[2020] JMCC Comm 18

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

COMMERCIAL DIVISION

CLAIM NO. 2017CD000594

BETWEEN	**JASON ABRAHAMS**	**APPLICANT**
AND	**CABLE &WIRELESS JAMAICA LIMITED**	**RESPONDENT**

IN CHAMBERS

Mr Conrad George and Mr Andre Sheckleford instructed by Hart Muirhead Fatta, Attorneys-at-Law for the Applicant

Mrs Denise Kitson QC, Mr. Kevin Williams and Ms Anna-Kay Brown instructed by Grant Stewart Phillips, Attorneys-at-Law for the Respondent

Heard: 3rd, 19th June and 17th July 2020

Companies Act - Application for leave to bring a derivative claim – Factors to be considered – Whether leave should be granted to bring claim outside the Jurisdiction – Application of pre-2017 company law relating to fiduciary duties – Extent of applicability of business judgment rule

LAING, J

The Application

[1] The Applicant is an Investment Banker. He is the holder of the legal title of 40,000,000 shares in the Respondent and he asserts that he is also the beneficial holder of 23,661,056 shares which are held for his benefit by an entity named CASA Corporation Limited.

[2] The Respondent is a company duly registered under the laws of Jamaica in the business of providing telecommunications services under the FLOW brand formerly under the LIME brand ("the Company").

[3] The Applicant by notice of application filed 27th November 2017 (relisted 29 November 2017) is seeking leave to bring a derivative claim. A derivative claim is a claim by a member of a company seeking relief on behalf of the company in respect of a cause of action which is vested in that company. The Applicant is seeking leave to bring a claim in the name of the Respondent ("the Proposed Claim"), against certain directors for alleged breaches of their statutory and other duties to the Company and he also wishes to claim against Cable and Wireless Communications Limited (formerly bearing the suffix "Plc") ("CWC") on the basis that it is a shadow director.

Why is leave to bring the Proposed Claim necessary?

[4] A convenient starting point in any analysis of the development of shareholder remedies is the rule in **Foss v Harbottle**, derived from the case of **Foss v Harbottle** (1843) 2 Hare 461). The classic exposition of the rule is by Jenkins LJ in **Edwards and Another v Halliwell and Others** [1950] 2 All ER 1064 at 1066 as follows:

> *The rule in Foss v Harbottle, as I understand it, comes to no more than this. First, the proper plaintiff in an action in respect of a wrong alleged to be done to company or association of persons is prima facie the company or the association of persons itself. Secondly, where the alleged wrong is a transaction which might be made binding on the company or association and on all its members by a simple majority of the members, no individual member of the company is allowed to maintain an action in respect of that matter for the simple reason that, if a mere majority of the members of the company or association is in favour of what has been done, then **cadit quaestio**. No wrong had been done to the company or association and there is nothing in respect of which anyone can sue. If, on the other hand, a simple majority of members of the company or association is against what has been done, then there is no valid reason why the company or association itself should not sue. In my judgment, it is implicit in the rule that the matter relied on as constituting the cause of action should be a cause of action properly belonging to the general body of corporators or*

> *members of the company or association as opposed to a cause of action which some individual member can assert in his own right.*

[5] The rationale behind the rule was that it would be detrimental to the proper functioning of a company if each shareholder had the right to interfere with the everyday decisions of the company by bringing a claim on behalf of the Company. The operation of the rule meant that, because of his minority shareholding, the minority shareholder was hardly ever able to bring an action in the name of the company, since the right to bring such an action lies with the directors in the first instance.

[6] Over time there developed a considerable body of case law which provided a number of exceptions to the rule in **Foss v Harbottle** pursuant to which a shareholder could, bring an action on behalf of the company where there had been, *inter alia*, a fraud on the minority and where the wrongdoers themselves were in control of the company. These claims are generally referred to as common law derivative claims.

[7] The Companies Act 2006 (UK) consolidated and in many respects replaced the common law derivative claim procedure. This move to place the common law derivative claim procedure on a statutory footing has been adopted by a number of commonwealth jurisdictions, including Jamaica, which has done so by virtue of the current Companies Act 2004 ("the Act"). The approaches of the various jurisdictions to the details of the statutory derivative claim procedure has varied widely and I will highlight some of these differences, referencing in particular the British Virgin Islands later in this judgment.

[8] The Jamaican statutory provision governing derivative claims is found at section 212 of the Act which provides as follows:

> *212- (1) Subject to subsection (2), a complainant may, for the purpose of prosecuting, defending or discontinuing an action on behalf of a company, apply to the Court for leave to bring a derivative action in the name and on*

> *behalf of the company or any of its subsidiaries, or intervene in an action to which any such company or any of its subsidiaries is a party.*
>
> *(2) No action may be brought, and no intervention in an action may be made under subsection (1) unless the Court is satisfied that—*
>
> > *(a) the complainant has given reasonable notice to the directors of the company or its subsidiary of his intention to apply to the Court under subsection (1) if the directors of the company or its subsidiary do not bring, diligently prosecute or defend, or discontinue, the action;*
> >
> > *(b) the complainant is acting in good faith; and*
> >
> > *(c) it appears to be in the interests of the company or its subsidiary that the action be brought, prosecuted, defended or discontinued.*
>
> *(3) In this section and section 213 and 213A, "complainant" means—*
>
> > *(a) a shareholder or former shareholder of a company or an affiliated company;*
> >
> > *(b) a debenture holder or former debenture holder of a company or an affiliated company;*
> >
> > *(c) a director or officer or former director or officer of a company or an affiliated company.*

[9] It is common ground between the parties that the Applicant is a "complainant" pursuant to section 212(3) of the Act and that he has fulfilled the notice requirement of section 212(2)(a). The main issues which fall for determination concern whether the Applicant has satisfied the requirements that (a) he is acting in good faith; and (b) that it appears to be in the interests of the company that the Proposed Claim, for which he seeks leave be brought.

The degree to which there needs to be an analysis of the Proposed Claim

[10] In many applications before the Court, the applicant is required to demonstrate that a claim can clear a minimum bar. The requisite standard varies depending on the nature of the application. By way of example, on an application for a freezing order the applicant must prove that he has "*a good arguable case*". Mustill J in **Ninemia Maritime Corporation v. Trave Schiffahrtsgesellachaft m.b.H. Und Co. K.G. ("the Niedersachsen)** [1983] 2 Lloyds Rep 600 explained that this was

"*a case which is more than barely capable of serious argument and yet not necessarily one which the judge believes to have a better than 50 percent chance of success*". On the other hand, on an application for an interlocutory injunction the applicant is required to establish to the satisfaction of the court "*that the claim is not frivolous or vexatious; in other words, that there is a serious question to be tried*" (per Lord Diplock in **American Cyanamid v Ethicon Ltd** [1975] 1 All ER 504 at 510).

[11] Notwithstanding the absence of any express term in the Act indicating the minimum bar which must be satisfied by the applicant on an application for leave, there must be some consideration of the Proposed Claim since this will have an impact on the issues of good faith and also whether the Proposed Claim appears to be in the interests of the company.

[12] Both parties relied to different degrees on the Judgment of Sykes J (as he then was) in the case of **Sally Ann Fulton v Chas E Ramson Ltd.** [2016] JMSC Comm 14. In **Fulton** (supra) Sykes J (as he then was), at paragraphs 77 to 80 examined the relevance of the merits of the applicant's case and the influence it may have on the consideration of the requirements of good faith and that the claim be in the interests of the company:

> *[77] It is this court's view that the closer the case is to being frivolous and vexatious the easier it is to infer an absence of good faith and the stronger the case, the easier it is to infer the presence of good faith. However, the fact that a case is frivolous and vexatious does not mean that the complainant does not have a genuine and honest belief in the case and that it should be brought. The complainant may be sincere and honest in his or her belief but misguided. A complainant can also have an honest belief in the case and the case may have good and sound legal merit but the complainant may have brought the claim in order to extract some concession from the company. It is entirely possible that the complainant has no intention of seeing the case through to completion.*
>
> *[78] What if the complainant is sincere but the case has little or no legal merit? It is this court's view that the good faith test would still be met but the court could say that it is not in the interest of the company to bring the claim because it has no legal merit.*

> *[79] This may well mean that the good faith test is easily satisfied and thereby confirms Mr Bruce Welling's view that the good faith requirement is virtually meaningless (see para 24 of Rajah JA's judgment). Implicit in Mr Bruce Welling's conclusion is the hint that it should be done away with.*
>
> *[80] But what if the good faith requirement is met but the court finds that the claim is frivolous and vexatious or lacking in merit? That can easily be accommodated under the third requirement of 'interests of the company.' It can never be in the interest of the company for the court to permit a claim that is frivolous, vexatious or lacking in legal merit.*

[13] As it relates to the good faith and the interest of the company requirements, the Claimant submitted that a similar approach should be taken by the Court as on an application for an interlocutory injunction in examining whether the claim is frivolous or vexatious or that there is a serious question to be tried. The Respondent also accepts Justice Sykes' view that whether the claim is frivolous or vexatious is relevant to the consideration of these requirement (as can be seen at paras 40 and 103 of the Respondent's written submissions).

[14] It is in this context of examining whether the claim is frivolous and/or vexatious that the Court will examine the evidence led by the parties. There are parallels between the Court's function at this stage and the Court's functions when it is considering whether a claim is frivolous and/or vexatious on an application for an interlocutory injunction. However, as Lord Diplock said in **American Cyanamid** (supra at page 510):

> *"It is no part of the court's function at this stage of the litigation to try to resolve conflicts of evidence on affidavit as to facts on which the claims of either party may ultimately depend nor to decide difficult questions of law which call for detailed argument and mature considerations.*

[15] The pith and core of the Applicant's complaint is that the Respondent's directors have not acted honestly and in good faith with a view to the best interest of the Company. He avers that the directors have not exercised the care, diligence and skill that a reasonably prudent person would exercise in comparable circumstances, including, but not limited to the general knowledge, skill and experience of the director or officer and have operated with conflicting duties. Fundamental to these complaints is the alleged influence of CWC.

