[2016] JMSC COMM 14

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN THE COMMERCIAL DIVISION

CLAIM NO. 2015CD00107

BETWEEN	**SALLY ANN FULTON**	**CLAIMANT**
AND	**CHAS E RAMSON LIMITED**	**DEFENDANT**

IN CHAMBERS

Lord Anthony Gifford QC, Randolph Cheeks instructed Levy Cheeks for the claimant

Ransford Braham QC, Georgia Gibson Henlin QC and Jeffrey Foreman for the defendant

May 10, 11 and 27, 2016

COMPANY LAW – APPLICATION TO COMMENCE DERIVATIVE ACTION – SECTION 212 OF THE COMPANIES ACT

SYKES J

The Ramsons

[1] Mrs Sally Ann Fulton is a member of the Ramson family. The family owns Chas E Ramson Ltd ('Chas E'). All the shares are privately held. Mrs Fulton is the sister of Mr John Ramson, the managing director. She was not involved in the operation of Chas E. She pursued a career in the travel industry. According to her it was only in 2014 she

realised that she owned 25.25% of the shares in Chase E. The context of this discovery was the deaths of her father, Mr Lauritz Ramson, who died in 2011, and her step-mother, Mrs Janet Ramson, the second wife, of Mr Lauritz Ramson. Mrs Janet Ramson died in 2014.

[2] There are many Ramsons and so to avoid misidentification or confusion in the narrative the court needs to refer to them by their first names. No disrespect is intended. Mr Lauritz Ramson will be referred to as Lauritz. Mr John Ramson will be referred as John. Mrs Sally Ann Fulton as Sally. Miss Anne Fulton as Anne. Mrs Janet Ramson as Janet.

[3] According to Sally it was the subsequent administering of the estates of her father Lauritz and her step mother that she came to appreciate that she owned shares in Chas E. John disputes this and says that Sally must have known or ought to have known that she held shares in the company because she was one of the original subscribers to the memorandum of association in 2001 when the company made the transition from an Industrial and Provident Society ('IPS') to a limited liability company. This was the second time that the entity became a limited liability company. The first time was in 1934. The entity commenced business in 1922 but was incorporated in 1934. It became an IPS in 1984 and continued as an IPS until 2001. Sally was a member of the IPS.

[4] After Sally's 'discovery' or more accurately 'reminder' of her shareholding she began to take a deeper interest in the affairs of the company and needless to say began asking all sorts of questions. In her view not all the answers were satisfactory. She advised the directors that she is prepared to take legal action if necessary. She has.

[5] She has made this application under section 212 of the Companies Act asking that she be permitted to bring an action in the name of the company against the directors for what she believes are breaches of fiduciary duty. Her ire is directed primarily at what she considers to be the following unsatisfactory state of affairs. She claims that a property known as Coconuts, owned by the company, was and is being

used as if it were the private property of John and his family to the detriment of the company. She also believes that another property, Sharrow Drive, where John lives has been and is being misused to the company's detriment. She believes that the properties could have been used to generate income for the company.

The derivative claim

[6] This type of action is derived from the status of the person seeking to bring the claim. Section 212 (1) states that a complainant may apply for leave to bring a derivate action in the name of and on behalf of the company. Section 212 (2) states that no action may be brought unless the court is satisfied that (a) reasonable notice has been given to the directors of the company; (b) the complainant is acting in good faith; and (c) it appears to be in the interests of the company that the action be brought. Section 212 (3) of the Companies Act states who can apply to bring a derivative action.[1]

[7] The derivative claim is an action brought by a person who comes within the category of persons who are permitted to bring such an action, in the name of the company, against the directors for wrongs done to the company. It used to be thought of

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[1] Section 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 a Court for leave to bring a derivative action in the name and on behalf of a corporation 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 corporation 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.

as an action brought by minority shareholders against the directors who may either be the majority shareholders or command the support of the majority. The directors who either controlled the company by majority share ownership or who were supported by the majority of shareholders would not take any action to correct the alleged wrongs committed against the company because they may themselves be the wrong doers or enablers of the wrong doers. At common law permission had to be sought to bring the claim. Under the statute permission is still required to bring the action. This procedural requirement was the practical outcome of two interrelated rules: (a) generally at common law only the person wronged could bring a claim and since a company was a separate legal entity from the humans who operated it only the company could sue; and (b) the courts did not readily interfere in the management of a company. The view was that management of the company was best left to the shareholders and directors.

[8] The derivative action is now on a statute footing. The remedy in the Companies Act of Jamaica has completely replaced the common law in this area. One of the drawbacks of the common law derivative action was that the person seeking to bring the claim had to be a member of the company. Another drawback was that if the conduct complained of could be legitimised by a vote of shareholders then that possibility was an effective bar to bringing the claim. The consequence of this was that, at common law, the person who wanted to bring the derivative claim had to show that the conduct complained of was ultra vires and could not be ratified or that the conduct in question had to be approved by a special procedure or special majority and that had not happened in the particular circumstance. In practice the person had to establish that what happened could not be rectified by the majority of shareholders. The logic of this position was simple: why permit such a claim to begin when it was possible that the conduct in question may be legitimised by a majority of the shareholders while the claim was going on?

[9] This court wishes to cite in full a passage from the elegant and simple judgment of Blair JA from the Court of Appeal of Ontario in **Rea v Wildeboer** 37 BLR (5th) 101; 384 DLR (4th) 747. It sets out in comprehensible language the background to and the reason for the derivative action;it explains the difference between a derivative action

and the oppression remedy. This distinction is important in this case because one of Chas E's submission is that the oppression remedy can be used to rectify the alleged wrongs complained of in this case. His Lordship stated at paragraphs 14 – 20:

> *14 At common law, minority shareholders in corporations had very little protection in the face of conduct by the majority (or by directors controlled by the majority) that negatively affected either the corporation itself or their interests as minority shareholders. This handicap was due to two well-entrenched common law principles of corporate law: the notion of a "corporate personality" and the "indoor management rule". Both of these principles can be traced back to a decision of now almost mythical stature - that of Vice-Chancellor Wigram in Foss v. Harbottle (1843), 67 E.R. 189, 2 Hare 461 (Eng. V.-C.).*
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> *15 In law, a corporation is a legal entity distinct from its shareholders. It followed from this that shareholders were precluded from bringing their own action in respect of a wrong done to the corporation. Except as modified by the derivative action, the oppression remedy, and winding-up proceedings, this remains a governing principle in Canadian corporate law: see Hercules Management Ltd. v. Ernst & Young, [1997] 2 S.C.R. 165 (S.C.C.), at para. 59; Meditrust Healthcare Inc. v. Shoppers Drug Mart (2002), 61 O.R. (3d) 786 (Ont. C.A.). As Laskin J.A. put it, in* Meditrust*, at paras. 12-14:*
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>> *The rule in Foss v. Harbottle provides simply that a shareholder of a corporation — even a controlling shareholder or the sole shareholder — does not have a personal cause of action for a wrong done to the corporation. The rule respects a basic principle of corporate law: a corporation has a legal existence separate from that of its shareholders. See Salomon v. Salomon & Co. (1896), [1897] A.C. 22, 66 L.J. Ch. 35 (U.K. H.L.) A shareholder cannot be sued for the liabilities of the corporation and, equally, a shareholder cannot sue for the losses suffered by the corporation.*

> *The rule in Foss v. Harbottle also avoids multiple lawsuits. Indeed, without the rule, a shareholder would always be able to sue for harm to the corporation because any harm to the corporation indirectly harms the shareholders.*
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> *Foss v. Harbottle was decided nearly 160 years ago but its continuing validity in Canada has recently been affirmed by the Supreme Court of Canada in Hercules Management Ltd. v. Ernst & Young, [1997] 2 S.C.R. 165 (S.C.C.) and by this court in Martin v. Goldfarb (1998), 163 D.L.R. (4th) 639 (Ont. C.A.).*

16 The companion indoor management rule has also played a significant role in restricting minority shareholders' rights to redress. At common law, if an act that was claimed to be wrongful could be ratified by the majority at a general meeting of shareholders, neither the corporation nor an individual shareholder could sue to redress the wrong. The rationale for this was that courts were reluctant to interfere in the internal management affairs of the corporation.

17 It took over a century for legislative reforms to be put in place to temper the restrictive effect of these principles on minority shareholder rights. In the latter part of the 20th century, however, the two statutory forms of relief that are at the heart of this appeal - the derivative action and the oppression remedy - were created for this purpose. It is noteworthy that they approached the problem in two different, although potentially overlapping, ways.

18 The derivative action was designed to counteract the impact of Foss v. Harbottle by providing a "complainant" - broadly defined to include more than minority shareholders - with the right to apply to the court for leave to bring an action "in the name of or on behalf of a corporation ... for the purpose of prosecuting, defending or discontinuing the action on behalf of the body corporate": Business Corporations Act, R.S.O. 1990, c. B.16, s. 246 ("OBCA"). It is an action for "corporate" relief, in the sense that the goal is to recover for wrongs done to the company itself. As Professor Welling has colourfully put it in his text, Corporate Law in Canada: The

Governing Principles, 3rd ed. (Mudgeeraba: Scribblers Publishing, 2006), at p. 509, "[a] statutory representative action is the minority shareholder's sword to the majority's twin shields of corporate personality and majority rule."

19 The oppression remedy, on the other hand, is designed to counteract the impact of Foss v. Harbottle by providing a "complainant" - the same definition - with the right to apply to the court, without obtaining leave, in order to recover for wrongs done to the individual complainant by the company or as a result of the affairs of the company being conducted in a manner that is oppressive or unfairly prejudicial to or that unfairly disregards the interests of the complainant. The oppression remedy is a personal claim: Ford Motor Co. of Canada v. Ontario (Municipal Employees Retirement Board) (2006), 79 O.R. (3d) 81 (Ont. C.A.), at para. 112, leave to appeal refused, [2006] S.C.C.A. No. 77 (S.C.C.); Hoet v. Vogel, [1995] B.C.J. No. 621 (B.C. S.C.), at paras. 18-19.

20 These two forms of redress frequently intersect, as might be expected. A wrongful act may be harmful to both the corporation and the personal interests of a complainant and, as a result, there has been considerable debate in the authorities and amongst legal commentators about the nature and utility of the distinction between the two. In the words of one commentator, "the distinction between derivative actions and oppression remedy claims remains murky": Markus Koehnen, Oppression and Related Remedies (Toronto: Thomson Canada Limited, 2004), at p. 443.

21 Yet the statutory distinctions remain in effect.

[10] From this passage, it is the case that the derivative action is designed for wrongs done to the company and not to the individual shareholder. The oppression remedy is directed at wrongs done to the individual. It is a personal claim. However, the passage recognises that in some instances the remedies overlap because the same conduct action may give rise to both actions.

[11] One of the important innovations of the Jamaican statute is that the derivative action is not barred simply by reason 'only that it is shown that an alleged breach of a right or duty owed to the company … has been or may be approved by the

shareholders, but evidence of approval by the shareholders may be taken into account by the Court (sic) in making an order under [section 212].' The means that the possibility of the impugned conduct being legalised by the shareholders is not in and of itself a sufficient reason to bar the claim.

[12] The other important thing about the statutory derivative action is that the categories of persons who can bring a derivative claim has been widened. It is no longer restricted to current shareholders. Under section 212, the complainant may be 'a shareholder or former shareholder'; 'a debenture holder or former debenture holder' or 'a director or officer or former director or officer of a company.'

[13] The legislature have not yet embraced the idea that such actions should be permitted without let or hindrance. The fear is that without the leave requirement such claims may proliferate. The statute has established three criteria that must be met before permission to bring such a claim is given. The first is (a) reasonable notice must be given to the directors of the company; (b) the complainant is acting in good faith; and (c) it appears to be in the interests of the company.

The statutory requirements

[14] As is well known, in interpreting any statute the interpreter must examine the words in their immediate context and the immediate context in the larger context of the entire statute. The starting point is always the actual words used. Section 212 is modelled on (some would say copied directly with immaterial changes) the Canadian Business Corporations Act and therefore Canadian cases are persuasive in interpreting the section.

[15] There is no doubt that Sally is a shareholder and therefore qualifies as a complainant under section 212 (3). The battle in this case is whether the three criteria have been met. The first is reasonable notice.

i) Reasonable notice

[16] It has been said that the purpose of giving notice to the directors is to enable them to examine all the facts and circumstances and make an informed decision.

[17] In this particular case, Mrs Gibson Henlin QC took up the unenviable task of attempting to persuade this court that the notice was too short. What are the facts? The directors received notice by way of a letter dated April 8, 2015. This application was filed on August 11, 2015. The notice was a culmination of ongoing queries by Sally. It began with a letter dated September 12, 2014 written by Sally's lawyers to Chas E's directors. The letter raised a number of questions concerning the governance of the company. The last paragraph of that letter ends with the solemn promise that unless 'satisfactory remedial action' is taken then Sally will file a claim in the Supreme Court.

[18] Mrs Gibson Henlin sought to say that he four-month period - beginning in April 2015 and ending with the filing of the claim in August 2015 - was insufficient time for the directors to inform themselves, get advice and make an informed decision on whether Sally's complaints had merit and if it did, whether they would take corrective action.

[19] Mrs Gibson Henlin relied on **Johnson v Meyer** [1987] CLD 387. In that case Grotsky J, at paragraph 28, cited with approval an extract from an article by Stanley M Beck, *The Shareholder's Derivative Action*, (1974) 52 Canadian Bar Review 159, 202. Mr Beck identified the purpose and benefit of giving notice. According to Mr Beck it may well be that once the directors receive notice and have had sufficient time to conduct the necessary assessment, they may decide that the company should take remedial measures to address the complaints raised. It may also be the case that the directors may give an explanation that may satisfy the applicant who then takes no further action.

[20] In support of her position that the directors in Chas E did not have sufficient time between the receipt of notice and this application, Mrs Gibson Henlin cited a case from the United States of America. That was the case of **Allison, on behalf of General Motors Corporation v General Motors Corporation and others**, 604 F Supp 1106 (1985). In that case Mr Allison brought a derivative action against certain officers and directors of the company. The company successfully applied for dismissal of the claim

on the ground, among others, that the time between notice and filing (2 ½ months) was too short. In particular Mrs Gibson Henlin cited this passage from His Honour District Judge Murray Schwartz at page 1117 col 2:

> *There can be no precise rule as to how much time a Board must be given to respond to a demand. Indeed, the question in premature filing cases is not how much time is needed to respond to the demand, but whether the time between demand and filing of suit was sufficient to permit the Board of Directors to discharge its duty to consider the demand. Generally, if demand is required, the amount of time needed for a response will vary in direct proportion to the complexity of the technological, quantitative, and legal issues raised by the demand.*

[21] The judge in that case concluded that the time between demand and filing of suit was too short. However, more needs to be said about this case since it was not a simple case of demand, 2 ½ months passed, therefore time too short and action dismissed. The claim involved a motor vehicle manufacturing company. Apparently the notice to the board alleged significant defects of a highly technical nature in the braking system of an automobile made by the company. This necessitated the board gaining sufficient knowledge of the technology involved so that it could make an informed decision. The judge concluded that '[g]iven the magnitude and complexity of these issues, two and one-half months was not sufficient time for the GM Board to complete an adequate investigation of the items set forth in the demand letter.'

