and the failure of the 3rd Defendant to provide financial information on the companies to the Claimant

[147] As part of the mismanagement by the Defendants, the Claimant has contended that the financials have no regularity or formality and that the Defendants have failed to provide him with financial information. The Claimant's expectation was that as shareholder and director he would have access to audited financial information or at least information that would set out the profits and losses of the companies. This expectation must be viewed in the context that as shareholder and director, he would be expected to be provided with accurate accounts and financial information in relation to the companies. That the Claimant in his capacity as shareholder is entitled to an account of the profit and loss of the company is evident in the provisions of section 145 of the Companies Act which stipulate as follows:

> *145.-(1) The directors of every company shall, at some date not later than eighteen months after the incorporation of the company and subsequently at least once in every calendar year, lay before the company in general meeting a profit and loss account or, in the case of a company not trading for profit, an income and expenditure account for the period, in the case of the first account, since the incorporation of the company,*

and, in any other case, since the preceding account, made up to a date not earlier than the date of the meeting by more than nine months, or, in the case of a company carrying on business or having interests abroad by more than twelve months: Provided that the Minister, if for any special reason he thinks fit so to do, may, in the case of any company, extend the period of eighteen months aforesaid, and in the case of any company and with respect to any year extend the periods of nine and twelve months aforesaid.

(2) The directors shall cause to be made out, in every calendar year, and to be laid before the company in general meeting, a balance sheet as at the date to which the profit and loss account, or the income and expenditure account, as the case may be, is made up and there shall be attached to every such balance sheet a report by the directors with respect to the state of the company's affairs, the amount, if any, which they recommend should be paid by way of dividend, and the amount, if any, which they propose to carry to the reserve find, general reserve or reserve account shown specifically on the balance sheet, or to a reserve fund, general reserve or reserve account to be shown specifically on a subsequent balance sheet.

(3) If any person being a director of a company fails to take all reasonable steps to comply with the provisions of this section, he shall, in respect of each offence, be liable on summary conviction before a Resident Magistrate to imprisonment with or without hard labour for a term not exceeding six months or to a fine not exceeding fifty thousand dollars:

[148] This section requires that a profit and loss account be provided and that this be done at the annual general meeting. So important is the need to provide this information that the failure to do so amounts to an offence under section 145 subsection 3. This is a clear right that a shareholder holds. Without this statement of accounts, the shareholder would not be aware of the true financial position of the company that they invested in. In fact, there have been cases where shareholders have filed claims for oppression simply on the basis of the directors' failure to provide financials. In the case of **Discovery Enterprises Inc v I.S.E. Research Ltd**[24], not cited before me, **Discovery Enterprises** filed a minority

[24] [2002] B.C.S.C. 1624

shareholder action complaining of oppressive conduct which included the refusal of the company to provide audited financials. The Claimant was successful in a claim for oppression where the law provided that shareholders should be provided with audited financials. The Court found that the denial of the Claimant's right to audited financial statements amounts to conduct that is less than fair to the Claimant and found it to be conduct that is oppressive. It goes without saying therefore that the Claimant in his capacity as a shareholder had a reasonable expectation that he would be provided with the company accounts and/or audited financial information.

[149] Similarly in a case from the British Virgin Islands **JG Ming Inc and Ming Shui Sum, Lawrence v Ming Siu Hung, Ronald, S/haw Siu Kuen Bertha and Ming Shiu Tong**[25] dealing with a claim for oppression and unfair prejudice, the Court of Appeal had to determine whether the failure to provide financial information amounted to unfair prejudice. The Court distinguished between a time period when the Claimant requested financial information and a time when the information was not requested. The case was decided in the context of the Articles of Association which provided that financial information should be furnished.

[150] The Court of Appeal determined that since the Articles of Association obliged the directors to provide the balance sheet and the profit and loss account annually it was not open to the Defendant to say that the Claimants had a duty to ask for it. He emphasized the fact that as the Articles required that it be provided, the Defendant could not be absolved from liability by saying the Claimant did not request it. The Court has this to say at paragraph 77:

> *"I nevertheless hold, by applying the principles stated in O'Neil v Phillips. That once the request for financial information was made in 2014, Lawrence ought to have provided the financial information. The non-provision of the financial information in 2014 suffices to establish the unfair prejudice claim and the judge was so entitled to conclude".*

[25] British Virgin Islands VG 2017 CA 11 delivered 30th June 2017

[151] The 3rd Defendant in his response to the allegation that he failed to provide financial information asserted that he believed that Mr. Graham would have been fully apprised of the financial position of the 1st and 2nd Defendants as his nominee Ms. Marvia Graham was the financial controller for the period 2008 to 2015 and was well acquainted with the financial records. He said she would collect both copies of the financial statements from the auditors and give him a copy and that he was of the view that she would have provided the said statements to Mr. Graham. According to Mr. Johnson, if Mr. Graham requested documents, they were right there with Ms. Graham.

[152] It is interesting to note the evidence of Mr. Johnson that if requested, the financials were with Ms Graham. There seems to be no appreciation on the part of Mr. Johnson of the need to provide financials whether requested or not and to operate in compliance with the provisions of section 145. What is clear from even his own evidence is that he did not ensure that an account of the companies' profit and loss was provided to the Claimant.

[153] King's Counsel on behalf of the 3rd and 4th Defendants contended that the evidence was that audited financial statements were prepared yearly and that the Claimant's evidence that the 3rd Defendant refused to provide accounting records was unsubstantiated. It is true that Mr. Graham admitted that Ms. Graham provided him routinely in 2016 with financial information and that the information that he relied on to say that the company was profitable was the sales report forwarded to him by Ms. Graham. However, there is a difference between providing a sales report and providing a balance sheet reflecting the profit and loss of the company as required by the provisions of section 146. The Claimant conceded that this was provided to him for one year being the year 2016, so what of the other years of operation of the businesses?

[154] The Claimant also accepted that in September 2018 he was invited to a General Board meeting for both companies and the Income and Expenditure Statement for the period January 1, 2018 to September 2018 was presented to him. This does not assist the 3rd Defendant as this was after this Claim was filed.

[155] The Claimant's evidence in relation to Mr. Johnson's refusal to provide him with financial information is supported by the evidence of Mr. White who gave evidence as follows:

> *During employment did you interface with directors?*
>
> *Yes, we had couple meetings.*
>
> *At those meetings all directors present?*
>
> *Yes, Mr Johnson and Mr Graham was introduced to me previously as a shareholder and director of the company.*
>
> *What was the nature of the meeting?*
>
> *There was a discussion between Mr Johnson and Mr Graham in relation to the profitability of the company. Mr Johnson was of the view that the company is not making any money. Mr Graham was saying ok if the company is not making any money give me the documents so we can concur but when Mr Graham would question those documents the meeting fell through.*
>
> *What do you mean?*
>
> *It just turned for the worse because the cordialness between the two gentlemen evaporated in thin air.*
>
> *What Mr Johnson is saying is that the company don't make any money and you should take my word and Mr Graham is saying give me the audited financials so I can see it. That is only fair to me and everything then went south.*

[156] The Claimant would not have been expected simply to take Mr. Johnson's word that the companies were operating at a loss. He was entitled to be shown the proof

of this. All of this has to be viewed within the context that the Claimant was not only a shareholder but also a director, so his position is distinguishable from someone who is only a shareholder. I therefore bear in mind that in his capacity as director he should have certain responsibilities towards the companies but, it was clear that Mr. Johnson was the managing director and that there was an agreement that the Claimant would operate from overseas and among his responsibilities that he spoke to executing was to secure trucks and other equipment for the companies. Mr. Johnson therefore had the primary responsibility to ensure that the financial statements are in fact provided. It is clear from even his own evidence that he took no steps to ensure that this was done.

[157] Mr. Johnson in his capacity as director was in charge of the day-to-day running of the company. Up to 2014 he and Marvia Graham were the directors. Mr. Graham was not then a director and so was seeking to obtain the financials in his capacity as shareholder. The position changed when in August 2014 he became a director. Mr. Johnson still maintained his position as managing director.

[158] The parties are at variance in relation to the issues that arose when Mr. Graham sought to get access to the accounts. I must therefore come to some findings of fact on those issues. I found the evidence of Mr. Graham to be more credible than that of Mr. Johnson and so I accept that he did on several occasions seek to get the accounts and that he got some records for 2016. I accept that Mr. Graham's attempts to secure yearly financial statements were met with a refusal on the part of Mr. Johnson and a statement from Mr. Johnson that no one should give him any information in relation to Concrete and proceeded to behave in a boisterous manner. I accept that Mr. Johnson also sought to prohibit Ms. Graham from divulging financial information to Mr. Graham. Although this specific statement related only to Concrete, it was also clear that he did not provide the required accounts in relation to Quarries as well.

