

**IN THE EASTERN CARIBBEAN SUPREME COURT  
IN THE HIGH COURT OF JUSTICE  
ANGUILLA CIRCUIT  
(CIVIL)  
A.D. 2020**

**CLAIM NO. AXAHCV 2018/0044**

**BETWEEN:**

**PALMAVON JASAMIN WEBSTER**

**Claimant**

**and**

**[1] JOHN OLIVER DYRUD  
[2] FIRST ANGUILLA TRUST COMPANY LIMITED**

**Defendants**

**Appearances:**

Mr. Gerhard Wallbank with him Ms. Rayana Dowden instructed by Webster LP of  
Counsel for the Applicant  
Ms. Jean M. Dyer instructed by JM Dyer & Co. of Counsel for the Respondents

-----  
2019: March 26;  
2020: May 27.  
-----

*Summary Judgment – CPR 15.2 – Test to be applied – Reasonable prospect of success -  
Application to strike out statement of case – CPR 26.3 (c) – Res judicata – Abuse of  
process – CPR 26.3 (1) (b) – Unfair prejudice and oppression claim – Sections 63, 97 and  
268 Anguilla Companies Act R.S.A. c. C65 – Arbitration award – Whether Arbitration  
Award settling all matters in dispute between the parties – Whether claimant seeking to re-  
litigate issues already determined in arbitration proceedings – Whether it can be implied  
from the arbitration award that a separate claim for oppression by the claimant was still  
alive and could be pursued*

**DECISION**

[1] **INNOCENT, J. (Ag.):** This matter came on for hearing upon the application of the first-named defendant, John Oliver Dyrud ('Mr. Dyrud'), for summary judgment pursuant to CPR 15.2 and to strike out the claimant's (Ms. Webster's) claim pursuant to CPR 26.3(1)(c) on the grounds that the proceedings brought by Ms. Webster is an abuse of the court's process and would bring the administration of

justice into disrepute. In support of the second limb of the application Mr. Dyrud relies on the doctrine of res judicata.

### **The Claim**

[2] Ms. Webster has brought the present claim against Mr. Dyrud, and further or in the alternative, against the second-named defendant, First Anguilla Trust Company Limited ('FATCL'), for relief pursuant to section 268 of the Companies Act, R.S.A c. C65 (the 'Companies Act'). Ms. Webster and Mr. Dyrud are both members and directors of FATCL. Ms. Webster claims, as a member of FATCL, that the affairs of FATCL have been, are being or are likely to be conducted in a manner that she considers to be oppressive, unfairly prejudicial and unfairly discriminatory against her in her capacity as member. By virtue of the present claim Ms. Webster seeks the following relief:

- (1) An order pursuant to section 268 of the Companies Act that her shareholdings in FATCL be bought out by Mr. Dyrud and/or FATCL;
- (2) An order that the price of such buyout shall be determined by a professional valuer as at 31<sup>st</sup> December 2006, alternatively as at 30<sup>th</sup> August 2013, alternatively as at a date to be fixed by the court;
- (3) An order that the parties shall endeavour to agree upon the identity of the professional valuer by a date certain, failing which the court shall direct which valuer shall be appointed from a shortlist to be provided by the parties;
- (4) An order that the valuation shall treat the monies paid to Mr. Dyrud as part of the assets of FATCL;
- (5) An order that the valuation shall treat the salary and benefits paid to Mr. Lee Jones as remaining part of the assets of FATCL;
- (6) An order that the valuation shall treat salaries and benefits paid to officers and/or employees, and/or other personnel engaged by FATCL without a duly made Board of Directors' resolution as remaining part of the assets of FATCL;

- (7) An order that transactions carried out without the approval of Ms. Webster as a director of FATCL be declared invalid and reversed;
- (8) An order that the Arbitrator's order for specific performance of the Partnership Withdrawal Agreement (the 'PWA') be complied with and that all clauses of the PWA be complied with;
- (9) An order that the monies paid to Mr. Dyrud by the clients of FATCL are for the account of FATCL;
- (10) Further, directions for the terms and criteria to be used for the valuation, including the costs of the valuation;
- (11) Interest at the judgment rate on the price for the share buyout from the date of the judgment until payment by Mr. Dyrud and/or FATCL.

### **Historical background**

- [3] The present proceedings are yet another episode in the long drawn out series of disputes between the parties that stem largely from the breakdown of the business and marital relationship that they once shared. Therefore, it would be necessary to chronicle the relevant series of events preceding the present claim in order to put the issues raised in the present application within the appropriate context.
- [4] Much of the historical background to the present proceedings can be gleaned from the statement of claim and the affidavits filed by the parties and do not appear, except in some instances, to be disputed by Mr. Dyrud.
- [5] Mr. Dyrud and Ms. Webster formed a partnership to carry on the business of a law firm known as Webster & Dyrud which was later renamed Webster Dyrud & Mitchell ('WDM'). The WDM partnership was for a fixed term and expired on 31<sup>st</sup> December 2002 unless otherwise agreed. After 31<sup>st</sup> December 2002, the firm continued to carry on business as a 'partnership at will'.
- [6] Ms. Webster and Mr. Dyrud formed FATCL on 19<sup>th</sup> September 1995. According to Ms. Webster, from the inception of FATCL all of its business and affairs were carried on as a quasi-partnership. This quasi-partnership was consistent with the

terms of a partnership agreement entered into between Mr. Dyrud and herself on or about January, 1993.

- [7] FATCL was established as a company limited by shares with an authorised and issued share capital of 1000 shares, and a minimum of two directors and a maximum of five. The parties were each issued 500 shares at US\$250.00 per share, making a total share capital of US\$250,000.00. It was agreed that Mr. Dyrud would be the initial Managing Director of FATCL. The parties enacted By-Laws for FATCL on or about 25<sup>th</sup> October 1995.
- [8] The quasi-partnership continued until 31<sup>st</sup> December 2006 when the parties dissolved their law practice.
- [9] From on or about the year 2003 disputes and tensions arose between the parties concerning the management of the finances and corporate governance of FATCL by Mr. Dyrud. As a result, the parties entered into an agreement on 30<sup>th</sup> July 2013 to have their disputes submitted to an Arbitrator (the 'Arbitration Agreement'). According to the Arbitration Agreement, Ms. Webster and Mr. Dyrud agreed that they would appoint a mediator whose terms of reference would include the resolution of all or any disputes between the parties in connection with FATCL, WDM and related entities. Attempts at private mediation between the parties failed; subsequently an Arbitrator was appointed by the court.<sup>1</sup>
- [10] Not surprisingly, a dispute arose between the parties regarding the scope of the Arbitrator's terms of reference. Ms. Webster applied to the Arbitrator seeking a ruling on his substantive jurisdiction and also a determination of the matters that had been submitted to the arbitration in accordance with the Arbitration Agreement. Ms. Webster also sought a ruling that the scope of the arbitration be limited to the disputed figures in respect of the FATCL accounts dated 12<sup>th</sup> December 2015. The Arbitrator delivered an Interim Award on 7<sup>th</sup> December 2015

---

<sup>1</sup> Claim No. AXAHCV 2015/0008 John O. Dyrud v Palmavon J. Webster, Order of 12<sup>th</sup> May 2015

denying Ms. Webster's application and refusing that Mr. Dyrud's statement of claim be revised (the 'Interim Award').<sup>2</sup>

[11] The issues that fell within the scope of the Arbitrator's terms of reference included the following:

- (a) Whether Mr. Dyrud was liable for sums paid to him from dividends of Ms. Webster belonging to FATCL.
- (b) What amounts, if any, were due from FATCL to Webster LP in respect of administrative services for the years 2010 to 2015.
- (c) Whether Ms. Webster is entitled to claim loss of profit due to alleged defective management of both FATCL and FNTC by Mr. Dyrud; if so, in what amount.
- (d) Did Mr. Dyrud wrongfully receive funds for services billed in the name of WDM into his personal accounts since 31<sup>st</sup> December 2006, and if so, the amount; and whether Mr. Dyrud should account for and pay over such sums to WDM.
- (e) Whether the remuneration paid to Mr. Jones be treated as a debt owed by Mr. Dyrud to FATCL.
- (f) Whether Mr. Dyrud was entitled to a salary from FATCL from the year 2007 without sanction of the Board of FATCL; if not, whether the cumulative amount of such salary together with interest be treated as a debt owed by Mr. Dyrud to FATCL.

