COMMONWEALTH OF THE BAHAMAS
IN THE SUPREME COURT

COMMERCIAL DIVISION

2022/COM/COM/00035

IN THE MATTER of an application by **DORIS THOMPSON** for leave to institute proceedings against the Defendants pursuant to section 278(c) of the Companies Act 1992

IN THE MATTER of the Companies Act 1992
(the Act)

AND

IN THE MATTER of ABACO OUTBOARD ENGINES LTD.
(the Company)

BETWEEN

DORIS THOMPSON
(Complainant pursuant to Section 280 of the Act)
Intended Claimant

AND

STEPHEN J. ALBURY
JEFFREY ALBURY
(Sued in their capacity as Officers & Directors of the Company)
Intended Defendants

Before:	**Her Ladyship The Honourable Madam Senior Justice**
	Deborah Fraser
Appearances:	**Mr. Kahlil Parker KC Ms. Roberta Quant and Ms. Leslie Brown for the Intended Claimant**
	Mr. Jacy Whittaker for the Intended Defendants
Judgment Date:	**16 June 2023**

Striking Out – Order 18 Rule 19(1) of the Rules of the Supreme Court, 1978 – No Reasonable Cause of Action – Scandalous, Frivolous or Vexatious – Abuse of the

Court's Process – Order 15 Rule 6(2)(a) of the Rules of the Supreme Court, 1978 – Proper Party – Sections 278 and 280 of the Companies Act, 1992 – Complainant under Companies Act, 1992 – Res Judicata

JUDGMENT

1. This is an application for Striking Out brought on behalf of Mr. Stephen J. Albury and Mr. Jeffrey Albury ("**Intended Defendants**").

Background

2. Ms. Doris Thompson ("**Intended Claimant**") commenced an action against Abaco Outboard Engines Ltd ("**Company**") – CLE/GEN/00513 of 2011 for breach of contract due to the Company's failure to provide an engine the Intended Claimant purchased from it for her boat. Default Judgment of Appearance was entered against the Company on 12 April 2011. On 22 November 2013, an assessment of damages was heard before Deputy Registrar Marilyn L. Meeres (as she then was) where she ruled that the assessed total damages owing to the Intended Claimant from the Company was $26,890.75 with interest thereon at the statutory rate. Ms. Thompson entered Final Judgment against the Company on 25 November 2013.

3. Subsequently, on 29 January 2018, an Examination of the Judgment Debtor was heard by Deputy Registrar Camille Darville-Gomez (as she then was) where Mr. Stephen Albury (General Manager, Secretary and Director of the Company – "**Mr. Albury**"): (i) stated that he was aware of the $26,890.75 debt owing to the Intended Claimant; (ii) stated that the Company was in a position to satisfy the debt; and (iii) gave an undertaking on behalf of the Company to pay the debt. The Deputy Registrar read those statements back to Mr. Albury and he confirmed that they were correct. To date, despite several attempts by the Intended Claimant to enforce the judgment, the debt remains owing.

4. On 20 July 2022, the Intended Claimant filed another Writ of Summons ("**New Writ**") as well as a Summons and Affidavit requesting, *inter alia*, an order of the Court pursuant to section 278 (c) of the Companies Act, 1992 ("**Act**") and under the inherent jurisdiction of the court declaring her a fit and proper person to bring an action against the Intended Defendants.

5. The New Writ claims, *inter alia*, breaches of fiduciary duty by the Intended Defendants as well as oppression, unfair oppression and/or disregard by the Intended Defendants as against the Intended Claimant.

6. Prior to the substantive hearing, on 16 August 2022, the Intended Defendants filed an application to have the Intended Claimant's New Writ struck out.

ISSUES

7. The issue that the Court must decide is whether the new Writ ought to be struck out because: (i) it discloses no reasonable cause of action; (ii) it is scandalous, frivolous or vexatious; (iii) it is an abuse of the court's process; and (iv) improper parties are being sued.