[159] In the context of the failure to provide an account in accordance with section 145, and the behaviour of Mr. Johnson I found this to be unfair to the Claimant and to amount to unfairly prejudicial conduct. The Claimant's reasonable expectation of being provided with accounts, of the 1st and 2nd Defendants was violated by the 3rd Defendant.

[160] The Claimant also had a reasonable expectation that he would be provided with information relative to any significant financial decisions made in respect of the 1st and 2nd Defendant companies. It is accepted that a loan in the sum of Twenty-Seven Million Jamaican Dollars (J$27,000,000.00) loan was secured using his 30% interest in the 2nd Defendant which he had no knowledge of or of which he approved. The Claimant's reasonable expectation that in his capacity as a director and shareholder of the 2nd Defendant he would be provided with information relative to significant financial decisions made by the 2nd Defendant was also violated.

The de minimis returns on the Claimant's investment

[161] At the heart of all the complaints by the Claimant is the fact of the de minimis returns on his investment in the 1st and 2nd Defendant companies. The Claimant had an expectation to obtain a return on his investment.

[162] It is therefore important to identify the understanding of the parties in terms of how returns were to be calculated and paid. There has been some divergence of the facts as it relates to the expected returns and so at this juncture, I will refer briefly to how the parties came to be in this arrangement. Although there was some dispute as to the exact sums invested by the Claimant in both companies, there has been no dispute as to the percentage holding of the Claimant which is 19 percent and 30 percent in the 1st and 2nd Defendants respectively.

[163] It is clear from this that there was an expectation on the part of the Claimant that the profits from the companies would be shared with him consistent with the agreed percentage holdings. He expressed that he invested in both companies in good faith believing that he would receive sound investment. The primary expectation of any shareholder is to obtain a return on his investment. The Claimant's expectation to receive return is therefore a reasonable one. If there are little or no returns, then this defeats the purpose of the investment. I also find that it would be reasonable that the profits would not be de minimis but rather be reflective of the profits made by the company, taking into account his percentage share.

[164] Section 158(3) of the Companies Act provides for dividends to be paid to shareholders but only from the profits made. In the context of the agreement of the parties and the prevailing law I accept the Claimant's evidence that there was an agreement for him to get profits by year's end supported by the fact that in the first year he did receive some dividend although it was channelled elsewhere. To date the Claimant has not received the expected returns on his investment. In order to determine whether this is di minimis, then there must be a full appreciation of whether this accurately or erroneously represents the gains made by the companies.

[165] This however must be viewed in the context of the business environment which is the expectation that there is some risk associated with any investment. The question arises whether the sums paid to the Claimant amount to di minimis returns and whether in the context of the gains made by the company the Claimant's expectation of more than di minis returns on his investment was reasonable.

[166] On behalf of the Defendants, it has been argued that the reasonable expectation would not only be dependent on the making of a profit but would also only be reasonable if the Defendant was in a position to pay dividends. Mr. Johnson

pointed out that there was no agreement for the payment of profits to Mr. Graham except in the usual course of business in the event that the 1st and 2nd Defendants made a profit. He pointed out that the company did not make a profit in the first few years of its operation. Further that in 2012 he caused the 1st Defendant to pay to him the sum of Five Million Jamaican Dollars (J$5,000,000.00) although he was not really entitled to it. Mr. Graham however said a payment of Five Million Jamaican Dollars (J$5,000,000.00) was made at the end of 2008. Although I prefer the Claimant's evidence that there was an agreement in place for the company to pay to the Claimant each year his percentage share in the profit, I accept that the expectation to have returns would be influenced by whether the company had made a profit and that the payment of any dividends would therefore fall to be determined by the general financial state of the company.

[167] Mr. Johnson also added that when the loan made by the Claimant in the sum of Two Hundred and Fifty Thousand United States Dollars (US$250,000.00) was repaid in full, he directed that the payment of Two Hundred and Ninety-Nine Thousand Jamaican Dollars (J$299,000.00) per month should continue to be paid directly to him on a monthly basis. Mr. Graham accepted that since the repayment of the loan in November 2015 he has continued receiving the sum of Two Hundred and Ninety-Nine Thousand Jamaican Dollars (J$299,000.00) on a monthly basis from the 1st Defendant and that from 2015 to 2023 he has received a total of Thirty-Three Million, Eight Hundred and Sixty-Five Thousand, Six Hundred and Ninety Jamaican Dollars and Fifty-Four Cents (J$33,865,690.54) from the 1st Defendant

[168] Mr. Johnson said that the financial position of the 1st Defendant became so bad that they failed to make monthly payments for loans at First Global Bank and in some instances, he had to make monthly payments from personal funds. During his evidence he tendered into evidence the letters received from First Global in proof of his assertions to demonstrate the status quo on the loans. He indicated that he advised Mr. Graham that his request for payments of profits and or

dividends was not sustainable as the financial statements disclose that the companies were operating at a loss.

[169] According to Mr. Johnson based on the audited financial statements he relied on the 1st Defendant company suffered significant losses between the years 2008-2017 and only made profits in the years 2011, 2012 and 2014. Further, that the 2nd Defendant only made profits for three years that is 2015, 2016 and 2017. It was therefore argued on behalf of the Defendants that the 1st and 2nd Defendants could not have been expected to pay dividends as they would first have to recover from the significant losses suffered. Further that having regard to the unprofitable state of the companies the Claimant's expectation to be paid profits was an unreasonable one.

[170] The Claimant's evidence is that at the end of 2009 Mr Johnson reported to him that no profit was made and that the 1st Defendant company suffered a loss. At the end of 2010 he told him that the companies had suffered a loss and he asked for accounting records but received none. At the end of 2011, 2012, 2013, 2014, 2015 that story remained the same that the companies were operating at a loss.

[171] In order to establish that there was a breach of the reasonable expectation to obtain returns consistent with his shareholding, the Claimant would have to prove that the company made a certain amount in profits and was able to pay dividends. The fact of there being di minimis return without the full accounting and on its own could not account for oppressive or unfairly prejudicial conduct amounting to oppression. In order to made this determination, the Court would have to be seized of the profits made by the 1st and 2nd Defendants. Of necessity there would have to be proof that dividends were withheld despite clear financial records demonstrating profitability.

[172] There was some attempt on the part of the Claimant to establish this through the expert's report of Mr. Lee. However, Mr. Lee did not arrive at any findings in relation

to the profits made by the companies and so no assessment could be made to determine how the returns he received compared to the profits made by the companies. Mr. Lee's conclusion was that in order to provide any definitive findings as to the liability of the Defendants to the Claimant, that a comprehensive forensic audit would be necessary. This would have been crucial to determining whether what he received was in fact di minimis. The Claimant has therefore failed to prove that what he received was in fact di minimis.

The conduct of the 3rd Defendant

[173] The Claimant complained that the 3rd Defendant exhibited consistent oppressive, underhanded and malevolent behaviour in his dealing with him and an obstructive, violent and threatening response to any enquiries made by the Claimant concerning the daily operations, returns and financials of the 1st and 2nd Defendant companies.

[174] According to the Claimant, in his evidence the boisterous, loud and threatening behaviour took place at a meeting in November 2017 during a discussion concerning the lack of returns when he told him that the companies were not making any money. Mr. Johnson denied acting in this manner. The Claimant's evidence in this regard is corroborated by Mr. White and I accept it to be true. This kind of behaviour is unsatisfactory but in and of itself would not necessarily amount to unfair prejudice and so would have to be considered in the context of the Claimant's expectation that the 3rd Defendant would behave in a manner that is civil. The 3rd Defendant was in the position of managing director of the companies and had assumed its day-to-day running. In this regard he was in a position of power over and above the Claimant.

[175] Although a single act of misconduct can support a claim for oppression or unfair prejudice, the conduct of the 3rd Defendant must be considered as a whole as conduct that may be oppressive in one situation may not be oppressive in another

situation.[26] The conduct of the 3rd Defendant may not in and of itself be an act of oppression however, in the context where it is a response to the Claimant's request for accounts then his behaviour must be considered in light of the alleged failure to provide financial information on the companies to the Claimant.