[12] The Arbitrator made his final award on 2<sup>nd</sup> November 2016 (the 'Final Award').<sup>3</sup> The Final Award was later amended by a ruling<sup>4</sup> of the Arbitrator with respect to paragraphs 90, 155 and 282 thereof, upon an application by Ms. Webster seeking clarification and corrections to certain matters contained in the Final Award.

---

<sup>2</sup> Exhibit JOD-1.

<sup>3</sup> Exhibit JOD-2

<sup>4</sup> Exhibit JOD-3

[13] In the arbitration proceedings Ms. Webster had counterclaimed<sup>5</sup> for the following relief which was vehemently opposed by Mr. Dyrud, namely:

- (a) The refund to FATCL's account of the purported salary paid to Mr. Dyrud being the sum of US\$120,000.00 per annum.
- (b) The full amount of dividends withheld from Ms. Webster and unlawfully appropriated by Mr. Dyrud.
- (c) The reimbursement to FATCL of the salary of Mr. Lee Jones appointed by Mr. Dyrud against the express wishes of Ms. Webster.
- (d) Administration fees due to WDM which were withheld by FATCL in the sum of US\$336,000.00 or such greater sum than the accounts may disclose.
- (e) Loss of profit due to defective management of FATCL.
- (f) An account of all monies billed by Mr. Dyrud or collected by Mr. Dyrud or by FATCL for work belonging to WDM since 31<sup>st</sup> December 2006.
- (g) An account of all monies Mr. Dyrud had received in his personal account or under Dyrud Law on behalf of WDM since 31<sup>st</sup> December 2006.

[14] It appears that Ms. Webster's defence and counterclaim in the arbitration proceedings were premised on what she termed 'defective management' on the part of Mr. Dyrud and the well documented complaints of Mr. Dyrud's style of corporate governance that had the effect of denying her any role in the management of FATCL. At paragraph 50 of her defence and counterclaim she stated:

"Despite repeated requests the Claimant refused to involve the Respondent in the business of FATCL and FNTCL after 2006 which effectively denied her (of) her statutory rights (and) obligations as a Director."

### **The Arbitration Award**

[15] In setting the backdrop to resolving the issues arising on the present application, it will be necessary to set out the parts of the Arbitration Award that related to the issues raised by Ms. Webster in her defence and counterclaim in the arbitration

---

<sup>5</sup> Exhibit JOD-5

proceedings and cross-reference the same with the relief sought by Ms. Webster in the present claim.

“Participation in corporate governance of FATCL”

[16] In the course of the arbitration proceedings, Ms. Webster had denied and sought to refute Mr. Dyrud’s contention that she had become a non-executive member of FATCL in 2005, and that pursuant to the PWA had undertaken not to interfere in the management of FATCL.<sup>6</sup>

[17] In the Final Award the Arbitrator found that the PWA was enforceable and that Mr. Dyrud was entitled to specific performance of the same.<sup>7</sup>

“Defective management – loss of profit”

[18] On the question of whether Ms. Webster was entitled to claim for the loss of profit due to alleged defective management by Mr. Dyrud, the Arbitrator held at paragraph 313 of the Final Award that:

“The tribunal submits that these claims by the Respondent are outside the scope of this arbitration and are not justiciable.”

“Mr. Dyrud’s salary”

[19] The Arbitrator held that Mr. Dyrud’s salary was reasonable. The Arbitrator said:

“The Tribunal accepts that with a review of all circumstances placed before it in the form of evidence provided by the Claimant, Respondent and Mrs. Kumara, it is found that the Claimant’s salary is reasonable.”<sup>8</sup>

“The salary of Mr. Lee Jones”

[20] On this issue the Arbitrator found that Mr. Dyrud, as a Director of FATCL, was not liable for any loss alleged as he, at all times, acted honestly and in good faith. The Arbitrator said:

“It is the Respondent’s contention for the reimbursement of FATCL of the salary paid to Lee Jones. The Claimant submits that this falls outside the scope of the arbitration agreement and the said Agreement dated 30<sup>th</sup>

---

<sup>6</sup> Paragraph 34 of the Final Award

<sup>7</sup> Paragraph 324 of the Final Award

<sup>8</sup> Paragraph 300 of the Final Award

July, 2013 does not address the issues of staffing. It is accepted that Recital D foreshadows issues related to governance and management, these were not particularized such that it could be said that the parties were ad idem as to their inclusion in the arbitral issues.”<sup>9</sup>

“The Tribunal concurs that the Claimant as Director of FATCL and FNTCL is not liable for any alleged loss as he, at all times, acted honestly and in good faith.”<sup>10</sup>

#### “The dividends”

- [21] The Arbitrator found that Mr. Dyrud had no liability to Ms. Webster for the declared dividends of FATCL due to her because those payments were contractually due to him and were consistent with what was agreed to by both parties. The Arbitrator said:

“The Tribunal has already accepted the PWA as being valid and enforceable. The Tribunal also accepts that Mrs. Kumara relied on the PWA in making the payments to the Claimant in respect of 50% of the declared dividends of FATCL due to the Respondent.”<sup>11</sup>

- [22] The Arbitrator also found as follows: -

“The Tribunal finds that the Claimant has no liability to the Respondent for those payments and those payments were contractually due to him and consistent with what was agreed to by both parties.”<sup>12</sup>

#### **The Application for Summary Judgment**

- [23] CPR 15 sets out the procedure by which the court may strike out a claim, part of a claim or a particular issue without a trial. The grounds upon which an application for summary judgment may be made are provided for by CPR 15.2 which states:

“The court may give summary judgment on the claim or on a particular issue if it considers that the –  
(a) claimant has no real prospect of succeeding on the claim or the issue;  
or  
(b) defendant has no real prospect of successfully defending the claim or the issue.”

---

<sup>9</sup> Paragraph 320 of the Final Award

<sup>10</sup> Paragraph 321 of the Final Award

<sup>11</sup> Paragraph 302 of the Final Award

<sup>12</sup> Paragraphs 303 and 324 of the Final Award

[24] CPR 15.6 defines the powers that the court may exercise on an application for summary judgment and provides:

“(1) The court may give summary judgment on any issue of fact or law whether or not the judgment will bring the proceedings to an end.

(2) If the proceedings are not brought to an end the court must also treat the hearing as a case management conference.”

### **Issues**

[25] The issue arising for determination is whether the claimant has a real prospect of succeeding on the present claim.

[26] The answer to this will be determined by whether or not Mr. Dyrud succeeds on his res judicata and abuse of process point. However, the court is mindful of the fact that if Mr. Dyrud only has partial success on his application, and only the offending parts of the claim are struck out, the court must still go on to consider whether the claim has a real prospect of success based on what is left of it.

[27] In any event, if it is found that the present claim has the inherent weaknesses in that it seeks to ventilate anew issues that were finally determined by the Arbitrator, the matter stops there, and it follows that the claim would inevitably be struck out.

### **The Application to Strike out**

[28] The application to strike out the statement of case is premised on CPR 26.3(1)(c) which provides:

“(1) In addition to any other power under these Rules, the court may strike out a statement of case or part of a statement of case if it appears to the court that –

(c) the statement of case or the part to be struck out is an abuse of the process of the court or is likely to obstruct the just disposal of the proceedings;”

### **Issues**

[29] Whether the bringing of the claim amounts to an abuse of process of the court. This issue arises within the context of Mr. Dyrud’s res judicata argument. In other words, whether the relief sought by Ms. Webster and the factual basis upon which

she relies in seeking that relief had already been decided in the arbitration proceedings and had been finally, discretely and distinctly determined in the Arbitration Award.

- [30] By extension, whether, if the court finds that issue (a) is answered in the affirmative, whether Ms. Webster can still bring a claim for unfair prejudice and oppression based on factual issues already decided upon by the Arbitrator in the Arbitration Award.

### **The Applicant's Submissions**

- [31] Ms. Jean Dyer, appearing for the applicant, argued that the form of abuse which the application is concerned with is not the form of abuse envisaged by the principles set out in the decision in **Henderson v Henderson**.<sup>13</sup> Counsel Ms. Dyer directed the court to paragraph 5 of the notice of application which she says makes it clear that the application to strike out the claim is also premised on the principle of res judicata (which is a form of abuse of process) and which is the form of abuse which concerned the court in the case of **Johnson v Gorewood & Co**.<sup>14</sup> Therefore, she says, that the entire basis of the application is premised on the principle of res judicata.
- [32] Ms. Dyer contends that the issues which Ms. Webster wishes to raise and litigate in the present claim are res judicata by reason of the Arbitration Award.
- [33] Ms. Dyer relies on the principle enunciated in **Charles Hickcock v Leeward Isles Resorts Limited**.<sup>15</sup>
- [34] Mr. Dyer contends that the claim is suitable for summary judgment or striking out because it raises questions of law, namely, whether the claim is res judicata to the extent that the court should give effect to the overriding objective of the CPR which is to deal with cases justly.