Intended Defendants' Submissions

8. The Intended Defendants' counsel submits that the New Writ ought to be struck out because: (i) it discloses no reasonable cause of action; (ii) it is scandalous frivolous or vexatious; (iii) is an abuse of the Court's process; and (iv) improper parties are being sued. The Intended Defendants' counsel draws the Court's attention to Order 18 Rule 19(1)(a),(b) and (d) of the Rules of the Supreme Court, 1978 ("**RSC**") which provide:

> **"19. (1) The Court may at any stage of the proceedings order to be struck out or amended any pleading or the indorsement of any writ in the action, or anything in any pleading or in the indorsement, on the ground that —**
>
> **(a) it discloses no reasonable cause of action or defence, as the case may be; or**
>
> **(b) it is scandalous, frivolous or vexatious; or…..**
>
> **(d) it is otherwise an abuse of the process of the court, and may order the action to be stayed or dismissed or judgment to be entered accordingly, as the case may be."**

9. Counsel then refers to **Halsbury's Laws of England 4th Edition, at paragraphs 430-435** for the following passage:

> **"….the powers are permissive….and they confer a discretionary jurisdiction which the court will exercise in light of all the circumstances concerning the offending pleading…Where a pleading discloses no reasonable cause of action….it would be ordered struck out or amended, if it is capable of amendment….No evidence including affidavit evidence is admissible on an application on this ground and since it is only the pleading itself which is being examined, the court is required to assume that the facts pleaded are true and undisputed….However, summary procedure…will only be applied to cases which are plain and obvious, where the case is clear beyond doubt, where the cause of action or defence is on the face of it obviously unsustainable, or where the case is unarguable…"**

10. This, the Intended Defendants' counsel submits, admonishes the Court to exercise its discretionary powers to strike out pleadings with the greatest care and circumspection. Learned counsel further asserts that pleadings should only be struck out where it is plain and obvious that it cannot succeed.

11. The Intended Defendants' counsel then refers to **Johnson v Gore Wood & Co [2002] 2 AC 1 [22]** ("**Gore Wood**"), where Lord Bingham made the following pronouncements:

> **"…[the] inherent power which any court of justice must possess to prevent misuse of its procedure in a way which, although not consistent with the literal application of its procedural rules, would nevertheless be manifestly unfair to a party to litigation before it, or would otherwise bring the administration of justice into disrepute among right thinking people…**
>
> **…broad merits based judgment which takes account of the public and private interests involved and also takes account of all the facts of the case, focusing attention on the crucial question whether, in all the circumstances, a party is misusing or abusing the process of the court…"**

12. Counsel also relies on the case of **Allen v The Grand Bahamas Port Authority, Ltd. and Others [2011] 3 BHS J. No. 18** for the following:

> **"I am mindful that the discretion to dismiss cases pursuant to order 18 rule 19 should be exercised sparingly. However, for the foregoing reason as well as those advanced by the counsel for the Defendants and on the authorities provided, it would, in my judgment, be an abuse of the process of Court to permit the plaintiff to proceed with this action as presently pleaded. In that regard, I accept the submissions of counsel for the defendants that the amended writ herein discloses no reasonable cause of action, that it is scandalous, frivolous, and vexatious and that it is otherwise an abuse of the process of this court…"**

13. The Intended Defendants' counsel asserts that the present claim is an abuse of the Court's process for the aforementioned reasons along with the following reasons:

- The action was brought on the "wrong footing" as the Intended Claimant is not a shareholder of the Company.
- The Intended Claimant is not a complainant under the Act;
- This is not an internal dispute for the Intended Claimant to bring an action under the Act;

- There is a pending action that has been filed by the Intended Claimant against the Company and this action is res judicata or there is an issue of estoppel as it appears to be the same cause of action; and
- It was unlawful to add the Intended Defendants as parties to the claim.

