

BRITISH VIRGIN ISLANDS
EASTERN CARIBBEAN SUPREME COURT
IN THE HIGH COURT OF JUSTICE
COMMERCIAL DIVISION

CLAIM NO: BVIHC (COM) 79 of 2011

BETWEEN:

NIGEL GRAY

Claimant/Respondent

and

(1) ALLAN LEDDRA

First Defendant/Applicant

(2) PRO-FLEX PACKAGING CO LIMITED

Second Defendant

Appearances: Mr Ben Mays for the Applicant/first Defendant
Mr Scott Cruickshank for the Respondent/Claimant

JUDGMENT

[2012: 27 March, 4 April]

(Section 184I of the Business Companies Act, 2004 – claimant a minority shareholder in second defendant company – claimant alleging quasi-partnership - claimant alleging failure to pay dividends – claimant alleging payment of bonuses to first Defendant and others to the exclusion of the claimant – claimant alleging that ‘other benefits’ paid from company to first defendant – claimant asking that first defendant and the company pay him what he would have received had he been permitted to participate in the bonus/other benefit scheme from which he was excluded, alternatively that they pay him an amount equal to a reasonable dividend – claimant also seeking declaration that property acquired by the first defendant with company funds is held by him on trust for the company and orders that the first defendant disgorge all assets so acquired – claimant seeking various orders regulating future administration of the company – whether objectionable to include derivative claim against first defendant in proceedings for unfair prejudice under section 184I – whether claim should be struck out as against first defendant – whether first defendant entitled to summary judgment – **re Chime Corporation** (2004 7 HKCFAR 546) considered)

[1] **Bannister J [ag]:** This is an application by the first defendant ('Mr Leddra') that the claim made against him by the claimant ('Mr Gray') in these proceedings be struck out; alternatively that Mr

Leddra be granted summary judgment against Mr Gray. The proceedings are brought by Mr Gray against Mr Leddra and a company called Pro-Flex Packaging Co Limited ('the Company') under section 184I of the Business Companies Act, 2004 ('section 184I', 'the Act'). The statement of claim is a meandering narrative which fails to comply with generally accepted principles of pleading and makes the identification of the issues difficult, but Mr Leddra does not complain of that on this application and has managed to plead a defence. The Company has separately pleaded its own defence, which does contain a complaint about the manner in which Mr Gray's case is pleaded, but it has not joined in Mr Leddra's application and played no part in the hearing.

The complaint

[2] The Company was incorporated here on 23 July 2004. It has an issued share capital of US\$50,000. Mr Leddra holds 60% of the Company's issued shares. Mr Gray holds 15%. There are five other shareholders about whom Mr Gray makes no complaint. His complaints, in the order in which they occur in the statement of claim and so far as they can be discerned, appear to be:

- (1) that the Company's financial statements for 2005 exist in different and inconsistent versions, such as to warrant a detailed explanation and consideration whether there was 'potential' fraud on the part of Mr Leddra in presenting misleading accounts to a third party and whether there has been misuse of the Company's assets by Mr Leddra;
- (2) that the Company's financial statements for 2006 may disclose that Mr Leddra has been in breach of his fiduciary duty as a director of the Company;
- (3) that Mr Gray has received no dividend for 2005 and none since 2006, whereas all other shareholders have received substantial benefits from the Company;
- (4) that legitimate requests by Mr Gray for information about the Company's affairs have not been answered or not adequately answered;
- (5) that a director has been appointed without Mr Gray's knowledge or approval in disregard of Mr Gray's rights as a shareholder;
- (6) that one of the directors has a conflict of interest in relation to an associated company;
- (7) that it is to be inferred that Mr Leddra is running the Company for his own benefit in disregard of the rights of Mr Gray;
- (8) that Mr Leddra has kept a 15% holding purchased from the widow of a deceased member with the Company's money largely for himself; and
- (9) that no accurate and detailed financial statements have been produced between 2005 and 2010.

