[2021] JMCC COMM 37

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

COMMERCIAL DIVISION

CLAIM NO. 2018 CD 00342

BETWEEN	**SALLY FULTON**	**CLAIMANT**
AND	**JOHN RAMSON**	**1st DEFENDANT**
AND	**SUSAN SILVERA**	**2nd DEFENDANT**
AND	**CHRISTOPHER RAMSON**	**3rd DEFENDANT**
AND	**PHILLIP RAMSON**	**4th DEFENDANT**
AND	**NOEL RAYMOND SILVERA**	**5th DEFENDANT**
AND	**CHAS E. RAMSON LIMITED**	**6th DEFENDANT**

IN CHAMBERS

Mr Michael Hylton QC and Miss Stephanie Ewbank instructed by Myers, Fletcher & Gordon for the claimant

Mrs Georgia Gibson Henlin QC, Miss Stephanie Williams and Miss Nicola Richards instructed by Henlin Gibson Henlin for the 1st, 2nd, 3rd, 4th and 5th defendants

Mr Ransford Braham QC and Miss Carissa Mears instructed by BRAHAMLEGAL for the 6th defendant

January 27, 2021, May 13, 2021 and October 15, 2021

Civil Practice and procedure – conduct which is oppressive or unduly prejudicial or unfair – Section 213A of the Companies Act – Summary judgment – Rule 15.2 of CPR – Beneficial interest in shares – whether Buy Out Order appropriate.

PALMER HAMILTON J

[1] There are four applications before this court. Two filed by the claimant, one by the 1st to 5th defendants and the other by the 6th defendant.

[2] The claimant's applications are outlined hereunder:

i. an application for share purchase orders dated July 24, 2020; and

ii. an application for the appointment of an independent accountant dated July 30, 2020.

[3] The applications of the defendant directors and the company are substantially the same, both seeking, among others, orders for summary judgment. The applications are dated November 6, 2020; they were filed on November 9, 2020.

[4] I will continue to refer to the parties as claimant (Mrs Fulton) and defendants (whether 1st to 6th) to avoid confusion given the number of applications which have been filed and the consequent changes in the designation of applicant.

Background

[5] It is noteworthy that the applications stem from a main claim; I will therefore provide a brief background to aid understanding.

[6] Chas E. Ramson Limited ('Chas' or 'the company') is a limited liability company owned by the Ramson family. The principal activities of the company are the sale and distribution of merchandise. It commenced its operations in or around 1922. Chas went through a number of changes to its structure. In 1984 it became an Industrial and Provident Society ('IPS') and so continued until 2001. Thereafter, it was incorporated as a limited liability company on 26 November 2001. John Ramson ('John'), the 1st defendant, was the managing director of the company. All the director defendants are shareholders in the company.

[7] The director defendants of Chas are the relatives of Mrs Fulton. Mrs Fulton is the sister of John and Susan Silvera, the 2nd defendant; she is the aunt and in law of the other directors of the company. Unlike the director defendants, Mrs Fulton has not been involved in the operations of the company and she has averred that in or around July 2014, she discovered for the first time that she has shares in Chas. Mrs Fulton is generally displeased with how the affairs of the company have been conducted. She has complained about the following:

i. *Her deliberate exclusion from the company by the director defendants*;

Mrs Fulton asserts that she has been excluded from participating in the affairs of the company from inception to present date. She states that prior to 2014, she was not sent any notices of annual general meetings. She further stated that a resolution to have her daughter, Anne Fulton, appointed to the Board of Directors was rejected by the directors.

ii. *The failure to provide her with information in respect of the company*;

According to Mrs Fulton, despite several requests the director defendants have refused to provide details of the terms of the service contracts between each of the directors and the 6th defendant. They have also failed to provide other pertinent information to which she is entitled as a shareholder.

iii. *Unlawful director payments*;

Mrs Fulton alleges that for the accounting years 2008 to 2014, the director defendants were paid emoluments in excess of $70,000,000.00 from the 6th defendant without the requisite approval via a general meeting and in breach of Article 79 of the 6th defendant's Articles of Association.

iv. *Unlawful benefits; and*

She further states that the director defendants have at all material times received payments from the 6th defendant for their personal expenses to which they are not lawfully entitled.

v. *The company's no dividend policy*

She also laments that since the incorporation of the 6th defendant to 2015, she has not received any dividend or any other benefit from her shares.

The main claim

[8] Mrs Fulton's grievance with the above led to her filing a claim form and particulars of claim[1] alleging that the 1st to 5th defendants have carried on or conducted the business affairs of the 6th defendant and/or exercised their powers as directors of the 6th defendant in a manner that is oppressive or unfairly prejudicial to her interest as a shareholder. Her claim was instituted pursuant to sections 213 A (2) of the Companies Act ('the Act').

[9] She has claimed the following:

i. An order compelling the defendants to produce and make available to the claimant all financial statements and other accounting and banking records for the past 15 years.

ii. An order that a qualified and independent forensic accountant be appointed to audit the financial documents of the 6th defendant.

iii. An order that the defendants instruct KPMG to provide the financial information and documents requested by Levy Cheeks (formerly Cheeks & Co.) on behalf of the claimant.