[22] This court has no difficulty with His Honour Judge Schwartz's dictum and neither does this court take issue with Grotsky J in **Meyer**. The ultimate question is whether in this case, the time between the notice and the filing of the application was sufficient. This court concludes that the time was sufficient. It was not a complicated case from the standpoint of understanding what Sally was complaining about. Her concerns were constantly being expressed in letters from September 2014. The directors had a fair idea of what she took issue with and the letter of April 2015 was simply telling them that she was not satisfied with their responses and was going to take legal action. In fact, previous letters had told the directors of the threat of legal action if she was not satisfied

with their responses. The directors in Chas E had sufficient time to decide and communicate with Sally what they intended to do about the issues raised in the notice letter. Having regard to the whole context of this case and the letters from 2014 it was obvious that Sally was honing in on the two properties, Coconuts and Sharrow Drive, and it was equally obvious that she strongly held the view that the company was not making the best use of them.

[23] The court now considers the good faith requirement.

ii) Good faith

[24] The second requirement under section 212 (2) of the Companies Act is that the complainant is acting in good faith. This requirement has not yielded a consistent meaning. In assisting the court, counsel on both sides cited cases from Jamaica, Australia, Canada and Singapore. Even within Canada there is a difference between the courts in the provinces. Generally, the divide seems to be on the issue of what has been called the elevated standard/high onus and the non-elevated standard. This court prefers and applies the non-elevated standard because that standard is consistent with the actual words of the statute. As will be demonstrated, some courts import standards and considerations not justified by the words of the statute.

The cases

[25] One of the earliest cases in this jurisdiction on this point is that of **Earle Lewis and another v Valley Slurry Seal Company** [2013] JMSC COMM 21 a decision of Mangatal J. Her Ladyship relied heavily on cases from Canada and Australia. The learned judge cited the case of **Tremblett v SCB Fisheries Ltd** 116 Nfld. & P.E.I.R. 139, 363 A.P.R. 139, 46 A.C.W.S. (3d) 431, **Primex Investments Ltd. v. Northwest Sports Enterprises Ltd**. (1995), [1996] 4 W.W.R. 54, 13 B.C.L.R. (3d) 300 (B.C. S.C), **Barrett v Duckett** [1995] 1 BCLC 243 and **Swansson v R A Pratt Properties Pty Ltd** [2002] NSWSC 583.

[26] All the cases relied on by her Ladyship applied the elevated or high standard of proof on this issue of good faith. All the cases say that as long as the derivative claim is brought in good faith and for the benefit of the company and for no ulterior purpose then it should go forward. The problem however with these cases is in the details which this court will examine. The court has no difficulty with the broad principle but the difficulty is with conceptual approach to good faith and the chain of reasoning to get to the ultimate conclusion that the applicant was either acting or not acting in good faith. In coming to its own conclusion the court in its research came across other Canadian cases which it preferred to those cited by counsel and those relied on by Mangatal J. The discussion to come will show that there has been a long standing problem of trying to determine what is or is not evidence of good faith. What is clear is this: the fact that the defendant intended to benefit himself is not an automatic barrier to the finding of good faith. One Canadian court has stated that the existence of a private vendetta is only a secondary factor in determining the absence of good faith (**Valgardson v Valgardson** 349 DLR (4th) 591).

[27] The Court of Appeal of Singapore has accepted that the presence of self-interest is not a bar to a finding of good faith provided that the applicant's judgment is not clouded purely by personal considerations (**Ang Thiam Swee v Low Hian Chor** [2013] SGCA 11).

The elevated standard/high onus cases

[28] In Canada the elevated standard cases are from British Columbia and Newfoundland. A good starting point in relation to the elevated standard case is that of **Tremblett**. In that case Puddester J said at paragraph 58:

> *58 In my view, the concept of good faith encompassed by the statutory requirements under s.369 relates to the intention of the applicant - whether the application is brought with the motive and intention of benefiting the corporation, or for some recognized or subliminal purpose or benefit outside that interest. This is not to say, of course, that an action for the benefit of the corporation may not also have a subsidiary benefit for the applicant, even beyond*

the applicant's benefit as one of a number of shareholders. However, in my view the history of the development of statutory provisions such as s.369 shows that for statutory relief against the strict common law position of non-intervention in majority decisions internal to corporations, in light of the extraordinary power vested in a shareholder or director applicant to use the corporate resources and to create a position of legal conflict between the corporation and others, it is necessary that an applicant bring cogent evidence establishing clearly on a preponderance of evidence that the application is in fact brought in good faith. It must be noted that this obligation is a positive requirement on any applicant for relief under s.369. It is not one which arises only where there may be evidence to the contrary adduced. In circumstances such as here where, I conclude, there is in fact substantial evidence bringing this aspect into question, there is in turn a substantial obligation on an applicant, including the applicant here, to satisfy the court as to the good faith under which this application, and the proposed action to be sanctioned by it, are brought and proposed by him.

[29] His Lordship was referring to section 369 of the Corporations Act. It is noteworthy that his Lordship did not conduct a textual analysis of the actual words used in the statute but relied on the (a) the history of the development of the statutory provision; (b) the extraordinary power vested in a shareholder or director to use corporate resources and to create legal conflict between the corporation and others in order to come to the conclusion that the claimant must bring 'cogent evidence' in order to meet the 'substantial obligation' on him to meet the good faith standard. His Lordship never said that the actual words of the statute led him to this view. This approach is not accepted.

[30] In **Primex** Tysoe J did not disapprove of the submission of counsel who urged the court to accept the elevated standard. **Primex** is from British Columbia. Counsel in **Primex** relied on Puddester J in **Tremblett**. Tysoe J was affirmed on appeal except for one small point which need not concern us (1996 Carswell BC 2505, [1996] B.C.W.L.D. 3016, [1996] B.C.J. No. 2309, [1997] 2 W.W.R. 129, 26 B.C.L.R. (3d) 357, 67 A.C.W.S. (3d) 271). As far as this court has been able to determine, this case is still the law in British Columbia. Supreme Court of Canada refused leave. The practical effect is that the Court of Appeal of British Columbia has affirmed the elevated standard test. Tysoe J

held that applicant (called Petitioner) had met the good faith standard inspite of the fact that he found that the Petitioner was 'acting out of self-interest in wanting to prosecute the derivative action. The self-interest is to maximize the value of its shares in Northwest by pursuing causes of action which it may have against Mr. Griffiths and the other directors' (**[42]**). His Lordship found that the Petitioner's self-interest coincided with the interest of the company. Tysoe J pragmatically recognised that '[a]nything that benefits a company will indirectly benefit its shareholders by increasing the share value and it is hard to imagine a situation where a shareholder will not have a self-interest in wanting the company to prosecute an action which is in its interests to prosecute' (**[42]**). This conclusion that the Petitioner met the good faith standard is very significant in this case because the elevated standard was still met in the face of an express finding that the Petitioner was acting out of self-interest in bringing the claim.

[31] In addition to these cases applying the elevated standard (which this court does not accept), they show that the presence of other motives other than acting for the benefit of the company does not mean an absence of good faith. Stated differently, there is no rule that the good faith standard is met if the sole and only motive is to benefit the company. Tysoe J stated that it is difficult to imagine a case where a shareholder will not have a self-interest in wanting a company to pursue an action which it is in the company's interest to prosecute. This court will take it step further and say that in the research done to date the court has not found a single case where the complainant was not seeking to advance his personal agenda. Although more will be said about the debenture holder later, this court will say at this early stage that a debenture holder, of all the person's entitled under Jamaican law to bring a derivative action, will have the least interest in the company's benefitting except so far as he is able to recover the money owed to him under the debenture.

[32] On the question of whether the presence of personal interest disqualifies a complainant under the good faith test other judges in Canada have held that the presence of personal interest is not a disqualification under the good faith standard. This was the position of Gunn J in **1140832 Alberta Ltd v Regional Tyre Distributors** 2014 SKQB 409, 248 ACWS (3d) 335, 463 Sask R 220 and Baynton J in **Schafer v.**

International Capital Corp. 1996 Carswell Sask 801, [1996] S.J. No. 770, [1997] 5 W.W.R. 98, 153 Sask. R. 241, 68 A.C.W.S. (3d) 76; decision on leave affirmed on appeal but reversed on costs order 1997 Carswell Sask 298, [1998] 4 W.W.R. 156, 152 Sask. R. 273, 140 W.A.C. 273, [1997] S.J. No. 374 | (Sask. C.A., Jun 4, 1997). Gunn and Baynton JJ added a proviso which was that the personal interest should be related to and not contrary to the interest of the company.

[33] The final case in this review of the elevated standard cases is **Swannson**. This court is cautious about relying on this case despite it commendation by both sides. Firstly, the judge, Palmer J observed that 'the terms of Pt 2F.1A are so different from the provisions of the New Zealand and Canadian legislation that the case law in those jurisdictions is of little assistance' (**[20]**).[2] The Jamaican sections 212 and 213 were

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[2] This extract of the statute comes directly from paragraph 21 of Palmer J's judgment.

The relevant provisions of Pt 2F.1A are as follows:

236 (1) *[Person may bring proceedings on behalf of company]* A person may bring proceedings on behalf of a company, or intervene in any proceedings to which the company is a party for the purpose of taking responsibility on behalf of the company for those proceedings, or for a particular step in those proceedings (for example, compromising or settling them), if:

(a) the person is:

(i) a member, former member, or person entitled to be registered as a member, of the company or of a related body corporate; or

(ii) an officer or former officer of the company; and

(b) the person is acting with leave granted under section 237.

…

237(1) [*Person may apply to Court]* A person referred to in paragraph 236(1) (a) may apply to the Court for leave to bring, or to intervene in, proceedings.

(2) *[Court must grant application]* The Court must grant the application if it is satisfied that:

(a) it is probable that the company will not itself bring the proceedings, or properly take responsibility for them, or for the steps in them; and

(b) the applicant is acting in good faith; and

taken from the Canadian legislation. Under the New South Wales statute that Palmer J was considering it was stated that in order to grant leave the applicant had to show that the company will probably not take action. The Jamaican statute has no such requirement. Another requirement in the statute Palmer J considered was this: 'if it is in the **best** interests of the company…' (emphasis added). The Jamaican statute does not have the adjective 'best'; it simply says, 'if it is in the interest of the company.' The New South Wales statute also says that there has to be 'a serious question to be tried'; the Jamaican statute does not require this. The only expression in common between the New South Wales statute and the Jamaican statute that is relevant to the instant case is that they both say that the complainant/applicant is 'acting good faith.'

[34] The second reason for adopting a cautious approach to **Swannson** is that it appears that Palmer J adopted a very restrictive approach to the statute which may be justified by his Honour's interpretation of the statute. That approach, as will be seen, is not justified by the wording of the Jamaican statute. His Honour said at paragraph 24:

> ***It is clearly the intent of Pt 2F.1A that leave to bring a derivative action must not be given lightly****. An application under s 237(2) is not interlocutory in character; the relief sought is final*

(c) it is in the best interests of the company that the applicant be granted leave; and

(d) if the applicant is applying for leave to bring proceedings — there is a serious question to be tried; and

(e) either:

(i) at least 14 days before making the application, the applicant gave written notice to the company of the intention to apply for leave and of the reasons for applying; or

(ii) it is appropriate to grant leave even though subparagraph (i) is not satisfied.

and the applicant bears the onus of establishing the requirements of the subsection to the Court' satisfaction. (emphasis added)

[35] This seems to suggest that in Palmer J's view since leave was not be lightly given then he would not adopt a liberal interpretation of expressions used in the statute even though, it may reasonably be argued that the statute was a remedial one designed to make such applications easier.

[36] The following paragraphs from Palmer J are not necessarily and inherently objectionable but unless carefully read they are capable of suggesting that if the applicant has multiple motivations for his application then he or she is disqualified under the good faith requirement. His Honour said at paragraphs 35 - 37:

> *35 At this early stage in the development of the law on the statutory derivative action created by Pt 2F.1A it would be unwise to endeavour to state compendiously the considerations to which the Courts will have regard in determining whether applicants in all categories defined by s 236(1) are acting in good faith. The law will develop incrementally as different factual circumstances come before the Courts.*
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> *36 Nevertheless, in my opinion, there are at least two interrelated factors to which the Courts will always have regard in determining whether the good faith requirement of s 237(2)(b) is satisfied. The first is whether the applicant honestly believes that a good cause of action exists and has a reasonable prospect of success. Clearly, whether the applicant honestly holds such a belief would not simply be a matter of bald assertion: the applicant may be disbelieved if no reasonable person in the circumstances could hold that belief. The second factor is whether the applicant is seeking to bring the derivative suit for such a collateral purpose as would amount to an abuse of process.*
>
> *37 These two factors will, in most but not all, cases entirely overlap: if the Court is not satisfied that the applicant actually holds the requisite belief, that fact alone would be sufficient to lead to the conclusion that the application must be made for a collateral purpose, so as to be an abuse of process. The applicant may, however, believe that the company has a good cause of action with*

> *a reasonable prospect of success but nevertheless may be intent on bringing the derivative action, not to prosecute it to a conclusion, but to use it as a means for obtaining some advantage for which the action is not designed or for some collateral advantage beyond what the law offers. If that is shown, the application and the derivative suit itself would be an abuse of the Court's process: Williams v Spautz (1992) 174 CLR 509, at 526. The applicant would fail the requirement of s 237(2)(b).*

[37] In these passages Palmer J is qualifying what is meant by good faith. His Honour states that simply stating that one is acting in good faith is not sufficient. It is the view of this court that this statement of principle is simply too broad. The way in which Palmer J states the matter is capable of being understood to mean that if there is an assertion of good faith and nothing else whether to bolster the assertion or take away from the assertion then the assertion of good faith is insufficient. If this is what his Honour meant then this court respectfully disagrees. What if the respondent agrees that the complainant is acting in good faith but submits that it is a case of misguided zeal? This court would have no difficulty if his Honour had said that if the applicant asserts that he is acting in good faith and there is nothing to suggest that he is not then that 'bald assertion' should be sufficient. The other part of Palmer J's dictum, namely 'the applicant may be disbelieved if no reasonable person in the circumstances could hold that belief' needs careful analysis. If his Honour meant that in assessing whether the belief was honestly held it is appropriate to test that belief by what a reasonable person may have thought that is one thing. On the other hand if his Honour meant that if a reasonable person could not have had an honest belief in the circumstances and therefore the applicant could not have had an honest belief it is this court's view that that is incorrect.

