

**EASTERN CARIBBEAN SUPREME COURT
SAINT CHRISTOPHER AND NEVIS
NEVIS CIRCUIT**

**IN THE HIGH COURT OF JUSTICE
(CIVIL)**

Claim Number: **NEVHCV2021/0054**

Between

James Liburd

Claimant

-and-

**Noel Errol Liburd Junior
Noel's Courtesy Garage Limited**

Defendant

Before: His Lordship Justice Ermin Moise

Appearances:

Mr. Brian Barnes with Mr. Adrian Daniel of counsel for the claimant
Mr. Kris Liburd of counsel for the defendant

2022: January, 17th
April, 19th
May, 31st
July, 20th

JUDGMENT

- [1] **Moise, J:** The claimant, Mr. James Liburd filed his Fixed Date Claim along with an affidavit in support on 16th April, 2021. In summary, he seeks orders and declarations regarding his shareholding in a company known as Noel's Courtesy Garage Limited. These include declarations that he remains a shareholder and director of the company and orders for an account and injunctive relief against the first defendant, Mr. Noel Liburd Jr., who acts as the company's manager. Mr.

James Liburd also seeks orders from this court invalidating a number of resolutions registered in the registry of companies and the setting aside of various alterations made to the composition of the board of directors and shareholders of the company.

- [2] In reply to this claim, the first defendant also seeks various orders from the court seeking in effect a ratification of the various actions taken on behalf of the company and a denial of the substance of Mr. James Liburd's claim. The matter came for trial on 17th January, 2022 and the court reserved its judgment whilst giving some time for the first defendant to file an account of his dealings with the affairs of the company. The account was filed on 19th April, 2022 with the claimant filing a reply on 31st May, 2022. Having reviewed the evidence and submissions of counsel, the court now delivers its judgment on the issues which had been raised by the parties.

The Facts

- [3] The circumstances of this case are somewhat unfortunate. The claimant is in fact the first defendant's uncle and brother to the first defendant's father, Mr. Noel Liburd Sr., who passed away on 26th March, 2019. The matter revolves around a company known as Noel's Courtesy Garage Limited, the second defendant in this case. This company had been practically owned and managed by Noel Liburd Sr. from the early 1990s until he relinquished management and control to his son, the first defendant, sometime in 2015. It appears from the facts that Mr. Liburd Sr., had taken ill in or before 2015 and by that time the company had found itself in significant levels of debt. The banks were foreclosing and it is not disputed that Mr. Liburd Sr. no longer felt capable of managing the affairs of the company. From the facts presented, it is also apparent that the company had not kept up with its obligations and annual filings with the Registry of Companies and had been struck off the roll of companies in 2011.
- [4] As a result of this, Mr. Liburd Sr. turned to his son for help and, by way of power of attorney dated 23rd March, 2015, handed over the affairs of the company to him. The circumstances under which the power of attorney was granted is an important feature in this case and I will address it in further detail later on in this judgment. The claimant states in his own evidence that he was aware of and did not object to Mr. Liburd Jr.'s new role in relation to the company. It would also appear from the

facts, that Mr. Liburd Jr. had in fact taken steps to stabilize the affairs of the company and managed to keep it afloat and meet its financial obligations until his father sadly passed away on 26th March, 2019.

- [5] However, in addition to that, certain steps were taken regarding the shareholding and directorship of the company, which forms part of the basis of the challenges being mounted by James Liburd in these proceedings. It is therefore important to first outline the early years of the formation of this company to determine the substance of Mr. James Liburd's claim and what I consider to be the equity which must be done between the parties; given the current state of affairs. The court will then go on to consider the involvement of the various parties in the affairs of this company up until Mr. Liburd's death in 2019 and then thereafter.

The Company's Incorporation and its Capitalization

- [6] Mr. Noel Liburd Sr. was an auto-mechanic by profession, who plied his trade from at least the early 1980s. Sometime in the early 1990s a decision was taken to formalize this craft by registering a limited liability company. Mr. James Liburd submits that in fact it was a shared dream between himself and his brother to offer automobile rental, repair and maintenance services to the people of Nevis. He states in his affidavit that, as a partner in the business, he worked alongside his brother and made significant contributions to the building and development of the company. He asserts that he contributed to the construction of buildings at Farms Estate, Nevis from where the business was operated. He also asserts that he contributed to the business by acting as the contractor which saved significant costs to the construction. Mr. James Liburd claims to have constructed the home in which his brother lived as part of his contribution to the incorporation of the company.
- [7] The defendants deny Mr. Liburd's claims regarding the joint motive behind the formation of the company and the extent of his role in the construction of the various buildings. I will address these assertions later on. However, whatever the motive behind its formation, the company was incorporated on 27th March, 1991 in the Registry of Companies. The Memorandum of Association lists the subscribers as Noel Liburd Sr. (director) and James Liburd (secretary). It is also the case that each of Mr. Noel Liburd Sr. and Mr. James Liburd were initially issued 1 share in the company as subscriber shares. In total the company was empowered to issue up to 100,000 shares.

[8] During the course of his oral testimony, Mr. James Liburd acknowledged that this brother had commenced his work as an auto-mechanic in the 1980s. He stated in cross examination that he was aware that his brother had fixed all types of vehicles and that he had been operating that business for many years from premises located at Morning Star. From what had been presented to me, it does not appear that Mr. James Liburd had any skills as an auto-mechanic himself; neither is there any evidence that he played a direct role in his brother's business affairs up to that point. The evidence is that building construction was his chosen profession. He also described himself in various documents in these proceedings as a businessman; but no details of the nature of his businesses were presented. Neither was there any evidence that he and his brother had actively engaged in joint business affairs prior to the formation of this company.

[9] During these proceedings, Mr. James Liburd acknowledged that he did not work in the business with his brother at the time of its formation. He also acknowledged that his brother moved his business to Farms Estate in 1987. That would have been 4 years prior to the incorporation of the business. On balance, this would also suggest that some form of building construction had already taken place at least by 1987 when Mr. Noel Liburd Sr. felt comfortable enough to move his business to those premises. Mr. Noel Liburd Sr. continued to carry on his auto-mechanic work from there up until 2015, when his son, the 1st defendant, took over the management of the business. It is also apparent to me, based on the evidence, that the survival of this business was predicated significantly on the peculiar skill which Mr. Noel Liburd Sr. possessed as an auto-mechanic. Although the business also incorporated the rental of vehicles, it appears that much of the enterprise related to vehicle maintenance and auto-mechanic work.