[16] The grounds filed in support of the Application sets out the areas of complaint in summary form and I reproduce hereunder the main points which deserve analysis. I will firstly simply identify the contrasting positions of the parties on these matters in dispute with a brief discussion of the law which may be relevant in an effort to give context to the divergent positions, but without expressing an opinion on the facts. My opinion will be reserved for the analysis section of this judgment. The issues are grouped for convenience in some instances and are not necessarily addressed in the order in which they appear in the grounds of the Application. In the Application they appear as follow:

> *The Directors and Shadow Directors have breached many of their fiduciary duties owed to the Defendant, causing the Defendant to suffer significant losses. These breaches of duty are particularised in the draft Shareholder Derivative Complaint, and include:-*
>
> *(a) Increasing the debt level of the Defendant to imprudent levels to suit the commercial interests of the Ultimate Parent Company;*
>
> *(b) Allowing the Ultimate Parent Company to offload costs and expenses of its global operation into Jamaica (i.e. to "earnings strip" the Defendant for Ultimate Parent Company's commercial gain);*
>
> *(c) Allowing the Defendant to destroy its "Lime" brand in favour of "Flow" to suit the interest of Ultimate Parent Company (after Ultimate Parent Company had acquired a 100% beneficial interest in a competitor, Columbus Communications Jamaica Limited ("FLOW Jamaica"):*
>
> *(d) Allowing the Defendant to transfer assets and value to FLOW Jamaica without receiving adequate consideration or compensation;*
>
> *(e) Allowing an individual, Mr. Garfield Sinclair, the Company's then CEO and former Chairman to manage a business consolidation between the Company and FLOW Jamaica, while simultaneously a director of the Defendant and Flow Jamaica, and on an employment contract with CWC*
>
> *(f) Abdicating their duties and responsibilities to an "Operating Board", which operated outside of Jamaica (in Florida, in the United States of America) and exclusively to further the commercial interests of CWC;*
>
> *(g) Rubber stamping decisions taken by the Operating Board for the exclusive benefit of CWC;*
>
> *(h) Allowing the Company to expend tens of millions of United States Dollars to develop a mobile television product (commercially known as*

LIME TV) owned at the time, and now, by its then Chairman Christopher Dehring, who has since used the benefit of the Company's investment to launch READY TV, in competition with the Company;

(i) Failing to take reasonable steps to protect the Company's investments in relation to the LIME TV;

(j) Deliberately pursuing and protecting the interest of CWC, at the expense of the minority shareholders, in relation to matters related to and consequent on the takeover of CWC by Liberty (the "Liberty Takeover");

[17] The Claimant asserts that as a result of the foregoing actions of the directors and the shadow director, CWC; which are not in the best interest of the Company, the Company suffered substantial financial losses.

Abdicating their duties and responsibilities to an "Operating Board", which operated outside of Jamaica (in Florida, in the United States of America) and exclusively to further the commercial interests of CWC;

Rubber stamping decisions taken by the Operating Board for the exclusive benefit of CWC;

[18] The historical source of the current director's duties was the common law which established the fiduciary obligations of directors. These common law obligations were captured to some extent and given statutory force in the 1967 Companies Act but not clearly so, resulting in a number of cases which sought to delineate their precise ambit. These duties are encapsulated in sections 174 and 174A of the Act, the latter of which was introduced by the Companies (Amendment) Act 2017 and provides as follows:

> ***174.***—*(1) Every director and officer of a company in exercising his powers and discharging his duties shall—*
>
> > *(a) act honestly and in good faith with a view to the best interest of the company; and*
> >
> > *(b) exercise the care, diligence and skill that a reasonably prudent person would exercise in comparable circumstances, including, but not limited to the general knowledge, skill and experience of the director or officer.*

> *(2) A director or officer of a company shall not be in breach of his duty under this section if the director or officer exercised due care, diligence and skill in the performance of that duty or believed in the existence of facts that, if true, would render the director's or officer's conduct reasonably prudent.*
>
> *(3) For the purposes of this section, a director or officer shall be deemed to have acted with due care, diligence and skill where, in the absence of fraud or bad faith, the director or officer reasonably relied in good faith on documents relating to the company's affairs, including financial statements, reports of experts or on information presented by other directors or, where appropriate, other officers and professionals.*
>
> *(4) In determining what are the best interests of the company, a director or officer may have regard to the interests of the company's shareholders and employees and the community in which the company operates.*
>
> *(5) The duties imposed by subsection (1) on the directors or officers of a company is owed to the company alone.*
>
> *(6) Where pursuant to a contract of service with a company, a director or officer is required to perform management functions, the terms of that contract may require the director or officer in the exercise of those functions, to observe a higher standard than that specified in subsection (1).*

[19] The Applicant asserts that CWC, the majority shareholder and parent of the Company is a shadow director. The term "*shadow director*" is defined at section 2 of the Act as follows:

> *"shadow director" in relation to a company, means a person in accordance with whose directions or instructions the directors of the company are accustomed to act, so, however, that a person is not deemed a shadow director by reason only that the directors act on advice given by him in a professional capacity.*

[20] A person who acts as a director although he is not formally appointed (sometimes referred to as a "*de facto*" director), might not escape liability for breach of duty by virtue only of the fact that he is not formally appointed. In some jurisdictions the positon is less than clear as to the duties owed by a shadow director, see for example the English decisions of **Ultraframe (UK) LTD v Gary Fielding and Ors** [2005] EWHC 1638 (Ch) and **Vivendi SA and anor v Richards and anor** [2013] EWHC 3006 (Ch). The draft claim annexed to the Applicant's first affidavit avers that under Jamaican law, CWC is a shadow director of the company and is subject

to precisely the same duties and responsibilities as appointed directors. The Respondent challenged whether CWC was a shadow director but did not forcefully challenge this proposition and I was not provided with any Jamaican authorities which have settled this point one way or the other. Accordingly, for purposes of this Application I will assume that a shadow director owes fiduciary duties to the Company.

[21] In support of its position that CWC is not a shadow director, the Respondent relies on the case of **Buzzle Operations Pty Ltd (in liq) and Another v Apple Computer Australia Pty Ltd and Others** [2011] NSWCA 109 as authority to support its submission that in order to establish that a legal person is a shadow director, the evidence must show "*something more*" than just being in a position of control. The Respondent submitted that the whole of the facts of the case must demonstrate that the power to control of the alleged shadow director was put into practice and was evidenced by a pattern of compliance occurring over a period of time. it was submitted that and this pattern of conduct has not been established in this case. Closely connected to the issue of whether CWC is a shadow director is the issue of the influence of the Operating Board about which the Applicant complains.

[22] The claim of the Applicant as it relates to the influence of CWC as summarised by counsel is essentially that:

> *"… the board of the Respondent has operated at the beck and call of CWC and has been operated in a manner aimed at furthering the commercial interests of CWC while depriving the Respondent of value. By virtue of what is set out in the affidavits in support of this application and the draft complaint, the directors of the Respondent were accustomed to acting on the direction and instructions of CWC."*

The Applicant therefore asserts that the board of the Company, with the complicity of, and/or on the instructions of CWC its shadow director, have breached their fiduciary duty to the Company. Central to the Applicant's assertions is the role played by the Operating Board in the management decisions of the Company. The issue is therefore raised as to whether, for example, directors have simply followed

the strategic direction, budgets and other major decisions set by CWC without satisfying their fiduciary duty to the Company.

[23] It is critical to the analysis on this issue to appreciate at the outset, that the directors of the Company owe their duties to the Company and not to the parent CWC, other group companies, individual shareholders or groups of shareholders. A parent-subsidiary relationship exists when one corporate entity owns a majority interest in another corporate entity. Where all the shares in a company are held by the parent the company in which the shares are held is called a wholly owned subsidiary. In the case of a wholly owned subsidiary there is unlikely to be a complaint that the directors of the subsidiary breached their duty of care to the company by considering the interests of the parent, since the parent is the only shareholder, but complaints by other interested parties such as creditors cannot be excluded. In this case it is relevant that the Company is not the wholly owned subsidiary of CWC.

[24] Mr Garfield Sinclair, President of Cable and Wireless Caribbean and former Managing Director of the Company ("Mr Sinclair") in his first affidavit filed herein on 2nd February 2018 at paragraphs 44 and 45 provides an explanation of the operation and decision making process of the Company. He refers to "…*the multinational conglomerate organization CWC's matrix management structure, whereby line functions within its group have dual reporting lines to both local and overseas management personnel*". This he asserts is a well-known and commonly applied management practice with several advantages which he identified.

[25] At paragraph 45 of the affidavit Mr Sinclair avers as follows:

> *45. That as regards paragraph 35 of the Abrahams affidavit I say that at various times the Caribbean operations of CWC have had various regional hubs, these include Jamaica, Cayman and Barbados. The senior executives of the regional hubs have operated using various names including Senior Leadership Team and Executive Leadership Team. In or around 2008 a regional hub was established at the regional head office in Barbados and that the persons who held senior management for the Caribbean were called the Operating Board. That the Respondent strenuously refutes the allegation that CWC's board implemented*

> *decisions for CWJ as a matter of course. CWJ has always had independent directors with sound judgment. They have been well established members of the Jamaican business community who have held positions such as chief executive of other entities (including multinationals) and have sat on boards of publicity listed companies. Reference is made to the Directors profiles as set out in CWJ's annual reports. CWJ through the leadership of its board has always practiced solid corporate governance with strong independent directors with broad experience.*

[26] On this issue of the role of the operating board, Counsel for the Respondent submits as follows:

> *70. Here, paragraphs 43-46 of GS's 1st Affidavit are relevant, that CWJ does not provide non-profit services to the companies which are part of the CWC group of companies. Also, the Board's decision to be a part of the said group of companies does not indicate that CWJ operates at the whims and fancies of CWC. Each company in the group operates as a separate entity and the CWJ Board makes decisions which it believes are in the best interest of CWJ. The Corporate Governance Policy is therefore geared towards the operation of each company as a separate entity.*
>
> *71. Moreover, the various companies in the group of companies provide mutual support to each other, which helps to increase the profitability of each company.*
>
> *72. Accordingly, it cannot be said that the CWJ Board's conduct as regards the Operating Board and related companies is injurious to the Company and as such there is no basis for an action alleging that CWJ has been negligent.*

[27] Whereas these submissions are noted I will later in these reasons explain why in the context of the position of the Company in the organisational structure of the group of companies of which it is a member, care must be exercised in treating with assertions, without analysis, that the directors of the Company acted independently in the best interest of the Company.

Allowing the Ultimate Parent Company to offload costs and expenses of its global operation into Jamaica (i.e. to "earnings strip" the Defendant for Ultimate Parent Company's commercial gain);

[28] In his first affidavit at paragraphs 29 and 30 Mr Abrahams avers as follows:

> *29. In addition to the harmful debt scheme, CWC's perception that Jamaica was a high tax, low labour cost jurisdiction led it to assign high cost, loss-making functions pertaining to its other subsidiaries to Jamaica, ultimately for CWC's own benefit. For the same reason CWC generally structured prices to show maximum profits in low or no tax jurisdictions such as the Cayman Islands, but not in Jamaica.*
>
> *30. Labour intensive services provided by the Company for CWC's subsidiaries were entirely unprofitable for the Company and only served to increase CWC's profitability.*

[29] Mr Abrahams did not present significant facts on which these assertions were based. The Company denies this assertion and in his first affidavit Mr Sinclair explains that the Company received value for the services it provided to the group. I have earlier referred to the assertion by Mr Sinclair in his first affidavit that CWJ does not provide non-profit services to the companies which are part of the CWC group of companies and that the various companies in the group of companies provide mutual support to each other, which helps to increase the profitability of each company.

Deliberately pursuing and protecting the interest of CWC, at the expense of the minority shareholders, in relation to matters related to and consequent on the takeover of CWC by Liberty (the "Liberty Takeover")

[30] In or about May 2016 CWC was acquired by Liberty Global plc ("Liberty"). Mr Abrahams asserted that he believes the board of the Company worked together with CWC to protect CWC's interest in the Liberty takeover of CWC. He opined that a lawsuit by minority shareholders of the Company was likely to have been prejudicial to CWC's interest in the takeover by Liberty. He considers that the board of the Company was influenced by CWC to assist in misleading the concerned shareholder group that a fair offer would be made to purchase their shares, with the objective of dissuading them from bringing legal action.