[38] Why does this court take this position? The surround circumstances are evidential in the sense that it can be used to test whether the applicant honestly held the belief. The appropriate analytical position ought to be this: if it is the case that a reasonable person would not hold the view of the applicant then the easier it is to infer that the applicant did not have an honest belief in the genuineness of the claim.

However, that does not mean that there cannot be an honest but unreasonable belief in the genuineness of the claim. Conversely, the fact that a reasonable person is likely to hold the view that the applicant has does not necessarily mean that the applicant honestly held the view he espouses. In other words, this court is saying that the reasonableness or unreasonableness of a belief is merely evidence to assist in determining whether the belief is honestly held but the unreasonableness of the view is not determinative one way or the other.

[39] Palmer J then goes to make a distinction not found in the statute cited by his Honour. The learned judge distinguishes on the one hand (a) where the complainant is a current shareholder 'who has more than a token shareholding' it will be easier to satisfy the good faith requirement even if the proposed derivative action 'seeks to recover property so that the value of the applicant's shares increase' and on the other hand (b) the complainant is a former shareholder or former director or officer of the company then the application should attract greater scrutiny. The reasoning of his Honour is set out below:

> *38. Where the application is made by a current shareholder of a company who has more than a token shareholding and the derivative action seeks recovery of property so that the value of the applicant's shares would be increased, good faith will be relatively easy for the applicant to demonstrate to the Court's satisfaction. So also where the applicant is a current director or officer: it will generally be easy to show that such an applicant has a legitimate interest in the welfare and good management of the company itself, warranting action to recover property or to ensure that the majority of the shareholders or of the board do not act unlawfully to the detriment of the company as a whole.*
>
> *39 However, where the applicant is a former shareholder or officer with nothing obvious to gain directly by the success of the derivative action, the Court will scrutinise with particular care the purpose for which the derivative action is said to be brought.*
>
> *40 For example, a creditor may happen to be a former shareholder of the company and may seek, by the derivative action, to place the*

company in a financial position to repay the debt. There would be no abuse of process in commencing and maintaining the derivative action itself in that the action is commenced and maintained in order to achieve the purpose for which it is designed, namely, to recover property for the company. However, it may well be said that, in making an application for leave under Pt 2F.1A, the applicant is not acting in good faith because he or she is, in reality, seeking to vindicate his or her interest as a creditor and not whatever interest he or she may have as a former shareholder.

41 To take another example: a derivative action sought to be instituted by a current shareholder for the purpose of restoring value to his or her shares in the company would not be an abuse of process even if the applicant is spurred on by intense personal animosity, even malice, against the defendant: it is not the law that only a plaintiff who feels goodwill towards a defendant is entitled to sue: see e.g. Dowling v Colonial Mutual Life Assurance Society (1915) 20 CLR 509, at 521-522; IOC Australia Pty Ltd v Mobil Oil Australia Ltd (1975) 11 ALR 417, at 426-427. On the other hand, an action sought to be instituted by a former shareholder with a history of grievances against the current majority of shareholders or the current board may be easier to characterise as brought for the purpose of satisfying nothing more than the applicant's private vendetta. An applicant with such a purpose would not be acting in good faith.

42 If a wrong appears to have been done to a company and those in control refuse to take proceedings to redress it, the Court should permit a derivative action to be instituted only by those within the categories allowed by s 236(1) who would suffer a real and substantive injury if the action were not permitted. The injury must be necessarily dependent upon or connected with the applicant's status as a current or former shareholder or director and the remedy afforded by the derivative action must be reasonably capable of redressing the injury.

43 Further, if an applicant for leave under s 237 seeks by the derivative action to receive a benefit which, in good conscience, he or she should not receive, then the application will not be made in good faith even though the company itself stands to benefit if the derivative action is successful. Such a benefit would include, for

> *example, a double recovery by the applicant for a wrong suffered or recompense for a wrongful act inflicted upon the company in which the applicant was a direct and knowing participant with the proposed defendant in the derivative action. In such a case the law would not permit the applicant to derive a benefit from his or her own wrongdoing.*

[40] This court has difficulties with this reasoning. First, the statute does not differentiate between shareholder with token shareholding (however defined) and shareholders that do not. Second, the statute does not discriminate against past shareholders, directors and officers. Third, Palmer J has clearly added considerations to the statute without any clearly identified policy reasons for so doing and his Honour did not demonstrate that his position flowed out of any textual analysis in order to justify the position taken. Fourth, his Honour's reasoning did not deal sufficiently with cases where a person has multiple motivations for seeking to bring the claim. In any event, these distinctions are not made in the Jamaican statute.

[41] Palmer J introduced further restrictions without analysing the language of the statute or by examining public policy. His Honour in paragraph 41 stated that the derivative action should only be instituted by those who would suffer a real and substantive injury if the action were not permitted. The Jamaican statute does not have any wording that would remotely permit such a construction. It does seem odd that a statute that was enacted to enable a wider group of persons including, in Jamaica, debenture holders who have no interest other than getting back the money lent to the company, should end up with either an interpretation or judicially created guidelines regulating the exercise of the discretion that narrows the class of persons who can seek to bring a derivative action when the language of Parliament simply does not allow such an approach.

[42] In paragraph 41 of Palmer J's reasons it seems that his Honour overlooked the possibility that despite the history of grievances with the company such grievances may have a sound basis and the history may merely be evidence of long standing issues which those who have majority shares or can command the loyalty of the majority

shareholders have not addressed and will not address. For this court a history of grievances cannot without more be seen as a negative. It may well be a case of one honest man among thieves and plunderers of the company's resources, or if he is not honest, his venality is very underdeveloped compared to the others. This court hesitates to accept the recommendation of relying on this case.

[43] Palmer J on the aspect of best interests of the company noted at paragraph 55:

> *55 At the outset, it is important to note that s 237(2)(c) requires the Court to be satisfied, not that the proposed derivative action **may be, appears to be**, or **is likely to be**, in the best interests of the company but, rather, that it **is** in its best interests. In this respect, s 237(2) differs significantly from its counterpart in the Canadian legislation, which requires the Court to be satisfied that the proposed derivative action "appears to be" in the interests of the company, and from s 165(3) of the New Zealand Act which requires that the Court "have regard to…the interests of the company". These provisions seem to have led the Courts of those countries to the view that the best interests of a company need be considered only in a prima facie way: see e.g. Re Bellman and Western Approaches Ltd (1981) 130 DLR (3d) 193, at 201; Vrij v Boyle (1995) 3 NZLR 763, at 765; Techflow (NZ) Ltd v Techflow Pty Ltd (1996) 7 NZCLC 261,138.* (emphasis in original)

[44] His Honour concluded that because of the difference in wording that difference may have caused the Canadian courts to approach the interests of the company requirement in a prima facie way. As noted earlier, the Jamaican statute says 'appears to be in the interests of the company.' The legislation before Palmer J spoke to 'best interest of the company.' This difference between 'may be, appears to be, or is likely to be' on the one hand and 'best interest' on the other hand led his Honour to say at paragraph 56:

> *56 The requirement of s 237(2) (c) that the applicant satisfy the Court that the proposed action is in the best interests of the company is a far higher threshold for an applicant to cross. It requires the applicant to establish, on the balance of probabilities, a fact which can only be determined by taking into account all of the*

> *relevant circumstances. Accordingly, the enquiry will normally require the applicant to adduce evidence at least as to the following matters.*

[45] It must be noted that Palmer J held that the phrase 'best interests of the company is a far higher threshold.' In the context, Palmer J must have meant 'higher threshold' than appears to be in the interests of the company since that was one of the phrases he cited in order to emphasis the difference between the Australian statute on the one hand and the Canadian and New Zealand statutes on the other. If this is correct then it would mean that the threshold in Jamaica is lower.

[46] Based on this higher threshold, Palmer J held that there should be evidence of four things. These were stated at paragraphs 57 – 60:

> *57 First, there should be evidence as to the character of the company: different considerations may well apply depending on whether the company is a small, private company whose few shareholders are the members of a family or whether it is a large public listed company. If the company is a closely held family company, it may be relevant to take into account the effect of the proposed litigation on the purpose for which the company was established and on the family members who are the shareholders. If the company is a public listed company, such considerations will be irrelevant. Again, the company may be a joint venture company in which the venturers are deadlocked so that the proposed derivative action is seen as being for the purpose of vindicating one side's position rather than the other's in a way which will not achieve a useful result: see e.g. Talisman Technologies Inc v Queensland Electronic Switching Pty Ltd [2001] QSC 324.*
>
> *58 Second, there should be evidence of the business, if any, of the company so that the effects of the proposed litigation on its proper conduct may be appreciated.*
>
> *59 Third, there should be evidence enabling the Court to form a conclusion whether the substance of the redress which the applicant seeks to achieve is available by a means which does not require the company to be brought into litigation against its will. So, for example, if the applicant can achieve the desired result in*

proceedings in his or her own name it is not in the best interests of the company to be involved in litigation at all. This was the case in Talisman Technologies in which it appeared from the evidence that the most desirable outcome for the applicant was to obtain an order for specific performance of a contract, which it could do in a suit in which the company did not need to be a party.

60 Fourth, there should be evidence as to the ability of the defendant to meet at least a substantial part of any judgment in favour of the company in the proposed derivative action so that the Court may ascertain whether the action would be of any practical benefit to the company.

[47] From this list, only the third is immediately attractive and should be adopted in Jamaica. The reason is that the third can be put before the court with relative ease and in an inexpensive manner. The other three matters are problematic. Since Palmer J says that there should be evidence of these things in the context of an application for leave to bring a derivative action, his Honour is clearly saying that the burden is on the applicant to adduce evidence of these matter. This does not mean that such evidence cannot be adduced by the respondent to the application but all things being equal the logic of Palmer J suggests that it is the applicant who must adduce the evidence on these factors. If this is correct, how would the applicant, in the position of Sally, in this matter secure such evidence? Sally has not been involved and has never been involved in the operation of Chase E. She and the possible defendant directors have an estranged relationship, short of some type of disclosure order where would Sally get the evidence to meet, for example, the fourth factor identified by Palmer J?

[48] The court is aware that **Swansson** was approved with slight modification by the Court of Appeal of New South Wales in **Chahwan v Euphoric Pty Ltd** [2008] NSWCA 52. The modification is that good faith is not restricted in the way suggested by Palmer J and extends to matters that could not be an abuse of process. It will be recalled that Palmer J had said that under good faith, it would not be good faith if the applicant sought to initiate the claim but had no intention of bringing it to completion or just to secure concession from the defendant. The Court of Appeal held that good faith extended to a consideration of whether the applicant was seeking to further his own

interest rather than the interests of the company as a whole. This is so even if the applicant's conduct was not an abuse of process. **Chahwan** approved Palmer J's view that the phraseology 'best interests of the company' meant that the standard for leave to be granted was a relatively high one.

[49] It is the view of this court that good faith refers to the applicant's motive and belief for bringing the action. At the very least good faith means that the applicant genuinely believes that a wrong has been done to the company and that the wrong needs to be corrected. This court accepts part of **Swannson** as modified by **Chahwan** that if the applicant had no intention to see the claim through to the end then that would be strong evidence of a lack of good faith because it would not be beneficial for the company to launch a claim it had no intention of seeing through.

[50] **Chahwan** made another important point. It held that the presence of a personal interest was not an automatic disqualifier since the presence of such an interest does not necessarily mean a lack of good faith. The reason is as explained by the court, if this was a disqualifier then very few applications would go forward.

Cases rejecting the high onus standard

[51] The Canadian cases rejecting the high onus standard are from Saskatchewan, Alberta and Ontario.

[52] In the **1140832 Alberta Ltd** case, from Saskatchewan the statute in question. It had the three-fold requirement of (a) reasonable notice; (b) good faith; and (b) 'it appears to be in the interests of the corporation. The wording, with immaterial differences is identical to that of Jamaica. [3] Gunn J in dealing with standard of proof

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[3] The statute is the Business Corporations Act ss 231 and 232:

231 (b) "complainant" means

expressly relied on Court of Appeal of Alberta's decision in **Valgardson v Valgardson** 349 DLR (4th) 591. The Court of Appeal expressly disapproved of dictum in **Mackenzie v Craig** (1997) 205 AR 362, [1998] 2 WWR 106 (Alta QB) which was followed by the first instance judge in **Valgardson** (**[13]**). The trial judge in **Valgardson** had concluded that 'the law in Alberta is that there is a high onus on an applicant to establish that the proceeding is brought in good faith.' **McKenzie** was a first instance judgment from the

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(i) a registered holder or beneficial owner, and a former registered holder or beneficial holder or beneficial owner, of a security of a corporation or any of its affiliates;

(ii) a director or an officer or a former director or officer of a corporation or any of its affiliates;

(iii) the Director; or

(iv) any other person who, in the discretion of a court, is a proper person to make an application under this Division.

232(1) Subject to subsection (2), a complainant may apply to the court for leave to bring an action in the name and on behalf of a corporation or any of its subdivisions, or intervene in an action to which any such body corporate is a party, for the purpose of prosecuting, defending or discontinuing the action on behalf of the body corporate.

(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 corporation...of his intention to apply to the court under subsection (1) if the directors of the corporation... do not bring, diligently prosecute...the action;

(b) the complainant is acting in good faith;

(c) it appears to be in the interests of the corporation...that the action be brought, prosecuted...