[10] When it comes to the incorporation of the business, James Liburd acknowledged that his brother incorporated the company and named it after himself. He also acknowledged that Noel Liburd Sr. managed the company on his own. He insisted however, that he too, James Liburd, was employed with the company. However, when pressed he admitted that his involvement was limited to the construction of the buildings from where Mr. Noel Liburd Sr. lived and operated the business. In fact he went on to assert in cross examination that the full extent of his involvement in the company was the construction of those buildings. He provided little to no evidence of any other involvement he

may have had regarding the management of this company, save for the assertion that he may have had a few informal meetings with his brother every now and then.

[11] When pressed further in cross examination, Mr. James Liburd accepted that his brother had in fact paid for all of the material and the cost of labour associated with the construction of the buildings. Although James Liburd insisted that he was not paid for his work, he states that he did not personally meet any of the costs of the construction. Therefore, it would seem that Mr. James Liburd's involvement, if true and at all, was to supervise the work as the building contractor. By that admission, in my view, it would be difficult to state that he in fact constructed the buildings alongside his brother and contributed significantly to it as his contribution to the company over all. It seems rather clear to me that Mr. Noel Liburd Sr. had in effect met the cost of construction himself. In addition to that, Mr. James Liburd acknowledged in cross examination that all other costs directly associated with this business was met by his brother Noel Liburd Sr. He also could not point to any other involvement he would have had to the capitalization or management of this business in these early stages or any time thereafter.

[12] On the other hand, the defendants vehemently dispute Mr. James Liburd's account of what transpired in the early stages of the formation of this company and I accept that the defendants' position is as near an accurate reflection of what transpired as is ascertainable at this stage. Evidence was presented by Ms. Mauva Daniel, who was Mr. Liburd Sr.'s life partner from even before the incorporation of the company until his death in 2019. They had two children together, one of whom is Noel Liburd Jr. She also acted as secretary to the company for many years. Ms. Daniel states that in fact, Mr. Liburd Sr. paid his brother for the services he had rendered in building the house and that it was during this process of construction that the relationship between the 2 brothers began to show signs of disagreement. She asserts that by the time of Mr. Liburd Sr.'s illness and death there was no relationship between himself and his brother James. This is corroborated by Noel Liburd Jr. who also asserts that his father had no relationship with his brother at all by the time of his death. Evidence was also led from Mr. Claudius Hanley to corroborate this assertion. I find, on balance, that this is the truth, as the peculiar facts of this case do not point to any significant relationship which Mr. James Liburd had with his brother. In fact, the evidence points to the contrary.

[13] Ms. Daniel asserts, and it is not in dispute, that Mr. Liburd Sr. started his business as an auto-mechanic in the 1980s. When he decided to incorporate his business, he included his brother as a mere formality. She asserts that Mr. James Liburd never contributed to the shareholding he claims to have. The first building which was constructed on the premises was built by Mr. Raymond Halliday. An additional garage was later built by Mr. Ralph Ottley. Ms. Daniel goes on to assert as follows:

“The claimant constructed the upstairs portion of one of the garages which served as a dwelling house for Noel Errol Liburd (deceased), me and our two children. The Claimant also constructed another building on the premises. The Claimant was fully paid for the construction services he provided. I can recall weekly visits to the bank to collect monies to pay the Claimant and his workmen.”

[14] As it relates to the affairs of the company at that time, the defendants also led evidence from Mr. Claudius Hanley who is retired and has resided in the United States for a number of years now. He states that he is a cousin of Noel Liburd Sr. and also attested to the fact that Mr. Liburd Sr. had been working as an auto-mechanic from the early 1980s. He states that he and Mr. Liburd Sr. had a very close relationship and referred to each other as brothers. He remembers the formation of the company in the 1990s but insisted that this was done at the instance of Noel Liburd Sr. and not as a common dream which he shared with his brother. He also states that for many years, the company repaired, rented and sold various types of motor vehicles. Mr. Hanley goes on to state that *“[t]o the best of [his] knowledge, Noel Liburd Snr was the company’s owner, director and investor. Noel was the man behind the company; the company was his idea.”* Mr. Hanley also states that although he recalls the construction work done by Mr. James Liburd, he asserted that to the best of his knowledge Mr. Liburd was paid for the work done and that he was not the only contractor who carried out work on the premises.

[15] The obvious difficulty in reconciling the two positions is that these buildings were constructed over 30 years ago. There is no documentary evidence to prove any of it. However, I find it somewhat difficult to accept that Mr. Noel Liburd Sr. could have invested such a significant amount of time and resources of his own into this business and agree that the construction of this home and one other building, for which he met the entirety of the cost of labour and material, would amount to a

capitalization of 50% of the value of the shares of this company to his brother. I appreciate that those were subscriber shares, but James Liburd could not provide any evidence of any other investment which he had made in this company over the years. In cross examination he insisted that almost every aspect of the work and the investment was his brother's contribution to the company. Yet it is also apparent that at the very least all of the labour and material costs of the construction of the home and buildings was also paid for by Mr. Noel Liburd Sr. Given that the business had moved onto the premises since 1987 I also find that on balance, the buildings were not constructed entirely by Mr. James Liburd as the building contractor. I accept Ms. Daniel's evidence where she states that other contractors had in fact done work on the premises.

[16] Therefore, any contribution Mr. James Liburd would have made to the construction of these buildings would have been limited to whatever the contractor's fees would have been at the time and not the actual cost of construction of the buildings themselves; and even that would not relate to the entirety of the buildings and property which formed part of Mr. Noel Liburd's business dealings in general. Bearing in mind that the peculiar skills necessary to carry out the main function of this business was that of his brother, who had been engaged in that profession for quite some time, Mr. James' Liburd's lack of any financial or managerial contribution in this company hardly comes across to me as credible evidence of his capitalization of the shares he claims to have had in this company and the general contribution he claims to have made. His argument has persistently been that the construction of the buildings was his contribution. However, from a purely equitable stand point I find that his assertions are incredible and it would seem to me to be entirely disproportionate to the contribution that his brother would have made over the years in a company which appears to me to have been his primary trade and source of income for himself and his family.