Disregard for regulatory, government and safety guidelines

[176] The Claimant has alleged that the companies were conducted in a way that avoided regulatory, government and safety legislation exposing the company to significant liability and legal consequences. On behalf of the Defendants, it was submitted that the company had a Quarry Licence which was renewed yearly as well as a Tax Compliant Certificate. In the evidence of Mr. Lee, he was confronted with this and shown a Tax Compliance Certificate which were in fact the subject of exhibits 8 and 9. The Defendants' evidence in this regard was therefore unchallenged. It is the Claimant who has asserted this disregard and the effect of it being that the company was exposed to significant liability and legal consequence, however the Claimant was unable to identify clearly the instances in which the Defendants failed to comply with these regulations and any effect it had on the company and failed to lead credible evidence to substantiate this.

[177] It is accepted however that there was a failure on the part of the 3rd Defendant to have annual general meetings on a yearly basis. Section 126 of the Act provides that every company shall have an annual general meeting in addition to any other scheduled meetings. The section speaks to the importance of calling a general meeting and the remedies where there is a default which include that the company and every officer of the company who is in default shall be liable to a fine. In this respect the 3rd Defendant in his capacity as managing director would have failed to comply with this requirement. This was important because it is the expectation that the account of the company would be laid before shareholders in this meeting

[26] Page 287 of Canadian Business Corporations Law 3rd Edition Vol 3

and the failure to do this deprived the Claimant of his right to information on the state of the companies' affairs. This must be considered in the context of all the other actions, conduct and failures of the 3rd Defendant to act in accordance with his fiduciary duties towards the Claimant as shareholder and director.

The falsifying of documents by the 3rd Defendant and fraudulent conduct of the 3rd Defendant

[178] The Claimant's expectation that financial records would not be falsified to show losses and that personal expenses would not be falsely recorded could not be said to be anything less than reasonable. So too is the Claimant's expectation that there would be no fraud or fraudulent conduct by the Defendants.

[179] The Claimant averred that the 3rd Defendant falsified documentation to show losses and mislead the Claimant. The Claimant himself being absent from the day to day running of the company was not able to speak directly to this, neither did his witness Ms. Marvia Graham who was more integrally involved. The Claimant sought to rely on the evidence of Mr. William White to establish this. Mr. White did not identify any instances of this but spoke generally about it. Mr. White alleged that individuals gave Mr. Johnson cheques, and he would ask them to be recorded as personal investments, but he did not indicate when this was done and who were the individuals involved. In fact, when he was taxed about this in cross-examination, he accepted that he did not actually witness persons giving over cheques as he worked primarily in office and not on the road and so is not in a position to say where the funds came from.

[180] I had already accepted that there were some irregular practices being done by Mr. Johnson but this is not to be equated with falsifying documents or fraud. In order to prove falsification of documents the Claimant would have to identify which

document is said to be falsified and the circumstances under which this was done. The evidence of Mr. White failed in this regard.

[181] In relation to fraud or fraudulent conduct the Claimant would have to provide evidence with some specificity and particularity about the circumstances under which this was done. It has always been the law that fraud cannot be proved by general allegations but there must be specific details as opposed to just broad accusations or statements.

[182] The Claimant also sought to say that certain personal expenses of Mr. Johnson were borne by the companies. However, neither Mr. White nor Mr. Lee was able to provide any clear evidence of this. In fact, Mr. Lee refuted the evidence given by the Claimant that the 3rd and 4th Defendants' personal expenses were being borne by the companies.

[183] The Claimant has also alleged that the 3rd Defendant diverted or caused to be diverted funds or true earnings of the 1st and 2nd Defendant. The allegation of diversion of funds on one hand related to a loan agreement between the 2nd Defendant, the 4th and 5th Defendants for the purchase of trucks. On behalf of the Defendants, Mrs. Thompson Watt gave evidence which has not been successfully challenged that the loan agreement was not detrimental to the 2nd Defendant as the 2nd Defendant benefited from the transaction.

[184] On the other hand, it was also argued that Mr. Johnson unfairly and illicitly enriched himself by acquiring greater shares in the companies using loans which were secured and repaid by both companies and that having obtained a loan to purchase his shares in the 1st Defendant company and the loan having been wholly serviced by the said company then his entitlement to the majority of the shares should be diminished. The Claimant's assertion in this regard was based on a loan agreement between the 2nd, 4th and 5th Defendant for the purchase of trucks. The Claimant sought to say that it was improper that these personal loans were repaid

from company funds but Mr. Lee in his evidence agreed that if those loans were in fact genuine it would not be unfair to have them repaid from company funds.

[185] The Defendant's expert Mrs. Thompson Watt provided an explanation for this which the Claimant was not able to challenge. The Claimant's assertion that the 3rd Defendant fraudulently enriched himself by acquiring greater shares in the 1st and 2nd Defendant companies by using loans which were secured and repaid by both companies and not by him was therefore not proved.

[186] As a consequence, the Claimant's submission that this is a massive case of fraud has little merit as the Claimant has not been able to prove falsification of documents or to identify any instance of fraud or fraudulent conduct. The Claimant however may have a better argument as it relates to his removal as shareholder and director in the companies and how this affected the 3rd Defendant's probity of conduct towards him which brings me to the next point.

Whether the Claimant was improperly removed as shareholder and director of the 1st and 2nd Defendants?

[187] It is the Claimant's contention that he was improperly removed as a shareholder and Director of 1st and 2nd Defendant Companies during the period 2015-2023 and based on the evidence from the Companies Office, those shares were transferred to the 4th Defendant. Section 179 sets out the requirement for the removal of a director which includes provision of a notice of the removal as well as an Ordinary Resolution. Section 179 provides as follows:

> *(1) A company may by ordinary resolution remove a director before the expiration of his period of office notwithstanding anything in its articles or in any agreement between it and him: Provided that this subsection shall not, in the case of a private company, authorize*

the removal of a director holding office for life on the 5th of February, 1963, whether or not subject to retirement under an age limit by virtue of the articles or otherwise.

(2) Special notice shall be required of any resolution to remove a director under this section or to appoint somebody instead of a director so removed at the meeting at which he is removed, and on receipt of notice of an intended resolution to remove a director under this section the company shall forthwith send a copy thereof to the director concerned, and the director (whether or not he is a member of the company) shall be entitled to be heard on the resolution at the meeting.

[188] In **Rickie Davis & Dorma Davis Wellesley Stokes, Keroy Myers, Dalou Wong, Prescilla Stokes & Rivera Insurance Agency Limited** Palmer Hamilton J at paragraph 54 found that notice is required even for informal companies. She stated that:

"54 The Defendants have admitted that no notice was sent to the 1st Claimant. Even though I have accepted that the Company operated in an informal manner, there ought to be some form of notice, even an informal one, sent to a person whose interests are being affected. This was not the case and as such it is necessary for me to make a finding that the removal of the 1st Claimant as director is invalidated due to non-compliance with the Companies Act."

[189] There is no evidence that the Claimant was provided with notice to be removed as a shareholder of the Companies, neither is there any evidence that a resolution was passed to such effect. Both Mr. Johnson and Ms. Simpson were questioned in relation to the removal of the Claimant as shareholder and director of the company. It was suggested to Mr. Johnson that he had Mr. Graham's name removed as shareholder from Concrete and he denied this. It was suggested that he had his wife's name replace Mr. Graham's name as shareholder and he said he did not know. It was suggested that it was after this case started that he went and put back Mr. Graham's name as shareholder. It was suggested to him that he

and his wife signed the document to effect this change, and he accepted that he signed it but said he did not read it. When taxed further he accepted that he signed for the company.

[190] Similarly, Ms. Simpson when questioned about this, said she did not sign any document to remove Mr Graham as shareholder of Concrete. She also said she is not a shareholder in the company. She also said she was not aware of Mr. Graham's shares being transferred into her name. When she was shown the Annual Returns for the years 2018 to 2022 which reflected that Three Million (3,000,000) shares were assigned to her during that period, she still insisted that she is not aware that she was listed as a shareholder. She claimed she did not do the application and had only signed the back page and she was not aware that any shares were given to her and that all she did was to sign the signature sheet of the Annual Returns and she did not prepare them. She said it was the accountant who did this.