Queen's Bench Division of Alberta. In correcting this view, the court in **Valgardson** stated at paragraph 14 – 17:

> *14 Trial courts have reached different conclusions regarding the standard of proof necessary to establish good faith in the context of leave to commence a derivative action. In addition to Mackenzie, courts in Newfoundland and British Columbia also appear to have preferred an elevated standard: see Tremblett v. S.C.B. Fisheries Ltd. (1993), 116 Nfld. & P.E.I.R. 139, 363 A.P.R. 139 (Nfld. T.D.), and Primex Investments Ltd. v. Northwest Sports Enterprises Ltd. (1995), [1996] 4 W.W.R. 54, 13 B.C.L.R. (3d) 300 (B.C. S.C. [In Chambers]). However, certain other trial level courts have explicitly declined to impose a high standard to establish good faith: see L & B Electric Ltd. v. Oickle, 2005 NSSC 110 (N.S. S.C.) at para 52, (2005), 233 N.S.R. (2d) 244 (N.S. S.C.); Turner v. Turner, 2011 ABQB 21 (Alta. Q.B.) at paras 33-35, (2011), 80 B.L.R. (4th) 212 (Alta. Q.B.); Discovery Enterprises Inc. v. Ebco Industries Ltd. (1997), 40 B.C.L.R. (3d) 43, 35 B.L.R. (2d) 111, 1997 CarswellBC 1586 (B.C. S.C.) at para 118 (WLeC).*
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> *15 There is nothing in the language of section 240 of the ABCA to indicate an intention to create a "high" standard of proof. Section 240(2) states: "No leave may be granted under subsection (1) unless the Court is satisfied that ... the complainant is acting in good faith ..." [emphasis added]. The Ontario Court of Appeal in Philippines (Republic) v. Pacificador (1993), 14 O.R. (3d) 321 (Ont. C.A.), at 325, (1993), 64 O.A.C. 344 (Ont. C.A.) held that "[a]bsent applicable statutory language, a party who bears the ultimate burden of proof on a fact in issue must meet one of two standards of proof. That party must prove the fact either beyond a reasonable doubt, or on the balance of probabilities". This accords with the general principle of law regarding the burden of proof. "The degree of satisfaction governing civil actions is the lower standard of a balance of probabilities": Alan W Bryant, Sidney N Lederman & Michelle K Fuerst, The Law of Evidence in Canada, 3d ed (Markham, Ont: LexisNexis, 2009) at §5.50. As there is nothing in the statutory language of section 240 to suggest a departure from the ordinary rule, the onus created by that section is simply proof on a balance of probabilities.*

16 The relevant starting point is the principle enunciated by Rothstein J. in C. (R.) v. McDougall, 2008 SCC 53 (S.C.C.) at para 40, [2008] 3 S.C.R. 41 (S.C.C.): "I think it is time to say, once and for all in Canada, that there is only one civil standard of proof at common law and that is proof on a balance of probabilities". There is no appellate authority which supports the imposition of an elevated standard of proof. Indeed, in Acapulco Holdings Ltd. v. Jegen (1997), 193 A.R. 287, 47 Alta. L.R. (3d) 234 (Alta. C.A.), this court addressed the issue of what constitutes "good faith" in the context of an application for leave to bring a derivative action, but gave no indication that a high onus is placed on the applicant under this branch of the test for leave.

17 Accordingly, we conclude that the chambers judge erred in his selection of the requisite standard of proof under section 240 of the ABCA.

[53] In this passage the Court of Appeal noted that some jurisdictions in Canada have preferred an elevated standard while others have explicitly declined to impose a high standard. Having noted this difference the court stated that there were only two standards of proof known to law (on final determinations as distinct from interlocutory proceedings). The court went on to say that there was nothing in the text of the statute requiring a departure from ordinary rule that the standard of proof on the application was balance of probabilities. This court agrees with this analysis and applies it to Jamaica. There is nothing in section 212 of the Jamaican statute suggesting that there is any elevated standard or higher standard of proof other than the civil standard. This is one of the main reasons for not relying on the elevated standard cases from Canada on this point and to that extent this court disagrees with Mangatal J's reliance on them in **Earle Lewis**.

[54] **Valgardson** had this to say about good faith at paragraph 20:

20 The question of good faith requires the court to ensure that the proposed action is not frivolous or vexatious: Acapulco Holdings Ltd. at para 17; First Edmonton Place Ltd. v. 315888 Alberta Ltd., [1988] A.J. No. 511 (Alta. Q.B.) at para 67, (1988), 60 Alta. L.R. (2d) 122, 40 B.L.R. 28 (Alta. Q.B.). There is both a subjective and

objective component to the requirement of good faith. The subjective aspect requires that the applicant believes the proposed derivative action has merit. This guards against actions spurned by self-interest or private vendetta. But even where the applicant believes that the proposed action has merit, the court must still consider whether objectively viewed the action is not frivolous and vexatious.

[55] And at paragraph 22:

The primary concern when determining the existence of good faith is whether the proposed derivative action is frivolous and vexatious.

[56] The court also stated this at paragraph 25:

25 And, while the chambers judge concluded that "there is a flavour throughout of an ongoing family dispute which has all the appearances of a private vendetta on the part of Blair Valgardson against his brothers": para 28, the existence of a private vendetta is only a secondary factor in determining the absence of good faith.

[57] The final case from Canada to which this court will refer on the good faith point is **Richardson Greenshields of Canada Ltd v Kalmacoff** 123 D.L.R. (4th) 628, 18 B.L.R. (2d) 197, 22 O.R. (3d) 577, 54 A.C.W.S. (3d) 477, 80 O.A.C. 98. In this court's opinion it represents the correct approach to the statute which is to take the words of the statute as they are. In that case the complainant acquired his shares after the events that gave rise to the need to seek to bring derivative claim. The statute is virtually identical to that of Jamaica's. [4] The judge in that case held that persons who

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[4] Trust and Loan Companies Act, 1991 s 339. (1) Subject to subsection (2), *a complainant* or the Superintendent *may apply to a court for leave to bring an action under this Act in the name and on behalf of a company* or any of its subsidiaries, or to intervene in an action under this Act to which the company or a subsidiary of the company is a party, for the purpose of prosecuting, defending or discontinuing the action on behalf of the company or the subsidiary.

(2) *No action may be brought* and no intervention in an action may be made *under subsection (1) by*

acquired shares after the facts giving rise to the complaint occurred should not be treated as a complainant. The Court of Appeal firmly rejected that view. Robins JA held in paragraph 17:

> *17 …They acknowledge, properly, in my opinion, that the appellant is a complainant for the purposes of s. 339. Although its shares were acquired after the roll down had been announced and for the express purpose of launching a derivative action, it is now common ground that this does not in itself preclude the appellant from being a complainant. The Act does not impose a condition of ownership contemporaneous with the acts complained of and, in any event, it may be noted that the breaches complained of are of an ongoing nature. It is sufficient that Richardson Greenshields is "a registered holder ... of a security of [the] company" at the time it brings the application. As such, it meets the requirements of clause (a). It follows that the judge erred in restricting the term "complaint" to persons who were shareholders at the time the facts which gave rise to the complaint occurred and in holding that the appellant did not have the necessary status by virtue of clause (a) of the defining section to invoke s. 339.*

[58] In other words take the words of the statute as they are and do not impose conditions not stated in the legislation. This court fully adopts these passages from Robins JA. They are found at paragraphs 21 and 22:

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a complainant unless the court is satisfied that

(*a*) the complainant has given reasonable notice to the directors of the company or the subsidiary of the complainant's intention to apply to the court under that section 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 the subsidiary *that the action be brought*, prosecuted, defended or discontinued.

21 In deciding whether leave should be granted, it should be borne in mind that a derivative action brought by an individual shareholder on behalf of a corporation serves a dual purpose. First, it ensures that a shareholder has a right to recover property or enforce rights for the corporation if the directors refuse to do so. Second, and more important for our present purposes, it helps to guarantee some degree of accountability and to ensure that control exists over the board of directors by allowing shareholders the right to bring an action against directors if they have breached their duty to the company: M.A. Maloney, "Whither The Statutory Derivative Action?" (1986) 64 Can. Bar Rev. 309.

22 It should also be borne in mind that s. 339 is drawn in broad terms and, as remedial legislation, should be given a liberal interpretation in favour of the complainant. The court is not called upon at the leave stage to determine questions of credibility or to resolve the issues in dispute, and ought not to try. These are matters for trial. Before granting leave, the court should be satisfied that there is a reasonable basis for the complaint and that the action sought to be instituted is a legitimate or arguable one. The preconditions of s. 339 cannot be considered in isolation. Whether they have been satisfied must be determined in the light of the potential validity of the proposed action.

[59] In responding to the submission that the shares were purchased in order to bring the claim, Robins JA provided a robust and sensible response. His Lordship said at paragraph 29:

29 In my opinion, the extent of Richardson Greenshields' stake, monetary or otherwise, in the outcome of these proceedings is of little weight in deciding whether it has met the good faith test applicable to the present circumstances. This case is not at all akin to a strike or bounty action. Although the appellant purchased shares for the purpose of bringing these proceedings, it is by definition a complainant, and stands, vis-à-vis the company, in the same position as any other person who fits within the definition of "complainant." The issues involved are of a continuing nature, and it seems to me apparent that the appellant is in a better position than most shareholders to pursue the complaint. Indeed, I see no advantage in requiring that the action be brought by another

shareholder, as suggested by the judge hearing the application. I think it significant that the appellant has had a long-standing commercial connection with this class of shares and is familiar with the matters in dispute. It acknowledges that it has clients who purchased shares on its recommendation, and, it can be inferred from the shareholders' vote, that it voices the views of a substantial number of the preferred shareholders. Whether it is motivated by altruism, as the motions court judge suggested, or by self-interest, as the respondents suggest, is beside the point. Assuming, as I suppose, it is the latter, self-interest is hardly a stranger to the security or investment business. Whatever the reason, there are legitimate legal questions raised here that call for judicial resolution. The fact that this shareholder is prepared to assume the costs and undergo the risks of carriage of an action intended to prevent the board from following a course of action that may be ultra vires and in breach of shareholders' rights does not provide a proper basis for impugning its bona fides. In my opinion, there is no valid reason for concluding that the good faith condition specified in s. 339(2) (b) has not been satisfied.

[60] Robins JA simply read the statute and gave effect to the actual words used by Parliament. His Lordship did seek to limit the effect of the statute by appealing to (a) the history of the legislation or (b) the fact that a derivative action gave the complainant power to use the company's resources to impose any additional requirements in order to meet the good faith standard.

Singaporean synthesis?

[61] In 2013, the Court of Appeal of Singapore in **Ang Thiam Swee v Low Hian Chor** [2013] SGCA 11 reviewed to this question of good faith in statutory derivative actions. The statute in question 'is modelled on s 239 of the Canada Business Corporations Act (RSC 1985, c C-44), and is also *in pari materia* with s 236 and s 237 of the Australian

Corporations Act 2001 (Cth)'. (**[10]**). [5] VK Rajah JA, speaking for the court, observed at paragraphs 12 and 13 respectively:

> *12. The best way of demonstrating good faith is to show a legitimate claim which the directors are unreasonably reluctant to pursue with the appropriate vigour or at all. Naturally, the parties opposing a s 216A application will seek to show that the application is motivated by an ulterior purpose, such as dislike, ill-feeling or other personal reasons, rather than by the applicant's concern for the company. Hostility between the factions involved is bound to be present in most of such applications. It is therefore generally insufficient evidence of lack of good faith on the part of the applicant. However, if the opposing parties are able to show that*

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[5] Taken directly from paragraph 9 of judgment of Rajah JA. Section 216A of the Companies Act (Singapore)

9 The relevant portions of s 216A of the Companies Act are as follows:

(2) Subject to subsection (3), a complainant may apply to the Court for leave to bring an action in the name and on behalf of the company or intervene in an action to which the company is a party for the purpose of prosecuting, defending or discontinuing the action on behalf of the company.

(3) No action may be brought and no intervention in an action may be made under subsection (2) unless the Court is satisfied that —

(*a*) the complainant has given 14 days' notice to the directors of the company of his intention to apply to the Court under subsection (2) if the directors of the company 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 prima facie in the interests of the company that the action be brought, prosecuted, defended or discontinued.

the applicant is so motivated by vendetta, perceived or real, that his judgment will be clouded by purely personal considerations that may be sufficient for the court to find a lack of good faith on his part. An applicant's good faith would also be in doubt if he appears set on damaging or destroying the company out of sheer spite or worse, for the benefit of a competitor. It will also raise the question whether the intended action is going to be in the interests of the company at all. To this extent, there is an interplay of the requirements in s 216A (3) (b) and (c).

And at paragraph 13:

It is clear from the above passage that the court ought to assess the motivations of the applicant in order to determine whether he is acting in good faith. It ought to be emphasised, however, that the motivations of an applicant will only amount to a lack of good faith in so far as they go to show that "his judgment [has been] clouded by purely personal considerations" (see Pang Yong Hock at [20]). This creates a crucial link between the requirement of good faith in s 216A(3)(b) and the requirement in s 216A(3)(c), in that an applicant whose judgment is clouded by purely personal considerations may not honestly intend to serve the company's interests, and also may not be the proper party to represent the company's interests. As such, it is not the questionable motivations of the applicant per se which amount to bad faith; instead, bad faith may be established where these questionable motivations constitute a personal purpose which indicates that the company's interests will not be served, i.e., that s 216A (3) (c) will not be satisfied.

[62] The careful wording of Rajah JA is to be observed. His Lordship stated the best way (not the only way) of showing good faith is show that there is a legitimate claim that the directors refuse to pursue and that such a decision is unreasonable. Of course, the caveat there is that if the directors are themselves the wrongdoers then good faith will be easier to establish if there is indeed a legitimate claim against them. That is to say one that is not frivolous or vexatious. His Lordship noted the obvious that hostility between the parties is expected. Thus evidence of hostility is not sufficient to deflect a conclusion of good faith. Rajah JA recognised that a person can in fact have a

legitimate claim but his objective is destruction of the company or his personal vendetta is so great that there is little doubt that he has any interest in the company's welfare. Having regard to the fact that the jurisprudence is clear that the presence of personal interest, animosity and the like does not mean an absence of good faith, it must be that for Rajah JA for the conclusion to be arrived at that the complainant's judgment is clouded to the extent that he or she lacks good faith the evidence must be of great cogency. Mere presence of ill will, spite, animosity will not do. It must not only be present but so dominating the complainant that there is little room for any conclusion other than spite that either excludes or diminishes any existent good faith to vanishing point.

[63] Rajah JA links the good faith and interest of the company together via the bond of the highway of the complainant's motivations. What Rajah JA has accomplished here is outstanding. His Lordship established that it is not the presence of spite, ill will and the like that per se means an absence of good faith but rather that the personal interests of the complainant are so predominant that the interests of the company will not be served. Despite this court's admiration for Rajah JA's contribution there is a note of caution. In Jamaica, a debenture holder is included as one of the persons who can properly be a complainant. This person's interest is almost invariably limited to getting back the money owed. The survival of the company is only important to him to the extent that it meets the objective of getting back his money. It may well be that pursuing the objective of getting back his money at the end of the day leaves the company in tatters. However, as Batts J pointed in **Leon Forte v Twin Acres Development Ltd** [2015] CD0004 seeking to get back your money is a lawful objective. Thus it would be a strong thing to conclude that a complainant who is motivated by pursuing what the law permits him to do should be regarded as lacking in good faith because complaint may sound the death of the company.

[64] His Lordship referred to the Canadian cases and concluded at paragraphs 16 and 17:

> *16 The general tenor which emerges from the case law is that good faith is dependent less on the motives which trigger the application for leave to bring a statutory derivative action, and more on the purpose of the proposed derivative action, which must have an obvious nexus with the company's benefit or interests. As this court noted in Pang Yong Hock at [20], "there is an interplay of the requirements in s 216A (3) (b) and (c)" (see the passage extracted above at [12]).*
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> *17 Often, an applicant will have a number of overlapping motives, which in turn may cloud the identification of his principal purpose in seeking leave to commence a statutory derivative action. The present case involves just such a confluence of factors.*

[65] At paragraphs 28 - 31 Rajah JA returned to the Canadian jurisprudence, then examined what has happened in Singapore. The paragraphs are cited now.