14. The Intended Defendants' counsel further submits that section 280 of the Act has been misapplied. **Section 280(1) and (2) of the Act** read:

> **"280. (1) A complainant may apply to the court for any order against a company or a director or officer of that company to restrain oppressive action.**
>
> **(2) If upon an application under subsection (1), the court is satisfied that in respect of a company or any of its affiliates —**
>
> **(a) any act or omission of the company or any of its affiliates effects a result;**
>
> **(b) the business or affairs of the company or any of its affiliates are or have been carried on or conducted in a manner; or**
>
> **(c) the powers of the directors of the company or any of its affiliates are or have been exercised in a manner, that is oppressive or unfairly oppressive to, or that unfairly disregards the interest of any shareholder or debenture holder, creditor, director or officer of the company, the court may make an order to rectify the matter complained of."**

15. **Section 278 of the Act** states:

> **"In this Part —**
>
> **"action" means an action under this Act;**
>
> **"complainant" means —**
>
> **(a) a shareholder or debenture holder or a former holder of a share or debenture of a company;**
>
> **(b) a director or an officer of former director or officer of a company or its affiliates;**
>
> **(c) <u>any other person, who in the opinion of the court is a proper person to institute an action under this Part</u> (emphasis added).**

16. Counsel's position is that the Intended Claimant is not a complainant as provided under the Act, as she is not an "oppressed shareholder". Thus, the action is misconceived and must fail.

17. Counsel advances his position by relying on the case of **Lady Henrietta St. George v Sir Jack Hayward CLE/gen/FP00233A of 2006** which provides:

"…in order to obtain the relief claimed under section 280 the person bringing the action to prove oppressive action must show that he is a "complainant" within the meaning of section 278. Persons listed in section 278(a) (shareholder or debenture holder or a former holder of a share or debenture of the company) and under section 278(b) (a director or an officer or former director or officer of the company or its affiliates) qualify as complainants as of right. Any other person can qualify <u>but only if he is judicially recognized as such and in exercising its discretion the Courts must do so as not to undermine the broad remedial scope of the Act.</u>

Furthermore, it was not intended for the Act to establish a threshold requirement of undisputed status before which a person purporting to be within the class of complainant can apply. There can be no reasonable cause of action for the relief under the Act in relation to any proven conduct under section 280(2) which allegedly "…is oppressive or unfairly oppressive…or that unfairly disregards the interest' of a person unless all three of the following are established:

> **(i) That the oppressive conduct was a corporate act, that is to say, it was an act or omission of the company [or any of its affiliates] or the exercise of the powers of the directors of the company in their capacity as such directors.**
>
> **(ii) That the oppressive act had as its victims a shareholder or debenture holder, creditor, director or officer of the company itself, not of its affiliate.**
>
> **(iii) That even though a person may be a shareholder or other member of the victim class of the company the person must have been a victim of the oppressive action in his capacity as a shareholder or director or other member of the victim class in his capacity as such member of that class.**

An "affiliate" in section 280 refers to a company incorporated or registered under the Act.

The word "shareholder" has the meaning ascribed to it in the Act as a person who is registered as the holder of such shares in the company. Persons beneficially or otherwise equitably interested in such shares are not shareholders for the purpose of section 280."

18. Counsel asserts that the Intended Claimant is not a victim under the Act and there is no internal dispute that could warrant the Intended Claimant bringing an action against the Intended Defendants.

19. He then submits that the Intended Claimant is not a proper person as envisioned under the Act. He provides the Canadian case of **N'Quatqua Logging Co. v Thervage (2006) BCSC 1122** at paragraphs 18-19 to buttress this submission. The paragraphs provide:

> **"The reference to an appropriate person is intended to provide a remedy for persons who are not shareholders but who, by virtue of their relationship to or dealings with, the company, have an interest that is not dissimilar to that of a shareholder."**

20. The Intended Defendants' counsel then provides the following examples of persons considered a "proper person":

- **A party to a pre-incorporation contract with the company, under which a person is entitled to the issue of shares but where the shares have not been registered in the Plaintiff's name;**
- **A beneficiary under a trust of shares; and/or**
- **A shareholder of a shareholder.**

21. The Intended Defendants' counsel asserts that the Intended Claimant does not fall within any of these categories and thus, does not fall within the ambit of the Act as a proper person.