[17] I find therefore that the claimant's shares in this company, though subscriber shares, had not been capitalized in substance; and I do not accept that his brother had agreed with him that his work on the construction of the buildings would have been his contribution towards the affairs of the company. I also do not accept Mr. James Liburd's assertion that the establishment of this company was a lifelong dream between himself and his brother. On balance I find the assertions of the defendants to be more credible in that Mr. James Liburd was added to the incorporation of this

company as a mere formality and he was not actively involved in its management in any way; neither did he derive any benefit from it during its years of operation.

The Notice of Continuance and Subsequent years

[18] On 7th March, 2001 a notice of continuance was filed in relation to the company. In that document, the directors of the company are stated to be Noel Liburd Sr. and James Liburd with Ms. Mauva Daniel acting as its secretary. The court was also furnished with an annual return for the company filed on 12th August, 2003. In that document the shareholding of the company was described as follows:

- (a) Noel Liburd Senior 3 shares
- (b) James Liburd, Claudius Hanley and Mary Queenly-Hanley each having 1 share

[19] Each of those persons was also listed as directors of the company with Ms. Mauva Daniel as the company secretary. The evidence also provides details of the minutes of a meeting of the company held on 24th November, 2003 in which Mr. James Liburd was listed as being present. The minutes also described the directorship of the company in the same manner as it was outlined in the Annual Returns of August, 2003. Mr. James Liburd was at that time described as one of 4 directors with Noel Liburd Sr. as the managing director.

[20] Mr. Claudius Hanley, who gave evidence on behalf of the defendants states that although by then he had moved to the United States, he would return to Nevis for the winter months and reside with Mr. Noel Liburd Sr. and his family between the months of November to February of the following year. During that time he would help out with the operations of the business. He also observed that Mr. Liburd Sr. did all the work while Ms. Mauva Daniel managed the administrative aspects of the business. This included paying wages to staff and conducting banking business on behalf of the company.

[21] Mr. Hanley states that he would spend long hours assisting Mr. Liburd Sr. and his staff with repairs to motor vehicles; sometimes as late at 2:00 to 3:00am. He recalls the first defendant, "*Noel Liburd Jr. and his older sister Noella Liburd assisting in the business by washing the cars on the lot*". He recalls Mr. Liburd Sr. travelling to Saint Marten to purchase supplies for the business, during which time he, Mr. Hanley, would assist Ms. Daniel in managing the affairs of the business in Mr. Liburd Sr.'s absence.

[22] It was Mr. Hanley's evidence that at no point was Mr. James Liburd ever actively involved in the operations of this business. He also insisted that over the years Mr. James Liburd had not performed the functions of a director and can only recall him attended one meeting in 2003. During that meeting a decision was taken to change the name of the company from Noel's Courtesy Garage & Car Rental Company Ltd to Noel's Courtesy Garage Limited. This appears to me to be the meeting to which the minutes of 24th November, 2003 relate.

[23] In his witness statement, Mr. Hanley also went on to state as follows:

Noel Liburd Snr had three (3) shares in the company while the rest of us had one (1) share each. Noel Liburd Snr also appointed Mauva Daniel as the company's secretary. I recall that the late Mr. Herman Liburd (Attorney-at-Law) assisted Noel Liburd Snr with the necessary paperwork to register the appointments.

Noel Liburd Snr continued to manage the company. To the best of my knowledge, James Liburd and Mary Hanley-Queeley were not involved in the auto mechanic business of the company. As shareholders, they did not make monetary or non-cash contributions to the company. From my observation, they were shareholders in name alone.

As a shareholder, I invested in the company by purchasing supplies for the business over the years. As a director, I advised Noel Liburd Snr on many key decisions regarding the company.

From my observation, Mary Hanley-Queeley and James Liburd were directors in name alone. They did not play any active role in the management of the company.

[24] Despite his role in the affairs of the company and the shareholding he is noted as having, Mr. Hanley is not staking any claim. He simply indicates that Mr. James Liburd was not actively involved in this company and that, for the most part, this was an investment made by Mr. Noel Liburd Sr. with no involvement of his brother.

[25] At trial James Liburd sought to deny his presence in any meeting of the company, let alone one held in 2003. He stated that he was unaware of the fact that Noel Liburd Sr.'s share had increased to 3 and denies any knowledge of Mr. Hanley and Ms. Queenly-Hanley's involvement in the company. He also claims that he was not aware that Ms. Mauva Daniel had been appointed secretary to the company and states that he was not present at any meeting when these decisions were being made. He only found out about these developments over 15 years later.

[26] However, to my mind, if the court is to accept this evidence from the claimant as being truthful, then it certainly underscores his lack of involvement in the affairs of this company altogether. He claims that this was a shared dream of his brother and his in circumstances where they had a good relationship with each other. Yet as far back as 2003 his shareholding in the company was allegedly diluted somewhat and additional directors were installed, without any input from him. As a director of the company it is also his duty to ensure that the company remains up to date with its filings with the Registry of Companies. The fact that it would take him 15 years to know what was filed in 2003, if even true, proves that he paid little attention to the affairs of the company and was simply not involved in what was taking place. As I indicated earlier, if he was unaware of Ms. Daniel's appointment as secretary then it means that as far as he was concerned he remained secretary to the company from the time of its incorporation. Yet, there is no evidence that he took any steps to ensure that the company remained up to date with its filings as he claims to be completely oblivious to what had in fact been filed.

[27] On balance I accept Mr. Hanley's evidence as being truthful. Despite the fact that no resolution was filed along with the annual returns, I do not doubt that the filings in 2003 were an accurate reflection of the shareholding and directorship of the company as at that point. These were actions taken during Mr. Noel Liburd Sr.'s lifetime and this court, on balance, is not minded to impinge them. It seems to me that Mr. James Liburd would have had ample time to dispute or deny the accuracy of what was being presented to the Companies Registry. In addition, I find as a matter of fact that he

was in attendance at the meeting of 24th November, 2003 and would have therefore been aware of the directorship of the company at that point. He raised no objections until after his brother's death some 16 years later, when he was no longer available to shed light on such issues.