> *28 On the issue of whether the legal merits of the proposed statutory derivative action should be taken into account in the determination of the applicant's good faith, some Canadian courts appear to have gone further to treat such legal merits as an overarching consideration which underpins all the preconditions for a statutory derivative action. This was the position adopted by Robins JA, delivering judgment on behalf of the Ontario Court of Appeal in Richardson Greenshields at 585:*
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> > *The court is not called upon at the leave stage to determine questions of credibility or to resolve the issues in dispute, and ought not to try. These are matters for trial. Before granting leave, the court should be satisfied that there is a reasonable basis for the complaint and that the action sought to be instituted is a legitimate or arguable one. The preconditions of s. 339 [of the Trust and Loan Companies Act (SC 1991, c 45)] cannot be considered in isolation. Whether they have been satisfied must be determined in the light of the potential validity of the proposed action. [emphasis added]*

29 This can be contrasted with the more subjective investigation into whether the applicant honestly or reasonably believes that a good cause of action exists, which test has been avowed in other Canadian cases (see, eg, Discovery Enterprises) and also Australian jurisprudence as a key factor in the positive proof of the applicant's good faith. Our courts appear to have added a further gloss to the Richardson Greenshields approach apropos the legal merits of the proposed statutory derivative action. This approach was adopted by Lai Kew Chai J in Teo Gek Luang v Ng Ai Tong and others [1998] 2 SLR(R) 426 ("Teo Gek Luang"), and was followed by Choo JC in Agus Irawan, who went one step further to find (at [9]) that the presence of a "reasonable and legitimate claim" would create an assumption of good faith. Both of these cases were then cited with approval in Pang Yong Hock, where this court regarded them as "generally beyond reproach" (at [19]). Subsequently, in Carolyn Fong, Prakash J held at [72(b)] that "bad faith [was] usually inferred from the lack of an arguable cause of action or a prima facie case". This survey of the case law reveals a piecemeal evolution which has incrementally incepted objective considerations of legal merits into s 216A (3) (b) of the Companies Act. It appears to us that this development detracts from both the language and the substance of the provision. While the applicant's good faith and the merits of his application need not be unconnected (for example, as pointed out in Swansson, the court may find that the applicant lacks good faith if no reasonable person in his position could believe that a good cause of action existed), they are not necessarily connected. Contrary to Prakash J's view in Carolyn Fong, an applicant might – albeit quixotically – seek to bring a statutory derivative action in good faith even where there is no arguable or legitimate case to be advanced (although the proposed action in this scenario would arguably not be prima facie in the interests of the company for the purposes of s 216A (3) (c) (see [53]–[58] below)). Similarly, an applicant with a legitimate case may be found to be lacking in good faith if he "is so motivated by vendetta, perceived or real, that his judgment will be clouded by purely personal considerations" (see Pang Yong Hock at [20]). As such, the conceptual integrity of the good faith requirement demands that any considerations of legal merits under this head must be yoked to the intents and purposes of the applicant who is seeking to initiate a statutory derivative action, i.e., to an

assessment of whether the applicant honestly or reasonably believes that there is a good cause of action. This is not inconsistent with the decision of this court in Pang Yong Hock, particularly in the oft-cited dicta at [20] that "[t]he best way of demonstrating good faith is to show a legitimate claim which the directors are unreasonably reluctant to pursue with the appropriate vigour or at all".

30 One consequence of the fixation on the legal merits of the proposed statutory derivative action is that local jurisprudence has been sparse on the substantive relevance of the applicant's motives to the assessment of his good faith. What is nevertheless clear, following Pang Yong Hock, is that hostility alone cannot constitute bad faith. However, no test has been articulated as to the point at which an applicant's motives will collaterally impugn his good faith. The Australian position is that the applicant lacks good faith where his collateral purpose amounts to an abuse of process (see Swansson at [37]). This test resonates, as abuse of process is one of the grounds for striking out an action under O 18 r 19 of the Rules of Court (Cap 322, R 5, 2006 Rev Ed). In this context, it is settled law that an action brought for an ulterior or collateral purpose may be struck out as an abuse of the process of the court (see Gabriel Peters & Partners (suing as a firm) v Wee Chong Jin and others [1997] 3 SLR(R) 649 at [22], citing Lonrho plc v Fayed (No 5) [1993] 1 WLR 1489). Given that the statutory derivative action under s 216A of the Companies Act also relates to a similar exercise wherein the court has to evaluate the bona fides of the applicant based on affidavit evidence, the "abuse of process" test provides a useful standard by which to decide whether the applicant's collateral purpose amounts to bad faith. In this regard, it should be borne in mind that the purpose of the statutory derivative action is to provide (see Pang Yong Hock at [19]):

> *… a procedure for the protection of genuinely aggrieved minority interests and for doing justice to a company while ensuring that the company's directors are not unduly hampered in their management decisions by loud but unreasonable dissidents attempting to drive the corporate vehicle from the back seat.*

31 The onus is upon the applicant to demonstrate that he is or may be "genuinely aggrieved" (see Pang Yong Hock at [19]), and that his collateral purpose is sufficiently consistent with the purpose of "doing justice to a company" (see likewise Pang Yong Hock at [19]) so that he is not abusing the statute, and, by extension, also the company, as a vehicle for his own aims and interests.

[66] This court agrees with this analysis of the Canadian cases and would add that the reason for that approach by the Canadian courts is that the statutes there, as the Jamaican statute and the Singaporean legislation are asking judges to make a finding about the state of mind of a person by looking at documents. At the leave stage there is rarely cross examination. There is no testing and sifting of the evidence. The applications are usually contested with conflicting evidence and herculean effort is expended to cast the other side in the worse possible light. The problem becomes more acute where there exists multiple motivations for seeking to bring the derivative claim. This means that in the absence of cross examination and fact finding there has to be some judicial method for resolving the conflict. That method is looking to see whether the claim has legal merit and once it has then the courts will find it easier to conclude that the complainant is acting in good faith. Rajah JA's observation that the Singaporean courts have placed more emphasis on the legal merits of the proposed action and less on the substantive relevance of the complainant's motive when assessing good faith is not surprising. Judicially, it is simply the best technique available given the realities of the leave stage application.

[67] So problematic has the determination of good faith become that one judge in Singapore proposed that the court should assume that the applicant has good faith unless the contrary is shown (**Agus Irawan v Toh Teck Chye and others** [2002] 1 SLR(R) 471). Rajah JA corrected this view. His Lordship held that since the Singaporean statute stated that leave should not be granted unless the court is satisfied of the matters stated that meant that there was no room for an assumption of good faith but rather it meant that the complainant had the burden of proving affirmatively that he or she is acting in good faith. This court has no difficulty with this position. This court

keeps in mind that depending on how the contest on the application develops the strength of the evidence on this point may vary.

[68] In light of the struggles to find good faith and the judicial strategies used to determine whether good faith exists it unsurprising that one leading Canadian text has described the good faith requirement as meaningless (Bruce Welling, *Corporate Law in Canada: The Governing Principles* (Scribblers Publishing, 3rd Ed, 2006) at p 511 cited by VK Rajah JA at paragraph 24).

[69] The great value of Rajah JA's contribution is that it brings into sharp focus the fact that the courts in Canada and Singapore have formed the view that it is artificial to separate good faith from interests of the company having regard to the nature of the application, the type of evidence typically presented, the conflict on the evidence, the absence of cross examination and the legal necessity to find the existence of both before the claim is allowed to go forward. However, despite this court's admiration for Rajah JA's significant advance of the law there is a reservation that is now dealt with.

[70] It is the view of this court that despite Rajah JA's explanation good faith should not be linked with interests of the company in the way that the Canadian and Singaporean courts have done. Rajah JA has certainly made a significant contribution but it is this court's view that it still falls short. Good faith, in this court's view, is a purely subjective matter. The requirement of good faith requires the court to find out whether the particular applicant is in fact acting in good faith. The way that the objective part of the test in Canada and Singapore is used suggest that once the proposed claim has good legal merit then it means that the person is acting in good faith. It is this court's position that what is referred to as the objective portion of the good faith test should no be referred to in that manner. Rather the evidence should be used as a tool of analysis in order to determine the existence of good faith. This is explained below.

Assessing whether the complainant is acting in good faith

[71] This court takes the view that there is no objective component to the good faith requirement. Under the Jamaican statute leave is not granted unless the court is satisfied that 'the complainant is acting in good faith.' It does not say 'good faith exists if a reasonable man in the applicant's position would have thought that the case had good legal merit.' The language is totally subjective. The focus is on the applicant in the particular case not an abstract reasonable complainant. Thus any analytical process that says that a reasonable man in these circumstances would believe so and so then it must be that the complainant here thought the same thing as the reasonable man is incorrect. When one speaks of an objective component and includes it as an integral part of the good faith test then the test is no longer purely subjective as the statute strongly implies. The test becomes partly subjective and partly objective but with this twist as pointed by Rajah JA, the objective part becomes so dominant that the danger is what has actually happened in Singapore, namely, '*that local jurisprudence has been sparse on the substantive relevance of the applicant's motives to the assessment of his good faith.*' This development is undesirable and should not become part of Jamaican law.

[72] The error made is that which was made in the criminal law for many years until the cases of **R v Morgan** [1976] AC 182; **R v Williams (Gladstone)** (1983) 78 Cr App R 276 and **Solomon Beckford v R** [1988] AC 130. The criminal law up to the time of those cases despite speaking the language of seeking to find the intent of the criminal defendant who was actually before the court had actually developed a judicial technique that was in practical terms a severely deformed mutation the subjective belief of the defendant. In all three cases the issue was whether a defendant should be acquitted of the crimes charged if he in fact had a honest belief in a state of facts, which if true would lead to an acquittal even if the belief was based on unreasonable grounds. All three cases said yes he could be acquitted. The argument raised against this position was that it would so easy for a defendant to assert honest belief and there would be no way to test it. All three courts allayed those fears by saying that the honest belief can be examined against the external facts. The court held that the more unreasonable

(objectively viewed) it was to hold that belief, the finders of fact may (not must) conclude that the belief was not honestly held, and conversely the more reasonable it was to have the belief (objectively viewed) the easier it is to find that the belief was in fact honestly held. The cases all cautioned that at the end of the day, the quest must be to find the subjective intention of the defendant and it was indeed possible that a defendant can in fact have an honest belief in a state of facts even though objectively viewed that belief was unreasonable in the extreme. The defendant may be plainly silly but silliness does not negate the existence of honest belief. He may be obtuse but that does not negate the existence of honest belief.

[73] It is the view of this court that the analytical process in those cases should be applied to the good faith requirement. This means that it is quite possible that objectively viewed the proposed derivative claim has no legal merit but that cannot mean that the complainant could never ever have had or does not have an honest belief that his claim is arguable and that it should be brought. The complainant may be severely misguided but that does not bar his or her mind from coming to an honest conclusion that he or she has a good case.

[74] In examining all the case cited so far on this question of good faith it is obvious that the struggle is to find a proper method of identifying good faith. It seems that the judges have added the objective component out of some unarticulated fear that if it is purely subjective, then it would become too easy to bring a derivative claim and having regard to the fact that the courts do not engage in the running of companies then there should be some additional element and hence the engrafting of the objective component to the good faith requirement. It is this court’s view that this approach, if that is the approach (and there is no other reasonable available explanation), that approach is not permitted by the words of the Jamaican statute. No objective component is required in the good faith test. No textual analysis of the Jamaican statute can yield such a result.

[75] The difficulty for the Canadian and Singaporean cases is exacerbated by the fact that they are unanimous in their position that the presence of (a) personal interest, (b)

self-interest; (c) vendetta does not automatically lead to the conclusion that such a person could not be acting in good faith. Rajah JA in **Ang Thiam** expresses it very strongly when he said that ‘it is not the law that only a plaintiff who feels goodwill towards a defendant is entitled to sue’ (**[13]**). This position by those courts inevitably raises the issue of how does a court conclude that the complainant was acting in good faith when he is tainted by personal interest, self-interest and private vendetta? It was seeking to find a way out of this real problem that perhaps led to the articulation of the objective component (see **Valgardson [20]**; **1140832 Alberta Ltd [22]**); **Sevaal Holdings Ltd v LCB Properties** [2014] 6 WWR 317, 238 ACWS (3d) 354, 437 Sask R 249 **[42]**). It was said that the role of the subjective component is to guard against actions ‘spurned by self-interest or private vendetta’ (**Valgardson [20]**). It was also said that the role of the objective component is guard against suits that are vexatious and frivolous (**Valgardson [20]**). Frivolous, according to **Black’s Law Dictionary** (already cited) means lacking in legal basis or legal merit; not serious; not reasonably purposeful. Vexatious, according to the same law dictionary, without reasonable or probable cause or excuse; harassing or annoying.

[76] This court’s conclusion, relying on the analytical technique from **Morgan**, **Wiliams** and **Beckford**, is that when one speaks of good faith in the Jamaican statute it is an exclusively subjective matter because good faith in the context of the statute really means honest belief. Good faith is the language used in civil law to describe the same state of mind in that the criminal law calls honest belief. For those who have visions of the proverbial flood gates or gates of hell opening and the demons are let loose, comfort can be taken from the fact that the criminal law in Jamaican since those cases have been decided has not seen a rise in acquittals because the defendant simply stands and says ‘I honestly believed this or that.’ The juries have applied large amounts of common sense to the assessment of that belief and no rumblings have been heard that they have gotten wrong to the extent that the law needs to be change. The same test has been applied by judges in bench trial without difficulty. On this basis there is no good reason to fear that it cannot be sensibly applied in these applications which are heard by judges only.

[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.

The debenture holder

[81] Before concluding on this issue of good faith the court must examine further the Jamaican statute. The court notes that in section 212 (3) (b) a debenture holder (and even a former debenture holder) is listed among the persons who can seek to bring a derivative action. The question that arises is this, why would a debenture holder be given this statutory right? In some instances the debenture holder may be a director of

the company. However, the statute allows the debenture holder or a former debenture to seek to bring the derivative claim in those capacities. He is not required to have any other capacity such as shareholder or director. Can any reasonable person suggest that the debenture holder's interest is anything other than purely financial? As long as the debenture holder gets paid he has no complaints. Is this not legislature recognition that this category of person in all probability will not have any other interest in bringing the claim other than a purely pecuniary one? What does a debenture holder who is not a shareholder or director or officer of the company care so long as the debt is repaid? This is yet another reason for this court to say that effect should be given to the plain words of the statute without gloss: good faith simply means honest belief that the proposed derivative action is justified.