22. Further counsel asserts that claiming money owed by itself does not entitle a person to standing in an action for oppression. He provides the Canadian case of **Royal Trust Corporation of Canada v Horder [1993] O.J. No. 1560** where the Court stated:

> **"…debt actions should not routinely be turned into oppression actions"**

23. The Intended Defendants' counsel then submits that the matter is *res judicata* and provides **Thomas v AG (No. 2) (1988) 39 W.I.R. 383 at page 385 d-f** ("**Thomas**") for the following:

> **"The principles applicable to a plea of res judicata are not in doubt and have been considered in detail in the judgment of the Court of Appeal. It is in the interest of the public that there should be finality to litigation and that no person should be subjected to action at the instance of the same individual more than once in relation to the same issue. The principle applies not only where the remedy sought and the grounds therefore are the same in the second**

action as in the first but also where, the subject matter of the two actions being the same, it is sought to raise in the second action matters of fact or law directly related to the subject matter which could have been but were not raised in the first action."

24. Counsel asserts that the Intended Defendants are improper parties as they are not necessary parties and there is no cause of action as against them. He contends that the Final Judgment was made against the Company and not the Intended Defendants. He further asserts that there are no legal grounds to find the Intended Defendants liable and asks the Court to exercise its powers under **Order 15 rule 6(2)(a) of the RSC**. That rule states:

> **"(2) At any stage of the proceedings in any cause or matter the Court may on such terms as it thinks just and either of its own motion or on application —**
>
> **(a) order any person who has been improperly or unnecessarily made a party of who has for any reason ceased to be a proper or necessary party, to cease to be a party"**

25. Finally, counsel concludes by requesting that the New Writ be struck out and requests costs.

Intendent Claimant's Submissions

26. The Intended Claimant's counsel submits that the striking out application should not be acceded to. He cited **Section 280(2) of the Act** (quoted above in this judgment) and highlights the following:

> ***"280. …***
>
> ***(2) If upon an application under subsection (1), the court is satisfied that in respect of a company or any of its affiliates —***
>
> ***(a) any act or omission of the company or any of its affiliates effects a result;***
>
> ***(b) the business or affairs of the company or any of its affiliates are or have been carried on or conducted in a manner; or***
>
> ***(c) the powers of the directors of the company or any of its affiliates are or have been exercised in a manner,***
>
> ***that is oppressive or unfairly oppressive to, or that unfairly disregards the interest of any shareholder or debenture holder, creditor, director or officer of the company, the court may make an order to rectify the matter complained of (emphasis added)."***

27. Counsel contends that the Act afforded the Intended Claimant, as a creditor, a statutory remedy when faced with oppressive or unfairly oppressive conduct of the Company, its affiliates or its officers/directors that unfairly disregards her interest.

28. The Intended Claimant's counsel submits that the Affidavit of Shelly Beadle filed on 20 July 2022 demonstrates that the Intended Claimant is a creditor of the Company, thus evidencing locus standi, as required under the Act. He contends that this evidence proves that the Intended Claimant is a proper person as envisioned under the Act.

29. With respect to the striking out application, Learned counsel asserts that there is a reasonable cause of action and relies on the case of **Drummond-Jackson v British Medical Association [1970] 1 W.L.R. 688 at 696**. That excerpt states:

> **"I think 'a reasonable cause of action' means a case of action with some chance of success when (as required by paragraph (2) of the rule) only the allegations in the pleading are considered"**

30. Counsel contends that an examination of the New Writ reveals that the Intended Claimant seeks redress for financial loss suffered which resulted from the Company's oppressive conduct. On the bare pleadings by itself, counsel contends that the claim has a chance of success at trial.

