

**EASTERN CARIBBEAN SUPREME COURT
TERRITORY OF THE VIRGIN ISLANDS
COMMERICAL DIVISION**

IN THE HIGH COURT OF JUSTICE

CLAIM NO. BVI HC (COM) 2014/0171

IN THE MATTER OF DRAGON CAPITAL GROUP LIMITED

**AND IN THE MATTER OF THE BVI BUSINESS COMPANIES ACT, 2004 (AS
AMENDED)**

BETWEEN

**[1] JOHN SHRIMPTON
[2] PITCAIRN LIMITED**

Respondents/Claimants

AND

**[1] DOMINIC SCRIVEN
[2] ALEXANDER PASIKOWSKI**

Applicants/Defendants

**[3] INTERNATIONAL FINANCE CORPORATION
[4] SOCIETE DE PROMOTION ET PARTICIPATION
POUR LA COOPERATION ECONOMIQUE
[5] DRAGON CAPITAL GROUP LIMITED**

Defendants

Appearances:

Robin Hollington QC, Adrian Pay and Jonathan Addo on behalf of the Claimants
Stephen Atherton QC and Oliver Clifton on behalf of the Fifth Defendant

2016: June 14; 15

JUDGMENT

- [1] These proceedings comprise a minority shareholder's claim under s184I of the Business Companies Act 2004. The background to the proceedings appears from a Judgment of Justice Sher QC delivered earlier this month in relation to a previous strike-out application which it is unnecessary to repeat.
- [2] This present Judgment concerns an application on behalf of the 5th Defendant (the Company). The application falls into two main parts.
- [3] First, there is an application for a declaration that the Company "*...was at all times, and continues to be, a substantive defendant in these Proceedings and is and was entitled to participate in the Proceedings as a substantive defendant...*"
- [4] Second, there is an application for further declarations that the directors of the Company (i) were permitted to cause the Company to incur costs incurred by it to date in defending the Proceedings and (ii) are permitted to cause the Company to incur all future costs in defending the Proceedings including (without limitation) the costs of providing disclosure in the Proceedings.
- [5] It is important to note that the declarations sought relate to the participation and costs of the Company both in the past and in the future.
- [6] In support of the applications, Mr Atherton QC relied upon a number of matters which were summarised in his skeleton arguments as follows:
- (1) The Claimants were seeking substantive relief against the Company, including:

- (a) An order that the Company purchase the Claimants' shares at a fair value;
 - (b) That the price to be paid for such shares was to be satisfied (in whole or in part) by the distribution, *in specie*, of the assets of the Company to the Claimants;
 - (c) Necessary further orders, accounts, inquiries and directions; and
 - (d) Damages to be assessed together with interest;
- (2) In the circumstances, the Company and its directors will need to comply with ss.56 to 63 of the BVI Business Companies Act, 2004;
- (3) A large proportion of shareholders (who hold some 13.7% of the total shares issued by the Company, excluding treasury shares) are not parties to and are not otherwise represented in these proceedings, yet they have interests that are affected by and need to be protected or (at the very least) borne in mind in the course of these proceedings;
- (4) Six out of the eight current members of the board of directors of the Company are not the nominees of any of the Claimants or the other Defendants and, moreover, are independent of the Claimants and the other Defendants;
- (5) The Company is a party to the Shareholders' Agreement and allegations are made in the Statement of Claim that the Company has acted (in certain respects) in breach of the Shareholders' Agreement;
- (6) Allegations have been made that the Company has acted in breach of its own Operating Guidelines and departed from policies and practices it has

previously and consistently adopted and adhered to as regards the payment of remuneration, bonuses and dividends;