[28] I would therefore find that as at 2003 the claimant owned 1 out of 6 shares in this company and that he had not taken any steps to capitalize those shares. I also find as a matter of fact that he had not generally fulfilled any of his duties as a director in this company and was not involved in any meaningful way in its day to day management. I also find that he had never benefited from the affairs of this company by way of remuneration or the issuance of dividends in any way. As Mr. Hanley puts it, he was a shareholder and director in name only.

The Power of Attorney and the change in management in 2015

[29] It is not disputed that Mr. Noel Liburd Sr. took ill in 2015. It is also not disputed that he was no longer able to manage the affairs of the company from that time onward. Mr. Noel Liburd Jr. stated in his affidavit that his father was overwhelmed by the company's affairs at that point and beseeched him to intervene in order to bring the company back into good standing. The evidence suggests that the company had what was described as "surmounting debts" (however; given the context in which it was written, I take it that this was intended to mean "insurmountable"). It is also apparent that the company had not filed annual returns with the Registry of Companies from as far back as 2004 and had been struck off the roll of companies in 2011. This therefore means that at the time Mr. Liburd Sr. took ill, the company was in fact not in good standing to the point where it was no longer on the roll at the Companies Registry. There were therefore late fees and penalties to be paid if the company was to get back on track.

[30] As a result of the company's debts, a meeting was convened with the Nevis Cooperative Credit Union on 16th March, 2015. The company owed the Credit Union a significant amount of money. However, that was only part of the outstanding debts; some of which had since been the subject of court action. Mr. Liburd Jr. attended that meeting on behalf of the company, together with the General Manager and solicitor for the Credit Union. At that point the Credit Union had engaged the legal process with a view to placing the property up for judicial sale on account of the mounting personal debts of Mr. Liburd Sr. as well as those of the company itself.

[31] It is apparent that at that meeting a plan of action was discussed, with a view to either completing the judicial sale of the premises or allowing for Mr. Liburd Jr. to pay monies towards the debt with a view to bringing matters up to date. At that meeting it was recommended that Mr. Liburd Jr. be given a power of attorney by his father authorizing him to manage the affairs of the company on his behalf. A memo emanating from that meeting was tendered into evidence and shows that Mr. Liburd Jr. had committed to paying \$250,000.00 towards the debt by 30th April, 2015. A payment schedule for the balance of the debt was put in place in the event that the property was not sold. It was agreed that the company would appoint an accountant and that it would seek no further debt financing until this debt was properly managed.

[32] The power of attorney was duly executed on 23rd March, 2015 and clause 4 directly empowered Mr. Liburd Jr. to *“take all administrative action regarding to Noel Courtesy Garage Limited in bringing the company up to date at the company registry and such other actions as the attorney may deem fit.”* Armed with this authority, Mr. Liburd Jr. took over the affairs of the company. I pause here to note that this power of attorney was executed at the instance of the Credit Union. However, I express my own doubts as to whether this was necessarily the proper course of action to pursue. The claimant has raised some issues regarding this approach and I will address them later on in this judgment

[33] However, at this point I make the observation that there appeared to me to be a blurring of the lines between the affairs of the company and that of Mr. Liburd Sr. in general. As I indicated earlier it does appear that the business operated much more like that of a sole trader or single practitioner, as is sometimes common in such circumstances. Be that as it may, Mr. James Liburd stated that he was aware of the fact that Mr. Liburd Sr. had given his son this power to manage the affairs of the company and did not object to this due to the fact that his brother was ill and needed this help. He never demanded any formal meeting of the shareholders and appears to have merely acquiesced to the recommendations which had been made. In any event, Mr. Liburd Sr. held a majority of the shares in the company at that time and obviously felt comfortable with his son assisting in the management of the company. As I had indicated earlier, it does not appear that he had received any assistance from his brother up to that point and Mr. James Liburd certainly does not appear to

me to have taken any steps to apprise himself of the status of a company which he claims to have been a 50% shareholder as well as a director in.

[34] Therefore, whatever the legal implications of the power of attorney, it seems clear to me that there was no objection raised and the evidence suggests that Mr. Liburd Jr. had in fact done a good job in stabilizing the affairs of the company and paying down on its debts for at least 4 years prior to his father's death. That much does not appear to me to be in dispute.

[35] Mr. Noel Liburd Jr. stated in his affidavit that at the time of the execution of the power of attorney the company was in financial crisis and he spent the years thereafter raising the capital necessary to stabilize this situation. Wherever possible he made payments towards the various creditors whenever there was income generated from the car rental business. I take judicial notice of the fact that a number of cases had been filed by financial institutions before this very court regarding the debts of this company. I place reliance on this as it does not appear to be in dispute that the company had significant debts. What Mr. James Liburd seeks as part of his claim is an account. No doubt such issues may become more apparent when this account is fully considered. However on balance it seems clear, even now, that Noel Liburd Jr. had a significant task to perform in stabilizing the affairs of this company in circumstances where James Liburd raised no objections to the role he was about to play and offered no assistance in solving the issues confronting this company, which had in fact been defunct by the time he took over its management.

[36] Mr. Liburd Jr. claims to have used his own funds at times to assist with this process. One example of the use of his own funds occurred when the company's standing was being updated with the Registry of Companies. He states that he negotiated a waiver with the Ministry of Finance as it related to the late fees and penalties associated with the filing of the annual returns which had been unfiled for 11 years. After that he claims to have personally met the cost of filing 11 years of annual returns.

[37] On balance, it therefore appears to me that Mr. Liburd Jr. had singlehandedly taken over the reins of this company at his father's request and taken steps to address the myriad of challenges which it had faced. The evidence suggests that Mr. James Liburd was neither consulted, nor did he offer any assistance at this time. Mr. James Liburd described himself as a business man. Yet, he never

offered any of his skills to assist with the management of the affairs of the company which he claimed to have been the manifestation of a lifelong dream of himself and his brother. If anything he failed in his duty as a director in not apprising himself of the affairs of the company and taking such a hands-off approach at a time when the company was clearly in poor financial health and standing.