31. The Intended Claimant's counsel further contends that the intended action is a claim for relief permitted by the Act. He submits that the application for relief is statutorily allowed and should succeed or fail on its merits. Learned counsel relies on the case of **Attorney General of the Duchy of Lancaster v London and North Western Railway Company [1892] 3 Ch. 274 at page 277** which states:

> **"…it appears to me that the object of the rule is to stop cases which ought not to be launched – cases which are obviously frivolous or vexatious, or obviously unsustainable"**

32. With regard to the claim that the New Writ is an abuse of the Court's process, the Intended Claimant's counsel asserts that the action is a bona fide and proper action pursuant to the Act. He then references section 280 of the Act and states that the Court is empowered to provide appropriate relief for any complainant under that section of the Act.

33. Counsel then asserts that the Intended Defendants sought to go into a full blown trial of the merits of the case, which he submits is not appropriate for this application. He advances the case of **Sandyport Homeowners Association Limited v Bain No. 289 of 2014 at paragraphs 34 to 36** to support this proposition. The relevant paragraphs of that case provide:

"34. In Wenlock, the English Court of Appeal sought to explain the proper approach to the exercise of the discretion under the rule. The following excerpts from the judgments of Sellers and Danckwerts LJJ respectively are particularly appropriate in the circumstances of the current appeal and are, in my view, worthy of reproduction:

"What has taken place here is, I think, without precedent and far from encouraging it...I would disapprove it. It is not the practice in the civil administration of our courts to have a preliminary hearing, as it is in crime…. There have been cases where affidavits have been used to show that an action was vexatious or an abuse of the process of the court but not, as far as we have been informed, or as I know, where it has involved the trial of the whole action when facts and issues had been raised and were in dispute. To try issues in this way is to usurp the function of the trial judge…" [per Sellers LJ. at p. 873]

35. Danckwert LJ put the matter no less forcefully in the following terms:

"There is no doubt that the inherent power of the court remains; but this summary jurisdiction of the court was never intended to be exercised by a minute and protracted examination of the documents and facts of the case, in order to see whether the plaintiff really has a cause of action. To do that, is to usurp the position of the trial judge, and to produce a trial of the case in chambers, on affidavits only, without discovery and without oral evidence tested by cross examination in the ordinary way. This seems to me to be an abuse of the inherent power of the court and not a proper exercise of that power…" [at p. 874] [Emphasis added]

36. Having analyzed the appellant's Statement of Claim as it stands, I am satisfied that the appellant's pleadings clearly disclose a viable cause of action against the respondent, who clearly had no difficulty in filing an Amended Defence and Counterclaim to the several allegations set out in the appellant's Statement of Claim. The issues between the parties are clearly joined and ready for substantive trial before a trial judge. "

34. In relation to the claim that the Intended Defendants are improper parties, Learned counsel draws the Court's attention to the express wording of section **280(1) of the Act**:

"(1) A complainant may apply to the court for any order against a company <u>or a director or officer of that company to restrain oppressive action</u>. (emphasis added)"

35. The Intended Claimant's counsel asserts that, by virtue of the fact that the Intended Defendants are directors of the Company, they fall squarely within the class of persons who may be sued for any wrongdoing of the Company.

36. Counsel then concludes by requesting the Court to dismiss the striking out application and to award the Intended Claimant costs.

DISCUSSION AND ANALYSIS

Whether the New Writ ought to be struck as (i) disclosing no reasonable cause of action; (ii) it is scandalous, frivolous or vexatious; (iii) it is an abuse of the court's process; and (iv) improper parties have been sued.

Disclosing no reasonable cause of action

37. The Court is empowered to strike out any pleading at any stage of the proceedings by virtue of Order 18 rule 19 of the RSC. The Intended Defendants' counsel submits that the New Writ ought to be struck out as disclosing no reasonable cause of action. The Intended Claimant refutes this submission.