[31] Mr Sinclair denies this assertion and at paragraph 62 of his first affidavit argues that the liberty takeover has facilitated an offer by CWC to buy the shares of the

minority shareholders at a price which reflects a significant premium on the price at which the shares were recently traded on the Jamaica Stock Exchange.

Allowing the Company to expend tens of millions of United States Dollars to develop a mobile television product (commercially known as LIME TV) owned at the time, and now, by its then Chairman Christopher Dehring, who has since used the benefit of the Company's investment to launch READY TV, in competition with the Company

Failing to take reasonable steps to protect the Company's investments in relation to the LIME TV

[32] The applicant asserts that the Company invested millions of dollars in developing a product which it marketed as LIME TV which it later abandoned and wrote off the company's investment of potentially US$100 million. He further asserts that Christopher Dehring who resigned as Chairman of the Company in 2015 has relaunched the technology as READY TV and now operates Ready TV as its Chief Executive Officer.

[33] In response the Company asserts that whereas the LIME TV initiative did involve investment it did not spend the sum of US$100 million because the Company was a mere licensee of the technology. He indicates that there was nothing proprietary about the technology which was first developed as far back as 1977. The technology Mr Dehring uses is not the same as that which the Company was exploring and he explains that it was not and is not owned by Mr Dehring. Mr Sinclair explains that at the time there was no applications like Mobdro, Amazon and Netflix offering TV services and the Company was attempting to get more consumers to get mobile phones by adding television but the venture proved not to be successful and was discontinued for this reason.

[34] Counsel for the Company submitted that there is no evidence that Mr Dehring misused the corporate opportunites of the Company or that the board of the Company breached their duties by allowing LIME TV to enure to the benefit to Mr

Dehring and/or was grossly negligent in allowing one of their board members to gain such a benefit/profit. It was also submitted that the case **Daniels and others v Daniels and Others** 1978 2 All ER 89 relied on by the Applicant is inapplicable to the circumstances of the present case because in **Daniels** there was a non-disclosure by a director of profit that it obtained, while the director in question was still a director. Counsel argued that in this case, Mr Dehring pursued his READY TV project after he ceased to be chairman of the Company.

[35] Counsel for the Company also submitted that where the Company's opportunity is taken by a former director after he resigns under circumstances where the Director was not coerced to leave by the desire to take advantage of that opportunity, there was no breach of fiduciary duty. Counsel relied on **Island Export Finance Limited v Umunna** 1986 BCLC 460 in support this position.

Increasing the debt level of the Defendant to imprudent levels to suit the commercial interests of the Ultimate Parent Company

[36] This is the complaint which has occupied the major portion of the evidence presented by both parties. The Applicant averred that based on his investigations, since 2010 the Company has had an extraordinarily high debt ratio which in 2013 peaked at 15 times earnings before interest, tax, depreciation and amortization (EBITDA), when CWC's publicly stated target for prudent leverage is 2.5 to 3 times EBITDA. He stated that based on his experience in analysing companies and his knowledge of best business practices it is not acceptable for a company to be as highly leveraged as the Company currently is. In his view, in capital intensive corporate entities such as the Company, it is commonplace to utilize both debt and equity to finance its renewal and replacement projects. He expressed concern that the debt utilized by the Company was borrowed mainly from CWC the majority shareholder.

[37] The Applicant stated that the loans from CWC have caused massive losses which had a devastating financial effect on the Company while simultaneously providing

a benefit to CWC by way of the earnings to CWC, derived from interest paid by the Company on the loans.

[38] The Applicant's opinion as stated in paragraph 28 of his first affidavit is that:

> *"28. It is inconceivable that this policy of loading the Company with debt to the parent could have been planned and implemented other than by CWC exercising control over the board of the Company as a shadow director of the Company, either directly or indirectly through the Operating Board, to achieve objectives that were contrary to the interests of the Company.*

[39] Mr George referred to the minutes of the board of directors held by teleconference on 30th August 2007 and in particular item 6, where in response to a query as to whether C&W [plc] would provide the Company with sufficient cash to fund the operations of the business, Director Mount reminded the directors that C&W plc had already provided US2.5 million in mid-May, US$14 million in mid-June and a further $8 million promised for September. He confirmed that the applicable interest rate was 15% and that Jose Roncal had suggested that US$24.5 million as the funding likely to be necessary.

[40] The portion on which Mr George places heavy reliance is what followed which is reproduced below:

> *Director cocking suggested that borrowing from C&W plc in US$ at the given rate might not be the best source funding for the company, as cheaper funds were available on the local market. It was therefore agreed that the matter of funding the company's operations should be revisited, and in particular the local market should be considered.*
>
> *The President advised the Board that he needed some more time to look more closely at the matter of the company's funding requirements and to review the relevant cash flow analysis. It was therefore agreed that the President would undertake a revised H-2 projection and would brief the Board at its next meeting on these matters as well as any other pressure points on the business.*

Mr George submitted that the subsequent minutes do not disclose that this issue was again examined in any detail, and that this supports the Applicant's contention that the loans from CWC at the interest rate being paid by the Company was not in the best interest of the Company.

[41] In response to the Applicant's allegations on this issue, the Respondent relies on the evidence presented by Mr Sinclair who in his first affidavit explains that the liberalization of the telecommunications industry resulted in the Company surrendering its exclusive licence in or around September 1999. The three phased liberalisation process resulted in competition in the mobile voice market and in the fixed voice market. Mr Sinclair provides a very detailed chronology of the events which characterised this new competitive environment and the challenges posed by its competitors, and in particular Digicel, which mainly to do with issues of pricing strategy and interconnection agreements. I find that it is unnecessary for the purposes of this judgment to repeat those details. Paragraph 19 of his first affidavit effectively summarises his opinion which is as follows:

> *19. CWJ asserts that there was "market failure" in the (sic) Jamaica's mobile market, which was at the heart of the losses which CWJ sustained during that period as a result of being forced to operate in what was not a level playing field. In that anti-competitive environment CWJ saw a significant reduction of its customer base, lack of growth and reduction in revenue and revenue potential."*

[42] Mr Sinclair admitted that the Company last paid a dividend of $0.03 in two tranches, on 26th November 2007 and on 16th February 2008. He blamed the regulatory constraints for the Company's inability to compete which resulted in losses and its inability to pay dividends.

[43] Mr Sinclair exhibited a letter dated 20th October 2015 from Myers Fletcher and Gordon, which was then the law firm representing the Company, to LevyICheeks in which it was explained that the Company took advantage of debt financing from CWC to meet its needs for injection of working capital at various points in time, often on an expedited basis to maintain its operations and to "*meet the day to day and ever changing challenges in the Jamaica market*". He indicated that he still stands by those assertions.

[44] In paragraph 25 of Mr Sinclair's first affidavit, he lists the capital expenditure by the Respondent and at paragraph 26 he states the following:

These items of expenditure were necessary to meet working capital for the build out of the network. This network comprised of a mobile, fixed/broadband network. As regards mobile Capital Expenditure for voice and data services included (sic) inter alia the cost of spectrum, upgrades from 2G to 3G and now LTE, and the build out of towers. The fixed network has seen the copper network being complemented by the addition of fibre. CWJ also owns extensive sub-sea facilities which support residential and business customer internet demands. Over the years the CW Business division has been obliged to constantly upgrade the network and retool to ensure network readiness and reliability especially against natural disasters. Business customers' demands on capex include establishment of high speed Multi-Protocol Labelling Switch (MPLS) networks. There has therefore been extensive expenditure on the build out and expansion of an island wide fixed network to support fixed voice and data to meet both residential and business customer demands. The telecommunications business is a capital intensive business. There is need for continued investment in cutting edge technology. This includes providing Fibre to the Home (FTTH), investment in 3G, 4G and LTE technologies for both mobile voice and data services. These investments are necessary for the viability of the business and to compete effectively. "

[45] Mr Sinclair admitted that the overall EBIDTA to overall debt ratios were high but are not overly alarming for the Company due to the relatively manageable interest rate coverage ratio accorded by CWC. These rates, which were lower than that which could have been obtained locally, rendered the debt serviceable and flexibility was derived from the fact that there is not a specific repayment date of the principal.

[46] As it relates to the Applicant's criticism of the Company for not raising capital by an equity issue, Mr Sinclair sought to refute the Applicant's assertion that an equity or rights issue was preferable. This he explains in paragraph 39 of his affidavit as follows:

39. As is no doubt appreciated, the issue of equity, with the requirements for public disclosure and detailed prospectus information, opens up sensitive information to competitors that would not otherwise be available. When the Respondent needed the subject working capital, it was time sensitive and in most if not all instances at a time when it would not have been in the Respondent's overall best interest to take its challenged history and current results to the equity market. Equity is typically and more likely to be successfully raised, and on more affordable/acceptable terms, when the facts reflect either a reasonable degree of success and/or where future performance and prospects are reasonably seen as promising and somewhat predictable. By contrast, a single source debt issue is often less

expensive to the issuer than raising equity and is undertaken in a private environment, with no obligation to make public disclosure of sensitive financial, operational or other proprietary information.

[47] In addition to the evidence of Mr Sinclair, the Respondent also relies of evidence of Anura Jayatillake, a chartered accountant and partner of the Jamaican member firm of Ernst &Young. He was instructed by Counsel for the Respondent to provide a professional analysis in the form of an affidavit in relation to the following issues:

A. Whether or not the intercompany loans (related party loans) provided to CWJ by Cable & Wireless Communications Limited (CWC) or its subsidiaries were reasonable and necessary.

B. If the related party loans were made at concessionary or other interest rates over the period of the financial support.

C. Whether the related party loans are in fact loans in form and substance and not equity disguised as loans.

[48] In his affidavit Mr Jayatillake traces the history of the build-up of the related party loans. He acknowledges that the regulatory and competitive environment which the Company experienced after liberalization of the telecommunications market in Jamaica and explains how the cash flow problems experienced by the Company resulted in the deferral of the declared dividend payments to CWC from 2000/2001 to 2003 and ultimately led to the conversion of this sum to a loan in 2004. He notes that in the Chairman's Report section of the 2004 Annual Report it was indicated that these deferred payments were to "*facilitate the Company's continued capital investment programmes, pending the completion of alternative external funding which is anticipated to be secured during the 2004/2005 financial year*". This declared intention to settle the related party loans from the proceeds of an external loan facility was also stated in note 26 of the audited financial statements for 2005.

[49] Mr Jayatillake opined that after 2008 the company's financial condition deteriorated further and it would have been extremely difficult to obtain external loans at

competitive rates, especially with a longer maturity period. He notes that in February 2011 when the Company secured a J$340 million loan facility from proven Wealth Limited for one year it was two hundred basis points above the rate charged on the related party loans. He also concluded that by virtue of the related party loans, the company was able to access debt that was on average approximately 29% lower than the prevailing rate on Jamaican Dollar loans and 55% on its United States Dollar loans. These related party loans he averred, were largely unsecured revolving facilities as compared with external party loans which usually required some form of collateral or guarantee.