- (7) It is alleged that the Company constituted a quasi-partnership, whereas in fact the Company avers that it was incorporated as and has (at all material times) remained a limited liability company, the business and affairs of which were and are conducted under the supervision and control of its directors and by reference to its Memorandum of Incorporation, its Articles of Association (“Articles”), the Shareholders’ Agreement, its Operating Guidelines and the general law and not by reference to, or in any way fettered by, either the Co-founding Partner Understanding and/or the Understandings (as defined in the Amended Statement of Claim) or any other agreements, arrangements or understandings collateral to or outside of its Articles, the Shareholders’ Agreement or its Operating Guidelines;
- (8) Allegations are made in the Amended Statement of Claim that the Company has participated in and/or acquiesced in the unfairly prejudicial conduct alleged in the Statement of Claim including the exclusion of the First Claimant from participation in the management of the Company and financial benefits generated by the Company;
- (9) Allegations are made that call into question or directly affect the structure of its management, the membership of the Company’s board of directors and its statutory obligations (under the BVI Business Companies Act, 2004) as they relate to and affect the maintenance of its register of directors; and

(10) Allegations are made against the Company to the effect that it participated in the alleged frustration of the Claimants' alleged efforts to mitigate their alleged losses.

[7] It is fair to say that certain of these matters are historic and are no longer "live" in the proceedings going forward – in particular, the Claimants have now abandoned the original claim *in specie* as well as any damages claim against the Company. As to the remaining extant allegations, Mr Hollington QC submitted that this was in substance a dispute between the shareholders rather than between the Claimants and the Company itself; that the inclusion of the Company as a Defendant is only necessary as a matter of form and practice and because of the relief ultimately sought; and that the Company is, in truth, only a "nominal" Defendant. There has been much correspondence between the parties on this topic.

[8] I am not sure what is meant by the term "nominal". Certainly, the Company is a "named" Defendant. However, if and to the extent that the term "nominal" is intended to mean that the Company has no active role to play in the proceedings, that must depend upon the pleaded allegations. Here, it seems plain that at least some of the allegations in the Amended Statement of Claim are – and remain - directed against the Company itself or may otherwise affect the Company; and for that reason, I readily accept that the Company may have an interest to participate in the present proceedings to at least some extent. I deal with this aspect further below.

[9] On behalf of the Claimants, Mr Hollington QC accepted that the Court had jurisdiction to make the declarations sought by the Claimants. There was some debate before me as to whether such jurisdiction was statutory or derived from the

Court's inherent jurisdiction. However, in light of Mr Hollington QC's concession, it is unnecessary to consider this further.

[10] As appears from his skeleton argument, it was Mr Hollington QC's submission that there is a "*chorus of disapproval*" in the authorities of the expenditure of company money on active participation in proceedings of the present kind; that save in very exceptional circumstances, the company should, as has been emphasised time and time again in the authorities, take a neutral position in the proceedings and participate solely to give disclosure; that in certain circumstances, the company may properly make submissions after Judgment on the question of relief; that in very exceptional circumstances, it is conceivable that the court may, as sought in the present application by the Company, approve in advance proposed active participation by a company on one or more particular defined issues which peculiarly concern it and where separate representation on such issues by the company is shown by "*cogent evidence*" of "*the most compelling circumstances*" to be desirable, as opposed to issues which concern the shareholder parties or where separate representation on such issues by the Company is not so shown to be desirable.

[11] But, submitted Mr Hollington QC, such approval in advance of the trial is of its very nature extremely rare and in fact unprecedented. Because the general rule makes any improper participation by the company a misfeasance (i.e. a breach of duty by the directors who are involved in that participation), it would be wholly exceptional for a court to be able to form the view prior to trial that the proposed participation in question would not be a misfeasance. And there would be no point in the court approving retrospectively, as is sought in the present application, past participation by the Company, which is in any event an issue raised as a ground of unfair prejudice which falls to be determined at trial, and which could have formed the

subject-matter of an earlier application. But the Company should not in any event take a partisan position on any of the issues as between the shareholders.

[12] Be all this as it may, it is important to note that the Claimants do not (at least at this stage) themselves seek any injunction or order of the Court restraining the Company from participating in these proceedings.