[38] However, in addition to his management of the affairs of the company, Noel Liburd Jr. also took steps to alter the composition of the company's shareholding and directorship. On 31st January, 2018, a notice of change of directors was filed in which it was noted that Mr. James Liburd and Mr. Claudius Hanley had ceased being directors and that Mr. Noel Liburd Jr. was appointed as a director. On that same date a special resolution of the company was filed with the Registry of Companies. That resolution alleges that an extraordinary meeting of the directors of the company was held on 26th June, 2017, during which a decision was taken to remove Mr. James Liburd as a director and shareholder and to issue 50,000 shares to Mr. Noel Liburd Jr.

[39] The court was also provided with another special resolution of the company; this time filed with the Registry of Companies on 15th November, 2019. In that resolution it was stated that at an extraordinary meeting of the company held on 11th November, 2019, Mr. Claudius Hanley was re-appointed as a director. Noella Liburd was also appointed as a Director and Noel Liburd Jr. was appointed as managing director of the company. However, I make the observation here that by that date Mr. Noel Liburd Sr. had already passed away. I am therefore not of the view that the actions taken in that extraordinary meeting were lawful. In addition to that, it was not disputed in evidence that James Liburd, who was a shareholder in the company, was not invited to that meeting; if it did in fact take place.

[40] By way of letter dated 16th June, 2020, Mr. James Liburd, through his solicitors, wrote to Noel Liburd Jr. accusing him of unlawfully managing the affairs of the company. He also demanded that Mr. Liburd Jr. desist from holding himself out as a shareholder and director of the company. On account of his assertion that he owned 50% of the shareholding in the company, Mr. James Liburd, through his solicitors, also stated that he would be taking over the management of the affairs of the company and informing the estate of the late Noel Liburd Sr. of the issues he had raised. He also, in that letter accused Mr. Noel Liburd Jr. of being illegally appointed as a director.

[41] I make just a few observations about the content of this letter at this stage. Firstly, whilst I do agree that the power of attorney may not have been the most legally effective way of appointing Mr. Noel Liburd Jr. to manage the affairs of the company, one must remember that Mr. James Liburd claims in his own evidence to have been aware that Mr. Liburd Jr. was called upon by his father to take over the affairs of the company. Yet, during Mr. Liburd Sr.'s lifetime he did nothing to ascertain the legality of what had taken place. He was a director then and could have demanded the information which he now sought in his letter of June, 2020. In fact, one may well argue that had he been concerned at all, he ought to have stepped in to assist in addressing the issues faced by this company when his brother took ill; yet, he did nothing knowing full well that his brother was handing over the affairs of the company to his son.

[42] Mr. Liburd Jr. was apparently left to address what had been described as a number of debts as well as the fact that the company had not filed returns in over a decade and had been struck off the roll of companies. There appears to me to be something inequitable about those demands being made at that point in time, when Mr. James Liburd clearly showed little to no interest in the affairs of the company for over 30 years after its incorporation. Whilst I can see the merit in seeking an account of what was taking place, his threats to take over the affairs of the company at that stage and stake a 50% interest in the shareholding appears to me to be a rather inequitable and unjustified in the circumstances.

[43] Notwithstanding this, I do agree that Mr. Liburd Jr.'s attempts at altering the shareholding and directorship of the company at that stage was improper and that he had no authority to do so given that the power of attorney would not have authorized him to do so unilaterally and that his father, who had granted him this authority, had since died. In light of this, it is now necessary to give consideration to the legal submissions put forward by counsel for the parties in order to determine the best way in which these issues can be resolved.

The Submissions

[44] The first submission put forward by counsel for the claimant is that as a subscriber to the Memorandum of Association, he is a member of the company upon incorporation and therefore no allotment of shares is required. Consequently, it is submitted, the argument that the claimant must

prove his contribution to justify having his share is not supported by law and therefore ought to be rejected. For that proposition reference is made to the case of ***Myrtle Looby v. GEO TECH Limited and Dorthy Gittens as personal representative of the Estate of George Looby***¹ where Thomas J referencing **Palmer's on Company Law** noted the following:

"Every subscriber to the Memorandum of Association becomes a member ipso facto on the incorporation of the company, and liable as the holder of whatever number of shares he has subscribed for. 'It is plain', said Lord Caines in Evans Case, that the original subscribers, are by the Act of Parliament, deemed to have taken the shares set apposite their names', the object being that the public might rely with confidence on the subscribers of the Memorandum, therefore, no allotment is required, and no entry on the register of members is necessary in order to constitute membership. The subscriber is bound to take the shares from the company, and to pay for them on calls duly made like any other shareholder. He cannot in satisfaction of this obligation take a transfer of fully paid shares from another member; the only way he can escape liability is by showing that all the shares have been allotted to others. In Re Esparto Trading Co, a subscriber who had not been placed on the register was nevertheless held liable after a lapse of nine years for the shares for which he had subscribed".

[45] Whilst I agree that a subscriber to the company is in fact a shareholder with no further need for a formal allotment, it is worth noting that no one has actually submitted otherwise as it relates to Mr. James Liburd. The issues raised by the defence in this case are not necessarily questions relating to whether Mr. James Liburd had become a member of the company. It is a matter of his fulfillment of the obligations upon becoming a member, secretary and director which is a cause for concern here. Given the breadth of the powers which the court has under the **Companies Ordinance** when it comes to the settlement of disputes of this nature, these issues must be considered. As Thomas J himself noted in the case of ***Myrtle Looby***, ***"[i]t is clear from the learning that the matter of signing the memorandum brings with it certain legal consequences one of which is liability to the company."*** Thomas J also highlighted the subscriber's duty to pay for the shares like any

¹ ANUHCv2009/0092

other shareholder. This appeared to be a case where the duty of the shareholder to capitalize his shares was underscored rather than diminished in any way.