[82] Thus if a debenture holder who is quite likely more motivated by personal gain than the other categories can be seen as potential worthy candidate to be permitted to bring a derivative action why should a shareholder be barred because his motivation is just as pecuniary as the debenture holder? What process of reasoning permits us to say the shareholders should be more virtuous than debenture holders when the raison d'être for a shareholder investing in a company – other than a charity - is to make money. Debenture holders lend money to companies because they want to make money. They do not lend because maudlin sentimentality.

[83] When it is recalled that a debenture holder may cause a receiver to be appointed and that act, in many instances, sounds the death knell of the company, then asking that good faith under section 212 (2) (b) have some other meaning other than an honest belief that claim should be brought becomes difficult to justify in principle or logic.

[84] The court also noted that under section 213 (1) the court may, in a derivative action order that any amount judged payable by a defendant be paid 'in whole or in part, **directly to a former and present shareholder … instead of the company ...**' If this is what a court can order on a derivative action what can be so wrong about a complainant (in this instance Sally) asking that the money be paid to her in the proposed derivative claim? This is indeed an awesome power if one recalls what a

derivative action is supposed to be. It is a claim arising because wrong doing has been done to the company and those who have the responsibility of taking action have declined to do so having been given notice. Thus the claim is brought in the name of the company at the behest of a complainant. On the face of it, it is the person who suffered damage who should be compensated which prima facie would be the company. Section 213 (b) permits the court to divert the payment of the loss from the company to past and present shareholder or debenture holders.

[85] The decision of Batts J supports this point. In **Leon Forte** his Lordship found that Mr Leon Forte should be granted permission to bring a derivative clam even in the face of his Lordship's conclusion that 'Mr Leon Forte's primary purpose for seeking permission to bring this claim may be to ensure that the Company (sic) will be in a position to pay its debts **including the debt he alleges is owed to him**' (**[14]**) Mr Forte was also a director of the company and entitled to bring the application. His allegation of breach of fiduciary duty was primarily motivated by his desire to recover the money he lent the company. It appears it was not secured by debenture. The point is Mr Forte was not making the application because he believed in the virtue of good corporate governance. He wanted to get back his money.

[86] The Court in **Richardson Greenshields of Canada** noted that '*self-interest is hardly a stranger to the security or investment business.*' The debenture holder may well be in the lending, security and investment business.

iii) In the interests of the company

[87] The Jamaican statute does not use the phrase 'best interest of the company.' There is no adjective before 'interest'. Some of the Canadian cases proceed on a discussion of 'best interest' when the statute under consideration uses the word 'interest.' Mangatal J in **Earle Lewis** held that Jamaican statutory words of 'in the interest of the company' created a lower threshold than 'in the best interest of the company' or 'prima facie in the best interest of the company.'

[88] The case of **Bellman v Western Approaches Ltd** [1982] B.C.W.L.D. 64, 12 A.C.W.S. (2d) 93, 130 D.L.R. (3d) 193, 17 B.L.R. 117, 33 B.C.L.R. 45 is interesting for a number of reasons. It is from an elevated standard province. Nonetheless the Court of Appeal noted that the expression 'in the interest of the company' was quite different in meaning and content from the common law standard. Nemetz CJ BC held at paragraphs 19 – 20:

> *19 In my view this is the key section for consideration in this case. The section does not say that the court must be satisfied that it is in the interests of the corporation. It says that no action may be brought unless the court is satisfied that it appears to be in the interests of the corporation to bring the suit. I take that to mean that what is sufficient at this stage is that an arguable case be shown to subsist. This is quite different from the rules established at common law. Mr. Justice Miller of the U.S. Supreme Court in Hawes v. Contra Costa Water Co., City of Oakland (1882), 104 U.S. 450, well described the law emanating from the leading English cases of Foss v. Harbottle (1843), 2 Hare 461, 67 E.R. 189; Mozley v. Alston (1847), 1 Ph. 790, 41 E.R. 833; Lord v. Copper Miners (1848), 2 Ph. 740, 47 E.R. 1337; and MacDougall v. Gardiner (1875), 1 Ch.D. 13 (C.A.), when he said in part:*
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> > *... that nothing connected with internal disputes between shareholders is to be made the subject of a bill by someone shareholder on behalf of himself and others, unless there be something illegal, oppressive or fraudulent; unless there is something ultra vires on the part of the company qua company, or on the part of the majority of the company, so that they are not fit persons to determine it, but that every litigation must be in the name of the company if the company really desire it. Because there may be a great many wrongs committed in a company, there may be claims*

against directors, there may be claims against officers, there may be claims against debtors, there may be a variety of things of which a company may well be entitled to complain but which, as a matter of good sense, they do not think it right to make the subject of litigation, and it is the company as a company which has to determine whether it will make anything that is a wrong to the company a subject matter of litigation or whether it will take steps to prevent the wrong from being done.

20 The learned justice then proceeded to outline the exceptions which, by and large, are consonant with those set out by Jenkins L.J. in Edwards v. Halliwell, [1950] 2 All E.R. 1064 (C.A.), which generally comprise wrongs done to the company which, however, cannot be accepted by ratification of the shareholders. These exceptions include ultra vires acts, resolutions requiring special majority, invasion of personal rights and fraud on the minority. In 1917 the United States Supreme Court summarized the common law in the oft-quoted passage of Brandeis J. in United Copper Securities Co. v. Amalgamated Copper Co. [1916], 244 U.S. 261 at 263-264:

Whether or not a corporation shall seek to enforce in the courts a course of action for damages is, like other business questions, ordinarily a matter of internal management, and is left to the discretion of directors, in the absence of instruction by vote of the stockholders. Courts interfere seldom to control such discretion intra vires the corporation, except where the directors are guilty of misconduct equivalent to a breach of trust, or where they stand in a dual relation which prevents an unprejudiced exercise of judgment; ...

> *This co-called sound business judgment rule has been followed in a number of American decisions: Ash v. Int. Business Machines Inc. (1965), 353 F. (2d) 491 at 493 ; Issner v. Aldrich (1966), 254 F. Supp. 696; Gall v. Exxon Corp. (1976), 418 F. Supp. 508. The short effect of the American common law appears to be that if in the honest and impartial opinion of the directors the best interests of the company do not require it to sue, their decision not to sue will be a bar to the bringing of a derivative suit by a shareholder.*

[89] It is crucial extract the fundamental point being made by the Nemetz CJ BC. His Lordship gave effect to the words of the statute. For him 'appears to be in the interests of the corporation' meant showing that an arguable case exists. It does not mean that the court must be satisfied that **it is in the interest of the corporation**. His Lordship then noted that this standard is different from the common law rule which has now been displaced by statute. At common law, because a great many wrongs may be done to a company and because the view was that matters connected with internal management of the company are really for the shareholders to resolve the common then claims were not permitted to be brought by a shareholder unless he is alleging something illegal, oppressive or fraudulent by the company qua company or by those in charge. Once the company had the legal authority to make decision ratifying the wrongs the courts rarely intervened unless the acts could not be ratified, the acts were ultra vires, the acts required special majorities or special procedures, or the acts trampled on personal rights or constituted a fraud on the minority. The learned judge went on to make the point that the sound business judgment rule meant that if the shareholder and directors acting within the rules of the company and the law could in fact make the alleged wrongdoings right then it would be virtually impossible to argue, at common law, that it was in the interest of the company to bring the claim. The revolutionary nature of the statute must be grasped. All this common law has now been brushed aside.

[90] In **Bellman** one of the crucial factors affecting the independence of the independent directors was that their appeared to be in a position of conflict. Whether they were in fact in a position of conflict was ultimately a trial issue but it was sufficient

to meet the appearance test. This reasoning of Nemetz CJ BC shows what the appearance test means.

[91] As far as Jamaica is concerned, for those who may still be labouring under some misguided view of the real impact of the statute, section 213 (2) of the Companies Act puts the matter beyond doubt. It says merely because the wrong doing can be put right by the shareholders is not a reason, without more, for not permitting the claim. This is a mighty and giant step towards accountability of directors. The common law shielded them from being held accountable.

[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.

A final issue – the standard of proof and the strength of evidence required

[94] This court has already accepted that the standard of proof acceptable in these applications is the civil standard. There are only two standards known to law: the criminal standard which is proof beyond reasonable doubt and the civil standard which is on a balance of probabilities.

[95] Within the civil standard, it is well known that the strength of the evidence (called cogency by lawyers) varies according to the issue to be decided and how the contest has developed if the hearing is a contested one. For example, an allegation of fraud requires more than just a statement that the defendant committed fraud. One would expect to find documents or statements made whether orally or in writing on which such an adverse finding can be based. This explains why it has been said that fraud requires not only unequivocal pleading but cogent evidence. On the other hand, unless there is some very serious contest about it, a witness usually meets the civil standard of proof about proof of his or her address by simply making the statement that they live a particular address.

[96] All this is necessary to determine the question of what is the strength of evidence required on these applications. This court accepts that at this stage it is not a trial of the ultimate issues. However, in Jamaica the statute says that no action may be brought 'unless the court is **satisfied'** of the three requirements. An argument can be made that the use of 'satisfied' means on a balance or probabilities.' Assuming this to be the standard the question is what is the level of cogency of evidence required? Is it akin to that required for fraud? Or is it the cogency required for ordinary civil cases where no allegation of fraud or imputation of character is involved? It seems to this court that the cogency is that of ordinary civil cases. The three-fold requirement suggests this. Taking the notice requirement first. The jurisprudence from Mangatal J in **Earle Lewis** shows that there is no strict formality or technicality for the notice that is given to directors. Thus the notice does not have to specify every possible cause of action that may be brought against the directors. The directors need not even be named in the notice. Good faith is the subjective state of mind of the particular complainant and not of a

generic reasonable applicant. This means that where the complainant makes the assertion that he or she is acting in good faith and the surrounding evidence is consistent with that then it should be taken that the good-faith standard has been met. Regarding interest of the company, the crucial word (verb) is appears. Even Palmer J in **Swannson** accepted that 'appears to be' is different from 'best interest of.' Mangatal J held in **Earle Lewis** that 'interest of' is a lower threshold than 'best interest of' meaning a lower level of cogency of evidence. The consequence then, given that this application is not a final hearing to determine whether the claim has been made out, given that the permission is to commence or continue a claim, given that it is exceedingly rare for cross examination to take place on the affidavits, given that the judge at this stage like the judge on injunction applications is not to resolve conflict of evidence (and there usually is because hostility between the factions is frequently present) the cogency of evidence required could not possibly be that required for fraud or anywhere near that level of cogency. It has to be at the other end of the sliding scale of cogency.

[97] Once this is understood it should be obvious why the presence of ill-will, spite, personal interest, self-interest and the like are not automatic disqualifiers for a finding of good faith.

Bringing it all together

[98] From all the case law reviewed and this court's understanding the court states what it considers to be the principles applicable to section 212 (2):

(1) notice to the directors is required but that notice need not articulate all possible causes of action that may be pursued. The notice need not take any particular form. The statute does not require the notice to be in writing but it is very strongly recommended that it be in writing.

(2) whether the time between the giving of notice and the filing of the application is reasonable is to be decided by closely examining all the surrounding circumstances. This includes whether there was discussion between the directors and the complainant before the notice; the nature

and content of those discussions; whether the issues raised required the directors to understand any complicated technical issue;

(3) the good faith requirement is purely subjective and does not have any objective component;

(4) good faith refers to the subjective state of mind of the applicant and it includes:

(a) an honest and sincere belief that the claim should be brought;

(b) an honest and sincere belief in the legal merit of the proposed claim;

(c) an honest and sincere intention to pursue the claim to its ultimate conclusion;

(5) matters such as whether the claim is frivolous and vexatious or it lacks legal merit (objectively viewed) are not conclusive one way or the other but are factors that may be taken into account when deciding whether the complainant has met the good faith standard;

(6) a conclusion that the complainant is acting in good faith but that the claim is in fact frivolous and vexatious or lacking in legal merit does not mean that the claim must go forward because those considerations can be taken into account under the 'interests of the company' criterion;

(7) the presence of animosity, ill-will, personal interest and the like does not automatically mean that the complainant lacks good faith;

(8) for there to be an absence of good faith where ill-will, self-interest and the like are present then these other motivations must be so dominant that they make it difficult if not impossible for there to be the existence of good faith in the complainant;

(9) if the claim has good legal merit it is easier to conclude that the complainant is acting in good faith;

(10) if the claim has little or no legal merit it may be an indication that good faith is lacking but that is not conclusive;

(11) if the claim has little or no legal merit then it is a strong indication that that the claim is not in the interest of the company;

(12) if the proposed claim is an abuse of process then that is an indication that it is not in the interest of the company and may be an indication of a lack of good faith;

Application

[99] It seems to this court that Sally is simply bold enough to ask directly, in her proposed derivative action, for remedies such as payment to her, that the court is authorised to grant. If the court can grant that remedy based on its own assessment why can't Sally ask directly for it?

[100] Sally is accused of bringing the claim because her son was dismissed from the company over 20 years ago. It is said that she has been seething ever since and this application is putting into action what could only be described, by the court and not John, as her revenge plan. John disclosed, in great detail, material surrounding the dismissal of Sally's son. This court has carefully read the affidavits of all deponents. The fact that Sally's son was dismissed cannot lead to any automatic conclusion that this proposed derivative is causally connected to the dismissal.

[101] Mr Braham QC submitted that the letters written by Sally's lawyers from as far back as 2014 made it clear that she was only interested in advancing her personal interest only, and not that of the company. The evidence of this is said to come from the following:

i) in the letter of September 12, 2014 Sally said that if her concerns are not addressed the court action would be taken for ‘amongst others’:

(a) an accounting of all dividends to which our client is lawfully entitled since inception;

(b) an immediate open market sale of Coconuts and a distribution of the proceeds to the shareholders pro rata in accordance with their shareholding;

(c) the immediate appointment of our client (or her chosen representative) as a director of the company;

(d) such ‘protective orders’ as we consider appropriate to protect our client’s interest as a minority shareholder;

(e) the immediate repayment to the company of all remuneration to directors made in breach of article 76 (d) a compulsory buyout and/or a winding up of the company.

ii) the substantial delay in bringing the claim even though it was Lauritz who purchased Coconuts.

[102] Mr Braham took the view that since Sally wanted the properties sold then that was strong evidence that she was motivated solely or mainly by personal interest and was not looking out for the interest of the company.

[103] What this court concludes is that Sally’s personal interest is not at odds with the company’s interest of seeing that its property is properly managed and used.

[104] Sally has also indicated, via the letters by her attorneys, and in her affidavits that she wished to find out more information about the terms of the service under which the directors who were employed to the company were remunerated. This is quite a legitimate request made by a shareholder. Section 195 does require the company to have available for inspection contracts of service or written memorandum in respect of

directors employed by the company and who are working inside of Jamaica. John says no such contracts exist and neither is there any memoranda.