---

<sup>13</sup> [1843] 3 Hare 100 at 115

<sup>14</sup> [2001] 2 AC 1

<sup>15</sup> [2004] ECSCJ No. 132

- [35] Mr. Dyer submits that it is in the interest of justice to save expense, achieve expedition and avoid prolonged and unnecessary use of the court's resources by making an early determination as to whether Ms. Webster's claim or part, or parts thereof, are bound to fail. This exercise should be undertaken as part of the court's active case management powers to identify issues at an early stage and to decide which issues need further investigation at trial and to dispose summarily of the others. In support of this argument Mr. Dyrud relies on paragraph 12 of the decision in **Charles Hickox**.
- [36] Ms. Dyer says that res judicata is founded on the principle that there must be finality to litigation and that the issues in dispute between the parties must also be resolved. According to Ms. Dyer, the filing of the present claim is even more egregious considering that the parties had contractually agreed to submit certain matters in dispute between them to arbitration. These disputes have been investigated and adjudicated upon within the context of the arbitration agreement and the subsequent Arbitration Award. An award which is final, and can only be appealed on points of law.
- [37] Ms. Dyer further argued that the other underlying basis of the doctrine of res judicata is that it seeks to protect the court or tribunal, as the case may be, from having to adjudicate the same issues more than once to avoid the risk of inconsistent findings.
- [38] Counsel argued that although the issues decided by the court may not be decisive of the dispute, they ought to be regarded as final for the purpose of res judicata. In support of this contention Mr. Dyrud relied on paragraph 19 in **Charles Hickox**.
- [39] Ms. Dyer considered that the relevant question arising for determination on the application was whether or not the issues raised on the present claim have been previously litigated and adjudicated upon with finality; This, she says, can be answered by reference to the Arbitration Award and the findings of the Arbitrator in making the award.

- [40] Ms. Dyer referred the court to page 56, paragraphs 324 to 325 of the Arbitration Award. At paragraph 324 under the rubric "Issue No. 21", that is, whether the claimant was entitled to sue for loss of profit due to defective management by Mr. Dyrud in the affairs of FATCL. She argued that this was the only claim that the Arbitrator found to be outside the scope of the terms of reference.<sup>16</sup>
- [41] Ms. Dyer also pointed out that paragraph 32 of the Arbitration Award sets out the matters raised on the counterclaim. She also cited the affidavit in opposition filed by Ms. Webster<sup>17</sup> which she says amounts to an acceptance of the evidence of Mr. Dyrud contained at paragraph 17 of his affidavit wherein Mr. Dyrud sets out the matters that formed the basis of Ms. Webster's counterclaim. She said that the critical words are "they were not all determined". Ms. Dyer says that implicit in that statement is the interpretation that some of the matters on Ms. Webster's counterclaim were decided by the Arbitrator. Therefore, she says that Mr. Dyrud accepts that Issue No. 21 that arose on Ms. Webster's counterclaim was not decided by the Arbitrator.
- [42] Ms. Dyer alerted the court to what is contained at paragraph 20 of Mr. Dyrud's affidavit which she says deals with Issue No. 16 of the Arbitration Award. Issue No. 16 concerned whether Mr. Dyrud was liable for sums paid to himself from dividends allegedly owed to Ms. Webster. According to Mr. Dyrud, the main thrust of Ms. Webster's complaint under Issue No. 16 was that certain unauthorised resolutions had been passed by FATCL that permitted the payment of dividends payable to her to be paid to Mr. Dyrud. She stated further that under issue No. 16 the Arbitrator found that Mr. Dyrud was not liable for any loss claimed by Ms. Webster in relation to those dividends and that the payment was made to Mr. Dyrud in accordance with the PWA.<sup>18</sup> This finding, she says, ought to be taken in conjunction with the fact that at paragraph 300 of the Arbitration Award the Arbitrator found that Mr. Dyrud's salary was reasonable.

---

<sup>16</sup> At paragraph 22 Affidavit of John Oliver Dyrud

<sup>17</sup> At paragraph 12 Affidavit in Opposition of Palmavon J. Webster

<sup>18</sup> At paragraph 21 (iv) Affidavit of John Oliver Dyrud

[43] In relation to Issue No. 14 in the Arbitration Award which dealt with the issue of the amounts, if any, owed by Mr. Dyrud to FATCL, Ms. Dyer directed the court to the matters contained at page 5, paragraphs 23(v) to (vi) of the Arbitration Award which sets out the nature of Mr. Dyrud's claim in the arbitration proceedings. She argues that the matters set out therein is consistent with the argument that Ms. Webster, in bringing the present claim, is seeking to litigate anew issues that arose and were already determined in the arbitration proceedings. Therefore, she says, Ms. Webster cannot rely on these matters afresh to form the substantial basis for bringing the present claim. She relied also on paragraph 299 of the Arbitration Award where the Arbitrator said:

"The Tribunal accepts the testimony of Mr. Crefton Gumbs with respect to the indebtedness to FATCL and FNTCL that is outlined in his witness statement which states: According to my review of the financial records of FATCL, it is owed the following amounts by the parties and related entities. WEBSTER owes FATCL the sum of US\$216,338.94. This sum represents accumulated payments made for and on behalf of WDM/WEBSTER by FATCL. Palmavon J. Webster owes FATCL the sum of US\$224,992.29. This sum represents payments by and/or withdrawals from FATCL by the Respondent. John O. Dyrud owes FATCL the sum of US\$190,525.66 for payments made on his behalf and/or withdrawals from FATCL for his benefit."

[44] In the circumstances, and in view of the foregoing, Ms. Dyer submits on Mr. Dyrud's behalf that the issue of Mr. Dyrud's salary had already been litigated in the arbitration proceedings and that Ms. Webster is now seeking to re-litigate this issue on the grounds of defective management. She says that it is not open to Ms. Webster to put forward a similar claim in the present proceedings in light of the Arbitration Award and the Arbitrator's findings. In support of this contention she makes reference to paragraphs 49 and 50 of the statement of claim and cross-references them to Issue No. 20 and paragraph 21(2) of Mr. Dyrud's affidavit.

[45] Ms. Dyer pointed out that the issue regarding the dividends is pleaded at paragraphs 94 to 105 of the statement of claim. She referred the court to Issue No. 16 in the Arbitration Award. With respect to Issue No. 16 which concerned whether Mr. Dyrud was liable for sums paid to him for dividends of Ms. Webster, the Arbitrator found that:

“The Tribunal finds that the Claimant has no liability as the payment was made in accordance with the PWA.”<sup>19</sup>

[46] Mr. Dyrud deals with the issues raised at paragraphs 58 to 70 of Ms. Webster’s statement of claim under the rubric “unilaterally declared dividends and withheld payments”. This area of dispute, Ms. Dyer argues, is canvassed at Issue No. 2 in paragraph 302 of the Arbitration Award. The Arbitrator had found that the PWA was enforceable and valid as appears by virtue of paragraphs 302 to 303 of the Arbitration Award. Ms. Dyer argued that Ms. Webster has raised this issue anew at paragraph 69 of her statement of claim although they had been expressly determined by the Arbitrator.

[47] With respect to the corporate management issues, Ms. Webster canvasses this at paragraph 49 of her statement of claim. At paragraph 49 of the statement of claim, Ms. Webster addresses what can be described as the supposed failure on the part of Mr. Dyrud to involve her in the business of FATCL and the related entities. Ms. Dyer contends that these issues had been raised in the arbitration proceedings and had been decided by the Arbitration Award.<sup>20</sup>

[48] Ms. Dyer went on to say that other parts of the claim are relevant to the Arbitrator’s findings which are found at paragraph 263 of the Arbitration Award. At paragraph 263 of the Arbitration Award the Arbitrator said:

“The Tribunal accepts that there has been performance of the PWA. It is accepted that the Claimant withdrew from the WDM practice and spent much of his time to the development and growth of the related entities FATCL and FNTCL in accordance with Clause 3.1(d) of the PWA. It is further accepted that the PWA reaffirmed the position that the Respondent has served as a non-executive Director of FATCL from on or about 1<sup>st</sup> September 2005 in clause 3.2(d). It is also accepted that support was contemplated in Clause 3.2(a) of the PWA and is consistent with Clause 4.3 of the PWA.”