38. As Counsel for the Intended Defendants provide in his submissions, the Court too relies on the Bahamian Court of Appeal decision of **West Island Properties Limited v Sabre Investment Limited and others SCCivApp No. 119 of 2010 at paragraphs 15, 30 and 57** ("**West Island**") for a summary of the Court's power to strike out pleadings – specifically in relation to whether or not the New Writ discloses any reasonable cause of action. There, the court stated the following:

> **"30 In the case of Drummond-Jackson v. British Medical Association [1970] 1 W.L.R. 688, Lord Pearson determined that a cause of action was reasonable where it had some chance of success when considering the allegations contained in the pleadings alone. That is, beginning at page 695, he said the following:**
>
> **"Over a long period of years it has been firmly established by many authorities that the power to strike out a statement of claim as disclosing no reasonable cause of action is a summary power which should be exercised only in plain and obvious cases.**
>
> **…**
>
> **In my opinion the traditional and hitherto accepted view — that the power should only be used in plain and obvious cases — is correct according to the intention of the rule for several reasons. First, there is in paragraph (1)(a) of the rule the expression "reasonable**

cause of action," to which Lindley M.R. called attention in Hubbuck & Sons Ltd. v. Wilkinson, Heywood & Clark Ltd 18991 1 Q.B. 86, pp. 90–91. No exact paraphrase can be given, but I think "reasonable cause of action" means a cause of action with some prospect of success, when (as required by paragraph (2) of the rule) only the allegations in the pleading are considered. If when those allegations are examined it is found that the alleged cause of action is certain to fail, the statement of claim should be struck out. In Nagle v. Feilden (1966) 2 Q.B. 633 Danckwerts L.J. said, at p. 648:

The summary remedy which has been applied to this action is one which is only to be applied in plain and obvious cases when the action is one which cannot succeed or is in some way an abuse of the process of the Court'

Salmon L. J. said, at p. 651: it is well settled that a statement of claim should not be struck out and the plaintiff driven from the judgment seat unless the case is unarguable.' Secondly, subparagraph (a) in paragraph (1) of the rule takes some colour from its context in subparagraph (b) "scandalous, frivolous or vexatious," subparagraph (c) "prejudice, embarrass or delay the fair trial of the action" and subparagraph (d) "otherwise an abuse of the process of the Court." The defect referred to in subparagraph (a) is a radical defect ranking with those referred to in the other subparagraphs. Thirdly, an application for the statement of claim to be struck out under this rule is made at a very early stage of the action when there is only the statement of claim without any other pleadings and without any evidence at all. The plaintiff should not be "driven from the judgment seat" at this very early stage unless it is quite plain that his alleged cause of action has no chance of success. The fourth reason is that the procedure, which is (if the action is in the Queen's Bench Division) by application to the master and on appeal to the judge in chambers, with no further appeal as of right to the Court of Appeal, is not appropriate for other than plain and obvious cases.

…

That is the basis of rule and practice on which one has to approach the question whether the plaintiff's statement of claim in the present case discloses any reasonable cause of action. It is not permissible to anticipate the defence or defences possibly some very strong ones — which the defendants may plead and be able to prove at the trial, nor anything which the plaintiff may plead in reply and seek to reply on at the trial.

30 Concerning Order 18; rule 19(1)(d) R.S.C., both Bramwell B. And Blackburn J. in the cases of Castro v. Murray Law Rep. 10 Ex. 213; 218 and Dawkins v. Prince Edward of Saxe-Weimar 1 Q.B.D. 499; 502 respectively, underscored the fact that the Court possessed a discretion to stop proceedings which are groundless and an abuse of the Court's process. The discretion, as Mellor, J. in Dawkins v. Prince Edward of Saxe-Weimar indicated, must be exercised carefully and with the objective of saving precious judicial time and that of the litigant (emphasis added)""

39. According to the Intended Claimant's pleadings, Final Judgment was granted and subsequent efforts were made to enforce the judgment. In fact, Examination of the Judgment Debtor took place and both of the Intended Defendants (who are directors of the Company) were examined. Mr. Albury spoke on behalf of both of them and gave an undertaking that the outstanding debt would be paid. It is also noted that Mr. Albury stated that the Company had the financial means to satisfy the debt owing.