[105] Sally has alleged that the Coconuts is being used by John as if it were his private property. John refutes this by saying 'Coconuts is 75% for business.' Presumably, that means 'mainly for business purposes' (first affidavit at **[31]**). He also says that it has an office, fax machine for senior managers working on the North Coast. John also deponed that these senior managers spend two to three nights per month on the North Coast 'at which time they will stay at Coconuts instead of renting accommodation.' This was what was stated in his first affidavit. In his second affidavit John makes reference to trade visits requirements of approximately eight to twelve days/nights per week. It is not clear whether he is saying that these trade visits necessitate the senior managers staying at Coconuts for the same period of time or that the visits take place but the senior managers stay at Coconuts two to three nights per month.

[106] Sally challenged John's statement regarding the frequency of the use of Coconuts. She produced evidence from Ms Lesline Downer who worked as a domestic helper at Coconuts from 1982 to 1998 (sixteen years ago). According to John, the property was acquired in 1983. The submission was that Miss Lesline Downer is not to be believed because she got the year wrong. Respectfully, this submission misses the mark. The point of the affidavit was that she worked there for an exceptionally long period right up to 1998 and the only persons she recalls seeing there were the Ramsons and their friends. No one has suggested that she was not a domestic helper at Coconuts and neither has it been suggested that she did not work there for a very long time. She said that Coconuts was occupied almost always by the Ramsons on weekends or holiday periods. She also said that it was rarely occupied or used during the week.

[107] Sally relied on affidavits from her children and a social friend of one of her children. The burden of the affidavits was to show that Coconuts was not being used in the manner suggested by John. Mr Braham submitted that these deponents ought not

to be believed. It was said that those who claimed to be able to see the villa could not do so because of their physical location. The court is not required to resolve who can see what from where. The issue raised is that Coconuts is being used as if it were private property without any regard for the fact that it is company property.

[108] On this application the directors did not put any record before the court about the use of Coconuts. May be they exist. May be they don't. There is no denying though that on this application there is no record of use of the Coconuts. No letter. No email. No text message. No handwritten note. No minutes of board meetings. No log book. Nothing. The court cannot help but notice that the assertion that a property that is said to be used for business is not supported by single scrap of paper or electronic communication. Sally's case may be understood in this manner: the persistent absence of written evidence is more consistent with private use than being used for the company's business since the use of the company's property ought to attract some degree of record keeping if it is even a log book showing when the property has been booked for the various senior managers.

[109] On the question of the lack of evidence the court notes that in relation to Sally's complaint that she did not receive notice of meetings. The company's response was that all the notices were sent by hand to an address on Waterloo Road. One would suppose that this was by way of a bearer and that someone at the Waterloo Road address would receive the notice. No note of any kind has been exhibited suggesting that the notices were in fact delivered. No record of anyone signing for them. It may be that at the trial these records may be produced but at this stage there is none.

[110] In the minutes of the emergency general meeting held on Friday, November 21, 2014, John, in his capacity of chairman, explained that Coconuts was used to entertain customers and overseas principals and as a retreat venue for senior managers when required. That may be true but where is the documentation.

[111] John, through his affidavit, has portrayed the company as one of detailed, careful and meticulous record keeping. He has produced documents setting out the details of

Sally's son's dismissal in 1995 (over 20 years ago). He produced other documents dated 1990, 1991, 1992, 1993, and 1995 relating to Sally's son. Even a receipt from the University of Miami's bookstore (dating back to Sally's son's time there in 1992) was produced. By contrast a property that is said to be in frequent use by the company qua company has no documentation of any kind exhibited.

[112] In respect of Sharrow Drive John said that the property was purchased as the managing director's residence and is part of his emoluments. Before this arrangement was made, John stated that the company rented a house for the managing director. Sally says that John has been living there for decades and she does not believe that it is a term of his service contract that he is entitled to live there rent free. Other than John's assertions, there is no written evidence of any minutes of meeting, resolution of the board – absolutely no documentary evidence to support the assertion of the purpose of the purchase and that it is part of John's emoluments. If one can produce a receipt for Sally's son at the University of Miami over 20 years after that event it cannot be too pedantic to suggest that perhaps a receipt showing this renting of property for the managing director be exhibited.

[113] The point is, on close examination of the material before the court, it is safe to say that in relation to the two properties owned by the company there is no documentation to support the assertion by John that Coconuts was or is being used in the manner he suggests and neither is there any documentation supporting the purpose for which Sharrow Drive was purchased. The court is not saying that Sally has proved her case of breach of fiduciary duty. However, the paucity of records on this application cannot be overlooked. Where is the evidence on this application that the directors actually considered the use of the property and exercised their best judgment that the present use was indeed in the best interest of the company?

[114] Mr Braham sought to say that the use of the properties was within the province of the directors to decide. That may be true but the crucial question is did they so decide at any time and if they did, is it documented anywhere, and if so, why has that documentation not been produced in the face of a complaint that the properties are not

being used to the benefit of the company but for the personal benefit of some of the directors? The **1140832 Alberta Ltd** case answers this. At paragraph 29 Gunn J held:

> *29 If the directors of a corporation have made an informed decision on the utility of an action, the courts are reluctant to interfere. There is a presumption that the decision of the directors is in the best interests of the corporation.*

[115] In addition to this dictum there is the dictum of Lax J **UPM-Kymmene Corp. v. UPM-Kymmene Miramichi Inc**. (2002), 214 D.L.R. (4th) 496, 27 B.L.R. (3d) 53 (Ont. S.C.J. [Commercial List]), at para. 153 in cited by Wilkinson J in **Sevaal Holdings** at paragraph 50. Lax J's dictum was approved by the Supreme Court of Canada in **BCE Inc., Re**, 2008 SCC 69, [2008] 3 S.C.R. 560 (S.C.C.), at para. 155..

> *50 In UPM-Kymmene, Justice Lax stated:*
>
> > *153 However, directors are only protected to the extent that their actions actually evidence their business judgment. The principle of deference presupposes that directors are scrupulous in their deliberations and demonstrate diligence in arriving at decisions. Courts are entitled to consider the content of their decision and the extent of the information on which it was based and to measure this against the facts as they existed at the time the impugned decision was made. Although Board decisions are not subject to microscopic examination with the perfect vision of hindsight, they are subject to examination.*

[116] What this passage is saying is that it is not for the courts to second guess the board of directors with the benefit of hind sight. The directors do not need to be perfect. If there the directors are saying that on a specific issue, a decision was made there ought to be some evidence that the directors actually addressed the issue that has given rise to a challenge to their decision. If there is no evidence that the directors actually considered the matter and made the decision how can anyone determine

whether the decision was the product of a choice between reasonable alternatives? In this case there is no evidence that the board of Chas E actually met, discussed and decided that Coconuts and Sharrow Drive should be used in the manner that they have been used over the many years. There is no evidence that use of the properties has been reconsidered.

[117] An example from Canada of how at least one court there approaches this question of the business judgment rule can be found in **Ford Motor Co of Canada v OMERS** 12 B.L.R. (4th) 189, 144 A.C.W.S. (3d) 859, 206 O.A.C. 61, 263 D.L.R. (4th) 450, 79 O.R. (3d) 81. This is a case from the Ontario Court of Appeal. It was a very complex case by all accounts. One of the issues that arose in the trial was that of transfer pricing between Ford Motor Company in the United States of American and Ford Motor Company of Canada. Without getting into the details transfer pricing can have an impact on the value of shares. It appears that Ford US got the better end of the deal under the transfer pricing regime as it existed. The trial judge concluded that the transfer pricing system was unfair and had Ford Canada been independent it would have been able to negotiate changes to the system. Ford Canada challenged this conclusion on appeal. One of the arguments put forward was that the judge erred in applying the business judgment rule despite the judge explicitly saying that '[*a]bsent bad faith, or some other improper motive, business judgment that, in hindsight, has proven to be mistaken, misguided or imperfect, will not give rise to liability through the oppression remedy*.' Ford Canada was in fact saying that while the judge articulated the rule he improperly applied it. Rosenburg JA, speaking for a unanimous court made these findings at paragraph 56:

> *56 The evidence shows that Ford Canada's board had little understanding of the transfer pricing system and its impact on the profitability of Ford Canada's operations. There was little discussion of the system at the board level and Ford Canada did not conduct any independent review of the system. The evidence suggests that Ford Canada simply accepted the system that was put in place by Ford U.S., the majority shareholder. There was no evidence that Ford Canada tried to negotiate an agreement that was more*

> *consistent with arm's-length principles and failed; the attempt was never made. In fact, when Dr. Wright concluded her study shortly before the 1995 transactions and suggested a slight change to the TELO allocation that favoured Ford Canada, the change was made.*

[118] The trial judge is quoted as making these explicit findings about Ford Canada's board at paragraph 57:

> *57 Following are some of the trial judge's findings:*
>
> *[307] **The problems inherent to the transfer pricing system would have been recognized by the senior management of both Ford Canada and Ford U.S by 1984**. From 1977 onwards, Ford Canada generally budgeted losses for CVD. **There was no apparent sentiment on the part of management to change the regime, at least until Mr. Bennett voiced his concerns in 1995. Even then there was no detailed analysis made by the board of directors to explain and understand clearly the problem** from the standpoint of determining fair value for the minority shares. The existing regime was satisfactory to Ford U.S. [Emphasis added.]*
>
> *[319] The transfer pricing agreements could be terminated on 30 days notice. However, there was no new transfer pricing agreement after 1979. **The mark-ups to manufacturing and assembly were negotiated within Ford U.S.'s divisions without input from Ford Canada.** [Emphasis added.]*
>
> *[352] The chairperson of the Special Committee acknowledged that there was little analysis of transfer pricing principles or how TELO costs are calculated. **The evidence indicates that the board of directors had a limited knowledge of the inter-company pricing arrangements. There is nothing in the record to suggest that either the board of directors or the Audit Committee ever addressed the fundamental question of fairness to the minority shareholders because of the complex inter-company pricing arrangements. The record suggests the contrary, that is, that the reality was that the inter-corporate pricing system was determined solely by Ford U.S. and accepted uncritically through the years by Ford Canada's management.** Mr. Bennett's letter of February, 1995 is the first and only critical comment in the evidentiary record. It was followed by the decision*

> *of Ford U.S. within two months to buy out the minority shareholders. [Emphasis added.]*
>
> *[357] In fact,* ***Mr. Bennett acknowledged that there were no negotiations between Ford Canada and Ford U.S. with respect to prices paid by Ford Canada. Rather, all such prices and mark-ups were determined by Ford U.S. without input from Ford Canada****. The annual reports of Ford Canada iterated that prices are negotiated on an arm's length basis but did not give any details of the transfer pricing system. [Emphasis added.]*
>
> *[432]* ***The record indicates that the Ford Canada management and Board of Directors did not give any consideration at any time to the reasonableness of the TELO paid, nor did the management and Board of Directors conduct any studies or give any consideration*** *to the fairness to Ford Canada and in particular, to its minority shareholders, of the transfer pricing system in place. [Emphasis added.]* (

[119] In the original judgment the parts in bold were in italics. The *[Emphasis added]* is in the original.

[120] Rosenburg JA continues at the end of paragraphs 57 to 59 in this vain:

> *These and other findings of fact are supported by the record. They strongly tell against any argument in favour of business judgment.*
>
> *58 Justice Blair summarized the business judgment rule in these terms in CW Shareholdings Inc. v. WIC Western International Communications Ltd. (1998), 160 D.L.R. (4th) 131 (Ont. Gen. Div. [Commercial List]), at 150:*
>
>> *It operates to shield from court intervention business decisions which have been made honestly, prudently, in good faith and on reasonable grounds. In such cases, the board's decisions will not be subject to microscopic examination and the Court will be reluctant to interfere and to usurp the board of directors' function in managing the corporation.*

59 On this record, it was open to the trial judge to find that the board did not act on reasonable grounds and therefore was disentitled to the deference ordinarily accorded by the operation of the business judgment rule. As Lax J. said in UPM-Kymmene Corp. v. UPM-Kymmene Miramichi Inc. (2002), 214 D.L.R. (4th) 496 (Ont. S.C.J. [Commercial List]), aff'd (2004), 42 B.L.R. (3d) 34 (Ont. C.A.) at para. 153, "directors are only protected to the extent that their actions actually evidence their business judgment".

[121] These passages from Rosenburg JA, if nothing else, show that it is not simply a matter for the directors, when challenged to say to the court, 'We exercised our judgment and it should be accepted.' They need to demonstrate that they applied their minds to the issue. In the **Ford Motor** case, there was evidence that the board of Ford Motor Canada had not (a) recognised that something was wrong with the transfer pricing system; (b) expressed no interest in changing the system; (c) even when concerns were raised no detailed analysis was made by the board of directors in order to explain and understand the nature of the problem that arose; (d) the board had limited understanding of inter-company pricing arrangement; (e) the inter-company pricing system was determined solely by Ford US and was accepted uncritically by Ford Canada; (f) there was no negotiation between Ford Canada and Ford US regarding prices paid by Ford Canada to Ford US for the parts coming from Ford US; and (g) the board of Ford Canada did not conduct any study or give any consideration to whether the system was fair to Ford Canada.

[122] In light of these failings, Rosenburg JA had absolutely no difficulty concluding, like the trial judge, that the business judgment rule could not shield scrutiny. Boards of directors cannot simply make the 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 boards' actions. This will always be a difficult exercise but one that must be done if required.