---

<sup>19</sup> Paragraph 324 of the Arbitration Award

<sup>20</sup> See: paragraphs 321 and 324 of the Arbitration Award; paragraphs 106 to 140 of the Statement of Claim

[49] Ms. Dyer argues that Ms. Webster is not competent to bring the present claim because the matters that they touch and concern are Mr. Dyrud's position as an executive member and her lack of involvement in the decision making process.<sup>21</sup>

[50] At paragraph 21(2) of his affidavit, Mr. Dyrud deals with Issue No. 20 which is related to the amounts due by FATCL to Webster LP for administrative services. The Arbitration Award determined that "no monies are due and owing".<sup>22</sup> The Arbitrator sets out the basis of his decision and findings at paragraphs 311 and 312 of the Arbitration Award in the following terms:

"The Financial Comptroller of FATCL and FNTCL has testified that no monies are owed to WDM for administrative services for the years 2010 to 2015. Further, evidence has been tendered that on 15<sup>th</sup> December 2005 the Board effected a resolution that the Management Agreement between FATCL and WDM was terminated. Evidence has also been tendered, which the tribunal accepts, that a draft Administrative Services Agreement was prepared; it was not agreed by the parties.

The Tribunal accepts that no monies are owed for the years 2010 to 2015."

[51] Ms. Dyer cross-references this part of the Arbitration Award to what is contained at paragraph 50 of Ms. Webster's statement of claim where she sets out her claim in relation to amounts payable by FATCL to WDM for office premises, management, staff and equipment services provided to FATCL by WDM.

[52] In relation to the salary of Mr. Lee Jones, which is canvassed at paragraphs 321 to 322 of the Arbitration Award, where it says that Mr. Dyrud, as a director of FATCL, is not liable for any alleged loss as he acted honestly and in good faith at all times. The issue of Mr. Lee Jones's salary is canvassed at paragraphs 71 to 93 of the statement of claim. Ms. Dyer argues that these issues had already been resolved in the arbitration proceedings and therefore, Ms. Webster cannot rely on them as forming the basis of the present claim.

---

<sup>21</sup> See: Issue No. 2 paragraph 324 of the Arbitration Award

<sup>22</sup> Paragraph 311 of the Arbitration Award

[53] Ms. Dyer also commented on the point raised at paragraph 11 of Ms. Webster's skeleton argument where she argues that the abuse of process point could not be raised by Mr. Dyrud because of his objection to the terms of reference in relation to issues concerning corporate management and governance. That is the basis for her reliance on the case of **Henderson v Henderson**. Ms. Dyer argued that this is not the only kind of abuse of process that can be relied on to strike out the claim. She cited paragraph 10 of **Johnson (A.P.) v Gore Wood & Co. (A Firm)**.<sup>23</sup> Ms. Dyer counsel for Mr. Dyrud argued that Ms. Webster should not be permitted to launch a collateral challenge to the Arbitration Award. She says, that Ms. Webster's pleadings in the present case are inconsistent with the findings of the Arbitrator.<sup>24</sup>

[54] In his written submissions Mr. Dyrud contends, essentially, that the claim clearly cannot succeed as the matters raised therein are res judicata. Ultimately, he says, it is a question of whether the issues raised in the present claim were previously raised and determined under the Arbitration Award. He further contended that the court in determining the application for summary judgment should be mindful that the purpose of resolving issues on a summary basis and at an early stage of the proceedings is to save time and costs. The court, he says, should look to see what will happen at the trial; if the case is so weak that it has no reasonable prospect of success, it should be stopped before great expense is incurred. Ms. Dyer appearing for Mr. Dyrud cited the case of **Taylor v Midland Bank Trust Co. Ltd** which was cited at paragraph 91 in the case of **Three Rivers District Council v Bank of England (No.3)**.<sup>25</sup> This she argued, is an important aspect of active case management which achieves expedition and avoids the court's resources being used up unnecessarily on cases where this serves no purpose.

[55] Ms. Dyer also submitted that in considering whether summary judgment ought to be granted on the claim or part of the claim, the court's function is to decide whether Ms. Webster's prospects of successfully establishing her claim is a real

---

<sup>23</sup> UKHL 65; [2001] 1 All ER 481

<sup>24</sup> Paragraphs 58 to 69 of the statement of claim

<sup>25</sup> [2001] 2 All ER 513

one as opposed to one that is fanciful or merely arguable; that in assessing the prospect of success of the claim, the court can form a provisional view of the outcome of the claim.

### **The Respondent's Submissions**

- [56] Mr. Wallbank appearing for Ms. Webster submitted that the legal test and burden of proof to be satisfied on the application is a high one, and that Mr. Dyrud has not met the threshold of the test to be applied. Mr. Wallbank relied on the decision in **Charles Hickox** in support of this contention. He also cited paragraph [12] in the case of **Baldwin Spencer v AG**.
- [57] Relying on paragraph [13] in the decision of **Charles Hickox**, he says, that on the papers before the court one has to look at what the Arbitrator said objectively.
- [58] Mr. Wallbank argued that the Arbitrator made no findings, comments or observations about the corporate governance actions of Mr. Dyrud, and that nowhere in the Arbitration Award is this mentioned. He says that the Arbitration Award contained no significant findings that Ms. Webster wishes to litigate in the current claim. He relied on the dicta at paragraph [10] of **Charles Hickox** particularly in relation to the terminology used there, that is, that the issue must be “distinctly determined” “special circumstance”. According to Mr. Wallbank, corporate governance issues and issues related to the management of FATCL have not been distinctly or otherwise determined by the Arbitrator.
- [59] Mr. Wallbank rightly submitted that the test to be applied on summary judgment applications, and the burden of proof being on the applicant, is for the applicant to show that the claimant has no reasonable prospect of success of getting around the res judicata principle. In support of this contention he cited the decision of **Johnson v Gore Wood** at page 19, which will be referred to later on in this decision.

- [60] Again, Mr. Wallbank rightly submits, that the court must look at the nature of the claim. He says that this is an unfair prejudice claim by Ms. Webster as a shareholder of FATCL, claiming that Mr. Dyrud should buy out her shares in FATCL.
- [61] Mr. Wallbank submitted that this is so firstly, on the basis that Mr. Dyrud has oppressed or unfairly prejudiced Ms. Webster in relation to her rights in FATCL; that FATCL had been ran as a quasi-partnership and that partnership is now at an end and is in a state of deadlock. He says that this is not a claim where the claimant is seeking damages or financial reward from the defendant. Mr. Wallbank says that money comes into play only for the limited purpose of the court making a determination at the trial of the value of FATCL's shares. Therefore, he says that the present claim is different from the kind of claim brought in the arbitration proceedings. He argued that Ms. Webster is not seeking to relitigate the issues that were within the terms of reference of the Arbitrator. On the contrary, he says that Ms. Webster specifically pleads that she is bound by the findings of the Arbitrator; this, he says, does not amount to a collateral attack. Ms. Webster's position, he says, is that the Arbitrator did not make any findings on a number of points that are now raised in the present claim.
- [62] According to Mr. Wallbank, the claim incorporates two kinds of events: firstly, a series of events where Ms. Webster pleads oppression and unfair prejudice; and secondly, events subsequent to the arbitration which could not be referred to the Arbitrator. Therefore, these matters cannot be considered *res judicata* and must be seen in terms of the subsequent conduct of Mr. Dyrud. He says that the subsequent events are pleaded at paragraphs 151 to 163 of the statement of claim. He argued that, in a nutshell, what exist is a dispute over the amendment of the By-Laws of FATCL required by the PWA and Mr. Dyrud having taken the position that Ms. Webster's approval was not required for the amendment to the By-Laws on the basis that Ms. Webster was found by the Arbitrator to be a non-executive member of FATCL. Mr. Wallbank argued that the PWA required a members' resolution and not a directors' resolution. The material terms of the

PWA, he says, are set out at paragraph 57 of the statement of claim which references Clause 3.1(b) of the PWA.