40. Furthermore, the Intended Claimant may have a chance at success at trial of this action as she relies on section 280 of the Act for certain reliefs. Whether or not the Intended Claimant falls squarely within the section of the Act is an issue which the Court will not consider in this application.

41. At this early stage, it is difficult to definitively state that there is no prospect of success of the Intended Claimant's claim. The Intended Claimant may very well be successful at trial after considering any documentary or *viva voce* evidence from witnesses. The Court does not wish to drive any litigant from the judgment seat without considering the substantive merits of the case. As was highlighted by the Intended Claimant's counsel, the Court will not, at this stage, determine any substantive merits of any arguments put forth which are more appropriate for the substantive trial.

42. Based on the foregoing, the Court is not prepared to strike out the New Writ as disclosing no reasonable cause of action.

Scandalous, Frivolous or Vexatious

43. In relation to whether or not the New Writ ought to be struck out as being scandalous, frivolous or vexatious, the case of **Attorney General of the Duchy of Lancaster v London and North Western Railway Company [1892] 3 Ch. 274** provides:

> **"It appears to me that the object of the rule is to stop cases which ought not to be launched - cases which are obviously frivolous or vexatious, or obviously unsustainable….(emphasis added)"**

44. Though only persuasive, the Singaporean High Court decision of ***Tan Swee Wan v Johnny Lian Tian Young [2016] SGHC 206*** provides a helpful discourse on what is meant by "scandalous frivolous or vexatious". George Wei J opined:

> **"…I shall briefly set out the below:**
>
> **(a) O 18 r 19 (1)(a): "it discloses no reasonable cause of action", this involves an action which does not even have "some chance of success when only the allegations in the pleading are considered": Gabriel Peter & Partners (suing as a firm) v Wee Chong Jin and others [1997] 3 SLR® 649 ("Gabriel Peter") at [21].**
>
> **(b) 018 r 19 (1)(b): "it is scandalous, frivolous or vexatious".**
>
> **(i) A matter is "scandalous" where it does not even have a "tendency to show" the truth of any allegation material to the relief sought: Law Swee Lin Linda v AG [2006] 2 SLR(R) 565 at [67], citing Christie v Christie (1872)-1973) LR 8 Ch App 499 at 503.**
>
> **(ii) "Frivolous or vexatious" means "obviously unsustainable" or "wrong", A case that is "plainly and obviously sustainable" is one which is either legally or factually unsustainable. A case is legally unsustainable if "it may be clear as a matter of law at the outset that even if a party were to succeed in proving all the facts that he offers to prove he will not be entitled to the remedy that he seeks". A case is factually unsustainable if it is "possible to say with confidence before trial that the factual basis for the claim is fanciful because it is entirely without substance, [for example, if it is] clear beyond question that the statement of facts is contradicted by all the documents or other material on which it is based": The *"Bunga Melati 5" [2012] 4 SLR 546 at [39](emphasis added)"***

45. The New Writ is not scandalous as there is a tendency to show the truth of the allegations material to the relief sought. The New Writ details the particulars of the claim (in great detail) which are material and which the Court will have to consider at the trial of the action.

46. Moreover, the Court does not view the New Writ as "obviously unsustainable", frivolous or vexatious because there appears to be a real issue to be tried and considered on the merits. Indeed, it has to be determined if the Intended Claimant is a fit and proper person/complainant who can bring a claim as against the Intended Defendants.

47. The Court rules that the New Writ is not scandalous, frivolous or vexatious.

Abuse of the Process of the Court

48. I reiterate the ***Gore Wood*** case which states:

> **"…[the] inherent power which any court of justice must possess to prevent misuse of its procedure in a way which, although not consistent with the literal application of its procedural rules, would nevertheless be manifestly unfair to a party to litigation before it, or would otherwise bring the administration of justice into disrepute among right thinking people…**
>
> **…broad merits based judgment which takes account of the public and private interests involved and also takes account of all the facts of the case, focusing attention on the crucial question whether, in all the circumstances, a party is misusing or abusing the process of the court…"."**

49. Considering the public and private interests involved with respect to the issues and applicable law in this matter, the Court forms the view that there would be no abuse of the court's process to permit the claim to be considered at trial.