[191] Based on the evidence of Mr. Johnson and Ms. Simpson in denying that they signed these documents, Mr. Graham was allowed to be recalled tendering into evidence the Annual Returns which reflected his removal and return as shareholder. Having considered this evidence, I do not believe Mr. Johnson and Ms. Simpson, I find that they fully well knew what was happening when signing and that there was in fact an intention to remove Mr. Graham as shareholder. I also find that the attempt to rectify this during the trial of this matter was an attempt to disguise what had happened. What is clear to me is that the 3rd and 4th Defendants removed the Claimant as a shareholder in the 2nd Defendant company commencing in 2018. This was done without the knowledge of the Claimant. It was after this Claim had been filed and after the commencement of the trial herein that they went to the Companies Office and took steps to have him reinstated. There is a process to be followed for the removal of a shareholder. There was an attempt to either conceal this or failure to admit.

[192] It is however clear that the Claimant was returned as a shareholder sometime in 2023. However, it is clear to me that the Claimant had a reasonable expectation that any removal of his name as shareholder or as director would be done according to what the law provides. The Defendant having failed to follow the steps outlined in section 147 of the Act have violated the Claimant's reasonable expectation in this regard.

[193] The Claimant is asking the Court to intervene in the affairs of the 1st and 2nd Defendant companies and protect his interest as a minority shareholder and director and among other remedies to appoint a receiver to administer the affairs of the companies. The Court must therefore be satisfied on a balance of probabilities that he has made out a case of oppression.

Whether the Claimant has succeeded in proving that the conduct complained of is oppressive and/or unfairly prejudicial.

[194] The law makes a distinction between the different categories of conduct being oppressive conduct, unfairly prejudicial conduct and conduct which unfairly disregards. Oppression carries the sense of conduct that is coercive and abusive and suggests bad faith. Unfair prejudice may admit of a less culpable state of mind, that nevertheless has unfair consequences. Unfair disregard of interest extends the remedy to ignoring an interest as being of no importance, contrary to stakeholders' reasonable expectation.

[195] The three categories overlap and the Court in **BCE** cautioned that these categories should not be considered as watertight compartments as they often overlap and intermingle. The categorization, however, may be relevant to the type of remedy to be imposed. Any distinction I will make will be more of an academic exercise and also to assist in the determination of an appropriate remedy.

[196] In the Article on 'The Oppression Remedy and the Demise of Classical Company Law Theory' by Andrew Burgess[27] he summarizes the position in relation to claims for unfairly prejudicial conduct as follows:

> *It is clear from the cases that there are no set categories of what constitutes unfairly prejudicial conduct. Be that as it may, the cases in which conduct is held to be unfairly prejudicial tend to fall into certain well-defined categories.*
>
> *1. Where a shareholder is excluded from management or removed from the board. 2. Where controlling shareholders make adverse changes to an existing shareholder's rights. 3. Where there is the diversion of business to another company in which the majority shareholder has a greater interest. 4. Where there is failure to hold annual general meetings and to have financial statements prepared in accordance with the Acts thus depriving shareholders of their right to information on the state of the company's affairs. 5. A failure to call a special general meeting of shareholders to fill a vacancy on the board of directors resulting from the bankruptcy of the second director has been held to amount to unfairly prejudicial conduct. 6. Where there has been a serious departure from normal and business-like practices. In Re Abraham and Inter Wide Investments Ltd,38 the Ontario High Court held that conduct was unfairly prejudicial where payments which were characterized as directors fees had not been legally authorized, did not have the character of directors fees, were not associated with the duties and responsibilities of directors and had been paid to companies related to the directors and where financial statements were inadequate, inaccurate and not prepared in accordance with accepted accounting principles"*

[197] The reasoning of the court in **Isaac v Tate** relied on by King's Counsel on behalf of the 1st and 2nd Defendants is also instructive. In this case the court found that the Claimant had failed to establish its unfair prejudice claim and reasoned as follows at paragraph 91:

> *In the present case, there is no shareholder' agreement, and it was not agreed that Mr Tan had infringed any provision of the Company's*

[27] The Oppression Remedy and the Demise of Classical Company Law Theory, the Honourable Mr Justice Andrew Burgess, Judge of the Caribbean Court of Justice

articles. Thus, taking Lord Hoffmann's first point, I do not see that Mr Isaac can complain that there was a breach by him of the terms on which he agreed that the affairs that the company should be conducted".

[198] In treating with the issue regarding what I have found to be the ad hoc way of management by the 3rd Defendant, I came to the conclusion that that alone would not have been sufficient to prove any of the categories of oppression. I took into account the fact that the companies are relatively small and the cases suggest that more latitude is expected in small companies especially where the directors are family members or previously known to each other. The strict formalities would not be expected as in a more formal business. So the fact of certain failures to comply with certain procedures would not have convinced me of oppression by itself. If it were just the issue regarding the ad hoc management and the irregularities that was the problem I may have felt the same way as the Judge did in **Isaac v Tate** considering that the parties operated in a very informal way.

[199] However, there is more than that in this case. The Claimant has been excluded from management, adverse changes were made to his rights as shareholder in the companies without him being informed, there was the failure to hold annual general meetings and have the financial statement prepared thus depriving him of his right to information about the affairs of the companies. He has also established two breaches of the law by the 1st, 2nd and 3rd Defendants in firstly breaching the provisions of section 145 in failing to provide accounts and secondly, in breaching the provisions of section 179 in removing the Claimant as a shareholder without his knowledge. The Claimant has succeeded in proving that his reasonable expectations of being provided with the financials and information about the 1st and 2nd Defendant have been violated. This is aggravated because of the conduct of Mr. Johnson and the boisterous way in which he treated the Claimant's request for information and his orders to the employees including Ms. Graham not to give Mr. Graham this information.

[200] He has also succeeded in establishing that his reasonable expectation that the Defendants would give him notice before removing him as director and shareholder in accordance with section 147 was violated. This is also aggravated because of the steps that the Defendants took thereafter. The clandestine way in which it was done along with their attempts to conceal this and to even go as far as to seek to rectify the position after the trial of the matter has commenced. To add to that is the fact of the violation of the Claimant's reasonable expectation to be informed of important financial decisions that may have an effect of diluting any returns he may be entitled to such as a loan given to the 5th Defendant in the sum of Twenty-Seven Million Jamaican Dollars (J$27,000,000.00). The actions of the 3rd Defendant were not in accordance with section 174 which requires him to act honestly and in good faith and exercise care, diligence and skills in the performance of his duties as director.

[201] I also have to consider whether the Claimant could have taken any preventative steps to protect his own interest in light of his position as director. It is evident that the Claimant made efforts to ascertain the viability of the companies. He sought this information from Mr. William White, the accountant at the material time and was provided with bits and pieces of information which alluded to the companies being lucrative. The Claimant's evidence however is that Ms. Graham was prevented from giving reports on the companies by Mr. Johnson. The Claimant went as far as to obtain a search order to gather information on the companies. His efforts to secure the information to which he was entitled were thwarted by the actions of the 3rd Defendant in being boisterous and giving orders to his employees which rendered the Claimant powerless to act even in his own interest.

[202] These circumstances fit squarely within the criteria for unfair prejudice in that the 3rd Defendant's actions demonstrated a disregard for the interest of the Claimant as shareholder and director and amounts to oppression that requires the Court's intervention under section 213(A).

Whether the Claimant has established that he is entitled to an interest in the 5th Defendant.

[203] The Claimant's claim against the 5th Defendant is for an order directing that an investigation be conducted into the 5th Defendant company to determine its true share capital and to determine if its assets and holdings were acquired through the income of the 1st and 2nd Defendant companies and to cause the register to be amended to add him as a director and shareholder with such shares as determined. There is no evidence that the Claimant falls within the definition of a complainant of the 5th Defendant as he is neither a shareholder, debenture holder or director, so as to enable him to bring an action under section 213A. As a consequence, his claim for investigation or rectification in relation to the 5th Defendant fails at the outset.

[204] The Claimant has asserted that he is entitled to an interest in the 5th Defendant on the basis that the funds of the 1st and 2nd Defendants were used to acquire assets of the 5th Defendant. His contention is that a loan in the sum of Twenty-Seven Million Jamaican Dollars (J$27,000,000.00) was secured using his 30% interest in the 2nd Defendant which he had no knowledge of or approved of and so he is entitled to such percentage returns of the company profits. He has argued successfully that company funds belonging to the 1st and 2nd Defendants should not be used to purchase assets of another company, in particular, the 5th Defendant. The question then is whether the evidence supports this.

[205] The evidence presented is that the 4th Defendant is the sole director and shareholder of the 5th Defendant. She accepted during cross-examination that the 2nd Defendant obtained a loan from the Bank of Nova Scotia in the sum of Twenty-Seven Million Jamaican Dollars (J$27,000,000.00) to assist her in purchasing trucks for the 5th Defendant. The evidence from the 4th Defendant is that the loan was repaid. Even though Mr. Lee in his first report had indicated that there was nothing on the income statement to show that the loan was repaid, he retracted this position in his supplemental report.