[123] Lest it be thought that this outcome was the product of a liberal Court of Appeal running amok, this court will cite the case of **Bellman v Western Approaches Ltd** [1982] B.C.W.L.D. 64, 12 A.C.W.S. (2d) 93, 130 D.L.R. (3d) 193, 17 B.L.R. 117, 33

B.C.L.R. 45 which is interesting for a number of reasons. It is from an elevated standard province. It the Court of Appeal of British Columbia. The court had to deal with a statute in similar terms to that of Jamaica's. The court noted that the statute had uprooted the common. More is said on this below. The important passage for this specific point of business judgment rule is at paragraphs 25 - 27. Nemetz CJ BC said:

> *25 How is a court to exercise its discretion in coming to a determination that it is satisfied that "it appears to be in the interests of the corporation" to allow the derivative action to be brought? The discretion is a wide one. However, despite its breadth, nowhere does Parliament say, nor, in my opinion, was it intended, that the logic of the common law in cases of this kind be disregarded. One must first look to the decision of the directors who, having been given reasonable notice by a complainant in good faith, decide not to assert a corporate right of action. In this case they refused. Can it be said that this refusal was given impartially? It was submitted that the resolution not to sue was passed by four independent directors since the Duke group and Asper did not vote. It was also submitted that the decision of these "independent" directors was based upon the reports of their accountants and outside lawyers and that in any event they could reasonably conclude that the disadvantages to the company outweighed the advantages. How do I conclude that these four directors were not independent? Messrs. Milroy, Dewar, Shier and Atkinson were nominated by the Investors group on 16th January 1980, at a time when the Duke group held a majority of the Investors' shares. More important is the effect upon their independence of clauses 3.03 and 3.04 of the guarantor's agreement where the borrowers covenanted to use their powers as directors to assert control over the directors nominated by the Investors group to act and vote in ways favourable to the lender.*
>
> *26 It is also curious that the instructions of the directors to the investigators, i.e., Price Waterhouse, were limited to certain periods of time in respect only of legal expenses, expenses charged to the company and contra account settlements. Since the legal opinion of 15th January 1981 was based on this limited report it can hardly be said to have been conclusive of the substantive issues raised by the complainants, namely, the breach of fiduciary duty.*

> *27 Considering the whole of the evidence before the chambers judge, she could have come to the conclusion that at the time when they came to the decision not to sue, the directors did stand in a dual relation which prevented them from exercising an unprejudiced judgment. While it is true that a quantifiable loss was not proven, nevertheless it was sufficient to have adumbrated a potential loss resulting from the covenant in the guarantor's agreement requiring the borrowers to pay a fee to the guarantor in the event that they were not able to cause the company to go public. Since the fee was based on gross revenue, it might place the directors in a position of conflict in deciding whether it is in their interest to keep revenues down in order to reduce the potential fee or to maximize revenues in the interest of all of the shareholders. However, this would be a matter for the trial court to consider. It is sufficient that it appears to be in the interest of the company that the action be brought.*

[124] Whereas in the **Ford Motor Co** case that was a full blown trial. In this **Bellman** case it was an application to seek leave to file a derivative action. The conduct of the directors had come up for scrutiny. The chambers judge and the Court of Appeal actually looked at the decision making process of the directors. This means that there was actual evidence of what they did and what they did was found wanting. Thus it is not a matter of a mere assertion from the directors that they exercised their discretion. They must set forth the material to show that they did in fact exercise their minds in respect of the decision or non-decision that is under consideration. The law is saying to directors silence is not golden. In **Bellman** the effect of the chambers judge's decision and that of the Court of Appeal was that the directors' decision albeit that they actually addressed the issue was still vulnerable because the process was flawed in that the alleged independent directors were not really independent. The upshot of this was that it was in the interest of the company that the claim be brought.

[125] The application of this on an application for leave implies this: at the leave stage if there is no evidence that the board of directors actually made an informed decision regarding the use of company property how can it be said that the board exercised it best business judgment in the best interests of the company? The cases do not support a willingness to accept the board's naked assertion that it did. It may well have done so

but in the absence of supporting documentary evidence or supporting material of some kind, it is not an assertion easily accepted. If that assertion, by itself, was always accepted then any person seeking to challenge the board in a derivative action would be like a climber ascending Mount Everest without an oxygen tank.

[126] It is this court's respectful view that the judicial technique to be applied in these circumstances is that demonstrated by the **Ford Motor Co** case.

[127] John has produced copious amounts of evidence to show why he says that Sally must have known that she was a shareholder. He produced exceptionally detailed material surrounding the dismissal of Sally's son from the company but on the vital questions of use of Coconuts, the purpose for the purchase of Sharrow Drive and its use, the documentation or supporting evidence of some kind has not been produced. In light of this this court has no basis to conclude that Sally is not acting in good faith as asserted by John. Even if she is motivated by personal animosity, there is no evidence that her judgment has been clouded to such an extent that one can say that good faith has been extinguished. The court will say that there is no basis for this court to conclude that Sally is acting solely or primarily out of personal interest.

[128] Sally has raised very serious issues of corporate governance. As the court remarked during submissions, in this court's experience it appears that in Jamaica, privately held companies, especially those held by families do not seem to have a high regard for the fact that company property is company property and quite different from their own. The court also remarked that perhaps the time had come to remind those in charge of managing closely held family companies that they are subject to the general law. The law must also give hope to those who feel buffeted, powerless, burdened and heavy laden that the law is there to provide remedial action once the criteria are met. They must never feel that because it is private family owned company they are subject to whims and fancies of the powerful. There is hope. Like the hundreds of immigrants who filed through Ellis Island and who would have read these words at the base of the Statute of Liberty: *Give me your tired, your poor, Your huddled masses yearning to breathe free, The wretched refuse of your teeming shore. Send these, the homeless,*

tempest-tossed to me, I lift my lamp beside the golden door, and felt hope so too must those who honestly believe that some wrong has been done to the company of which they are apart feel that the courts will not become unduly technical and deny access when the whole point of the statutory reform was to put to rest the poor job that had been done by judges in this area of law. The common law relating to derivative actions is now in the legal Jurassic Park, and there it should remain.

[129] Mr Braham submitted that the timing of the application is significant. The argument was that Sally waited until Lauritz and his second wife died to bring the application. The not-so-subtle point urged was that Sally declined to take any steps during the life time of Lauritz and if she was acting in good faith she would have acted before Lauritz died. This submission could only go the point of whether Sally was acting in good faith.

[130] To understand this submission reference must be made to John's affidavit. John spared no effort to portray Lauritz as a man who brooked no opposition; his word was not just law but like the law of the Medes of the Persians – unalterable and unchangeable. According to John after he returned from studies, Lauritz simply told him to 'sit and work.' There was no discussion about salary or anything of that nature. When John's sister came up with the idea of going to work for Grace Kennedy, Lauritz's response was 'No!' That was the end of the matter. Mr Braham also submitted that the fact that Sally's proposed claim only goes back to 2001 and not to the time of acquisition of both properties is further proof of Sally's bad faith. The idea being that Sally did not want to or was 'afraid' of Lauritz or was partial to him and hence her delay. This is does not show an absence of good faith. If these alleged wrongs began under Lauritz that is no reason for them to continue under John if indeed they are continuing.

[131] Even if Sally was peeved about her son's dismissal that does not preclude her from having an honest belief in the merits of the claim and an honest belief that it is in the interest of the company that it be brought. This court has no evidence concerning the reason for limiting the proposed claim to 2001 coming forward. These reasons

advanced by Mr Braham are not sufficient either by themselves or taken with others to find an absence of good faith on Sally's part.

[132] It was submitted that Sally is not acting in good faith because she knew or ought to have known that she was a shareholder in light of (a) she was a member of the Industrial and Provident Society; and (b) the decision to make all members of the Society shareholders in Chas E and (c) she was one of the original subscribers. Sally's response is that she is not well versed on financial matters and simply does not recall the incorporation exercise. By all accounts Sally was not involved in the operation of the company. Sally was inaccurate when she thought she was not a shareholder but that does not mean necessarily that she is not acting in good faith.

[133] As the authorities indicate all that Sally has to do is raise an arguable case. She does not have to prove, at the leave stage, that the claim is in fact in the interest of the company. She only needs to prove that it '**appears** to be in the interest of the company.' This standard as noted by Nemetz CJ BC in **Bellman** is quite different from the common law standard. Also, as **Bellman** and the **Ford Motor Co** cases show, if the directors respond, their assertion (if it is made) that these are matters for the internal decision making process of shareholders and directors is not the end of the matter. Nemetz CJ BC, by his reasoning and decision, in effect, said that in determining the issue of interests of the company, the court can legitimately look at the decision of the directors. The assumption here is that the directors actually made a decision and there is proof of that. Surely, if an application can be made successfully where there is evidence of an actual decision then it must be that an application may succeed if the directors present no evidence of the actual decision. In **Bellman** an actual resolution was passed. Also in **Bellman** the independent directors who were part of the decision were shown not be independent at the application not the trial stage.

[134] Mr Braham sought to say that Sally's claim could be addressed under section 213A. This section deals with oppression and unfair prejudice. Learned Queen's Counsel cited other provisions of the Companies Act which he said were more appropriate. This court disagrees. The proposed derivative claim alleges wrong done to

the company. For wrongs done to the company the only claim permitted is one by the company against the directors. Sally has not pleaded in the proposed claim allegations of wrong done to her and that she has suffered loss in her capacity as a shareholder. A personal action is not used for seeking redress for wrongs done to the company.

[135] The court is fully aware that in privately held family companies not all the formalities are kept. However, the fact of the matter is that company property is company property and ought to be treated as such. It is not easy to see how it could not be in the interest of the company for this claim to be permitted in the face of significant absence of documentation supporting the use of the properties. Would the company not benefit from the directors making good any loss to the company if it is found that the company suffered loss because of the directors' breach of duty?

[136] How could it not be in the interest of the company for the directors to account for their decisions relating to the use of company property in circumstances where there is no documentation produced at this application supporting the directors' version of use of property in one instance and in another, purchase and use of company property? Sally is saying that the properties could have been rented and money earned. John is suggesting that that does not make sense. He may be correct. Sally may be correct. The court does not have to decide that question at this stage. There is no evidence that Sally's claim is not arguable and nothing to say that it is bound to fail.

[137] John has produced figures showing why it would not make economic sense to rent Coconuts. That is of no moment. Those are trial issues.

[138] Lord Gifford QC is saying that in the absence of any contract between the company and John, what is the legal basis for him to be living in the house at Sharrow Drive? Learned Queen's Counsel is saying that, based on the evidence presented so far, John has no contractual right to be living at Sharrow Drive. He submitted that there is no evidence of any formal decision in respect of the use of Sharrow Drive for John's residence. He also submitted that there is no evidence of the value of the benefit to John.

[139] The court will now deal with Sally asking for the proposed sale of company property as evidence that she does not have the interest of the company at heart and she is pursuing her only private agenda without regard for the company. This argument needs to be purged with a strong dose of reality. Charities and ethical investors apart, generally speaking shareholders in companies are not shareholders because they have the milk of human kindness flowing through their veins and are DNA descendants of or ancestors of Mother Theresa. They are shareholders because they want to make money and as much of it as they can. This court accepts that generally the shareholder ask one question, 'What's in this for me?' As long as the money keeps flowing their way, the average shareholder cares little about the minutiae of company management. They will be shareholders as long as the money keeps coming. If it is not, they either get out if they can by selling the shares and if they cannot they struggle within the company to get things operating in their favour. Where the company is privately held there is no stock exchange to measure the value of the shares and so selling the shares is not an easy option. Therefore when persons in privately held companies approach the court for derivative action permission they are not be viewed as lepers were in times past. Yes, they have a personal agenda. Yes, they want to make money. Yes, they may want to be bought out. Yes, they are looking out for their interest. Nothing is wrong with that. The fact that Sally has proposed a particular remedy cannot bar her from getting permission if she has in fact raised important issues regarding the appearance of misuse of the company's property.

[140] It would be an odd thing if the judicial interpretation placed on the section results in practical terms in the reimposition of shackles and burdens of a new kind which would virtually keep the law in the same place where it has been kept for over one hundred years. Even, debenture holders can sue. Can there be a clearer case of pure personal interest?

[141] This court agrees with Lord Gifford that Sally's request that the properties be sold is a remedy that the court may not grant. In any event it would be a remarkable thing if at this stage a proper derivative action is turned away because the complainant may be over ambitious in the remedies that he or she may seek.

[142] Mr Braham submitted that sale of the properties as sought by Sally would impair the company's asset base. Again, that is not the only solution. It may not happen. The proposed derivative claim includes among the defendants the directors of the company. If they are found liable then it is they who would be required to make good the loss to the company. This need not involve the sale of properties. The court may not even order that Sally be paid directly.

[143] In this case, Sally has met the standard on a balance of probabilities. Even though the court has applied the balance of probabilities standard, the court sees strong argument for saying that even that standard is too high since this application, like an application for judicial review, is permission to bring or continue a claim and not the claim itself. However, that will have to wait for another time.

A parting note

[144] There seems to be an underlying theme in Mr Braham's submissions which is this: if Sally is asking for personal remedies even if there are some remedies appropriate for a derivative action then a derivative action is not in order. The response to this subliminal argument is found in **Acapulco Holdings Ltd v Jegen** , [1997] 4 W.W.R. 601, [1997] A.J. No. 174, 135 W.A.C. 287, 193 A.R. 287, 47 Alta. L.R. (3d) 234, 69 A.C.W.S. (3d) 461 from the Court of Appeal of Alberta. In that case the complainant had commenced a personal action and then sought leave to commence a derivative action. The judge granted leave and the derivative action commenced. The appellant had second thoughts about appealing and decided to launch an appeal. The appeal was dismissed. This case confirms that the same circumstance may give rise to both an oppression action and a derivative action. The court made this important statement which actually is consistent with the response by Lord Gifford on the point about remedies. The court stated at paragraph 23:

> *23 The appellants directed some criticism at the precise wording of the derivative statement of claim. But the remedy for defects would be amendment, not barring the entire lawsuit. And motions to strike out part of a statement of claim are a notorious waste of time and*

money. If the whole statement of claim requires only an arguable case, it is hard to see why individual parts of it should be squeezed through a finer sieve. In any event, the formal order under appeal says that any objections to the form of the statement of claim may be addressed to the chambers judge. We understand that counsel for the respondents made a number of changes to the statement of claim at the request of counsel for the appellant defendants.

[145] The passage is important because it is saying that there need not be this fixation on remedies sought. Defects can be cured by amendment. The underlying premise for this is found at paragraph 18 of the judgment:

18 We stated above that we thought that the respondents are right to say that the derivative action would yield benefits which the oppression action would not. Our reasons are as follows. It is arguable that the existing oppression suit can give the individual minority shareholders damages for breach of fiduciary duty. And it seems to claim that. So strictly speaking, the chambers judge was probably wrong to deny that. But it does not matter. Even if the existing suit can give such damages, it is no answer to the request for the derivative suit. The oppression action is by the minority shareholders (respondents), and can only proceed upon causes of action which they have. Any remedies in it must be in favour of those minority shareholders. It may be that the oppression action can give them money relief, but that would have to be tailored to the measure of their loss. Where wrongs are done to the company (Testing), the measure of a minority shareholder's loss may be a matter of some contention, even of genuine difficulty. But if assets are wrongly taken from the company, its loss is direct. The loss of any shareholder is only indirect and consequential, and no shareholder loses in a way different from any other shareholder. See the very instructive article by MacIntosh, loc. cit. supra, esp. at pp. 31, 45-46, 51, and 59-62.

[146] The court noted that where wrongs are done to the individual the oppression suit gives that remedy but where wrongs are done to the company the loss to the company is direct. In other words, the court is to focus on the nature of the complaint – the essence of the complaint. Of course any impact on the company will undoubtedly have an impact on the shareholder but that is indirect and consequential.

[147] And at paragraphs 7 of the judgment:

> *7 Indeed, the relevant statutory provision, s. 232 (2) (c) codifies the particular test as follows: "It appears to be in the interests of the corporation ... that the action be brought ...". **The word "appears" plainly indicates that certainty is not needed.** (Sec. 232(2) gives two other tests as well.) See Richardson Greenshields of Canada Ltd., supra, at p. 638.* (emphasis added)

[148] So there it is.

Disposition

[149] The order is granted in terms of the fixed date claim form dated June 25, 2015.