[50] Mr Jayatillake stated that a generally acceptable EBITDA is within the range of 2.5 to 4 times and noted that in 2011 the total debt to EBITDA ratio increased to an "*unacceptable*" 12.6 times from 3.4 times in 2010. He conceded that this at first blush may give the impression that it was as a result of imprudent borrowings. However, on closer analysis he notes that it was a result of a 62% reduction in EBITDA in 2011 when compared to 2010, the previous year when it was J$2.7 higher. If it had remained the same then the total debt/EBITDA for 2011 would have been 4.1 times. He attributed the gradual reduction in EBITDA from approximately J$9.5 billion in 2002 to $1,644 billion in 2011 to the competitive and regulatory environment of the time.

[51] He noted that the total debt/EBITDA remained extremely high over 10 times up to 2015 and then gradually reduced to 6.8 times by December 2017. He concluded that based on the ratios between 2011 and 2015 it would not have been practical or possible to raise external debt at reasonable rates.

[52] Mr Jayatillake indicated further, that the share price of the Company fell from J$1.68 as at 31 December 2004 to J$0.50 by 31st December 2008 and further to $0.16 by 31 December 2013. These share prices, he asserted, experienced an overall decline of 52% from 2000 to 2017 while the Jamaica Stock Exchange main index expanded by 802% over the corresponding period. He asserted that this underperformance suggested a relatively higher attractiveness of a broader cross

section of other listed equites. In such circumstances he opined that it would have been imprudent to consider a share issue which would have required a significant discount on the market price, which could have, *inter alia,* resulted in a further dilution of the holdings of all shareholders (assuming CWC was not interested in participating in a rights issue and there was a bargain purchase agreement with a third party).

[53] Mr Jayatillake explained further, that because the Company's market capitalization had declined from J$28 billion in 2004 to J$2.7 billion in 2012, in each of the years for example 2011 to 2013 the Company would have had to issue more shares than those in issue just to fund the capital expenditure requirement alone, which averaged over J$5 billion per annum between 2004 and 2017. He concluded that in view of the downward spiral in share prices no rational investor would have invested equity unless offered a significant discount. His conclusion on this issue at paragraph 45 of his affidavit was that:

> *"45. Based on the foregoing, I conclude that the related party loans were reasonable and necessary. Given CWJ's financial performance after liberalization of the telecommunications industry, the volatile and declining stock prices, and the amount of funds that would have been required, it would not have been practical to consider raising equity. If CWJ raised external debt with regular interest and principal payments, CWJ would not have been able to service them.*

[54] There is therefore a difference of opinion between the Applicant and the Respondent on the issue of the debt incurred by the Company which I will address further in my analysis below.

Allowing the Defendant to destroy its "Lime" brand in favour of "Flow" to suit the interest of Ultimate Parent Company (after Ultimate Parent Company had acquired a 100% beneficial interest in a competitor, Columbus Communications Jamaica Limited ("FLOW Jamaica")

Allowing the Defendant to transfer assets and value to FLOW Jamaica without receiving adequate consideration or compensation

Allowing an individual, Mr. Garfield Sinclair, the Company's then CEO and former Chairman to manage a business consolidation between the Company and FLOW Jamaica, while simultaneously a director of the Defendant and Flow Jamaica, and on an employment contract with CWC

[55] The Applicant conveniently separates his complaints in respect of the FLOW Merger into the 'economic event' and the 'corporate process'. He asserts that both reflect breaches of duty by the board as well as a lack of regard for the rights and interests of the minority shareholders of the Company.

[56] The Applicant alleges that in or around the first quarter of 2015 CWC acquired 100% of the equity of Columbus International Inc which owned and still owns all the issued share capital in FLOW Jamaica which was a direct competitor of the Company in several areas of the telecoms market. He avers that there was not a merger between the Company and FLOW but that the board of the Company had caused the Company to abandon its LIME brand and adopted the FLOW brand and simply transferred the Company's voice over Internet protocol (VOIP) and fixed line business to FLOW without any consideration being received by the Company.

[57] The Company's response is contained in paragraphs 47 to 50 of Mr Sinclair's first affidavit on which reliance has been placed by Counsel and I reproduce that response hereunder:

> *47. CWJ and Columbus Communications Jamaica Limited (FLOW) operate just like every other majority owned member of the CWC group. They transfer priced and paid the value of any customers that moved from one network to another and this activity was subjected to independent financial audits. Even more importantly, the companies benefited from dramatically reduced operating costs resulting from the rationalization of Retail outlets and the people required to staff them. An immediate merger of both entities was not possible due to separate bond and various other corporate covenants that required that they remain separate legal entities for a specified period of time. The decision to utilize the consumer brand FLOW was arrived at after extensive research conducted both inside and outside both companies, which additionally resulted in adopting C&W Business and C&W Networks for the B2B and Wholesale fibre leasing businesses respectively.*

48. It is important to note that the fixed line and in fact fixed services are in structural decline as more persons choose to utilise mobile services. Notwithstanding fixed broadband is an important element of maintaining the viability of fixed services. As such CWJ fixed services have benefited from the operational synergies with the Columbus network and with the addition of television. What is even more significant is that the copper network which was seeing greater levels of structural decline has benefited from the introduction of television. This has meant that rather than fully retire this network it is now being upgraded by the use of multi-service access nodes (MSANS) to provide higher internet speeds and television over the copper network. This technology was expected to pass over 40,000 homes in 2018 but has already passed over 90,000 homes over the last 18 months. It expands the fixed and broadband services available in rural Jamaica thereby increasing the subscriber base of CWJ. This significantly increases Revenue Generating Units using multiple services. Accordingly, the merger has significantly complimented CWJ's offerings as is evidenced in increased revenues as set out in audited financials of CWJ over the period 2014 (pre-merger) to 2017:

Year ended March 31, 2014- $18.44 billion

Year ended March 31, 2015- $ 21.59 billion (17% increase on prior year)

Year ended March 31, 2016- $23.03 billion (5% increase on prior year)

9 months ended December 31 2016- $19.19 billion (12 % increase year on year)

49. That Columbus Communications was formerly a competitor of CWJ in the areas of fixed line and broadband. That in the telecommunications industry there is a growing trend of mergers and acquisitions as with convergence of technology customers are demanding quad play of fixed, internet cable and mobile. This is evidenced in Jamaica by mergers such as that between Digicel and Claro in 2011 and Digicel's subsequent acquisition of TV content providers/cable operators Sportsmax and Telstar. In 2006 AT&T acquired BellSouth another phone company in a $67 billion deal. The deal resulted in giving AT&T a local customer base of 70 million across 22 states in the United States of America. By that acquisition, AT&T sought to become a more effective and efficient provider in the wireless, broadband, video, voice and data markets.

*50. As indicated in page 3 of the letter dated 20 October 2015 and written by Myers Fletcher and Gordon, Attorneys-at-law (MFG) on CWJ's behalf, which is exhibited as **GS31**, the acquisition of Columbus by CWC has been seen as a very positive development in the international investments and banking markets, competitors have even acknowledged that the combination makes for a stronger competitor.*

The acquisition of Columbus and the opportunities it presents are good for the consumers and the company. With respect to the Company it has

> *allowed CWJ to be better positioned to maintain viability and to continue to operate in a highly competitive market. Notably, it has increased its corporate performance. In turn, these advantages have benefitted the collective and indirect interests of all shareholders.*

[58] Counsel for the Company submitted that the evidence of growth in all sectors including mobile and broadband is as a result of the collaboration with FLOW and was in the best interest of the Company.

[59] As it relates to the change from LIME to the FLOW Brand, Mr Sinclair explains in his affidavit that the Company did not bear the cost associated with the development of the LIME brand but only incurred costs for licencing and local costs for its use. As a consequence, the Company did not lose any money by the brand change which the board determined after "*extensive comparative research*" was "*better and more lucrative*".

Some of the legal issues to be considered

The statutory duty of care

> *174A.—(1)Subject to subsection (9), it shall be the duty of the director of a company to avoid circumstances which, whether directly or indirectly constitute a conflict of interest or may result in a conflict of interest with the interest of the company.*
>
> *(2) A director who is directly or indirectly interested in a matter which may constitute a conflict of interest or may result in a conflict of interest with the interest of the company—*
>
> > *(a) shall disclose the nature of his interest at a meeting of the directors;*
> >
> > *(b) shall not take part in any deliberations at the meeting of the directors in respect to that matter.*
>
> *(3) The duty under subsection (1) applies in particular to the exploitation of any property, information or opportunity (and it is immaterial whether the company could take advantage of the property, information or opportunity).*
>
> *(4) The duty referred to in subsection (1) is not infringed—*
>
> > *(a) if the circumstances cannot reasonably be regarded as likely to give rise to conflict of interest; or*

> *(b) if the matter giving rise to circumstances has been approved by the directors.*
>
> *(5) The approval referred to in the subsection (4)(b) may be given by the directors, where—*
>
> *(a) the company is a private company and nothing in the company's articles invalidates such approval, by the matter being proposed to and approved by the directors in accordance with the company's articles; or*
>
> *(b) the company is a public company and its articles include a provision enabling the directors to approve the matter, by the matter being proposed to and approved by them in accordance with the company's articles.*
>
> *(6) The approval of the directors is effective only if—*
>
> *(a) any requirement as to the quorum at the meeting at which the matter is considered is met without counting the director in question or any other interested director; and*
>
> *(b) the matter was agreed to without their voting or would have been agreed to their votes had not been counted.*
>
> *(7) A director of a company shall not accept a benefit from a third party conferred by reason of—*
>
> *(a) his being a director; or*
>
> *(b) his doing or not doing an act as a director, unless the acceptance of the benefit cannot reasonably be regarded as likely to give rise to a conflict of interest.*
>
> *(8) Any reference in thus section to a" conflict of interest" includes, a conflict of interest and duty and a conflict of duties.*
>
> *(9) In this section, "third party" means a person other than the company, its holding company or subsidiary company or any person acting on behalf of the company, its holding company or subsidiary company.*
>
> *(10) This section does not apply where the company has only one director and only one shareholder, who is the same individual.*

[60] Mr Sinclair refutes the allegation that there was a conflict of interest on his part in respect of the FLOW merger. At paragraph 57 of his affidavit he avers as follows:'

> *57. that I was not engaged by both CWJ and CWC at the same time there was no conflict of interest. Accordingly, I was not in breach of my fiduciary duties as Managing Director of CWJ or at all.*

Furthermore, he avers that he was not the only person who oversaw the FLOW merger.

[61] It is not disputed that Mr Sinclair was the Managing Director of the Company at the time when the joint venture with FLOW took place. However, he was being compensated handsomely by CWC. His evidence is that he was appointed Managing Director of the Company in October 2010 and worked that capacity until 2017. His characterization of his position as not being "*engaged*" by both CWJ (the Company) and CWC at the same time is a display of semantics and is misleading. He was engaged by CWC to the extent that CWC was his employer and the party responsible for his remuneration. He was engaged by CWJ because he was the Managing Director of CWJ performing duties on its behalf which imposed on him duties of care by virtue of his position. He was not an independent contractor in the exercise of his duties at the Company.