[206] Counsel Mr. Wildman submitted that the fact that this loan was obtained without the knowledge of the Claimant as director and shareholder is a very serious act of dishonesty which calls for the intervention of the Court to appoint a receiver in keeping with the principles in **Karen Stewart**. I do not agree that this requires the intervention of a receiver and in any event, I have already found that the Claimant would not be the proper person to bring such an action for oppression against the 5th Defendant which may result in a receiver being appointed.

[207] The question of the 4th Defendant's credibility came into focus during the trial. This related to her evidence regarding the changes made to the Annual Returns. At first she sought to deny this but it became evident that she was not truthful in this regard and had in fact executed documents to effect this change. Mr. Wildman made heavy weather about this and relied on the **R v Lucas** [28] to say that this provides corroboration for her alleged wrongdoing not only in relation to the Annual Returns but also in relation to how she funded the 5th Defendant. I have considered this, but I am not prepared to say that her entire evidence in relation to the acquisition and funding of the 5th Defendant is a lie. Even if I were to do so, and reject her evidence, I would still have to ascertain whether there is evidence to support the Claimant's assertions. The Claimant being so removed from the day to day operations of the companies was handicapped in this regard.

[208] Although there is some evidence to support an inference that the 5th Defendant obtained great financial assistance through the 2nd Defendant company as well as from the 3rd Defendant himself who, is an immediate relative of the sole director of the 5th Defendant, the Claimant was not able to successfully challenge the evidence of the 4th Defendant that the 5th Defendant was funded by her. The expert report of Mr. Lee also did not support this. This would not be sufficient to give the Claimant an interest in the 5th Defendant. The Claimant's case against the 5th Defendant therefore fails. The Claimant has also not established a Claim against

[28] [1981] 2 All ER 1008

the 4th Defendant in her personal capacity. He had averred that she was company secretary of the 1st and 2nd Defendants and he has succeeded in proving that she was instrumental to his removal as shareholder in the Annual Returns however, this did not form a part of his pleaded case.

[209] However, the actions of the 4th Defendant, who based on her own evidence is someone who is trained in business administration and would be deemed to know the importance of the Annual Returns have been found to be wanting. I have found that she fully participated in the act of seeking to deprive the Claimant of his shares in the companies in her own favour. This aided towards proving that the Claimant was in fact unfairly prejudiced and had suffered oppression in accordance with section 231A. He has succeeded in proving this although his pleaded case against the 4th Defendant has not been established.

[210] However, in light of my finding that there was a total disregard for the interest of the Claimant in using a company in which he is shareholder and director as security for the loan without his knowledge and consent, his claim against the 4th and 5th Defendants was not unwarranted. I am minded to make an order that there be no order as to costs but I would invite the parties to make brief submissions on this point.

The Defence and Counterclaim

[211] The 1st and 2nd Defendants denied that the companies have been operated in a manner that is oppressive and/or unfairly prejudicial to the interest of the Claimant. They maintain that the business of the companies was operated in an open and professional manner. Based on my findings of oppression the 1st and 2nd Defendants' cases are rejected. The Counterclaim however still remains to be treated with.

[212] The Claimant's case against the 3rd Defendant also succeeds which means that the 3rd Defendant's Defence fails.

[213] The 1st and 2nd Defendants in their Counterclaim sought orders which included a declaration that the Claimant invested the sum of Seven Hundred and Sixty-Five Thousand United Stated Dollars ($765,000.00) in the 1st Defendant and that the 1st Defendant is to pay the Claimant the said sum subject to deductions as set out in the order which is the sum of Five Hundred and Fifteen Thousand United States Dollars (US$515,000.00) less amounts paid to the bank on account of interest on the loan and all other amounts paid to him since his investment.

[214] With respect to the 2nd Defendant, they seek an order that he be repaid his investment in the sum of Seven Million Jamaican Dollars (J$7,000,000.00) in light of his repudiation of the agreement to invest in the 2nd Defendant proportionate to the 30%interest therein.

[215] They also seek an order that upon payment of the sums by the 1st and 2nd Defendants that the Claimant resign as director and that he execute a transfer in respect of his shares in favour of the 1st and 2nd Defendants companies respectively.

[216] The Counterclaim seeks orders for assessment of damages or for an account of the sums paid by the 1st and 2nd Defendants in relation to payments made on loan.

[217] King's Counsel Mrs. Gibson Henlin in her final submissions before me submitted that the Counterclaim should succeed as the Defendants were seeking a buyout and that that is an appropriate order to make as there are irreconcilable differences between the parties. This is a compelling argument as the Court will have to examine the question of a buyout when considering remedies. However, in the Counterclaim as drafted, it was not clear to me that what the Defendants were

seeking was a buyout of shares. The Counterclaim seemed more concerned with the return of the actual sum invested and the assessment of the loan.

[218] With respect to the orders sought in the Counterclaim, when dissected, what the 1st and 2nd Defendants are seeking would essentially amount to a refund of the money the Claimant invested. This could only be given if the Claimant was found to have given a loan to the company and not invested in shares. If the Court were to order that the Claimant be given a sum amounting to the value of the money he put it, it would mean that he really was never a shareholder. I have found that he was in fact a shareholder and so I am of the view that this would not be an appropriate order to make. As a shareholder he would be entitled to a sum representing his shareholdings in both companies. Any sum to which he is entitled would be influenced by whether or not the companies made a profit for the relevant years and were in a position to pay dividends. For these reasons the Counterclaim fails.

What remedy is the Claimant entitled to?

[219] Among the remedies sought by the Claimant are that an investigation be carried out with a view to ascertaining the true share capital for which the Claimant is entitled in the 1st, 2nd and 5th Defendant companies. He is also asking the Court to direct rectification of the registers of both the 1st and 2nd Defendants to reflect his true allocation of shares in keeping with his contributions and also that the 30% shares acquired wholly by the 3rd Defendant be allocated equally between the Claimant and the 3rd Defendant.

[220] In the submissions advanced before me by Mr. Wildman on the Claimant's behalf, he posited that the appropriate remedy considering the state of the evidence is for a winding-up order. The Defendants have stoutly resisted any orders imposing investigation or winding-up.

[221] The Court has a wide discretion to grant appropriate remedies, in fact the Court is not even bound to impose any of the remedies requested and can even craft its own remedies as appropriate. The main consideration for the Court is to impose a remedy or remedies which are necessary to rectify the oppression. Jamadar in **Sharma Persad Lalla v Trinidad Cement Limited and TCL Holdings Limited and Andy J. Bhajan** [29] said that "once oppression is proven, it is then for the Court to make whatever order it thinks fit (that are just and equitable) to rectify the situation. In doing so there is no limit to what orders can be made, though such orders may include any of those prescribed at section 242(3) of the Companies Act".

[222] The word fit is equated to the words "just and equitable" as also seen in the Ontario Court of Appeal case of **Naneff v Con-Crete Holdings Limited 23 B.L.R.** (referred to by Jamadar J) (2nd) 286[30]. Galligan J.A. at page 297.22 to 24 in reference to the similar provisions opined as follows:

> *"The provisions of s248(3) give the court a very broad discretion in the manner in which it can fashion a remedy. Broad as that discretion is, however, it can only be exercised for a very specific purpose: that is, to rectify the oppression."*

[223] The Court first considers whether to direct that an investigation be conducted with a view to ascertaining the share capital to which the Claimant is entitled in the 1st or 2nd Defendant. Section 160 of the Act allows for an investigation to be conducted into the affairs of a Company through a Special Resolution or by Order of the Court.