Improper Party

50. Based on the current pleadings before the Court, the Intended Defendants initially appeared as directors of the Company at the Examination of the Judgment Debtor. Section 280(2)(c) of the Act does permit directors and officers to be sued/held liable for certain acts/omissions of the Company. The Intended Defendants' counsel did not refute nor dispute the fact that the Intended Defendants are directors of the Company.

51. Accordingly, they would be deemed proper parties for purposes of these proceedings and the Court is thus not prepared to exercise its powers under Order 15 rule 6(2)(a) of the RSC.

Res Judicata or Issue Estoppel

52. This is a legal point with great merit. Back in 2011, similar issues were brought before the court and a Final Judgment was granted (though based on a Default Judgment). To now permit the Intended Claimant to rely on similar pleadings on a matter that has already been determined would likely be seen as (as the Intended Defendants' counsel submitted) "a second bite of the cherry".

53. In the Privy Council decision of **Yat Tung Investment Company Ltd v. Dao Heng Bank Ltd [1975] AC 581,** Lord Kilbrandon said at page 590:

> **"But there is a wider sense in which the doctrine may be appealed to, so that it becomes an abuse of process to raise in subsequent proceedings matters which could and therefore should have been litigated in earlier proceedings. The locus classicus of that aspect of res judicata is the judgment of Wigram V.C. in Henderson v. Henderson [1843] 3 Hare 100, 115, where the judge says:–**

… 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 matter which might have been brought forward as part of the subject in contest, but which was not 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."

The shutting out of a "subject of litigation" — a power which no court should exercise but after a scrupulous examination of all the circumstances — is limited to cases where reasonable diligence would have caused a matter to be earlier raised; moreover, although negligence, inadvertence or even accident will not suffice to excuse, nevertheless "special circumstances" are reserved in case justice should be found to require the non-application of the rule…

The Vice-Chancellors phrase "every point which properly belonged to the subject of litigation" was expanded in Greenhalgh v. Mallard [1947] 2 All E.R. 255, 257, by Somervell L.J.:–

res judicata for this purpose is not confined to the issues which the court is actually asked to decide, but … it covers 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 the process of the court to allow a new proceeding to be started in respect of them (emphasis added)."

54. Borrowing the language from the ***Thomas*** decision (referred to at paragraph 23 of this judgment): *"It is in the interest of the public that there should be finality to litigation and that no person should be subjected to action at the instance of the same individual more than once in relation to the same issue."*

55. The initial court did not have an opportunity to consider section 280 of the Act as, at the time, the Intended Claimant was not yet adjudged to be a creditor and no such application was before it at the time. This is a new issue. Furthermore, these are new parties to the litigation and not the initial Company. Though this factor alone does not mean that there is a new cause of action, it is a matter for the Court's consideration.

56. Furthermore, the Intended Claimant seeks to bring claims for, *inter alia*, breach of fiduciary duty and oppression by directors of the Company. These are fresh matters that the Court must consider in the present circumstances.

57. A close analysis of the pleadings and facts surrounding this case reveal that the matters before the court are novel, arguable and needs closer analysis and consideration in order to determine whether or not the Intended Claimant's claim is meritorious and warrants the Court granting the relief sought in the New Writ.

58. The Court accordingly rules that the matter is not *res judicata*.

CONCLUSION

59. In the circumstances and based on the authorities referred to above, the Court does not accede to the Intended Defendants' application and thus, the strike out application is dismissed.

60. The Intended Claimant is awarded her costs, to be taxed if not agreed.

61. For the avoidance of doubt, these proceedings are now governed by the Supreme Court Civil Procedure Rules, 2022 and its amendments.

Senior Justice Deborah Fraser

Dated this 16th day of June 2023