[3] All of this is said to mean that the affairs of the Company have been or are likely to be conducted in a manner unfairly prejudicial to Mr Gray. In particular, the failure to pay dividends while conferring benefits on the other shareholders; the failure to produce accurate and detailed financial statements; and the appointment of the additional director are said to be unfairly prejudicial to Mr Gray.

[4] The prayer seeks the following relief:

- (1) inquiries into: what sums have been paid by way of bonus or other benefit and to whom (with special reference to Mr Leddra);
- (2) a declaration that any assets in Mr Leddra's name acquired with Company money are held by him on trust for the Company;
- (3) a declaration that the additional director was not properly appointed and an order that he cease to act;
- (4) an order that Mr Leddra and the Company pay Mr Gray a sum equal to what he would have received had he participated in the distribution of bonuses or alternatively a sum representing a reasonable dividend had dividends been paid instead of bonuses;
- (5) an order that the Company in future pays dividends instead of bonuses;
- (6) an order that Mr Leddra repay all sums and other benefits found on the taking of the inquiries to have been received by him, other than assets held on trust for the Company, in respect of which an order is sought that Mr Leddra transfer such assets to the Company;
- (7) an order for the preparation by the Company of audited financial statements and for the provision of such statements to Mr Gray; and
- (8) an order amending the Company's articles of association to provide for a five member board, of which two are to be appointed by each of Mr Gray and Mr Leddra.

[5] It will be seen from the above (a) that Mr Gray never makes a direct allegation of fraud or misappropriation against Mr Leddra, contenting himself instead with an allegation that it is to be inferred that he is running the company for his own benefit and in disregard of the rights of Mr Gray; (b) that he wishes to establish through Court conducted inquiries what money and other benefits have been paid to Mr Leddra by the Company and is unable to allege that any particular sums have been paid away by the Company to Mr Leddra; (c) that he never alleges that the payment of any sum by the Company to Mr Leddra was unlawful or involved a breach of duty on the part of Mr Leddra such as to ground a right of recovery; and (d) that, despite that, he seeks an order for the payment to the Company of money found due by Mr Leddra on the taking of the inquiries which he seeks.

The application

[6] Mr Mays, who has appeared for Mr Leddra on the hearing of this application, does not complain of deficiencies in Mr Gray's pleading and I ignore them for present purposes. His point is that the head of relief which I have summarised in paragraph 4(6) above is a head of relief claimable only (a) by the Company in proceedings brought for the purpose or (b) in a derivative action properly constituted and for which permission has been given under section 184C of the Act. Such permission could plainly be given as, or as part, of relief granted under section 184I. Mr Mays further submits that unless special circumstances obtain, it is wrong in principle to introduce into an unfair prejudice action, which asserts a personal claim by a shareholder, what is in truth an unauthorised derivative claim seeking to assert a right vested in the company in question.