[46] If the court were to find that Mr. James Liburd had not capitalized his shares, and not fulfilled his obligations to the company, this may have implications for some of the very orders which he seeks in this case. As I have stated in my assessment of the facts, this is a company which found itself in significant debt and was struck off the roll of companies for failure to fulfill its obligations. There is therefore a serious question in my mind as to whether even equity will allow Mr. Liburd to stake the claims he is making without any scrutiny of his own actions, or lack thereof, in fulfilling his obligations to the company for in excess of 30 years. When balanced against the efforts of Mr. Liburd Jr. to rectify these issues upon his father's illness, it seems rather unfair for Mr. James Liburd to pursue some of the remedies which he now seeks.

[47] Counsel for the claimant then refers extensively to section 241 of the **Companies Ordinance**. Subsections (1) and (2) state as follows:

241. (1) A complainant may apply to the court for an order under this section.

(2) If, upon an application under subsection (1), the court is satisfied that in respect of a company or 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 prejudicial to, or that unfairly disregards the interests of, any shareholder or debenture holder, creditor, director or officer of the company,

the court may make an order to rectify the matters complained of.

[48] The claimant is therefore entitled to bring an action as a shareholder of the company if his complaints fall within the parameters of the provisions referred to above. In sub-section (3) the Ordinance outlines the broad range of orders which the court may make if it is satisfied that one or all of the 3 features in subsection 2 are satisfied. The subsection states as follows:

(3) In connection with an application under this section, the court may make any interim or final order it thinks fit, including—

(a) an order restraining the conduct complained;

(b) an order appointing a receiver or receiver-manager;

(c) an order to regulate a company's affairs by amending its articles or bylaws, or creating or amending a unanimous shareholder agreement;

(d) an order directing an issue or exchange of shares or debentures;

(e) an order appointing directors in place of, or in addition to, all or any of the directors then in office;

(f) an order directing a company, subject to subsection (6), or any other person, to purchase shares or debentures of a holder thereof;

(g) an order directing a company, subject to subsection (6), or any other person, to pay to a shareholder or debenture holder any part of the moneys paid by him for his shares or debentures;

(h) an order varying or setting aside a transaction or contract to which a company is a party, and compensating the company or any other party to the transaction or contract;

(i) an order requiring a company, within a time specified by the court, to produce to the court or an interested person financial statements in the form required by section 149 or an accounting in such other form as the court may determine; 102 CAP. 7.06(N) Companies Ordinance [Nevis Ordinances] Revision Date: 31 Dec 2017
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(j) an order compensating an aggrieved person;

(k) an order directing rectification of the registers or other records of a company under section 244;

(l) an order winding-up and dissolving the company;

(m) an order directing an investigation under Division B of Part V to be made; or

(n) an order requiring the trial of any issue

[49] In addition to these provisions, counsel also refers to section 244 of the Ordinance which empowers the court to amend or ratify the official records of the company. Counsel's submissions therefore hinged on the argument that as a subscriber shareholder, the claimant does not have to prove his contribution towards the shares in order to ground his claim. It is also submitted that the defendant's arguments ought to be rejected on that basis alone. Further, it is argued that at the point of Mr. Liburd Sr.'s death, the power of attorney became void and therefore any actions taken by Mr. Liburd Jr. ought also to be voided by the court. In substance the claimant's counsel argued that the status of the company remains the same as it was outlined in the Memorandum of Association and on that basis the claimant's case ought to succeed. That was in substance the extent of the submissions put forward by counsel for the claimant.

[50] By grounding his submissions in section 241 of the **Companies Ordinance**, the claimant seeks to argue for what has been described as relief under the oppression provisions of the Act. As was

noted in the case of *PIC Insurance Company Ltd. v Zona Barthley and Zorol Barthley et al*², the remedies available under section 241 are equitable in nature. The court of appeal there noted that the legislation “*seeks to ensure fairness. It gives a court a broad, equitable jurisdiction to enforce not just what is legal, but what is fair. Secondly, like many equitable remedies, oppression is fact-specific. What is just and equitable is judged by the reasonable expectations of the stakeholders in the context. Conduct that may be oppressive in one situation may not be in another.*”

[51] By way of history, it is important to note that the common law created little avenue for persons to bring such actions prior to the passage of such legislation, unless the remedies sought were firmly grounded in law. However, as was noted by Andrew Burgess, in the text *Commonwealth Caribbean Company Law*³:

“These provisions are not a codification of the common law; rather, they are intended to confer upon individual shareholders and other complainants a remedy which removes the impediments of the rule in Foss v Harbottle [which held that only the company itself could sue its directors for a breach of their duty to it] and ensures that they are insulated from conduct that is oppressive or unfairly prejudicial or that unfairly disregards their interests.”

[52] In the *PIC Insurance Company Ltd* case the court of appeal cited the Canadian case of *BCE Inc. v 1976 Debenture holders*⁴ where the Canadian Supreme Court noted as follows:

“One should look first to the principles underlying the oppression remedy, and in particular the concept of reasonable expectations. If a breach of a reasonable expectation is established, one must go on to consider whether the conduct complained of amounts to “oppression”, “unfair prejudice” or “unfair disregard” as set out in s. 241(2) of the CBCA.”

² ANUHCVP2019/0003

³ (Commonwealth Caribbean Law Series, Routledge, Oxon 2013)

⁴ 2008 SCC 69

[53] It must be observed that limited liability companies can range from large multi-national corporations with hundreds, if not thousands of shareholders, to small family type businesses or even the incorporation of sole trader or single practitioner type business to take advantage of what a limited liability corporation has to provide. In the latter case, it is not unusual for family members and friends to be added as subscribers, shareholders and directors of such companies as a mere formality. The general nature of the operations of such businesses may take the form of a sole practitioner, with little attention being paid to the obligations which are inherent in the continued registration of a corporation of this nature. As in the circumstances of this case, it may sometimes be difficult to truly ascertain the reasonable expectations of those who are registered as shareholders and directors, when balanced against the obligations which they are called upon under the legislation to perform. Whilst on the one hand it may seem unfair for a subscriber or shareholder to be excluded from the decision making process, on the other hand it may be equally unfair for one member to bear the brunt of the investment and responsibility only to allow the neglecting member to continue to stake a legal claim. The legislation therefore takes one into the realm of equity and fairness rather than a strict application of the common law.