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[29] Sharma Persad Lalla v Trinidad Cement Limited and TCL Holdings Limited and Andy J. Bhajan (unreported decision H.C.A No. Cv. S-852/98 delivered 30th November, 1998

[30] A PORT IN THE STORM: THE AVAILABILITY OF PROTECTION FOR MINORITY SHAREHOLDERS IN THE COMMONWEALTH CARIBBEAN JAMAICAN BAR ASSOCIATION Continuing Legal Education Weekend Conference 16 November 2013 Montego Bay, Jamaica

[224] Section 161(a) of the Act gives the Court the discretion to order that the affairs of the company ought to be investigated in instances:

> *that its business is being conducted with intent to defraud its creditors or the creditors of any other person or otherwise for a fraudulent or unlawful purpose or in a manner oppressive of any part of its members or that it was formed for any fraudulent or unlawful purpose; or*
>
> *that persons concerned with its formation or the management of its affairs have in connection therewith been guilty of fraud, misfeasance or other misconduct towards it or towards its members; or*
>
> *that its members have not been given all the information with respect to its affairs which they might reasonably expect.*

[225] Based on the provisions above, it appears to me that this would be an appropriate remedy where there is some proof of fraud or fraudulent conduct and also where there is a failure to provide relevant information. The remedy of an investigation is usually coupled with the appointment of an inspector who will be responsible for carrying out the investigation and is best ordered as an interim remedy. This remedy is designed to serve two purposes. First, it is a valuable weapon in the armoury available to shareholders as a protection where mismanagement seems likely, but where there is a lack of precise information as to the details of the suspected management. That information is, by its very nature, likely to be known by the suspected wrongdoers and unlikely to be known or voluntarily disclosed to those seeking to complain of the suspected wrongdoing. So if an applicant can satisfy the court that there are circumstances suggesting wrongdoing, an investigation order may be made in aid of litigation. The purpose of appointing inspectors is not to confirm the occurrence of fraud but rather to determine facts. Alternatively stated, the primary purpose of an investigation is to bring to light facts which otherwise might be inaccessible to the prospective complainant, whether that person is a shareholder or security holder.[31]

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[31] See Canadian Business Corporation Law, 3rd Edition Vol 3 page 564 21-596.

[226] The caution issued is that the appointment of an Inspector is a drastic and extraordinary remedy. The court should not intervene in the affairs of private corporations through the appointment of an Inspector except in the clearest of cases. This is not one such case.

[227] The Claimant has suggested that this cases bears striking similarities to the case of **Karen Stewart** case and has relied heavily on it to suggest that the Court should appoint a receiver to manage the affairs of the 1st and 2nd Defendants. The effect of doing this would be to wind up the companies. It is noted that the genesis of the oppression remedy was to prevent just that.

> *The oppression remedy introduced into the UK Companies Act 1948 was intended to provide an alternative to winding up, and gave the court the power to "make such order as it thinks fit".8 The provision has since evolved but pursuant to Part 30 of the UK Companies Act 2006, the court retains the power to "make such order as it thinks fit for giving relief in respect of the matters complained of". 9 The unfair prejudice provisions in the companies acts in Jamaica and across the Caribbean grant a similarly broad discretion to the courts. It is crucial to note that the court's discretion may only be used to rectify the wrongs committed. (See Article – Port in the Storm).* [32]

[228] In the K**aren Stewart** case the learned Judge made an order for the appointment of a receiver manager because of her concern about the management of the company, especially in light of allegations of fraud. The Court however acknowledged the difficulty in identifying all the conduct that might be determined to be unfairly prejudicial to shareholders and cited common examples such as dilution of a minority shareholder's shareholding or the exclusion of someone who is both a director and shareholder who has a legitimate expectation to be involved in its management as in the case of very small companies or quasi partnerships.

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[32] A PORT IN THE STORM: THE AVAILABILITY OF PROTECTION FOR MINORITY SHAREHOLDERS IN THE COMMONWEALTH CARIBBEAN JAMAICAN BAR ASSOCIATION Continuing Legal Education Weekend Conference 16 November 2013 Montego Bay, Jamaica

[229] The court at paragraph 40 acknowledged the wide range of reliefs available to be granted. The court found that having regard to the impugned circumstances under which the current directors of the company were appointed and the learned judge's order to restrain the appellant and another and their servants and or agents from further dealings with the company until further orders of the court, that there was the need for adequate provisions to be made to ensure the proper operations of the company until the issues raised by the Claimant are resolved. The object of an oppression remedy is to rectify the oppression complained of but should go no further than is necessary to rectify the wrong complained of.

[230] The questions for me are what steps would ensure that the Claimant does not continue to be unfairly prejudiced? How can he be provided with the necessary financial information which can be used to determine what if anything he is entitled to in the 1st and 2nd Defendant companies? Is the appointment of a receiver necessary to do this or is there some other means by which this can be achieved without imposing the remedy of last resort being winding-up?

[231] In the **Karen Stewart** case, it was made clear at paragraph 42 that the appointment of a receiver manager is a serious step to be taken however in that case it was determined to be a manifestly sensible order to make to protect the company as a going concern and to protect the respondents. The Court of Appeal found that it was an option open to the learned judge and did not find there to be any improper exercise of the judge's discretion indicating that a judge's discretion as to which of the remedies available under section 213(A) of the Act is not limited to those reliefs specifically prayed for. In exercising the judicial mind, the Judge is able to determine which are best suited to meet the needs of the particular circumstances before him.

[232] In the case of **Scottish Cooperative Wholesale Society Ltd. V Meyer and Anor** [1959] AC 324, Lord Denning in discussing the similar section 210 and available remedies spoke about the object of the remedy in these terms:

> *"The object of the remedy is to bring to an end the matters complained of" that is the oppression, and this can be done even though the business of the company has been brought to a standstill. If a remedy is available when the oppression is so moderate that it only inflicts wounds on the company, while leaving it active, so also it should be available when the oppression is so great as to put the company our of action altogether. Even though the oppressor by his oppression brings down the whole edifice-destroying the value of his own shares with those of everyone else-the injured shareholders have, I think, a remedy under section 210."*

[233] What is clear from this is that the nature of the remedy must be commensurate to the nature of the oppression and a moderate case of oppression as in this case which is categorized as unfairly prejudicial, would attract a moderate remedy whereas an extreme case of oppression would attract an extreme remedy. This is not a case of the first category of oppression requiring an extreme remedy such as winding up and appointment of a receiver. Winding up should be used only if there is no other way of resolving the oppression proceeding.

[234] In the evidence of Mr. Peter Lee, he recommended that there be a forensic audit. There is a fine line between an investigation and a forensic audit. I have already considered the question of an investigation and found it to be too drastic a remedy for this case. Whereas an investigation would be more concerned with unearthing any fraudulent act or wrongdoing, a forensic audit would be more concerned with assessing the accuracy and reliability of the financial statements and I am of the view that that is warranted in this situation to ascertain the profitability of the companies for the benefit of the shareholders. The scope of the forensic audit would be to determine what profits the companies have made over the period from the date of the Claimant's investments in both companies. This would have to be conducted by a qualified and independent chartered accountant who has expertise in auditing as well as valuations. After the audit, the company should be assessed to ascertain the value of its companies and what value should be accorded to the shares.

[235] The Claimant also sought an order that upon payment of the sum he be removed from the register of the companies. It is agreed that there has been a complete breakdown in the relationship and so there would be no point in the Claimant continuing as director and even as shareholder. Even the 3rd Defendant in his evidence indicated that it is clear to him that the relationship of trust and confidence between himself and the Claimant has broken down and so he is prepared to purchase Mr. Graham's shares in the 1st and 2nd Defendant or refund him his money in exchange for a transfer of the shares.

[236] In light of the breakdown in the relationship between the parties, and there being no hope of reconciliation the Court must fashion a remedy that takes that into account. There is a wide discretion on the judge to craft such a remedy. The Court has to come up with a remedy that provides a suitable alternative to winding up, where the parties will no longer be forced to continue in the business together. The question of one party buying out the other becomes a live one. A buyout order is actually provided for in section 213A, subsection 3(f) of the Act which provides for the company or any other person to purchase the shares of the 'oppressed' shareholder. The value of a buyout order is that the business will be preserved while at the same time according to the Claimant the fair value for his shares.

[237] In the normal course of things, it makes sense for the majority shareholder to buyout the minority shareholder. The learned author in Canadian Business Corporations Law expressed as follows:[33]

> *"Where a corporation is deadlocked to so great an extent that there is clearly a need for one party to an oppression proceeding to buy out the other, there is a clear benefit in requiring the party who has the greatest business experience and who will be the best qualified and capable person to run the business to buy out the other. The alternative in such a case would a winding up order, but the usual result of the dissolution of any business is that its assets will be sold*

[33] McGuiness Canadian Business Corporations Law,3rd Edition Vol 3 page 568

> *at a fraction of their value, resulting in a loss shared by all parties involved in the corporation. There is also a very legitimate concern that the dissolution of a corporation will lead to the loss of employment among the employees of the business, who will therefore be prejudiced by an order made in a legal proceeding in which they are not directly concerned. For these reasons, if for no other, a buy our order is preferable because the courts take the view that the winding-up of a business should only be resorted to if all else fails."*[34]

[238] In determining the question of a buyout, issues such as minority shareholder discount would arise but where the relief is granted for oppressive conduct on the part of the majority shareholder and the majority shareholder is required to purchase the shares of the minority shareholder, no minority discount should be applied in valuing the share to be purchased.[35]

[239] The question arises as to what if the 3rd Defendant is not in a position to buyout the Claimant, then another alternative would be for the company or companies to buyout the Claimant. If none of this is possible, for example the assets of the company are such that no assets exist to effect this buyout, it is only then that the Court would be prepared to order a winding-up as it would then be the only means of ensuring that the Claimant gets the fair value of his shares.