[62] In the affidavit of Mr Bruce David Levy filed on 28th November 2017, he avers that on 4th November 2016 he attended an inspection meeting with his Partner Randolph Cheeks hosted by Ms Rochelle Cameron who he understood was the Company Secretary. Based on his inspection of the documents to which he was given access he discovered that over several years up until 2014 all the service contracts were between the Company and Mr Sinclair. However, in 2015 the contracting party with Mr Sinclair changed to CWC accompanied by a substantial increase in his salary over the 2014 level.

[63] Mr Sinclair states at paragraph 56 of his affidavit as follows:

> *56. Further there is nothing in law nor the Company's Articles of Incorporation, which prevents multiple directorships by its directors. Furthermore, directors with conflicts of interest can still act on behalf of the Company in relation to transactions in which there is a conflict, provided the conflict is fully disclosed and the Board approves same. Additionally, the Companies Act under section 174A does not classify a holding*

> *company as a third party and as such, benefits in this case an employment contract, from a holding company is not considered a conflict of interest.*

The point is made by Mr George in his submissions that this assertion by Mr Sinclair does not take into account section 174A (5) of the Act which provides that an approval by a publicly traded company for such a matter must be expressly provided for in its articles and there is no evidence of such a provision or of an approval by the Company's Board.

[64] Mrs Kitson QC in her usual candid style admitted that the circumstances of Mr Sinclair's employment created a situation of "*potential conflict*". However, she submitted that the provisions of section 174A (5) only became applicable in 2017 after the joint venture. This submission of course makes redundant Mr Sinclair's assertion that CWC being a holding company was not a third party under that provision and that the benefits obtained from CWC do not amount to a conflict of interest by operation of those provisions of the Act.

[65] Mrs Kitson's submission on the applicability of the Act to Mr Sinclair on this issue, again brings to the forefront the point I alluded to earlier, which is that although directors' duties are much more clearly defined in the Act by virtue of the 2017 amendments, similar duties and obligations predated those amendments. The recognition of this fact is evidenced in the UK Companies Act 2006, Section 178 (1) of which unlike the Act, specifically provides that the consequence of breach (or threatened breach) of sections 171 to 177 are the same as would apply if the corresponding common law rule or equitable principle applied. In the UK Companies Act section 175 is the provision which imposes a duty on directors to avoid a conflict of interest.

[66] The common law and equitable principles are important not only in respect of Mr Sinclair but the other directors as well since some of the allegations of breach would have spanned a period before the 2017.

Common law and equitable duties

[67] Lord Porter in **Regal (Hastings) Ltd v Gulliver and Others** [1967] 2 AC 134 at 159 made the following observation:

> *"Directors, no doubt, are not trustees, but they occupy a fiduciary position towards the company whose board they form. Their liability in this respect does not depend upon a breach of duty but upon the proposition that a director must not make a profit out of property acquired by reason of his relationship to the company if which he is a director"*

[68] In Palmer's Company Law, 28th edn, Volume 2 at paragraph 8.405 the learned author states:

> *" For most purposes it is sufficient to say that directors occupy a fiduciary position and all powers entrusted to them are only exercisable in this fiduciary capacity.*
>
> *As agents they stand in a fiduciary relationship to the company as principal. The fiduciary relationship imposes upon directors duties of loyalty and good faith, which are akin to those imposed upon trustees properly so called. As agents, directors are also under duties of care, diligence and skill, but these duties are very different from the duties to be cautious and not to take risks which are imposed upon many trustees proper."*

[69] Historically, the Courts were always concerned about the possibility of fiduciaries placing themselves in positions of conflict, that is where their interest conflicts with the interests of the persons to whom they owe duties or on whose behalf they are obligated to act. This is referred to as the no conflict rule. However, the rule also requires that a fiduciary not place himself in a position where his duties to one principal may conflict with the duties owed to another principal, a possibility which attorneys-at-law for example must be vigilant to avoid. Closely connected to and arguably stemming from the no conflict rule, is the no profit rule, which is a rule of equity that a fiduciary may not make an unauthorised profit from his fiduciary position. These rules were strictly and consistently applied to directors by the courts. In **Boardman v Phipps** [1966] 3 All ER 721 the majority of their Lordships in the House of Lords agreed that the liability to account for profits made by virtue of a fiduciary relationship is strict and does not depend on fraud or the absence of *bona fides*.

[70] In **Boardman v Phipps** (supra at page 756), Lord Upjohn made the following observation which remains valid notwithstanding the fact that his was a dissenting judgement:

> *It is perhaps stated most highly against trustees or directors in the celebrated speech of Lord Cranworth LC, in **Aberdeen Ry Co v Blaikie Brothers** ([1843–60] All ER Rep at p 252) where he said:*
>
> > *"… and it is a rule of universal application that no one having such duties to discharge shall be allowed to enter into engagements in which he has or can have a personal interest conflicting or which possibly may conflict with the interests of those whom he is bound to protect."*
>
> *The phrase "possibly may conflict" requires consideration. In my view it means that the reasonable man looking at the relevant facts and circumstances of the particular case would think that there was a real sensible possibility of conflict; not that you could imagine some situation arising which might, in some conceivable possibility in events not contemplated as real sensible possibilities by any reasonable person, result in a conflict.*

[71] In **Bristol and West Building Society v Mothew** [1997] 2 WLR 436 Millet LJ repeatedly emphasised the fact that "*not every breach of duty by a fiduciary is a breach of fiduciary duty*". The learned judge at pages 148 and 149 stated as follows:

> *I respectfully agree, and endorse the comment of Ipp J. in **Permanent Building Society v. Wheeler** (1994) 14 A.C.S.R. 109, 157:*
>
> > *"It is essential to bear in mind that the existence of a fiduciary relationship does not mean that every duty owed by a fiduciary to the beneficiary is a fiduciary duty. In particular, a trustee's duty to exercise reasonable care, though equitable, is not specifically a fiduciary duty …"*
>
> *Ipp J. explained, at p. 158:*
>
> > *"The director's duty to exercise care and skill has nothing to do with any position of disadvantage or vulnerability on the part of the company. It is not a duty that stems from the requirements of trust and confidence imposed on a fiduciary. In my opinion, that duty is not a fiduciary duty, although it is a duty actionable in the equitable jurisdiction of this court …. I consider that Hamilton owed P.B.S. a duty, both in law and in equity, to exercise reasonable care and skill, and P.B.S. was able to mount a claim against him for breach of the*

> *legal duty, and, in the alternative, breach of the equitable duty. For the reasons I have expressed, in my view the equitable duty is not to be equated with or termed a 'fiduciary' duty."*

[72] Millet LJ commented further as follows:

> *This leaves those duties which are special to fiduciaries and which attract those remedies which are peculiar to the equitable jurisdiction and are primarily restitutionary or restorative rather than compensatory. A fiduciary is someone who has undertaken to act for or on behalf of another in a particular matter in circumstances which give rise to a relationship of trust and confidence. The distinguishing obligation of a fiduciary is the obligation of loyalty. The principal is entitled to the single-minded loyalty of his fiduciary. This core liability has several facets. A fiduciary must act in good faith; he must not make a profit out of his trust; he must not place himself in a position where his duty and his interest may conflict; he may not act for his own benefit or the benefit of a third person without the informed consent of his principal. This is not intended to be an exhaustive list, but it is sufficient to indicate the nature of fiduciary obligations. They are the defining characteristics of the fiduciary. As Dr. Finn pointed out in his classic work Fiduciary Obligations (1977), p. 2, he is not subject to fiduciary obligations because he is a fiduciary; it is because he is subject to them that he is a fiduciary.*
>
> *(In this survey I have left out of account the situation where the fiduciary deals with his principal. In such a case he must prove affirmatively that the transaction is fair and that in the course of the negotiations he made full disclosure of all facts material to the transaction.*
>
> *Even inadvertent failure to disclose will entitle the principal to rescind the transaction. The rule is the same whether the fiduciary is acting on his own behalf or on behalf of another.*

[73] Many of the breaches of these fiduciary obligations were excusable by consent of the shareholders, usually by ratification but also by authorisation. There were a number of cases such as the well-known Privy Council case of **Cook v Deeks** [1916] UKPC 10 in which the Court held that the wrongdoing of the directors, on the specific fact of that case, misappropriation of the company's property, could not be ratified. However, the court found that there is no reason to suggest that a similar principle would apply to authorisation of certain other acts of directors.

[74] In any event, the Company is not relying on any ratification or authorisation and I am not required to consider the nature and/or effect of ratification and/or authorisation for purposes of a leave to bring a derivative action. What learned

Queen's Counsel Mrs Kitson suggests is that although there was a potential conflict arising from the circumstances of Mr Sinclair's appointment, there is no evidence by the Applicant of exactly what was Mr Sinclair's wrongdoing.

[75] Since his potential breach of duty pre-dated the 2017 amendments to the Act, the question is not whether the Applicant needs to show of Mr Sinclair's conduct, (for purposes of this specific allegation against him in particular), that as a director, he failed to "*avoid circumstances which, whether directly or indirectly constitute a conflict of interest or may result in a conflict of interest with the interest of the company*" (that is, the test necessary by the words of the statute). The test of his conduct before the 2017 amendment is whether he breached the obligation which applied before that amendment. In my opinion it is essentially the same duty which is stated in **Aberdeen Railway Company v Blaikie Brothers** (1854) 1 Macq 461 referred to in **Boardman v Phipps** (supra).

[76] The issue to be ultimately resolved is whether a director's liability is automatically triggered by the mere existence of a conflict or potential conflict or whether it is triggered by his pursuit of the conflict. The pursuit of the conflict for our purposes in my view would be by the director engaging in the making of decisions which affect the Company, in circumstances of a conflict of interest.

[77] In the Australian case of **Fitzsimmons v R** Supreme Court of Western Australia Court of Appeal delivered 12 March 1997, the Court was of the view that it is not the existence of the conflict that constitutes the mischief with which the law is concerned but rather the pursuit of that interest which renders the conduct objectionable and improper. **Fitzsimmons** was a case of a criminal prosecution of a director under the Companies (South Australia) Code for, *inter alia*, failing to act honestly as a director. This of course involved an analysis to the requisite criminal standard beyond a reasonable doubt, considering whether the accused director had the relevant *actus reus* and *mens rea*, so arguably a higher standard was applied which may not be appropriate in assessing whether a director has breached his fiduciary duty for purpose of a civil claim.

[78] Mr George has submitted that the English Court of Appeal case of **Boulting v Association of Cinematograph, Television and Allied Technicians** [1963] 2 QB 606 and in particular the judgment of Upjohn L.J at pages 637- 638 supports the argument that it is not necessary to prove that there is an actual conflict of interest and that it is only necessary to prove that there is a real possibility of conflict. Whereas Lord Upjohn, in my opinion, does not express it in such clear and unambiguous language, his lordships emphasis on the general rule that the company is entitled to the undivided loyalty of its directors and that only the party entitled to the benefit of the rule may relax it, suggests that the existence of the potential conflict is sufficient. His Lordship does sound a cautionary note as to the application of the rule as follows:

> *However, a broad rule like this must be applied with common sense and with an appreciation of the sort of circumstances in which over the last 200 years and more it has been applied and thrived. It must be applied realistically to a state of affairs which discloses a real conflict of duty and interest and not to some theoretical or rhetorical conflict".*

[79] The crux of the Applicant's complaint against Mr Sinclair is that there was a potential conflict of interest arising from Mr Sinclair's employment by CWC while acting for the Company and that Mr Sinclair pursued the conflict and the interest of CWC by acting in the FLOW deal. Mrs Kitson submitted that there was only a potential conflict of interest and there was nothing improper about the FLOW transaction because of the numerous benefits arising therefrom. Although Mrs Kitson did not express it in these terms I understand her submission to be that there was no "*pursuit of the conflict*" (if I should borrow the language used in **Fitzsimmons**). If my conclusion on the applicable law is correct, the existence of a real conflict would be sufficient ground in support of the Application.