[54] What section 241 of the Ordinance does is to give the court a broad discretion to do what is fair, when disputes of this nature arise. The starting point is for the claimant to establish that reasonable expectation upon which his claim is based. In the circumstances of this case, as I have already determined, I am not of the view that this expectation has been established. Mr. James Liburd has grounded his claim on the premise that he and his brother were expected to have incorporated a joint business venture as a lifelong dream and that his role in assisting with the construction of the buildings was his contribution to a 50% share in the corporation. For reasons which I have already explained, I am not satisfied that this assertion has been established. There is nothing about the dealings between the parties which points to any such expectation.

[55] In any event, even if the court were not to have found that to have been the case, I would not have been minded to exercise this equitable discretion in favour of Mr. Liburd in the manner submitted by his counsel. It seems rather clear to me even if there was that reasonable expectation in the start, that the nature of the operation of this business in the almost 30 years which elapsed between its incorporation and up to period of Mr. Liburd's illness and death, weighs heavily against such an approach. Mr. Liburd Sr. had generally been left to make the entirety of the investments which kept

this company going, with no input from his brother. The company appears to me to have been operated exclusively by Mr. Liburd Sr.; and for his benefit for all that time. There was no evidence that any dividends were ever issued. Mr. James Liburd does not claim to have acquired any benefit from the company as a shareholder, nor did he ever capitalize those shares or make any complaints during his brother's lifetime. In addition to that, he has played no significant role in fulfilling any of the obligations as a director of the company for in excess of 30 years.

[56] As I have already found to be the case, even when the company was in dire straits, Mr. James Liburd appears to have been aloof from the management of this organization. Financial institutions were attempting to foreclose on the real assets of the company and it was no longer in good standing with the Registry of Companies. Yet, even in his illness, it was to his son Mr. Noel Liburd Sr. would turn to assist him with this process. There is nothing equitable about allowing Mr. James Liburd to simply take over the management of this company at this stage in the process, whilst staking a claim for 50% of its ownership. I would not be minded to adopt such an approach at it would certainly not meet the ends of justice.

[57] Counsel for the defendants on the other hand refers the court to the case of ***Shaikha Lulwa Bint Mohamed Abdulla Al Khalifa (by her attorney Shaikh Rashid Bin Salman al Khalifa v Financial Services Commission***⁵ in support of the submission that everything which was done by Mr. Liburd Jr. was lawful. In that case, the court addressed circumstances in which a power of attorney granted by a company's sole member can be invoked by that lawful attorney to restore a company to the companies register. There Wallbank J noted the following:

“Construing the Power of Attorney in this case as a whole it is clear to me that the purpose was to confer upon Shaikh Rashid a wide authority to deal with Shaikha Lulwa’s private and business affairs and that it was intended to be inclusive, rather than exclusive, even upon a strict and narrow construction. It is also clear to me that being prepared overseas, without specific reference to any corporate affairs in this jurisdiction, or real property elsewhere that might be owned by a company originally established in this jurisdiction, does not detract from that wide authority. The provision in the Power of Attorney that “In general, he shall handle all her private business

⁵ BVIHCV 2011/0305

affairs” is in my view particularly instructive and indeed crucial in the present case. It is a catch-all provision, which is designed to supplement specifically mentioned general powers, in circumstances where the document is clear that the grantor of the Power did not intend to restrict the grantee merely to those powers. I have no doubt that Shaikh Rashid was intended to have the same powers as his mother to handle all her private business affairs, and that this must include restoring a company of which Shaikha Lulwa was a sole member and director.”

[58] The argument being made here is simply that Mr. Liburd Sr. had granted a power of attorney to his son in broad enough terms to encompass the actions which were taken. The power of attorney included a clause which states that Mr. Liburd Jr. was empowered to *“take all administrative action regarding to Noel Courtesy Garage Limited in bringing the company up to date at the company registry and such other actions as the attorney may deem fit.”* As such, in accordance with these terms and on the authority referred to above, there would have been nothing wrong in the grant of a power of attorney to perform the functions which Mr. Liburd Sr. had initially performed himself.

[59] I make just one observation as it relates to the defendant’s reliance on this case. It is simply that the case referred to related to a circumstance where the principal to the power of attorney was the sole shareholder and director of the company. That is a distinction between that case and the one at bar, where Mr. Liburd Sr. at that point was registered as having 3 out of the 6 shares in the company. It would therefore be open to debate as to whether Mr. Liburd Jr. was in fact empowered to alter the shareholding of the company without any notice to the other shareholders.

[60] Be that as it may, I have already considered the fact that Mr. James Liburd conceded that he was aware that Mr. Liburd Sr. was granting such a power to his son to manage the affairs of the company. He was aware that his brother was incapable of carrying on with that function and raised no objection. Mr. Hanley, who was also a shareholder of the company at that point, also stated that he was aware of this. In such circumstances, I have no difficulty in finding as a matter of fact, that Mr. Liburd Jr. was empowered to perform the duties of managing the affairs of the company at that time. That included the issue of restoring the company to the roll of companies and managing the debts which the company owed. As to whether it was lawful to alter the shareholding and directorship of the company I continue to express concern with those actions.

[61] Counsel then went on to refer to the case of ***Michael Joseph v RBTT Bank Caribbean Limited***⁶ where Wilkinson J came to consider what was referred to as a power of attorney coupled with an interest. There her Ladyship noted that in such an instance the power ***“is not held for the benefit of the principal, and it is irrevocable due to the agent’s interest in the subject matter. For this reason, some authorities assert that it is not a true agency power.”*** It is however unclear to me as to the relevance of this case to the issues before me. The case dealt with a power of attorney granted in order to secure the proprietary interest of the agent. For example, a power of attorney granted to a bank in order to secure its own interest in the mortgaged property falls within that category. A similar circumstance does not arise in this case and I am unable to place any reliance on that authority for any of the issues currently before me.