[63] Mr. Wallbank pointed out that the By-Laws have not been amended. He says that Mr. Dyrud did comply with Ms. Webster's request for the amendment of the By-Laws in the manner requested. However, he disturbingly continues to have disregard for the requirements for the performance of good corporate governance. Further, he says that Mr. Dyrud's desire is to govern on his own without complying with section 63 of the Companies Act. Essentially, Mr. Dyrud has treated the PWA as in effect a unanimous shareholder agreement which is not within the scope of section 63 of the Companies Act. Ms. Webster does not agree with these unilateral actions on the part of Mr. Dyrud. This, Ms. Webster says, is not within the scope and ambit of the Arbitration Award. Accordingly, Ms. Webster says, subsequent events cannot be canvassed by the Arbitrator's finding that Ms. Webster was a non-executive member. Therefore, there is a triable issue in relation to the events occurring subsequent to the Arbitration Award.

[64] According to Mr. Wallbank, Mr. Dyrud's notice of application only speaks to the question of res judicata. Hence, any disagreement over subsequent conduct of Mr. Dyrud over and connected to the corporate management affairs of FATCL cannot be regarded as res judicata. The issues to be tried on the present claim relate to subsequent conduct and subsequent events.

[65] Mr. Wallbank urged the court not to attempt to dissect the statement of claim because to do so would have the effect of preventing Ms. Webster from relying on past events in support of her contentions on the oppression claim. There is no basis, he says, why Ms. Webster should not be allowed to refer to what Mr. Wallbank described as "historical acts" committed by Mr. Dyrud.

[66] Mr. Wallbank says, that nowhere in the Arbitration Award did the Arbitrator deal with issues or ruled on matters related to acts of corporate governance by Mr. Dyrud. These issues, in particular the resolution unilaterally passed by Mr. Dyrud, were simply not dealt with by the Arbitrator. The Arbitrator neither

distinctly nor specifically determined any of them. He then referred the court to the Arbitration Agreement in particular recital D which bears upon an unfair prejudice action of the type being presently dealt with.

[67] In addition, Mr. Wallbank referred the court to Issue No. 21 at page 58 of the Arbitration Award where the Arbitrator found relative to the issue of whether Ms. Webster was entitled to claim for the loss of profit due to alleged defective management, that "This Claim is outside the scope of the Arbitration". Mr. Wallbank submits that it was outside the scope of the arbitration because the parties had to agree what claims that they wanted the Arbitrator to determine and, in fact, Mr. Dyrud objected to these matters being placed before the Arbitrator.

[68] In support of this argument Mr. Wallbank cites paragraph 320 at page 55 of the Arbitration Award and the Arbitrator's findings in relation to Issue 21 which was –

"It is the Respondent's contention for the reimbursement of FATCL of the salary paid to Lee Jones. The Claimant submits that this falls outside the scope of the arbitration agreement and the said Agreement dated 30<sup>th</sup> July, 2013 does not address the issues of staffing. It is accepted that Recital D foreshadows issues related to governance and management, these were not particularized such that it could be said that the parties were ad idem as to their inclusion in the arbitral award."

[69] Mr. Wallbank argued that it is because of this fact that Issue No. 21 falls outside the scope of the Arbitration Award. The Arbitrator specifically referred to recital D in the Arbitration Agreement. It follows that issues of staffing, corporate governance and management are outside the scope of the Arbitration Award as well. Therefore, he submitted, that Ms. Webster is at liberty to bring the present claim unrestrained by the issues canvassed in the Arbitration Award.

[70] Mr. Wallbank suggested that the reason why these issues were outside of the scope of the Arbitration Agreement was attributable to the fact that Ms. Webster had stated that particulars would have been forthcoming; and the Arbitrator had held that the claim had not been sufficiently particularized. He reiterated that the Arbitration Agreement clearly did not address these issues.

[71] Mr. Wallbank also suggested that Ms. Webster's position is reinforced by what is stated at paragraph 11 of the written submissions filed by Mr. Dyrud. He says that these submissions specifically state that these matters were outside the scope of the arbitration proceedings.

### **The Resolution**

[72] Mr. Wallbank relied heavily on the point that Mr. Dyrud unilaterally declared dividends<sup>26</sup> but, the point that Ms. Webster is making, is that from a corporate governance point of view, this act on the part of Mr. Dyrud was not in accordance with the By-Laws of FATCL. The By-Laws specifically provided that any resolution of FATCL must be in writing and signed by all the directors in order to be valid. However, the Resolution of FATCL under review and which forms part of the substance of the present claim, was only signed by Mr. Dyrud and not all the directors. According to Mr. Wallbank, the Arbitrator made no findings whatsoever as to the propriety of this Resolution. He made no findings, comments nor observations concerning the observance of the process of passing resolutions of FATCL. He says, that this lacuna can only be explained by holding that the governance procedure of FATCL was not included or not considered to be within the scope of the Arbitration Agreement by the Arbitrator.

[73] Mr. Wallbank argued that whether or not the contractual obligations of the parties in terms of the PWA were within the scope of the Arbitration Agreement, and by extension the Arbitration Award, is an entirely distinct and separate issue altogether.

[74] In addition, Mr. Wallbank says that the Mr. Lee Jones's staffing issue is canvassed at page 59 of the Arbitration Award. This part of the Arbitration Award, he admits, clearly determined that Ms. Webster is not entitled to claim for any alleged loss. He says that in relation to Mr. Jones the unilateral allocation of salary without consultation with Ms. Webster and her approval was contrary to both the PWA and the By-Laws. He argued that Mr. Dyrud had appointed Mr. Jones as an officer of

---

<sup>26</sup> Issue No. 16 in the Arbitration Award

FATCL. In order for this to have been done the appropriate corporate procedure would have had to be triggered under the PWA and the By-Laws. The Arbitrator did not make any conclusions on these matters. Mr. Wallbank referred the court to what is contained at paragraph 320 of the Arbitration Award. Therefore, the present claim related to this issue was outside the scope of the Arbitrator's terms of reference.

[75] Mr. Wallbank also submitted that whereas the tribunal found that Mr. Dyrud as a director of FATCL was not liable for any losses because he, at all times, acted honestly and in good faith<sup>27</sup> that aspect of the Arbitration Award does not deal with the validity of acts of corporate governance by Mr. Dyrud. This, he says, is an entirely different issue. It was Mr. Dyrud who said that he wanted these issues to be outside the scope of the arbitration proceedings. Mr. Wallbank contends that it would be alarming if Ms. Webster could not now bring these claims before another forum or court.

[76] Furthermore, Mr. Wallbank said, that in relation to the issue of Mr. Dyrud awarding himself a salary,<sup>28</sup> this finding is reasonable, but, begs the question as to how the Arbitrator made that finding within the context of the arbitration. The arbitrator did not consider the question of whether there had been a breach of the By-Laws and the corporate governance procedure. It is on this basis that Mr. Wallbank says that there was no distinct determination and no specific findings of fact determinative of this issue.

[77] Mr. Wallbank submitted that all the events when taken together clearly show that they involved matters that could not have been placed before the Arbitrator because they occurred after the Arbitration Agreement. Therefore, he argued that it cannot be said that the present claim amounts to a collateral attack or a revisiting of the issues already settled on the Arbitration Award. Clearly, an evaluation of the remedies claimed in the present proceedings requires an

---

<sup>27</sup> Paragraph 321 of the Arbitration Award

<sup>28</sup> Paragraph 300 of the Arbitration Award

assessment of the management and corporate governance of the company by Mr. Dyrud. He referred to the prayer at paragraph 4 of the claim form wherein Ms. Webster seeks an order that any valuation of her shares treat the monies paid to Mr. Dyrud as part of the assets of FATCL.