[13] In support of his general submissions, Mr Hollington QC relied in particular on *Re A Company* [1994] 2 BCLC 146 where the relief sought by the petitioner in that case was very similar to that sought by the Claimants in the present case – see p149c-g. In that case, Lindsay J. carried out a full review of the earlier authorities and summarised the relevant principles at pp155h-156c:

'Firstly, that there may be cases (although it is unlikely nowadays when wide objects clauses are the norm) where a company's active participation in or payment of its own costs in respect of active participation in a sec. 459 petition as to its own affairs is ultra vires in the strict sense.

Secondly, leaving aside that possible class, there is no rule that necessarily and in all cases such active participation and such expenditure is improper.

Thirdly, that the test of whether such participation and expenditure is proper is whether it is necessary or expedient in the interests of the company as a whole (to borrow from Harman J in ex parte Johnson).

*Fourthly, that in considering that test the court's starting point is a sort of rebuttable distaste for such participation and expenditure, initial scepticism as to its necessity or expediency. **The chorus of disapproval in the cases puts a heavy onus on a company** which has actively participated or has so incurred costs to satisfy the court with evidence of the necessity or expedience in the particular case. What will be necessary to discharge that onus will obviously vary greatly from case to case.*

*Fifthly, if a company seeks approval by the court of such participation or expenditure in advance then, in the absence of **the most compelling circumstances proven by cogent evidence**, such advance approval is very unlikely.*

*Mr Moore would have me add that such participation and expenditure should never be approved in advance, or at all, unless there is a clear demonstrable and unchallenged independence between the company and the protagonists under sec. 459. **Obviously, where that independence is present the task of satisfying the tests I have described is likely to be easier than in those cases where it is absent, but I am reluctant to specify that independence as either a sufficient or a necessary condition.** It is not sufficient because even truly independent board members can be swayed by partisan or other considerations they should not have entertained. It is not necessary because even where that independence is lacking, directors, for all their lack of independence, could arrive at a true view of what was necessary or expedient in the interests of the company as a whole and might even arrive at that view for the right reasons.*

*Finally on the law, I comment that I do not see this analysis as opening floodgates such that the courts will be swamped with applications of the kind before me. **In the vast majority of sec. 459 petitions there will, I think, be no real prospect of satisfying the tests I have mentioned and applications of the kind before me will be so hopeless as not even to be embarked upon.***’ (emphasis in bold added).

- [14] In the event, Lindsay J. refused to grant the declarations sought in that case. Although the learned Judge made plain that he was not suggesting that a Court might not, in appropriate circumstances grant such declarations, it is noteworthy that neither Counsel was able to refer me to any case in England where the Court had made orders of the kind now sought by the Company. However, Mr Atherton QC did refer me to a number of authorities from other jurisdictions which he submitted were relevant and supported the Company’s applications. As to these, my general observations are as follows:

- (a) *Re D G Brims* (1995) ACSR 559 at 591-2. As submitted by Mr Hollington QC, it seems to me that this case is of little, if any, assistance to the Company and, if anything, supports the Claimants' case. In particular, it seems entirely consistent with *Re A Company* confirming the general position viz. the company is not entitled to defend proceedings on behalf of the majority shareholders although it is entitled to expend money on discovery and may be entitled to expend money to argue the question of relief.
- (b) *Yuanta Securities Asia Financial Services Ltd v Core Pacific Investment Holdings (BVI) Ltd & Ors* [2003] HKCFI 963. There is much in that Judgment which is of interest – in particular, the general observations of the Court (e.g at paragraph 47) that it will ordinarily be inappropriate for a company which is involved in this type of case in respect of the conduct of its affairs by a majority shareholder whose actions in that regard are under attack by a petitioner, to participate actively in the proceedings regardless of the source of funding for such participation. However, it is important to note that the application in that case was by the petitioner for an injunction or order to restrain the company from participating in the proceedings (which is, as I have already noted, not the application now before this Court) and that the Court granted the injunction subject to what might be described as a “liberty to apply”: see para 58. Importantly, there were no claims in that case against the company itself, a factor which was obviously considered important by the Judge in deciding to grant the injunction: see eg para 47. At first blush, it might be thought that *Yuanta* does not support the Company's position here. However, Mr Atherton submitted that it did indeed support the Company's position because, unlike *Yuanta*, there were, in the present case, allegations made against

the Company itself. I readily accept that such fact might be relevant in persuading the Court to refuse to grant an injunction restraining the Company from participating in the present position. But, at the risk of repetition, there is no application for such injunction or order in the present case – at least at this stage. However, in my view, the fact the Court might refuse to grant such injunction or order is, of itself, no necessary justification for granting the Company the positive relief it now seeks in the present application.