[62] As it relates to the lawfulness of Mr. Liburd Jr.’s appointment counsel refers to section 83 of the **Companies Ordinance** which states that ***“[a]n act of a director or officer is valid notwithstanding any irregularity in his election or appointment, or any defect in his qualification.”*** Counsel goes on to refer to the case of ***State for Trade and Industry v Hollier and others***⁷ where the following was noted:

“On the basis of the analysis above, I would summarise as follows the principles to be applied in determining in proceedings under the 1986 Act whether the defendant was a de facto director. (1) The touchstone is whether the defendant was part of the corporate governing structure. (2) Inherent in that touchstone is the distinction between someone who participates, or has the right to participate, in collective decision-making on corporate policy and strategy and its implementation, on the one hand, and others who may advise or act on behalf of, or otherwise for the benefit of, the company, but do not participate in decision-making as part of the corporate governance of the company. Accordingly, the test is not satisfied by someone who was at all times and in all material decisions subordinate to the de jure directors. (3) The defendant may have been a de facto director even though he or she did not have day-to-day control of the company’s affairs, and even though he or she was only involved in part of the

⁶ SLUHCV2007/0067

⁷ [2006] EWHC 1804 (Ch)

company's activities. (4) The issue is to be determined objectively on the basis of all relevant facts. Whether the defendant was held out by the company, or claimed or purported, to be a director, and whether the defendant had access or the ability to obtain access to relevant company information is likely to be highly relevant and may be decisive. Factors such as a family relationship with other admitted directors and the defendant's financial interest in the company may also be relevant, sometimes supporting and sometimes negating the allegation that the defendant was a de facto director. (5) De facto directorships and shadow directorships are alternatives, although there may be cases, particularly where the defendant's influence in the corporate governance was partly concealed and partly open, where it may not be entirely straightforward which of the two descriptions is most apposite."

[63] The argument here is that regardless of the manner in which he was appointed, Mr. Liburd Jr. had become an integral part of the management of this company to the point where from 2015 onwards he had day to day control of the affairs of the company. He managed its debts. He brought the company into good standing with the Registry and negotiated with financial institutions in order to address their concerns. When coupled with section 83 of the Ordinance, counsel submits that the court should at least consider Mr. Liburd Jr. to have become a de facto director of the 2nd defendant company and to ratify the actions which he had taken in the performance of this function.

The Court's Conclusions

[64] I have throughout this judgment expressed my views on the facts which have been presented in evidence in this case. On the basis of these I am generally not of the view that a reasonable expectation has been raised in favour of Mr. James Liburd in this case. I find as a matter of fact that there was no agreement between himself and his brother that this company would be used as a means to fulfill a lifelong dream. I also find that his role in the construction of the buildings does not amount to the capitalization of the shares he obtained upon subscribing to the memorandum of association. I find that his brother had singlehandedly built this company and used it as his main source of financial survival with no input from him to the point where they were not on speaking terms at the time of Mr. Liburd Sr.'s death.

[65] In addition, I find that Mr. Liburd Sr. did in fact own 3 shares in the company and that Mr. James Liburd owned 1 share. I am of the view that as at November, 2003 Mr. James Liburd was aware of this change in shareholders and directors and raised no objections to it. I would therefore not be minded to impinge that decision and that alteration which had been made in the Registry of Companies.

[66] I also find that Mr. Liburd Jr. had in fact become a de facto director of the company as at the date of the power of attorney in 2015. At that point his father was too ill to manage the affairs of the company and handed them over to him. It is not necessary to reconcile whether the power of attorney was the most effective way of doing so. It is enough that Mr. James Liburd and Mr. Hanley were aware and had also left the direction of the company from thereon to be handled by Mr. Liburd Jr. From there he took the necessary steps to restore the company into good standing with the Registry of Companies. He managed the company's debts and kept it as a going concern until his father unfortunately died.

[67] However, I am not of the view that Mr. Liburd Jr. was empowered to alter the shareholding of the company with no notice to the other shareholders. The power of attorney and directorship were not given for his private benefit and I would agree with the claimant that the resolutions passed in 2018 and 2019 are invalid and should be set aside. However, it seems rather clear to me that Mr. James Liburd's own failure as a director and his general lack of involvement in this company over the years make him ill-suited to simply take over the affairs of the company. In fact such a failure is so glaring that I would be minded to exercise the broad powers available to me under section 241 of the Ordinance to order that he be removed as a director and be prohibited at this stage from hindering the proper management of the affairs of the company in any way.

[68] I am also of the view that under section 241(e) of the Ordinance, the court is empowered to appoint a director in order to ensure that the affairs of the company are being properly managed. The section in general gives the court broad equitable powers to make orders which are in the best interest of the company at this stage. Having found that Mr. Liburd Jr. is the de facto director and also being of the view that he is the person who was most entrusted by his father to manage the company at the time of his illness, I am minded to exercise my powers in ensuring that he is recorded as the managing director of the company so as to ensure that the efforts he had made in

managing the debts of this company continue unhindered. However he is to ensure that a certified accountant is appointed as was agreed at the meeting with the Credit Union to assess the current state of the company. The account which has been filed so far, to which Mr. James Liburd has recorded his objection, are to be supplemented by the report of an accountant as to the state of affairs of the company.

[69] I also understand that there may be issues, or perhaps some measure of dispute, relating to the estate of the late Noel Liburd Sr. However that is a matter for the estate and the beneficiaries to consider and is not currently before me. I would therefore make no further comment on this issue which had been raised by counsel for the claimant.

[70] In the circumstances it is hereby declared, ordered and directed as follows:

- (a) Mr. James Liburd is the holder of 1 out of 6 shares issued in the 2nd defendant company. The remaining shareholders are as outlined in the annual returns filed for the year 2003;
- (b) Subject to the remaining orders below, the resolutions passed on 31st January 2018 and 15th November, 2019 are declared null and void;
- (c) Mr. Noel Liburd Jr. is to be appointed as the managing director of the 2nd defendant company;
- (d) Mr. James Liburd is to be removed as a director and is not to be appointed as a director in the future;
- (e) Mr. Noel Liburd Jr. is to take all steps necessary to ensure that a certified accountant is appointed to conduct an assessment of the affairs of the company. A report is to be filed with the court and served on the remaining shareholders of the company;

- (f) Orders f, G, H, and I as sought in the claim form and affidavit of James Liburd are all denied;
- (g) The Registrar of Companies is to take all steps necessary to ensure that the records of the company are brought up to date in line with the orders of this court;
- (h) Given that each party has enjoyed some measure of success in this claim, there is no order as to costs.

Ermin Moise
High Court Judge

BY THE COURT

REGISTRAR