### **The Applicant's Response**

- [78] Firstly, Ms. Dyer countered by submitting that Mr. Dyrud is not liable in a pecuniary sense but the matter goes beyond that. According to Ms. Dyer, reimbursement of Mr. Jones' salary had been dealt with by the Arbitrator to the extent that the Arbitrator found that Mr. Dyrud was not liable for any losses emanating therefrom, and that Mr. Dyrud had, at all times, acted in good faith. She disputed whether Mr. Wallbank's point regarding the adding back of those sums is a consequential order that the court can make in the present claim<sup>29</sup>. She disputes that this is an appropriate basis of valuation.
- [79] Ms. Dyer said that the Arbitrator found that Mr. Dyrud had no liability in relation to the dividends and Mr. Jones's salary. Therefore, Ms. Webster cannot rely on these factual issues to buttress her claim. Ms. Dyer contended that Ms. Webster relies on these matters, not merely for the purpose of setting the historical background to her claim, but rather forms the substantive basis for bringing the present claim.
- [80] Ms. Dyer contended that Ms. Webster is relying on what she daubs as "historical factors" as the basis for the valuation of her shares and that there shall be a historical "adding back" to value her shares. It cannot be disputed that the Arbitrator had found that Mr. Dyrud was not liable because the payments were in pursuance of fulfilling the mandate of the PWA. Ms. Dyer says that Mr. Dyrud's liability had been distinctly determined by the Arbitrator. In support of her argument she relied on paragraph 300 of the Arbitration Award<sup>30</sup> in relation to the Arbitrator's finding that the salary paid to Mr. Dyrud was reasonable<sup>31</sup>. Therefore, the court understands Ms. Dyer to be saying that the method of valuation contemplated by

---

<sup>29</sup> See: paragraph 108 of the statement of claim

<sup>30</sup> See also paragraph 29 of the Arbitration Award (Issue No. 14)

<sup>31</sup> Issue No. 14 in the Arbitration Award

Ms. Webster flies in the face of the Arbitrator's findings and are incompatible with the same.

### **Approach**

[81] In determining Mr. Dyrud's Application, the court will first consider the striking out application based on res judicata, issue estoppel and abuse of process argument. The reason for this approach lies in the distinction, notwithstanding the overlap between the two rules.

[82] At first blush it was made to appear to the court that Ms. Webster's statement of case seems to contain a coherent set of facts which discloses a legally recognisable claim against Mr. Dyrud. However, notwithstanding this fact, the court is nevertheless entitled to go on to consider whether Ms. Webster has no reasonable prospect of success. It is at this second stage that the court will consider any evidence that Ms. Webster may adduce if the matter goes to trial.<sup>32</sup>

### Striking out – Abuse of Process

[83] The court retains the power to prevent the use of proceedings which are likely to constitute an abuse of the court's process.<sup>33</sup> The abuse of process of which Mr. Dyrud complains arises in two respects. First, on the basis of an attempt by Ms. Webster at relitigation where she failed to bring her whole case in the arbitration proceedings and now wishes to supplement it in a second set of proceedings. However, this is not the basis upon which Mr. Dyrud relies. This is not a case where Ms. Webster is seeking to raise issues which should have been raised in the arbitration proceedings and were not pursued by Ms. Webster in these proceedings.

[84] Distilled to its essence, the present claim brought by Ms. Webster seems to be that, despite repeated requests, Mr. Dyrud has refused to involve her in the business of FATCL which has the effect of depriving her of her statutory rights as

---

<sup>32</sup>See: Chief Constable of Kent v Rixon [2000] All ER (D) 476

<sup>33</sup> See: Ebert v Birch [2000] Ch. 484; [1999] 3 WLR 670 and CPR 26.3 (1) (c)

a member of FATCL; and that Mr. Dyrud's conduct of the management of FATCL has the likely tendency to threaten her interest as shareholder. It is on that basis that she seeks an order for the buyout of her shares in FATCL by Mr. Dyrud.

[85] The court has considered the question of whether this claim had been raised in Ms. Webster's counterclaim in the arbitration proceedings. It appears that in the arbitration proceedings, Ms. Webster, by her counterclaim, had sought substantially the same relief as in the present claim. Therefore, these matters had been raised before the Arbitrator. The question that arises is whether these issues had been specifically and distinctly decided by the Arbitrator in the arbitration proceedings. If the answer to this issue is in the affirmative, then the doctrine of res judicata or issue estoppel would be triggered and Ms. Webster would be barred from relitigating these issues.

[86] The Arbitrator's terms of reference were to "resolve certain disputes with respect to WDM, FATCL and related entities". The terms of reference were clearly in very broad and general terms. However, what is relevant to the present case is whether there were any findings and decisions of the Arbitrator on the specific issues now raised in the present claim.

[87] Essentially, Mr. Dyrud argues that Ms. Webster is proscribed from bringing the present claim in relation to issues touching and concerning the corporate management and governance of FATCL purely on the basis that he had successfully defended Ms. Webster's counterclaim on the grounds that Ms. Webster had become a non-executive member of FATCL in 2005; and that pursuant to the PWA, Ms. Webster had undertaken not to interfere with the management of FATCL.

[88] The court understands this proposition to mean that Ms. Webster agreed to play no part in matters of corporate governance related to FATCL. The Arbitrator found in favour of Mr. Dyrud on this point. The Arbitrator found that the "PWA reaffirmed the position that Ms. Webster had served as a non-executive member of FATCL

from on or about 1<sup>st</sup> September 2005”.<sup>34</sup> However, it seems that the present claim relates to Ms. Webster’s rights as a shareholder and not as a director. This appears to be in contrast to the issue that was litigated in the arbitration proceedings.

[89] The court is of the view, that notwithstanding Ms. Webster being a non-executive member of FATCL, she is entitled to bring a claim against FATCL and its directors qua member and/or shareholder, in the event that her rights in that capacity are threatened by unfairly prejudicial conduct or they are oppressed by the directorship of FATCL.

[90] The court has arrived at the conclusion that the issues arising on the present claim were raised in Ms. Webster’s defence and counterclaim in the arbitration proceedings, but were held by the Arbitrator to be outside the scope of the arbitration.

[91] The abuse of process argument arises secondly, within the context of the res judicata argument. It appears that the complaint made by Mr. Dyrud is that Ms. Webster, in bringing the present claim, is seeking to litigate afresh issues that ought to have been brought under the arbitration proceedings.

[92] However, it appears that Mr. Dyrud’s complaint is not only grounded on the principle of res judicata, but more so on the principle of abuse of process and issue estoppel, which is broader in scope than the principle of res judicata. The court finds this implicit in Ms. Dyer’s representation to the court that the point raised in respect of res judicata was not raised only in the form contemplated by **Henderson v Henderson**.

[93] The abuse of process complained of in the present case is canvassed on the basis of re-litigation where a party fails to bring his whole case forward in one go and wishes to supplement it in a second set of proceedings.

---

<sup>34</sup> Paragraph 34(i) Final Award

- [94] Ms. Dyer contended that this is clearly what Ms. Webster is seeking to do, by bringing a subsequent claim, which Ms. Dyer alleges, amounts to the raising of issues that should have been raised in the arbitration proceedings and were not pursued by Ms. Webster.
- [95] The court understands the principle in **Henderson v Henderson** to be, that a litigant should bring his whole case against all possible parties in 'one go'; however, that does not mean that relitigation is barred, but that it may be a demonstrable abuse of process.
- [96] Mr. Wallbank, on the other hand, contended that, the present claim cannot be taken to amount to an abuse of process because the possibility of litigating these issues were not available in view of Mr. Dyrud's insistence that they did not fall within the scope of the arbitration agreement and the Arbitrator, having stated explicitly that matters related to corporate governance, did not fall within the ambit of the arbitration; and therefore, the Arbitrator did not consider it as falling within the terms of reference of the arbitration.
- [97] Having heard the oral representations made on behalf of the parties; and having read the affidavits and the written submission of the parties, the court has arrived at the following conclusions.

### **Striking Out**

- [98] It appears that the arbitration proceedings between the parties was primarily concerned with the business relationship between the parties as it relates to WDM, FATCL and related entities under the PWA.
- [99] The court has also taken the view that the present proceedings in which Ms. Webster seeks relief by way of an unfair prejudice and oppression claim involves entirely different considerations from what was canvassed in the arbitration proceedings. Therefore, Ms. Webster appears to bring the claim clothed as a member of FATCL. However, considering that the Arbitrator has found that Ms. Webster was a non-executive member of FATCL, the court finds it difficult to

comprehend why a substantial portion of her claim focuses on her position as director and her being shut out of the corporate management affairs of FATCL. However, Ms. Webster brings the present claim in her capacity as a member of FATCL.

[100] Ultimately, the answer lies in the nature of the cause of action brought under section 268 of the Companies Act, the relief sought by Ms. Webster, and the relief which the court is entitled to grant in claims for oppression and unfair prejudice brought pursuant to section 268 of the Companies Act.

[101] Section 268 of the Companies Act provides:

“(1) A member of a company who considers that the affairs of the company have been, are being or are likely to be, conducted in a manner that is, or any act or acts of the company have been, or are, likely to be oppressive, unfairly discriminatory, or unfairly prejudicial to him in that capacity, may apply to the Court for an order under this section.