- [7] Mr Mays relies upon **re Chime Corp. Ltd**,¹ a decision of the Court of Final Appeal of the Hong Kong Special Administrative Region, where that Court held that while the Courts of the Hong Kong SAR had jurisdiction in what is sometimes called the strict sense to entertain, within the confines of an unfair prejudice application, a claim for relief in respect of a wrong actionable at the suit of the company in question, such a claim would not ordinarily be allowed to be advanced as part of an unfair prejudice application unless (a) the claim for recovery made in the unfair prejudice proceedings corresponded precisely with the company's claim and (b) it was clear from the pleadings that quantification of the claim could be made 'conveniently' at trial.
- [8] I get very little assistance from this authority. It is unclear whether Hong Kong company law, like BVI company law now, then required the permission of the Court before a derivative claim could be brought. The fact that the point was not mentioned suggests that it did not, but I do not know if in fact that was so. Secondly, and with all appropriate humility, Lord Scott's treatment of conflicting authority is unsatisfactory. He does not convincingly explain, for example, how the decision of Hoffmann J in **In re a Company (No 005287 of 1985)**² can sit with the decision of Millett J in **Re Charnley Davies Ltd**³ and his suggested solution, that if quantum mirrors the company's claim and can conveniently be established at trial, disposes of the difficulty as a matter of pure practicality rather than of principle. The case is not cited in **Gore Browne on Companies**, presumably because now that United Kingdom company law requires permission before derivative proceedings may be brought, which was not the position at the time when the authorities upon which Mr Cruickshank, who appeared for Mr Gray, relied⁴ were decided, it is not considered to be of any relevance.
- [9] In my judgment, the position here in the BVI is clear. A derivative action requires permission under section 184C. In considering whether to grant permission, the Court here is mandated to take into account a number of important considerations.⁵ The Court may not give permission unless it is satisfied that the company itself does not intend to make the claim and that it is in the interests of *the company* that conduct of the proceedings should not be left to the company or to a majority of its board or of its members (emphasis added). These conditions are of so stringent a nature that in my judgment it is an abuse of the process to attempt to mount a derivative claim without the consent of the Court under section 184C. If that permission is granted, then it seems to me that it is a matter of case management whether the derivative claim is prosecuted as part of unfair prejudice proceedings or is tried together with them or separately, but to attempt to bring such a claim without permission is, in my judgment, an abuse.
- [10] It follows that paragraphs 1(4), 1(7)(ii) and 1(7)(iii) of the prayer in the statement of claim must be struck out. It further follows that there will be no need for the inquiries envisaged by paragraphs 1(1), 1(2) and 1(3), so that they also must be struck out.
- [11] So far as Mr Leddra is concerned personally, that leaves only paragraph 1(6) of the prayer, requiring him to pay compensation to Mr Gray for missing out on bonuses or dividends. That is

¹ (2004) 7 HKCFAR 546

² [1986] 1 WLR 281

³ [1990] BCLC 760

⁴ **In re a Company (No 005287 of 1985)** (supra); and **Lowe v Fahey** [1996] 1 BCLC 262

⁵ section 185C(2)

clearly not attendant upon any derivative claim. On the contrary, it falls squarely within the terms of section 184(2)(b). Mr Mays submits that it is not explained how Mr Leddra, rather than the Company, can be said to have any such liability. That, I think, is to miss the point. Unfair prejudice relief is not restricted to the enforcement of legal liabilities. On the contrary, it is granted precisely because strictly legal remedies are not available to the applicant shareholder. Mr Mays also submits that it is not established that, if an order compensating Mr Gray for losing out on bonuses or dividends is made, the Company will not be in a position to satisfy it. That is to prejudice the matter. The Company's defence to this aspect of the claim is to assert that all bonuses have been paid to salaried employees, who do not include Mr Gray. There is no allegation in the statement of claim that any person other than Mr Leddra has been acting unfairly in relation to Mr Gray. If, therefore, it turns out at trial that as between the several shareholder recipients of bonus and the Company their bonuses have been justified, it would be unfairly prejudicial to them that the Company should use its own funds (and thus deplete the value of their shareholdings) in order to rectify a situation which, so far as Mr Gray's pleading goes, is the fault of Mr Leddra and no other person. It might, on that basis, be considered just and equitable that he alone should compensate Mr Gray in this respect.

- [12] I should not have to make clear that in saying this I am making no assumptions against Mr Leddra or indeed in favour of anyone else. I am merely saying that I cannot see how it is possible for me to find that Mr Gray's claim against Mr Leddra for compensation under paragraph 1(6) of the prayer is an abuse or that, treating, as I must, all the allegations in the statement of claim as true,⁶ to reach the conclusion now that there is no reasonable prospect that Mr Gray will succeed at trial on his claim under paragraph 1(6) of the prayer against Mr Leddra.

Conclusion

- [13] The strike out and summary judgment applications therefore fail inasmuch as I refuse to strike out the entirety of the claim as against Mr Leddra or to give summary judgment in his favour. For the reasons given above, however, I will strike out paragraphs 1(1), 1(2), 1(3), 1(4), 1(7)(ii) and 1(7)(iii) of the prayer to the statement of claim.

Edward Bannister
Commercial Court Judge
4 April 2012

⁶ the summary judgment application adds nothing to the strike out application and does not, despite the fact that Mr Leddra has put in an affidavit on this application, involve any consideration of non-procedural fact.