Applicability of the business judgment rule

[80] Mrs Kitson submitted that in determining whether there is any evidence that the decisions of the directors in respect of which the Applicant complains were affected by the influence of CWC, the Court must consider the decisions in a commercial

context and in doing so the Court should have regard to the business judgment rule. Counsel submitted that this rule is part of the Canadian jurisprudence since the relevant Canadian legislation is *pari materia* the Act. Learned Queen's Counsel referred to the judgment of the Ontario Court of Appeal in **UPM-Kymmene Corp. v. UPM- Kymmene Miramichi Inc** (2004), 250 D.L.R. (4th) 526 (Ont. C.A.), at para. 6 as follows:

> *...The trial judge was well aware that the court is not entitled simply to second-guess the Board's decision. As the trial judge said, the court looks to see whether the Board made a reasonable decision, not a perfect decision. She stated that the business judgment rule "recognizes the autonomy and integrity of a corporation and the expertise of its directors" since they are "in the advantageous position of investigating and considering first-hand the circumstances that come before it and are in a far better position than a court to understand the affairs of the corporation and to guide its operation."*

[81] It was Queen's Counsel's submission that by virtue of the application of the business judgment rule, in order for a plaintiff to succeed in challenging a business decision it had to be established that the directors acted (i) in breach of the duty of care and (ii) in a way that caused injury to the plaintiff.

[82] In the written submissions on behalf of the Company it was also acknowledged and submitted as follows:

> *..Additionally, in assessing whether the duty has been undertaken by directors of a company as indicated in **Aronson** the court must consider whether there are any disqualifying factors such as conflicts of interest.*

[83] It is important to highlight that in **Aronson v Lewis** 473 A.2d 805 (Del. Supr. 1984), one of the issues that the Court had to consider was that of demand futility. It can be distilled from the judgement that under Delaware law a shareholder wishing to file a derivative claim must make a demand of the company's board to take action to remedy the misconduct complained of. The purpose of this as stated by Justice Moore at page 809 is to "*give a corporation the opportunity to rectify an alleged wrong without litigation, and to control any litigation which does arise*". Alternatively, the shareholder can allege that such a demand would have been

futile because the company could not have properly considered the demand. This latter option is known as "*demand futility*" and at page 809 Justice Moore noted that according to the Lord Vice Chancellor the test of futility is "*whether the Board, at the time of filing of the suit, could have impartially considered and acted upon the demand"*

[84] Learned Queen's Counsel quite correctly appreciated that in **Aronson** the Court considered the relationship between a director's impartiality and the applicability of the rule as is evident in the following extract from **Aronson**:

> *The function of the business judgment rule is of paramount significance in the context of a derivative action. It comes into play in several ways -- in addressing a demand, in the determination of demand futility, in efforts by independent disinterested directors to dismiss the action as inimical to the corporation's best interests, and generally, as a defense to the merits of the suit. However, in each of these circumstances there are certain common principles governing the application and operation of the rule. First, its protections can only be claimed by disinterested directors whose conduct otherwise meets the tests of business judgment. From the standpoint of interest, this means that directors can neither appear on both sides of a transaction nor expect to derive any personal financial benefit from it in the sense of self-dealing, as opposed to a benefit which devolves upon the corporation or all stockholders generally. Sinclair Oil Corp. v. Levien, Del. Supr., 280 A.2d 717, 720 (1971); Cheff v. Mathes, Del. Supr., 41 Del. Ch. 494, 199 A.2d 548, 554 (1964); David J. Greene & Co. v. Dunhill*

[85] Justice Moore at paragraph 13 explains that in determining demand futility the court must make two enquiries:

> *"…one into the independence and disinterestedness of the directors and the other into the substantive nature of the challenged transaction and the board's approval thereof. As to the latter enquiry the court does not assume that the transaction is wrong to the corporation requiring corrective steps by the board. Rather, the alleged wrong is substantially reviewed against the factual background alleged in the complaint. As to the former enquiry, directorial independence and disinterestedness, the court reviews the factual allegations to decide whether they raise a reasonable doubt, as a threshold matter, that the protections of the business judgment rule are available to the board.* ***Certainly if this is an "interested" director transaction, such that the business judgment rule is inapplicable to the board majority approving the transaction, then the enquiry ceases.*** *In that event futility of demand has been established by any objective or subjective standard." (emphasis supplied)*

[86] Although the approach described in the preceding paragraph is in respect of a shareholder trying to establish demand futility, in my opinion a similar inquiry and approach would be appropriate in a substantive derivative claim. However, at this application for leave stage, I am not required to conduct a detailed analysis on these two enquiries but simply to determine whether the Proposed Claim is frivolous or vexatious. My enquiry is limited and is assisted by two questions. Is there an arguable case that Mr Sinclair or other directors were "interested"? and if so, should I assess their conduct complained about without affording them the benefit of the business judgment rule.

[87] I am of the view that the business judgement rule still has some applicability, but this has to be considered and possibly tempered in light of the allegations as to the conflict of interest which existed. This is because the Court is not simply assessing the directors' conduct in terms of the skill applied to their decisions but also assessing any impact which a conflict of interest may have had on how those decisions were arrived at.

[88] Nevertheless, even in the context of my limited enquiry, and with full recognition that the main issue in **Aronson** was demand futility, there are a number of other observations of the Court in **Aronson** as to how the evidence before the court should be analysed, which I find to be pragmatic and useful. I agree with the comment at paragraph 17 of the judgment as to the care that should be taken in not attaching undue weight to the fact of majority ownership as follows:

> *…Moreover, in the demand context even proof of majority ownership of a company does not strip the directors of the presumption of independence, and that their acts have been taken in good faith and in the best interest of the corporation. There must be coupled with the allegation of control such facts as would demonstrate that through personal or other relationships the directors are beholden to the controlling person.*

[89] At paragraph18 the following appears:

> *We conclude that in the demand-futile context a plaintiff charging domination and control of one or more directors must allege particularised facts manifesting "a direction of corporate conduct in such a way as to*

> *comport with the wishes or interests of the corporation (or persons) doing the controlling".* ***Kaplan*** *284 A.2.d at 123. The shorthand shibboleth of "dominated and controlled directors" is insufficient. In recognizing that Kaplan was decided after trial and full discovery, we stress that the plaintiff need only allege specific facts; he need not plead evidence. Otherwise, he would be forced to make allegations which may not comport with his duties under Chancery Rule 11.*

[90] I remind myself that CPR 8.9 only requires that the Claimant must include in the claim form or particulars of claim a statement of all the facts on which the claimant relies. He must show at least an arguable cause of action on the facts and in law. The Court should not attempt to resolve any conflicts that arise on the affidavit evidence. In the event of conflicts of evidence these should properly be resolved at trial.

[91] Having settled the procedural path to my decision it is now necessary for me to analyse the factual allegations with sufficient analysis for the purpose of this application and importantly, in doing so, without embarking on a mini trial.

Analysis of the particularised facts in support of the Proposed Claim

[92] The kernel of the Proposed Claim is that the Company suffered losses and diminution in value because of the decisions of the board which were not in the best interest of the Company. The overarching reason advanced for these decisions is the influence of CWC over the board. It would not be prudent nor indeed necessary for me to express a view on all the various heads of complaint by the Applicant for purposes of this application. These assertions span varying degrees of cogency. Some of the Applicant's assertions such as those in respect of the LIME TV and Mr Dehring, on the evidence before me and on which the Applicant intends to rely, *prima facie*, appears not to have much force. However, central to the Applicant's complaint is the role of CWC in the losses suffered by the Company and I am required to address this issue.

[93] The Company does not deny that there were losses but has produced a considerable body of evidence explaining how the losses originated. The Company submits that the losses were as a result of the unfairly competitive environment

which it faced after liberalisation in the telecommunications market, fostered mainly by the neglect of the regulators to control the abuse by the Company's main competitor Digicel of its market position. Coupled with that, was the need for constant injections of funds which was necessary because of the capital intensive nature of the industry and need for constant updating of infrastructure in order to remain competitive.

[94] The Applicant also asserted that CWC used its influence over the group of companies of which the Company was a part, to ensue decisions which were not in the best interest of the Company. This assertion of the Applicant was greeted by the response of the Company that each company within the group operates independently and that the board of the Company makes its decisions only considering what is in the best interest of the Company and not at the instructions of CWC.

[95] These contrasting position can only truly be tested against the decisions of the board in respect of which the Applicant complains. In reality, it is unlikely that at this stage one would be able to find a "*smoking gun*" admission in board minutes or resolutions that clearly demonstrates that the directors were abdicating the decision making process to the parent directly (or through an operating board).

[96] However, Mr George suggested that there is evidence contained in a number of board minutes which he said supports the assertions of the Applicant as to the non-independence of the board of directors of the Company. He pointed to the minutes of the board of directors held 28th February 2007. In those minutes of his address, the Chairman expressed his deep concern that once again Jamaica will not make its financial targets. The Chairman indicated that:

> *".. the stretch targets had been* ***imposed*** *by the UK and in circumstances the board had to think seriously about the implications for the company and the staff of yet another year where the financial out turn was below expectations. (emphasis supplied)*
>
> *…He explained that the targets set by C&W International correlated directly to the target of £409 Million imposed on Harris Jones by C&W plc. A private*

> *equity financing model had been utilized in setting the financial targets and Jamaica was allocated its proportionate share of the target based on the size of its balance sheet.*

[97] These minutes do have the potential of giving a glimpse into the role of CWC in the fixing of the Company's targets for example. This is evidence capable of supporting the assertion that CWC was in fact a shadow director. It is also capable of assisting in the Court's assessment of the permissible role of the parent CWC in its dealing with its subsidiary, the Company.

[98] These minutes also refer briefly to the call center outsourcing to be done and the possibility of the Barbados contact centre being outsourced and supported by resources in Jamaica which touches on the complaint by the Applicant that loss making functions of other operations were assigned to the Company. However, the minutes do not disclose any detail of the decision making process in this regard and is unhelpful as a consequence.

[99] Mr George also relied on the 6th November 2014 minutes in which the following is recorded:

> ***The Columbus Merger***
>
> *Director Kerr-Jarret asked how the acquisition of Columbus will work specifically and whether costs will be transferred to the Business Unit or will it operate as a hub. He expressed concern about intercompany debt penalising minority shareholding and discrediting the good work of management. The Chairman assured that everything will be done at the parent level. There are overlap markets in Jamaica, Barbados and St. Lucia, Antigua and Grenada and integration is expected over the next year. Until then it will be business as usual.*

He submitted that the chairman's response that "*everything will be done at the parent level*", to the concern of a board member demonstrates the influence the parent had in the decision making process of matters directly involving the Company's affairs and over its board which supports the position of the Applicant.