(2) If, on an application under this section, the Court considers that it is just and equitable to do so, it may make such order as it thinks fit, including, without limiting the generality of this sub-section, one or more of the following orders—

(a) requiring the company or any other person to acquire the shareholder's shares;

(b) requiring the company or any other person to pay compensation to the applicant;

(c) regulating the future conduct of the company's affairs;

(d) amending the articles or by-laws of the company;

(e) appointing a receiver of the company;

(f) liquidating the company under the supervision of the Court;

(g) directing the rectification of the records of the company;

(h) setting aside any decision made or action taken by the company or its directors in breach of this Act or the articles or by-laws of the company.”

[102] Clearly, Ms. Webster, in her capacity as a member of FATCL, is entitled to bring a claim for oppression and unfair prejudice based on the allegation that the affairs of FATCL have been, or are likely to be conducted in a manner that is oppressive, unfairly discriminatory or unfairly prejudicial to her. In bringing such a claim Ms. Webster is entitled to rely on past events.

- [103] In a claim for oppression, unfair discrimination or unfair prejudice, the court is armed with the statutory discretion to grant relief to resolve the matters in dispute between the parties. In the present case, Ms. Webster seeks an order pursuant to section 268(2)(a) of the Companies Act, that is, an order requiring FATCL and/or Mr. Dyrud to buyout her shares in FATCL.
- [104] It is obvious that the difficulty that arises in the present case is with respect to the method by which Ms. Webster seeks to have her shares valued in the event that the court orders a “buyout” of her shares. It appears from the pleadings that Ms. Webster is indeed seeking to engage in a historical adding back of sums the liability for which had already been determined by the Arbitrator in the Arbitration Award. Ms. Webster ought not to be allowed to do so. This is not to say that it may defeat the purpose of the possible buyout of shares if the court so orders after hearing the claim. In any event, the court has a very broad discretion in granting relief under section 268 of the Companies Act which is not limited to ordering a buyout of Ms. Webster’s shares in FATCL.
- [105] This brings us to the decision in **Johnson v Gore Wood**<sup>35</sup> where their Lordships drew the distinction between the form of abuse contemplated by the decision in **Henderson v Henderson** where Sir James Wigram V-C said:
- “In trying this question I believe I state the rule of the Court correctly when I say that, where a given matter becomes the subject of litigation in, and of adjudication by, a court of competent jurisdiction, the court requires the parties to that litigation to bring forward their whole case, and will not (except under special circumstances) permit the same parties to open the same subject of litigation in respect of a matter which might have been brought forward, only because they have, from negligence, inadvertence, or even accident, omitted part of their case. The plea of *res judicata* applies, except in special cases, not only to points upon which the Court was actually required by the parties to form an opinion and pronounce a judgment, but to every point which properly belonged to the subject of litigation, and which the parties, exercising reasonable diligence, might have brought forward at the time.”

---

<sup>35</sup> [2001] 1 All ER 481

[106] According to their Lordships in **Johnson v Gore Wood**:

“Thus the abuse question need not involve the reopening of a matter already decided in proceedings between the parties, as where a party is estopped in law from relitigating a cause of action or an issue already decided in earlier proceedings, but as Somervell LJ said in *Greenlough v Mullard* [1947] 2 All ER at 257 may cover

“issues or facts which are so clearly part of the subject matter of the litigation and so clearly could have been raised that it would be an abuse of process of the court to allow a new proceeding to be started in respect of them”

[107] Their Lordships held, at paragraph 19 of the judgment in **Johnson v Gore Wood**:

“But *Henderson v Henderson* abuse of process, as now understood, although separate and distinct from cause of action estoppel and issue estoppel, has much in common with them. The underlying public interest is the same: that there should be finality in litigation and that a party should not be twice vexed in the same matter. This public interest is reinforced by the current emphasis of efficiency and economy in the conduct of litigation, in the interest of the parties and the public as a whole. The bringing of a claim or the raising of a defence in later proceedings may, without more, amount to abuse if the court is satisfied (the onus being on the party alleging the abuse) that the claim or defence should have been raised in the earlier proceedings if it was to be raised at all. I would not accept that it is necessary, before abuse can be found, to identify any additional element such as collateral attack on a previous decision or some dishonesty, but where those elements are present the later proceedings will be much more obviously abusive, and there will rarely be a finding of abuse unless the later proceedings involves what the court regards as unjust harassment of a party. It is, however, wrong to hold that because a matter could have been raised in earlier proceedings it should have been, so as to render the raising of it in later proceedings necessarily abusive.”

[108] The court, in adopting the approach set out in **Johnson v Gore Wood**, holds the view that Mr. Wallbank’s submissions hold considerable weight. Indeed, the issues of corporate governance were indeed canvassed in Ms. Webster’s defence and counterclaim in the arbitration, and held by the Arbitrator to be outside the scope of the arbitration proceedings. This clearly was the reason why these issues were not canvassed. It appears to the court that certain specific acts of corporate governance were indeed raised in the arbitration. However, the arbitration and the Arbitration Award did not deal with the issue of corporate governance insofar as

the same related to issues of oppression, unfairness or unfair prejudice. The Arbitrator made absolutely no findings in relation thereto. Therefore, no question of a collateral attack can arise.

[109] In the circumstances, the court is of the view that Mr. Dyrud, to some extent, cannot avail himself by the application of the principles set out in either **Henderson and Henderson** or **Johnson v Gore Wood**. The court finds that it would be impossible, in the circumstances, to strike out Ms. Webster's claim in its entirety, given the findings that the court has made in relation to the arbitration proceedings and the intended claim for oppression and unfair prejudice.

[110] Mr. Wallbank relied on the decision in **Etoile Commerciale SA v Owens Bank Ltd.**<sup>36</sup> to buttress his argument that the principle of res judicata does not apply to the present proceedings since Ms. Webster was not seeking to relitigate issues that had conclusively been determined in the arbitration proceedings. Moreover, although Ms. Webster had attempted to raise these issues in the arbitration, not only did Mr. Dyrud object to them being raised but the Arbitrator agreed with Mr. Dyrud that the issues raised by Ms. Webster were outside the scope of the arbitration.

[111] Therefore, it cannot be said that these issues had been specifically and conclusively determined on their merits in earlier proceedings between the same parties.

[112] In the premises, the court is of the view that Ms. Webster is entitled to bring a claim seeking relief pursuant to section 268 of the Companies Act. The court has also taken the view that the ambit of the arbitration proceedings was confined to resolving disputes arising from the contractual nature of the relationship between the parties as it existed within its respective corporate context.

---

<sup>36</sup> (1992) 42 WIR 128

- [113] The court has taken its guidance from the decision of the Court of Appeal of the Eastern Caribbean Supreme Court ('Court of Appeal') in the case of **Citco Global Custody NV v Y2K Finance Inc.**<sup>37</sup> In **Citco Global**, the claimant had brought a claim for unfair prejudice under section 1841 of the BVI Business Companies Act. The claimant had invested money in a hedge fund with the respondent using certain entities as nominees. The claimant alleged that the representatives of the fund had depleted the net asset value of the fund by acting in breach of its equitable obligations in good faith. The pleadings alleged that the depletion occurred because representatives of the fund had allowed certain redemptions of shares which were not in accordance with the fund's Memorandum and Articles of Association. The relief sought by the claimants included in the prayer that the court order the repayment of all sums withdrawn from the fund in breach of the Memorandum and Articles of Association.
- [114] The fund made an application to the court for the claim to be struck out. One of the grounds for the strike out application was that the claim disclosed no complaint of unfair prejudice or ground for relief, and was in conflict with the rule against reflective loss. In determining the application, the learned judge applied principles applicable to a summary judgment application under CPR 15.2 and made factual findings from affidavit evidence adduced by the claimants instead of assuming, as the law required, that the facts pleaded were true; and thereafter, identifying any pleaded inferences from those facts before striking out the statement of case. The learned judge concluded that the pleadings did not disclose reasonable grounds for bringing the claim; and the relief claimed for reflective loss would be struck out. The judge ordered the claim be struck out in its entirety.
- [115] On appeal, applying **Morgan Crucible Co. Plc v Hill Samuel & Co Ltd [1991] Ch 295** and **Swain v Hillman and another [2001] 1 All ER 91**, it was held that the application to strike out was obviously an application under CPR 26.3(1)(b) and the learned judge would be obliged to assume that the facts alleged in the statement of claim were true and she would not be entitled to make use of the

---

<sup>37</sup> HCVAP 2008/022 (TVI) October 19, 2009

powers contained in CPR 15.2 in the absence of an application for summary judgment. The summary judgment test – whether the claimants had any real prospect of succeeding on the claim - was not an option in considering the respondent's application to strike out the claim.