- (c) *Power v Ekstein* [2010] NSCWC 137 at [119-120]. Again, it is important to bear in mind that this case concerned an application by the Plaintiffs for an order (i.e. an injunction) to restrain the company from participating in the proceedings in that case – an application which is not being sought by the Claimants in the present case. Austin J. referred to and expressly followed *Re A Company*: see, in particular, paras 111-115. In the event, the Court made an interlocutory order in effect restraining certain of those in control of the relevant companies from permitting such companies from taking certain steps in the proceedings and from applying any of the funds of such companies to the defence or conduct of the proceedings – subject to certain exceptions: see para 121. Mr Atherton QC submitted that such “exceptions” necessarily implied that the Court was giving its advance “approval” to the participation of the company and the expenditure of the company’s funds in relation thereto. I do not accept that submission. In my view, the Court was, in effect, simply limiting the scope of the restraining order; and it is difficult, if not impossible, to extract from such “carve-out” any approval by the Court of the kind suggested by Mr Atherton QC. However, even if that is wrong, whether or not the Court should here grant the declarations sought must depend upon the particular facts in the

present case. For his part, Mr Hollington QC submitted that this case is consistent with the point already referred to viz. that the company may appear on the question of relief; and that it is not authority for the proposition that the mere fact that an order is sought for the purchase of shares by the company – an entirely conventional order in a shareholders' dispute - justifies the company expending money or adopting a partisan position on matters which comprise the dispute between the shareholders. Such a proposition would, submitted Mr Hollington QC, be wholly inconsistent with the English authorities and would justify active or partisan participation in any shareholders' dispute where an order that the company purchase the shares or indeed in any application for a just and equitable winding-up. At the end of the day, I do not consider that this case is of much, if any, assistance to the present applications.

- (d) *Trojan Equity Limited v CMI Limited* (2011) 87 ACSR 144. Again, this was a case involving an application for an injunction. The main issue in *Trojan* was not whether to authorise any such expenditure, but rather whether or not to restrain it. It is true that the injunction was refused on the basis that the company should be permitted to participate in the proceedings: see paragraph [40]. However, there is nothing in the case to the effect that the Court should, in effect, give its approval in advance to the expenditure of Company funds. In any event, as submitted by Mr Hollington QC, *Trojan* was an exceptional case. It was a case of an unfair prejudice claim in respect of a listed company, where the members holding 46% of the ordinary shares and members holding 80.5% of class A shares were not parties. Even putting on one side the Claimant's allegation here that the Company was a quasi-partnership, the nature of the company in *Trojan* would seem to bear no relation to the closely and privately held Company

in the present case. In *Trojan*, McMurdo J clearly approached the matter before him as one turning on the listed status of the company: “*This is not a case of the kind in Pickering v Stephenson*” (at [27]). As submitted by Mr Hollington QC, he did not purport to depart from the general principles already expounded but rather pointed to the specific instances of discrete issues which peculiarly affected the company, given its listed status: [28].

(e) *Annuity & Life Re & Or v Full Apex (Holdings) Ltd & Ors* [2012] SC (Bda) 73 Com. So far as I am aware, this is the only decision where any Court has made a positive order in favour of a company permitting it to take an active part in the proceedings – see para 18. To that extent, I accept that it supports the first part of the Company’s application in the present case. However, I do not know the precise terms of the order actually made in that case. Although the Court appears to have granted the company permission to participate on a “narrow” basis, it does not appear that the Court was granting approval in advance to the expenditure of the Company’s funds.