[100] As it relates to the portion of the minutes quoted in the preceding paragraph, Mrs Kitson submitted that the summary nature of board minutes sometimes fails to capture the complete exchange between individuals and may be misleading when taken out of its full context. Counsel submitted that what can be gleaned from the Chairman's response is that the costs would not be borne by the Company. However. Counsel stated that in any event, paragraph 48 onwards of Mr Sinclair's first affidavit details the benefits accruing to the Company from the FLOW merger. Mrs Kitson submitted that what the minutes of all the meetings clearly indicates, is a consistent effort of the board to ensure that all decisions were in the best interest the Company particularly where this related to loans from CWC.

[101] Learned Queen's Counsel highlighted the minutes of 28th February 2007 and under matters arising – Page 7 Item 8 – Treasury Report

> *– "Management to ensure that rates charged on inter-company loans were not above market rates". It was reported that this had been reviewed with Group Treasury and the rates charged were in line with the fair market rates in the local market. The interest rate being charged is based on WATBY plus 200 basis points.*

Counsel submitted that this demonstrates that the board was cognisant of the need that the intercompany loans be at fair rates and conditions. To support this submission, Counsel referred to a number of entries in the minutes referencing the board's consideration of a J$3 billion syndicated loan arranged by Citibank in order to retire the debt previously owed to CWC and the eventual US$50 million loan (or the Jamaican dollar equivalent) which was obtained. Later, the company had to consider reverting to CWC to pay out the Citibank Facility because the rationale behind the loan (to mitigate foreign exchange risk by taking a Jamaican Dollar loan and tying it to the treasury bill rate) had changed because "*US$ interest rates had fallen significantly, changing the underlying circumstances*". Counsel submitted that there was no slavish adherence to the financing from the parent CWC but that the minutes demonstrated that the directors considered the situation of the Company as it evolved over time and were prepared to adapt by obtaining non-related party financing where this was in the best interest of the Company.

[102] It is a reality of modern commerce that groups of companies typically do operate pursuant to an overall strategy which is conceived at the parent company level. As I indicated earlier in this judgment, whether companies in the group are wholly or partially owned subsidiaries may affect the obligations owed by the directors of a subsidiary, or at the very least, may affect the exposure of the directors. There is little risk that the wholly owned parent will be challenging the decision of the board where those decisions had their genesis with the parent. Directors of a majority owned subsidiary have to be more careful in how they align the direction of the company with that of the parent and how they execute the strategy of the group. This has to be done while at the same time ensuring that they do not breach the duty of care owed to the Company for which they act as directors. This is a task which requires a finely balanced approach.

[103] Although the Court assesses the decisions of the board of which the Applicant complains in the context of the business judgment rule, as I have earlier indicted such consideration is not an absolute bar to enquiry into the decisions and the methodology employed in arriving at those decisions. The applicability of the business judgement rule must not shield those decisions from scrutiny. As Sykes J observed in the **Fulton** case (supra) at paragraph 122:

> *… Boards of directors cannot simply make an assertion that they exercised sound business judgment they must demonstrate that they actually did. As noted already, the courts have to be careful that it does not use ex post facto knowledge to assess the board's actions. This will always be a difficult exercise but one that must be done if required.*

[104] The evidence of Mr Sinclair is replete with statements that there were benefits which accrued to the Company as a result of it being a member of the Cable and Wireless corporate family and that all the decisions of the board were in the best interest of the Company. However, the board minutes are lacking in terms of sufficient documentation supporting any robust debate in the decision making process or sufficient evidence as to what factors led to the preference of one course over the other, or the factors which led to the resolution of conflicting options.

[105] As it relates to the operating board, Mr Sinclair in his first affidavit admitted that the persons who held senior management for the Caribbean were called the operating board. On behalf of the Company, he refuted the allegation that CWC's board implemented decisions for CWJ as a matter of course. However, I have not been referred to board minutes which acknowledged the role and function of the Operating Board. I have not been referred to any minutes of meetings of the board of directors of the Company in which the fact that the Company was a part of a group of companies and the consequence thereof (if any) in the decision making process was recognised. Neither have I been directed to any specific acknowledgment by the board of directors of the Company that any benefit which might have accrued to the parent or any other member of the Group by any decision of the board was an incidental by-product of a decision of the Company, which was in the best interest of the Company.

[106] I acknowledge that Mr Sinclair certainly asserts that all the decisions of the board were in the best interest of the Company. However, the express consideration of the role of the Company in a group structure and the fact that the decisions were in the best interest of the Company and not generated by any demand placed on the Company by its membership in the group structure, is not evidenced in the board minutes to which I have been referred.

[107] The treatment of the question raised by Director Kerr-Jarret in respect of the Columbus merger and how costs will be allocated with the response of and assurance by the Chairman that "*everything will be done at the parent level*" is interesting, in that it suggests the ability of the parent to resolve an important issue of concern without any input from the board in the process of its resolution. I find that it is evidence which is <u>capable</u> of supporting the allegations of the Applicant that the parent CWC, by virtue of its majority shareholding was able to act as a shadow director making decisions at the parent level which were not necessarily in the best interest of the Company.

[108] In respect of the FLOW transaction and in general, Mr Sinclair was required to consider whether the interests of CWC were in conflict with those of the Company. He was also required to consider whether his connection with CWC as his employer, the entity which was responsible for his remuneration, was likely to prevent him from giving sole consideration to the interests of the Company when he was acting as the managing director of the Company. He was required to disclose the conflict and get approval before he continued to participate in decisions which were potentially subject to the effects of any influence which might be brought to bear on him by CWC, by virtue of the conflict. There is no evidence that appropriate approval was obtained.

[109] However, in this regard, it must be appreciated that the employment of Mr Sinclair by CWC is not only important in the context of the FLOW joint venture That is a specific complaint highlighted by the Applicant, but it is also relevant to the extent that he was functioning as the Managing Director while employed to CWC. His connection to CWC must be considered in light of the general complaint by the Applicant of the role and pervasive influence of CWC in the decisions of the board, of which Mr Sinclair was a part.

[110] In **Bristol** (supra) Millet LJ at pages 450 and 451 offered the following test which is helpful. He stated that:

> *Even if a fiduciary is properly acting for two principals with potentially conflicting interests he must act in good faith in the interests of each and must not act with the intention of furthering the interests of one principal to the prejudice of those of the other: see Finn, p. 48. I shall call this "the duty of good faith." But it goes further than this. He must not allow the performance of his obligations to one principal to be influenced by his relationship with the other. He must serve each as faithfully and loyally as if he were his only principal.*
>
> *Conduct which is in breach of this duty need not be dishonest but it must be intentional. An unconscious omission which happens to benefit one principal at the expense of the other does not constitute a breach of fiduciary duty, though it may constitute a breach of the duty of skill and care. This is because the principle which is in play is that the fiduciary must not be inhibited by the existence of his other employment from serving the interests of his principal as faithfully and effectively as if he were the only*

> *employer. I shall call this "the no inhibition principle." Unless the fiduciary is inhibited or believes (whether rightly or wrongly) that he is inhibited in the performance of his duties to one principal by reason of his employment by the other his failure to act is not attributable to the double employment.*
>
> *Finally, the fiduciary must take care not to find himself in a position where there is an actual conflict of duty so that he cannot fulfil his obligations to one principal without failing in his obligations to the other: see* ***Moody v. Cox and Hatt*** *[1917] 2 Ch. 71;* ***Commonwealth Bank of Australia v. Smith*** *(1991) 102 A.L.R. 453. If he does, he may have no alternative but to cease to act for at least one and preferably both. The fact that he cannot fulfil his obligations to one principal without being in breach of his obligations to the other will not absolve him from liability. I shall call this "the actual conflict rule."*

[111] The position of Mr Sinclair as a very highly paid employee of CWC while acting as the Managing Director of the Company which was one of a number of companies in the CWC family of entities, was a situation in which there was a clear risk that the obvious potential for a conflict of interest may have manifested itself into actual conflict of interest, not only in respect of the FLOW joint venture but in many other decisions of the Company. This conflict would not be just a theoretical or rhetorical conflict of which Upjohn L.J warned in **Boulting** (supra). I find that the allegation of the Applicant in this regard is not frivolous and/or vexatious and I am satisfied on the facts before me that an arguable case is presented as it relates to the role and function of Mr Sinclair, operating with a conflict of interest, especially having regard to his position as Managing Director. Since he received no express authorisation from the Company, then there are triable issues raised as to what was required of him in order to mitigate or eliminate any conflict and risk that the Company would suffer from his dual roles. This issue would not be limited to the FLOW joint venture but to all decisions in which Mr Sinclair participated over the period when he was being paid by CWC while working for or on behalf of the Company.

[112] Having regard to the copious evidence and submissions before the Court, I have constantly reminded myself that I need to exercise great care in order to ensure that I do not fall into error by attempting to resolve the factual disputes on the basis

of the evidence before me and that the examination remains narrowly focused on determining whether the applicant has an arguable case.

[113] Having reviewed the factual allegations raised by the Applicant, I find that the assertion by the Applicant that the directors of the Company were influenced by CWC in making decisions which were not in the best interest of the Company and that they breached their duty of care to the Company is not frivolous and/or vexatious.

[114] I do not wish to be misunderstood to be making a finding that because the parent is a majority shareholder and the Company suffered losses then, *ipso facto*, the losses were due to decisions taken by the board of the Company on the advice and instructions of the parent which were not in the best interest of the Company. For the avoidance of any doubt, what I am finding, is that the position of CWC as parent, is an important factor which one has to consider because it creates a prism though which one has to view and assess the component decisions of the board which may have had a benefit to CWC (which extended beyond any benefit derived solely from its position as shareholder), whether directly or indirectly via another of its subsidiaries.

[115] I also appreciate that the Applicant has advanced a sum as the quantifiable loss suffered by the Company but that there is little support for this sum. This is understandable having regard to the unfolding chronology of events and the preliminary stage of this Application. However, this is not fatal to the Application because all that the Applicant is required to do is to give evidence of a potential loss resulting from the director's conduct and I find that he has sufficiently achieved this.

[116] There are risks associated with "*the multinational conglomerate organization CWC's matrix management structure, whereby line functions within its group have dual reporting lines to both local and overseas management personnel*" as Mr Sinclair described it. The risk being that the reporting lines to overseas

management may not result in decisions which are in the best interest of the Company.

[117] It is my finding that at this stage there are sufficient facts from which one may draw a reasonable inference that the Company, to its detriment, was influenced in its corporate direction by CWC. There is an assertion by the Applicant that there are decisions of the Company which were not in the Company's best interest and I appreciate that the Company challenges these assertions. One can highlight for emphasis, the example of the assertion of the Applicant that the level of the debt was imprudent and had a catastrophic effect on the Company. The evidence of Mr Jayatillake provides a comprehensive analysis in which he asserts that the debt was necessary and prudent. His analysis may well be correct and capable of withstanding vigorous cross examination, but what his analysis also does, is to fortify in my mind, my conclusion that the issue is not simple or straightforward and is deserving of further examination in the context of a claim. It is certainly not one in respect of which it would be appropriate for me to resolve on the evidence in favour of the Company and arrive at a finding that the Proposed Claim is frivolous and/or vexatious. The same is true for the other issues relating to whether the parent as the main source of funding created a dependency trap or whether the loans were equity injections disguised as a debt.