[240] In order to arrive at a determination of an appropriate value to be paid for shares in the company, there would have to be a valuation of the 1st and 2nd Defendant companies. The cost of the valuation should be borne by the companies. The court has to determine a valuation date that is fairest to all the parties.

Mesne Profits, Aggravated, Punitive and Exemplary Damages

Mesne profit

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[34] Ibid. p. 568
[35] Ibid. p. 574

[241] The Claimant has asked the court to consider granting an order for mesne profit for the loss and utility of monies as a result of the alleged illegal actions of the 3rd Defendant to prevent him from obtaining a return on his investment into the 1st and 2nd Defendant companies.

[242] Mesne profit was stated at paragraph 1 of Halsbury's Laws of England Volume 62 (2016) to arise in such circumstances:

> "*The landlord may recover in a claim for mesne profits the damages which he has suffered through being out of possession of the land, or if he can prove no actual damage caused to him by the defendant's trespass, the landlord may recover as mesne profits the value of the premises to the defendant for the period of the defendant's wrongful occupation. Mesne profits being a type of damages for trespass may be recovered in respect of the defendant's continued occupation only after the expiry of his legal right to occupy the premises."*

[243] The case of **Michael Johnson v Fredrica Crooks**[36] (not cited before me) dealt with deprivation of property. At paragraph 71, Hoffman J in **Ministry of Defence v Ashman** placed reliance on Woodfall on Landlord and Tennant which said:

> "[71*] Where an individual has been deprived of his property or has suffered loss of use and possession of his property because of wrongful occupation, damages are often awarded in the form of mesne profits. Hoffman J in Ministry of Defence v Ashman (1993) 66 P. & C.R. 195 and in reliance on Woodfall on Landlord and Tennant at paragraph 19.013 said the following about mesne profits: "The amount of mesne profits for which a trespasser is liable is an amount equivalent to the ordinary letting value of the property in question. This is so even if the landlord would not have let the property in question during the period of trespass."*

[244] This is not a claim about who is the rightful owner of land and/or whether there has been wrongful possession and whether rent is therefore applicable. This case is about an alleged fraudulent transfer of shares and returns on sums invested in the

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[36] [2017] JMSC Civ 100

1st and 2nd Defendant companies. Damages for mesne profit is usually applicable where trespass of land has arisen. I am not persuaded that this is an appropriate forum for such an award.

Aggravated damages

[245] As it relates to the claim for aggravated damages, the Claimant has alleged that the 3rd Defendant deliberately and/or wilfully and/or spitefully and/or maliciously abused his standing as Managing Director.

[246] In **Rookes v Barnard**, Lord Devlin pointed out elements required for a claim for aggravated damages to succeed. At page 1221, he said:

> *"It is very well established that in cases where the damages are at large the jury (or judge if the award is left to him) can take into account the motives and conduct of the defendant where they aggravate the injury to the plaintiff. There may be malevolence or spite or the manner of committing the wrong may be such as to injure the plaintiff's pride and dignity..."*

[247] At paragraph 37, Lindo J. in **Nattal Smith v Newton Wright**[37] quoted Williams JA (Ag) (as she then was) in The Attorney General v Gary Hemans, [2015] JMCA Civ. 63 where Williams JA said:

> *"...aggravated damages are to be awarded only where there was some feature in the behaviour of the appellant that required the respondent being additionally compensated beyond that which he would have received for the assault..."*

[248] Lindo J at paragraph 38 concluded that:

> *"I therefore accept that aggravated damages are awarded where the defendant's conduct is sufficiently outrageous to merit condemnation and punishment and would serve to compensate the claimant for the conduct of the defendant which increased the injury to him causing distress, embarrassment and/or humiliation and damage to his reputation."*

[37] [2020] JMSC Civ 100

[249] Compensation for an award of aggravated damages would arise over and above a remedy that is applicable pursuant to the Companies Act. The remedies the Court has decided to impose would be sufficient to compensate the Claimant for the oppression. There is no evidence that the Claimant suffered increased distress, embarrassment and/or humiliation that should additionally compensate beyond that which he would receive under the Companies Act.

Punitive damages

[250] The Claimant has also made a claim for punitive damages on the footing that any sum awarded for compensatory and aggravated damages will be insufficient both to reflect the gravity of the actions and conduct of the 2nd Defendant. The Claimant has not established that the conduct of the Defendants was egregious, malicious or reckless to the extent that there is a need to punish the Defendants.

[251] There is no basis to award damages under any of these limbs.

Whether the Claimant is entitled to Indemnity Costs?

[252] The power to order Indemnity Costs is not expressly provided for in the Civil Procedure Rules however rule 64.6(1) of the Civil Procedure Rules has been interpreted to allow for costs to be awarded on a basis which could be defined as an "indemnity basis". Brooks J (as he then was in the case **Michael Distant and Charmaine Distant-Minott** enunciated this interpretation of the rule:

> "*Although the CPR does not specifically mention awarding costs on an indemnity basis, rule 64.6(1) does seem, at first blush, to allow for an interpretation that costs are generally to be awarded on a basis which could be defined as an "indemnity basis"*

[253] Reference was also made to the case of **Noorani v Calver**[38] where the court stated that "if indemnity costs are sought, the court must decide whether there is something in the conduct or the action, or the circumstances of the case in question, which takes it out of the norm in a way that justifies an order for indemnity costs". The Claimant has not proven any circumstances over and above the actions of the 3rd Defendant that would justify an award for indemnity costs.

Costs in relation to the 4th and 5th Defendants

[254] I invited the parties to make brief submissions on the question of costs in relation to the 4th and 5th Defendants. This was to address the question of whether I should exercise my discretion to deviate from the principle that costs follow the event.

[255] Part 64.6(1) of the Civil Procedure Rules 2002 provides that if the court decides to make an order about the costs of any proceedings, the general rule is that it must order the unsuccessful party to pay the costs of the successful party. Part 64.6(2) provides that the court may however order a successful party to pay all or part of the costs of an unsuccessful party or make no order as to costs.

[256] Part 64.6(3) provides that in deciding who should be liable to pay costs the court must have regard to all the circumstances. Part 64.6(4) stipulates that the court in deciding who should be liable to pay costs must have regard to –

(a) the conduct of the parties both before and including the proceedings;

(b) whether a party has succeeded on particular issues, even if that party has not been successful in the whole proceedings;

(c) any payment into court or offer to settle made by the party which is drawn to the court's attention whether or not made in accordance with Parts 35 and 36);

(d) whether it was reasonable for a party-

[38] [2009] EWHC 561 (QB)

(i) to pursue a particular allegation; and/or

(ii) to raise a particular issue;

(e) the manner in which a party had pursued-

(i) the party's case;

(ii) a particular allegation; or

(iii) a particular issue.

(f) whether the claimant gave reasonable notice of intention of a claim.

[257] On behalf of the 4th Defendant, it was submitted that there is no reason to deviate from the general rule and that the conduct of the 4th Defendant is not such that it warrants a decision that no order be made as to costs. The case of **Capital & Credit Merchant Bank Limited v Real Estate Board**[39] was cited to support the point that the question of costs was entrusted to the discretion of the court and to emphasize the point that the starting point is that costs should follow the event. Reference was made to the issue concerning the Annual Returns and it was pointed out that the conduct attributed to the 4th Defendant did not form part of the Claimant's pleaded case and as such, cannot be considered conduct in the litigation or conduct which led to the occasion of litigation.

[258] On the issue of the loan, King's Counsel and Counsel further contended that this too did not form a part of the pleaded case and was raised only as a defence and should not therefore be considered conduct in the litigation or occasion of litigation. Reliance was also placed on the English Court of Appeal decision **Bostock v Ramsey**[40] which confirmed the position that there are two categories of conduct to be considered – 1) conduct in the litigation and 2) conduct which led up to and were the occasion of litigation.