[15] Here, it is in my view important to distinguish between the two main limbs of the Company’s application. In the passage quoted above from the Judgment of Lindsay J in *Re A Company*, the learned Judge deals compendiously with both participation and expenditure. However, it is plain from a later part of the same Judgment that these two aspects need to be considered separately. As in the present case, the company in that case sought approval in advance for liberty to participate in those proceedings (including by way of service of pleadings, adducing oral evidence and representation by Counsel at the trial) and that the directors of the Company be at liberty to pay for the costs of such participation out of the Company’s funds on the indemnity basis.

[16] In his Judgment, Lindsay J. deals specifically with the former i.e. the application for liberty to participate at p158d-g. In particular, at p158f, he states his conclusion which was in effect that the company did not need liberty actively to participate for the reasons there stated. In my view, the same is true in the present case. Here, the Company is, of course, a named Defendant and, as I have already stated, given the specific allegations in the Amended Statement of Claim, it seems to me plain that Company does or at least may have an interest to participate in the present proceedings to at least some extent. In that regard and at the risk of endless repetition, I emphasise again that there is no current application by the Claimants to restrain the Company from participating in the present proceedings. Of course, the extent of such participation is subject to the Court's ordinary powers in respect of case management. That is a matter that the Court will no doubt have to consider in the future and nothing in this Judgment limits or is intended to limit or otherwise circumscribe the exercise of such powers in the future. However, the Company does not, in my view, need the Court's approval to participate; and, for that reason, I decline to grant the first declaration sought.

[17] The other declarations sought – relating to the costs of such participation – raise more fundamental issues. In effect, the Company is seeking the approval of the Court with regard to the historic and prospective use of the Company's funds in defending these proceedings. In my view, it would be inappropriate for the Court *at this stage* in effect to approve either retrospectively or in advance in whole or in part such participation or the costs which have been or may be incurred by the Company in participating in these proceedings. The crucial point in my view is similar to the one made by Lindsay J in *Re A Company* at p158b-d. At this stage and given the nature of the underlying disputes between the various the shareholders, it is quite impossible for the Court to take any view as to whether the

historic and proposed participation by the Company has been or would be a misfeasance.

[18] In support of his case, Mr Atherton QC submitted that the Court could be satisfied here that the actions of the Company in participating in these proceedings has been and would continue to be entirely “proper” in particular because the Company had established an “independent” litigation committee which has, in effect, controlled and would continue to control such participation and related expenditure. On that basis, he submitted that the Court can and should be satisfied that the Company’s funds in the course of such participation have not been and will not be “misspent”. However, as it seems to me, the litigation committee can only act on information as may be provided by others – and the Court has no control on such information. Further, as emphasised by Mr Hollington QC, the members of the litigation committee include individuals who are identified in the Amended Statement of Claim as alleged “wrongdoers” – although it is fair to say that they are not named defendants and no specific relief is sought against them.

[19] Mr Atherton QC further submitted that the Company must be entitled to use the Company’s funds if only to protect the interests of the shareholders who are, on any view, not involved in the current dispute. I confess that I was initially much impressed by that argument. However, I was told that that group of shareholders is very small indeed and there is no direct evidence as to what their position might be. In any event, the vast proportion of any expenditure would inevitably serve to benefit the shareholders who are involved in the current dispute and, for that reason, it seems to me quite wrong that I should, in effect, give the Court’s blessing at this stage to the historic and prospective use of the Company’s funds for such purpose by granting the declarations sought.

[20] Ultimately, it will be a matter for the trial Judge to determine the incidence of costs. At that stage, he or she will be in a much better position to deal with the question of costs; and I see no good or sufficient reason to fetter the broad discretion as to costs which the trial judge should have.

[21] In reaching that conclusion, I bear in mind not only the general approach to cases of this kind as appears from the authorities but also the particular circumstances of the present case and the issues arising on the pleadings. For all these reasons, I decline to grant the other declarations sought.

Sir Bernard Eder QC
Commercial Court Judge (Ag)
15 June 2016