- [116] The Court of Appeal also held, that an accurate summary of the case for the claimants as pleaded was that by making certain redemptions in breach of its Memorandum and Articles of Association, the respondent's actions were unfairly prejudicial to the interest of the appellant, whose interest for these purposes included the interest of the nominating company on whose behalf it held the shares in the fund; and had the judge applied the correct principles in considering the application, she would have concluded that the appellant and the nominating company had pleaded reasonable grounds for bringing the claim.
- [117] The Court of Appeal also held, following the decision in **Atlas Ltd and others v Brightview and others [2004] BCC 542 at paras. 58 – 63**, that having regard to the law of reflective loss and the relief prescribed in section 184(2)(a) to (h) of the BVI Business Companies Act, any decision of the court as to whether to grant relief depended on the view that a court will take of the appellant's case in light of the pleaded facts, the evidence and law; and the learned judge therefore acted prematurely and unreasonably in striking out the prayer for repayment of the sums withdrawn from the fund.
- [118] The case of **Etoile Commerciale SA v Owens Bank Ltd**<sup>38</sup> cited by Mr. Wallbank is clearly distinguishable from the present case. It cannot be said that the claim which Ms. Webster now intends to raise in the present proceedings had been conclusively determined on the merits by the Arbitrator in proceedings between the same parties.

---

<sup>38</sup> (1992) 42 WIR 128

- [119] On the other hand, there are some aspects of Ms. Webster's claim that run afoul of the principle of *res judicata*. In the circumstances, the court will apply its case management powers to strike out those offending portions of the claim and statement of claim.
- [120] The court has considered the question of whether the arbitrator had made conclusive findings in relation to issues now raised by Ms. Webster. Therefore, the issue is whether Ms. Webster is estopped from raising these issues afresh.
- [121] The court rejects Ms. Webster's assertions that these matters were included in the claim to merely set the historical background to the present proceedings. It appears that Ms. Webster's reliance on these matters in support of the present claim would inevitably place the court hearing the substantive matter in the position of having to adjudicate on these matters afresh. The court does not accept that these are matters underscoring the chronology of past events. Ms. Webster appears to be making factual and legal assertions upon matters already decided in the arbitration proceedings.
- [122] The other complaint arises within the context of section 63 of the Companies Act which appears to be Ms. Webster's allegation with respect to the Resolutions passed by Mr. Dyrud. Section 63 of the Companies Act provides:
- "(1) Unless the articles, a by-law, or any unanimous shareholder agreement otherwise provides, the directors of a company may by resolution make, amend, or repeal any by-laws for the regulation of the business or affairs of the company.
  - (2) The directors of a company shall submit a by-law, or any amendment or repeal of a by-law made under subsection (1) to the shareholders of the company at the next meeting of shareholders after the making, amendment or repeal of the by-law, and the shareholders may, by ordinary resolution, confirm, amend or reject the by-law, amendment or repeal.
  - (3) A by-law, or any amendment or repeal of a by-law, is effective from the date of the resolution of the directors making, amending or repealing the by-law until—
    - (a) the by-law, amendment or repeal is confirmed, amended or rejected by the shareholders under subsection (2); or
    - (b) the by-law, amendment or repeal ceases to be effective under subsection (4);

and, if the by-law, amendment or repeal is confirmed or amended by the shareholders, it continues in effect in the form in which it was confirmed or amended.

(4) When a by-law, or an amendment or repeal of a by-law is not submitted to the shareholders as required by subsection (2), or is rejected by the shareholders, the by-law, amendment or repeal ceases to be effective, and no subsequent resolution of the directors to make, amend or repeal a by-law having substantially the same purpose or effect is effective until the resolution is confirmed, with or without amendment, by the shareholders.

(5) A shareholder who is entitled to vote at an annual meeting of shareholders may make a proposal to make, amend or repeal a by-law.

[123] Therefore, a reading of section 63 of the Companies Act makes it plain that Ms. Webster is entitled to seek relief, as a member of FATCL, if it is that she alleges that the provisions of section 63 have not been complied with or have not been properly utilized by the directorship of FATCL in a manner that operates oppressively, prejudicially and unfairly towards her. In any event, it cannot be said that this was a matter canvassed in the arbitration proceedings.

[124] However, what Ms. Webster is not entitled to do in the present claim is to rely on what had already been decided by the Arbitrator as matters of evidence that conflict with or contradicts findings and decisions of the Arbitrator. The court observes that she has done this in several instances as appears in the claim form and statement of claim. The court does not accept that these instances can merely be seen, as Mr. Wallbank suggests, as setting the stage or the historical background to the claim. The court will identify those portions of the pleadings that it considers are likely to create difficulty.

### **Summary Judgment**

[125] A defendant may apply to the court for summary judgment against a claimant for the claim or any part of the claim or any issue in the claim against them to be dismissed on the basis of the evidence as opposed to striking out on technical grounds as contemplated by the court's case management powers under CPR 26.

- [126] In the present case, the test to be applied is whether the claimant has no real prospect of succeeding on the claim or issue.
- [127] The court understands Mr. Dyrud's position to be, that this is a case fit for summary judgment, since, if the issue of res judicata is resolved in his favour, then clearly there would be no need for a trial. In addition, if part or parts of the claim were struck out he would still be entitled to summary judgment on the basis that the claim would have no reasonable prospect of success.
- [128] On the other hand, the court has to consider whether on the evidence before the court at the time of the application, whether there are issues which remain unresolved and oral evidence may affect the court's assessment of the facts, then the matter should proceed to trial.<sup>39</sup>
- [129] In **Comodo Holdings Limited v Renaissance Ventures Limited**<sup>40</sup>, the Court of Appeal held that CPR 15.2 provides that summary judgment is appropriate where the claim or defence and counterclaim has no real prospect of success. While it is recognized that on a summary judgment application the court is entitled to go behind the evidence which is incredible, the court will also disregard fanciful claims and defences. A claim of defence may be fanciful where it is entirely without substance, or where it is clear beyond question that the statement of case is contradicted by all documents or other material on which it is based.
- [130] In **Comodo Holdings Limited**, the Court of Appeal also held that:
- "The summary judgment procedure is unsuitable for claims or issues which would necessitate the court embarking on a mini-trial or to resolve issues, which ought to be properly tried. Summary judgment will almost always be inappropriate where there are allegations of reprehensible conduct. Similarly, complex claims, cases relying on complex facts and issued involving questions of law and fact where the law is not simple, are likely to be inappropriate for summary judgment."

---

<sup>39</sup> See: Kathleen Hasang v Kendal Bhaggy, TTVc 2009-02286 (Nov 2010)

<sup>40</sup> BVIHCMAP 2014/0032 May 3, 2016

[131] The court, when exercising the power to strike out, will have regard to the overriding objective and its general powers of management. The court has power to strike out only part of a statement of case or direct that a party shall have permission to amend.

### **Conclusion**

[132] In the circumstances, Mr. Dyrud's application for summary judgment pursuant to CPR 15.2 is dismissed. This matter was originally on the Master's list. However, unavoidably, it came before this Court. It appears that during argument the court did not hear the parties on the issue of costs. Therefore, the court will make an order to deal with the issue of costs.

### **Order**

[133] The court's order is as follows:

1. The defendant's application for summary judgment is dismissed.
2. The court in the exercise of its case management powers has determined that the following portions of the prayer to the claimant's claim form should be struck out, namely, paragraphs 4 – 9.
3. The court has also determined that the following parts of the Respondent's statement of claim be struck out, namely, paragraphs 71 – 93, 94 – 105, and 106 – 112.
4. The following paragraphs of the prayer in the statement of claim are struck out, namely, paragraphs 4 – 9.
5. The claimant is granted leave to amend her claim form and statement of case within 14 days of the date of this order.
6. The Respondent shall file and serve an amended claim form and statement of claim within 14 days of the date of this order.

7. The defendants shall file and serve their defence within 14 days after service of the Respondent's amended claim form and statement of case.
8. The matter is set down for case management before the Master on a date to be fixed by the Court Office.
9. Costs of the application to be is awarded to Ms. Webster to be assessed in accordance with CPR 65.11 and 65.12 within 21 days of the date of this order unless otherwise agreed.

**Shawn Innocent**  
High Court Judge

**By the Court**

**Registrar**