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[39] [2013] JMCA Civ 48

[40] UDC [1900] 2 QB 616

[259] On behalf of the 5th Defendant, it was submitted that the 5th Defendant being a separate legal entity from the 4th Defendant its director, the Court is precluded from considering the loan transactions between the 5th Defendant and the 2nd Defendant as being the basis on which the 5th Defendant is not entitled to its costs. It was highlighted that the 2nd Defendant benefited from the loan as it was repaid at a higher interest rate, and the 2nd Defendant was not at risk as the loan was secured by the personal assets of the 3rd Defendant.

[260] King's Counsel and Counsel also pointed out that it is improper to ascribe any conduct of the 3rd and 4th Defendants in their capacity as agents and/or servants of the 1st and 2nd Defendant companies to seek to deprive the 5th Defendant of its cost in a matter where it has succeeded on all aspects of the claim against it. They contended that there is no basis which would support the Court's departure from the general rule that costs follow the event. They bolstered the submissions by relying on the case of **Gordon Stewart v Goblin Hill Hotels Limited, Mines Investment, Marvin Goodman, Rosalee Goodman**[41] where Sykes J (as he then was) placed emphasis on the decision of **Straker v Tudor Rose**[42] where Walker LJ stated that '…In considering whether factors militate against the general rule applying, clear findings are necessary of factors which led to a disapplication of the general rule…'.

[261] The submissions made on behalf of the Claimant focused on the 3rd and 4th Defendants and not the 5th Defendant however they provided some value particularly as it related to the reliance placed on the case of **VRL Operations Limited v National Water Commission et al**[43] which reiterated the principle that cost orders are in the discretion of the court. Counsel also relied on the case of **Halsey v Milton Keynes General NHS Trust**[44] which emphasised the fact of the discretion of the court. Counsel submitted that given the 3rd and 4th Defendants'

[41] [2016] JMCC Comm 39
[42] 2008 RWCA Civ 368
[43] JMCA Civ 69
[44] [2004] WLR 3002

wrongful actions in using the Claimant's companies to obtain loans, as a matter of fairness the court should exercise its discretion in favour of the Claimant.

[262] From an examination of the provisions of Rule 64.4 and the authorities relied on, it is clear that the decision to order costs is a discretionary one. The burden is placed on the unsuccessful party to show why there should be a departure from the general rule, taking into account the evidence and findings of the court.

[263] On the part of the 4th Defendant, although the allegations in relation to what she did with the Annual Returns were not pleaded, it was evidence that affected my findings as to her credibility and pointed to her conduct which I found operated to prejudice the Claimant. I had also found that the 4th Defendant blatantly disregarded the Claimant's interest in taking out a loan which aided her in funding the 5th Defendant, a company in which she is the managing director.

[264] I am of the view that the conduct of the 4th Defendant leading up to the litigation as well as her conduct during the litigation is relevant the question of how to treat with costs. The part she played in seeking to remove the Claimant as shareholder and then during the course of the litigation taking steps to replace him was unfortunate. I find that when taxed during cross-examination on this point she was not forthright and it required probing cross-examination for her to admit the part she played in changing the Annual Returns, which demonstrated that she was not an innocent party and so amounts to conduct, that in all the circumstances I cannot disregard.

[265] As it relates to the 5th Defendant, there is some merit in the contention that it would be improper to ascribe the conduct of the 3rd and 4th Defendants to the 5th Defendant as the 5th Defendant is a separate legal entity and so I take that into account. However, despite that, I found that the 5th Defendant in its own regard, benefited from the loan proceeds which aided in its start up. I did not accept the findings of Mrs. Thompson Watt that the Claimant benefited from the loan and even

if that were so it does not take away from the fact that he was prejudiced by the decision to take out a loan without his input, knowledge or consent.

[266] There is also the question of whether it was reasonable for the Claimant to have brought a claim against the 4th and 5th Defendants. At the time of commencement of the claim, the Claimant was clearly seeking answers to a lot of questions in relation to the two companies and this information was not forthcoming. It was after he had commenced proceedings and through the process of discovery that he was able to access relevant information to substantiate his claim. If he had not included the 4th and 5th Defendants it might have been difficult to access necessary information in order to substantiate his claim, including relevant information about how the 5th Defendant was funded, the loans taken out and the handling of the Annual Returns by the 4th Defendant. I am therefore of the view that it was not unreasonable for him to have included the 4th and 5th Defendants as parties.

[267] For all these reasons, I feel fortified in the view that the Claimant should not be made to suffer any additional prejudice by being required to pay the costs of the 4th and 5th Defendants. In the circumstances, the 4th and 5th Defendants should be responsible for their own costs. I therefore make no order as to costs in relation to the case against them.

[268] My Orders are:

1. Judgment is entered for the Claimant against the 1st, 2nd and 3rd Defendants pursuant to Section 213A of the Companies Act.

2. The Claimant's case against the 4th and 5th Defendant fails.
3. A Declaration that the Claimant is entitled to a 19 percent share in the 1st Defendant Coast to Coast Quarries Limited.

4. A Declaration that the Claimant is entitled to a 30 percent share in the 2nd Defendant Coast to Coast Concrete Limited.

5. That the Claimant is not entitled to any interest in the 5th Defendant Ideal S & J Trucking Services Company Limited.

6. That an independent chartered accountant, with expertise in forensic accounting and valuations of shares, shall be agreed upon by the parties on or before the 30th April 2025. In the event of a failure to agree the Registrar of the Supreme Court shall select the said independent chartered accountant with expertise in forensic accounting and valuations of shares, from a list or lists to be filed by the parties on or before the 30th June 2025.

7. That the independent chartered accountant be instructed to carry out a forensic audit of the financial affairs of the 1st Defendant from November 2007 to the date of the commencement of the forensic audit, detailing the profit or losses made by the 1st Defendant.

8. That the independent chartered accountant be instructed to carry out a forensic audit of the financial affairs of the 2nd Defendant from May 2009 to the date of the commencement of the forensic audit, detailing the profit or losses made by the 2nd Defendant.

9. A joint instruction letter shall be sent to the valuer within twenty-one (21) days of this agreement. In the event that the parties are unable to agree on the joint instruction letter to be sent to the valuer, each party may send their own letter within seven (7) days of their failure to agree.

10. That the 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 the instruction and submitted to the Claimant's and Defendants' attorneys-at-law upon completion of the forensic audit.

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

12. That the 1st and 2nd Defendants through the 3rd Defendant are to pay to the Claimant the sums identified as profit for the period within two (2) months of being notified of any profits made by the independent chartered accountant.

13. That the independent chartered accountant, appointed in accordance with Order 6 shall be instructed to determine the fair value of the shares of the 1st and 2nd Defendants as at the date of judgment, after considering and completing the forensic audit.

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

15. That the said independent chartered accountant's (valuation) report is to be completed as soon as practicable and in any event no later than two (2) months after the completion of the forensic report and delivered to the attorneys-at-law for the Claimant and Defendants respectively.

16. The parties may put written questions to the valuator for clarification regarding the valuation report within ten (10) days of receiving the report.

17. That the 3rd Defendant is permitted to make an offer to purchase the shares of the Claimant within sixty (60) days of delivery of the final clarification being provided by the valuer of the shares in accordance with order 16 herein. In the event the 3rd Defendant fails to make an offer as aforesaid the 1st and 2nd Defendant companies are to be permitted to buyout the Claimant's shares within sixty (60) days of the refusal of the 3rd Defendant to do so.

18. That the Claimant's attorneys-at-law shall have carriage of sale of the shares being sold by the Claimant.

19. That upon receipt of the proceeds of sale of his shares by the Claimant, the Claimant is to resign as director and be removed as shareholder from the 1st and 2nd Defendant companies.

20. If neither the 1st, 2nd or 3rd Defendants or any suitable person agreed on by the Defendants is able to buy out the Claimant's shares only then is a winding-up order to take effect.

21. Costs to the Claimant against the 1st, 2nd and 3rd Defendants to be taxed if not agreed.

22. No order for cost in relation to the 4th and 5th Defendants.

ACKNOWLEDGEMENTS

[269] I take this opportunity to express my sincere gratitude to both King's Counsel and all Counsel who appeared in this matter for their industry and for the depth of their submissions and the assistance they provided to the Court. I also wish to express my profound gratitude to my Judicial Counsel Mrs. Moveta McNaught-Williams for the research she conducted and for the invaluable assistance and support she provided to me during the trial of the matter and with the writing of this judgment.

Special thanks also to my clerk Ms. Sherel Doyley for the efficient way in which she handled this matter both in and out of court.

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Stephane Jackson-Haisley
Puisne Judge