[118] It is therefore my conclusion that the Proposed Claim satisfies the applicable test to which I referred earlier in this judgement, in that it is not frivolous and/or vexatious.

[119] By way of comment, *en passant*, my findings herein are to be in no way interpreted to have the effect of casting aspersions on the directors and former directors of the Company but arises from my analysis of the application pursuant to the provisions of the Act. It may be of more than passing interest that the British Virgin Islands BVI BC Act 2004 section 184C (2) (c) provides that among the matters which the court must take into account in determining whether to grant leave to bring a derivative claim is "*whether the proceedings are likely to succeed*". There is no

such requirement under the Act. If there were, it would have required a more detailed and robust analysis of the evidence in support of the Proposed Claim. There is a possibility that there may have been a different result on this Application if that standard were to be applied. The consequence of this difference in the philosophical/legal approach of Jamaica and the BVI is that an Applicant in Jamaica will have a much lower bar to clear than his counterpart in the British Virgin Islands. However, this is only of academic interest since the setting of a lower threshold appears to have been the considered objective of the legislature and is not out of line with many other jurisdictions which have adopted a similar less restrictive approach.

Is the complainant acting in good faith?

[120] In the **Fulton** case (supra) Sykes J after a considerable analysis of a number of provisions in other jurisdictions in respect of the grant of leave concluded that there is no objective component in the good faith requirement. I wholeheartedly agree with this conclusion without any qualification. Whether an applicant is acting in good faith is therefore a question of fact to be determined by the Court in each case.

[121] The Company argues that the Claimant is not acting in good faith and his aim has been to secure and inordinately higher price for his shares. In **Fulton** Sykes referred to a number of cases including but not limited to the Canadian case of **Valgardson v Valgardson** 349 DLR (4t) 591 and the Singaporian case of **Ang Thiam Swee v Low Hian Chor** [2013] SGCA 11 from which one can conclude that a finding of self interest is not a bar provided that the applicant's motive is not solely to advance his personal agenda.

[122] In this case there is evidence that the Applicant wishes to have an offer at a higher price per share for his shares in the Company and that he took steps to negotiate this outcome prior to this application. It may be that this is one of the reasons behind his intention to bring this derivative claim and a part of his strategy to that

end. However, that without more is not evidence of the absence of good faith. I find that his investment of time and effort so far in preparing the Proposed Claim satisfies me that he has a honest and sincere intention to pursue the Proposed Claim to its ultimate conclusion. I also find that the Applicant honestly believes that the Proposed Claim is a good cause of action and that it is not frivolous and/or vexatious. I have arrived at that conclusion having regard to my own finding that the Proposed Claim is indeed, not frivolous or vexatious. I have also taken into account the fact that the Applicant is more than a token shareholder by virtue of his legal and beneficial ownership following the guidance of Palmer J in **Swansson v R A Pratt Properties Pty Ltd** [2002] NSWSC 583. I therefore find on a balance of probabilities that the Applicant is acting in good faith as contemplated by the Act and as determined by the case law authorities. This limb of the statutory requirement is therefore satisfied.

Does it appear to be in the interests of the company that the Proposed Claim be brought?

[123] The ambit of this requirement was addressed by Sykes at paragraphs 92 and 93 of the **Fulton** case as follows:

> *[92] The court wishes to refer to Robins JA yet again in Richardson Greenshields. His Lordship said at paragraph 30:*
>
> > *30 This brings me to the second of the applicable s. 339(2) conditions precedent, that is, whether the court is satisfied that it appears to be in the interests of the company that the action be brought. Manifestly, it is not for the judge hearing the application for leave to decide whether the bringing of the proposed action is, in fact, in the interests of the company. The judge's mandate at this stage is only to determine whether it appears to be in the interests of the company that the action be brought.*
>
> *[93] This passage emphasises the reason for the statute using the word 'appears.' At the application stage the court has untested allegations before it. There are accusations of breaches that have adversely affected the company. Those sought to be held accountable, resist by saying that the applicant is motivated by greed, avarice, selfish ambition, destruction of the company, personal vendetta and the like. At the end of the day, one of the*

> *crucial questions is whether legitimate questions have been raised concerning the directors stewardship and harm may have been caused to the company. If the claim is not frivolous and/or vexatious then surely it must necessarily appear to be in the interest of the company to bring the derivative claim. The enquiry does not stop there. Other factors are considered such as whether in the context of the case it may amount to an abuse of process or whether there is some other factor militating against bringing the claim.*

[124] As I have previously indicated, I have found that the Proposed Claim is not frivolous and/or vexatious. It remains for me to consider whether there are any other factors which might militate against the bringing of the Proposed Claim. The Applicant seeks to bring the Proposed Claim in Florida, United States of America and this is a factor which does have a bearing on my decision, since if the Proposed Claim is to be brought in Florida there would be added considerations. However, for reasons which I will address below, this element will be removed as a relevant consideration by the Court making an order that the Proposed Claim be brought in Jamaica. Subject to the issue of forum being dealt with in accordance with the order of this court, I find that it appears to be in the interests of the Company that the Proposed Claim be brought.

The issue of forum

[125] Mr George spent a considerable amount of time attempting to support paragraph 27 of his written submission that:

> *27. It is firstly submitted that the question of the location in which proceedings are intended to be brought is not a relevant factor for the court granting leave. This is so as the question as to whether a substantive claim in a foreign court on the basis of Jamaica law is valid is a question for the foreign court.*

Eventually, Mr George conceded that the issue of forum had relevance on an application for leave, albeit limited relevance and only to the extent that it is a factor which the Court should consider in determining whether the Proposed Claim appears to be in the best interest of the Company.

[126] In my opinion the issue of forum is an important consideration in assessing whether the Proposed Claim is in the best interest of the Company. Mrs Kitson submitted that it would make no sense for the Court to grant leave for a claim to be brought in an unsuitable (or unavailable) forum as that would be a waste of time and money. I accept here submission in this regard.

[127] Mrs Kitson also submitted that the Applicant has not presented sufficient evidence that Florida is an available forum. In response, Mr George submitted that the Proposed Claim was drafted by American lawyers who presumably are learned and have considered the issue of forum and that in any event the derivative claim is an American construct and it is unfathomable that the state of Florida would not be an available forum.

[128] The reasons provided by Mr George in his response are not particularly good reasons. The preferred course would be to have an expert opinion that the State of Florida is in fact an available forum. Nevertheless, for purposes of this application I am prepared to assume that Florida is an available forum.

[129] Mrs Kitson relied on **Konamaneni & Ors v. Rolls-Royce Industrial Power (India) Ltd & Ors [2003] B.C.C. 790** which was a case in which, a derivative claim was made in England by four claimants in the name of a company incorporated in India and the defendants successfully challenged it on the basis that the Indian court was the more appropriate forum. Queen's Counsel argued that this Court should apply the same test to the Proposed Claim. Mr George distinguished **Konamaneni** on the ground that the English Court was the court that was hearing the substantive claim and therefore it was the Court that has to decide on the issue of forum. I find that there is considerable force in this distinction proffered by Mr George. This is not a forum challenge in which the Court is tasked with determining which is the more appropriate forum. Nevertheless, there are similar considerations because the Court has to consider whether the bringing of the Proposed Claim in Florida, which is what the Applicant is applying for, appears to be in the best interest of the Company. This naturally raises an ancillary question as to whether the bringing of

the Proposed Claim in Jamaica instead of Florida appears to be in the best interest of the Company.

[130] Although it is a finely nuanced approached, I am of the view that although I am not approaching this as a forum challenge there are some factors which are equally relevant to my analysis. I start from the position that Jamaica is the place of incorporation of the Company. The directors therefore have the reasonable expectation that if they are to be sued for a breach of their duty then such a claim would be in Jamaica. The Company is incorporated in Jamaica and is subject to the laws of Jamaica and the supervision of its Courts. If there are issues concerning its management then it is my view that unless there are good reasons or at the very least, a good reason, then the claim ought to be brought in Jamaica. I appreciate the submission by Mr George that it is open to a foreign Court such as the Court in Florida to apply Jamaican law to the dispute (which I assume is the case for purposes of this application) and that the Act provides that the Court can still exercise supervisory jurisdiction over the procedure. However, the first question remains, what are the good reasons for the Proposed Claim to be brought in Florida? In summary, the reasons advanced by the Applicant are that:

1. Certain of the directors and individuals are based in Florida including CWC and Mr Sinclair;

2. Most if not all of the relevant documentation will be in the possession of CWC and the coercive power of the Court of Florida is needed;

3. CWC has assets in the state of Florida that would render a judgment automatically enforceable in Florida; and

4. The underwriters of the liability insurance policies of the director and officers will conduct the defences of the corporate defendants.

[131] I do not find any of these reasons to be a good reason. There is no explanation advanced as to why CWC would not be subject to the jurisdiction of this Court. If it is so subject, then the coercive power of the Court can be deployed to ensure compliance with any order for discovery, inspection or production of documents whether physically held in this jurisdiction or elsewhere. Furthermore, CWC has substantial shareholding in this jurisdiction which would be subject to any enforcement procedures which may become necessary.

[132] The Court was advised by the Respondent that save for Perley McBride who resigned from the board in May 2016, none of the directors or officers of the Company lived or live in Florida. Additionally, save for two former directors who are English nationals and residents namely Mr Houston and Mr Kelman, the remaining directors, past and present all reside in Jamaica.

[133] On the issue of the residence of the directors and former directors, Ms Kitson submitted as follows:

> *"It would be wholly unfair and wreak great hardship to force the past and present Directors and other officers and CWJ itself to incur the unwarranted expense of defending these spurious claims in a foreign jurisdiction when they are not based in the State of Florida".*

I accept the submissions of learned queen's Counsel on this point.

[134] It is therefore my considered view that the Proposed Claim appears to be in the best interest of the Company, provided that it is brought in this jurisdiction.

Conclusion and disposition

[135] It is my finding that the Applicant has established on a balance of probabilities that he has satisfied the statutory requirements as examined herein and that the application for leave to bring a derivative claim ought to be granted. I do not think that it would be prudent or necessary for me to include in the order any additional specificity as to the persons against whom the claim should be brought or in respect of which causes of action ought to be pursued.

[136] For the above reasons I make the following order

1. The Applicant is granted leave to file a derivative claim, in Jamaica, in the name of the Respondent, against present and former directors of the Respondent and Cable and Wireless Communications Limited.

2. Leave to appeal is granted to the Applicant in respect the Court's determination on the issue of forum and the order that the derivative claim be brought in Jamaica.

3. Leave to appeal is granted to the Respondent.

4. The Respondent's application for a stay of execution is refused

5. Costs of the Application are awarded to the Applicant to be taxed if not agreed.