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[1] Filed June 7, 2018

iv. A declaration that all annual general meetings of the 6th defendant prior to 2014 are invalid and of no effect.

v. An order that all payments made to the 1st, 2nd, 3rd, 4th and 5th defendants by way of directors' emoluments from the 6th defendant are immediately repaid to the 6th defendant together with interest at a rate of 19.75% per annum.

vi. An order that Ann Fulton or her nominee be appointed as a director of the 6th defendant.

vii. An order that the 6th defendant serve the claimant with all future notices convening general meetings of the 6th defendant.

viii. Costs.

ix. Any further or other relief that this Honourable Court deems just.

[10] In her particulars of claim, Mrs Fulton has outlined the particulars of oppression or unfair prejudice as follows:

i. Deliberately failing to send the claimant any notices of annual general meetings of the 6th defendant for the period 2001 to 2014.

ii. Deliberately failing to send the claimant copies of financial statements or any other financial information relating to the affairs of the 6th defendant prior to approving same at the annual general meetings for the period 2001 to 2014.

iii. Deliberately failing to provide the claimant with other pertinent requested information regarding the 6th defendant's affairs, including the terms of service contracts and information on benefits paid by the 6th defendant.

iv. Deliberately excluding the claimant from participating in the management of the 6th defendant.

v. Causing and/or permitting unlawful director payments to be paid by the 6th defendant to the director defendants without the requisite approval in general meetings in breach of Article 79 of the 6th defendant's Articles of Association.

vi. Causing and/or permitting unlawful benefits to be paid by the 6th defendant to third parties.

vii. Deliberately operating a restrictive dividend policy so that the claimant cannot benefit financially as a shareholder of the 6th defendant.

The defences and counterclaims

[11] The director defendants and the company filed defences[2] vehemently denying many of Mrs Fulton's allegations. The defences are quite similar. In addition to filing further amended defences, the defendants have all filed counterclaims.

[12] The 1st defendant sought the following orders by way of counterclaim:

i. A declaration that the claimant owns seven (7) shares in the 6th defendant company.

ii. An order that the claimant's shares in the 6th defendant be valued by an independent chartered accountant to be agreed between the parties and failing agreement a chartered accountant appointed by the court from a list of three submitted to the Registrar of the Supreme Court on behalf of all the defendants and the claimant.

iii. An order that the 1st defendant and/or the shareholders be permitted to purchase the shares in accordance with Article 29 A (ix) of the Articles of

[2] Further amended defences and counterclaims were filed on November 13, 2020

Association of the 6th defendant and the share value provided by the appointed chartered accountant.

iv. An order that if the shareholders are unable to purchase the shares, the 6th defendant be permitted to do so for the price per share provided by the appointed chartered accountant.

v. Costs to the 1st defendant to be taxed if not agreed.

vi. Such further and/or other relief and/or directions as the court deems necessary.

[13] The 2nd defendant sought the following orders by way of counterclaim:

i. A declaration that the claimant has only seven (7) shares in the 6th defendant company.

ii. An order in any event that the claimant's share (s) in the 6th defendant be valued by an independent chartered accountant appointed by the court from a list of three submitted to the Registrar of the Supreme Court on behalf of all the defendants and the claimants.

iii. An order that the 2nd defendant and/or the shareholders be permitted to purchase the shares in accordance with Article 29A (ix) of the Articles of Association of the 6th defendant and the share value provided by the appointed chartered accountant.

iv. An order that if the shareholders are unable to purchase the shares, the 6th defendant be permitted to do so for the price per share provided by the appointed chartered accountant.

v. Costs to the 2nd defendant to be taxed if not agreed.

vi. Such further and/or other relief and/or direction as the court deems necessary.

[14] Mrs Fulton replied to the defences and counterclaims and asked for a number of additional orders. The defendants then responded to her replies.

[15] I have considered it appropriate to deal with the summary judgment applications first.

The summary judgment applications

[16] The 1st to 5th defendants, by way of a notice of application, have sought, among others, the following orders:

i. "Judgment be entered in favour of the 1st - 5th Defendants against the Claimant permitting the 1st - 5th Defendants to purchase the Claimant's shares in the 6th Defendant, CHAS E. Ramson Limited.

ii. That there be a trial of the preliminary question as to whether in all the circumstances of the Claim and Counterclaim an appropriate order is to permit the 6th Defendant or any of the Defendants to purchase the shares of the Claimant.

iii. The Defendants or any of them is to purchase the shares of the Claimant at a value as determined by Anura Jayatillake, Partner (Strategy & Transactions) Ernst & Young in his report dated the 19th August 2020."

[17] By way of notices of intention to rely dated November 6, 2020 and January 11, 2021, the 1st to 5th defendants indicated that, to support this application, they would be relying on the affidavit of Kathryn Silvera filed on November 9, 2020 and the further affidavit of Ms Silvera filed on January 7, 2021[3].

[18] Mrs Fulton, by way of notice of intention to rely dated November 23, 2020, indicated that, with respect to this application, she would be relying on her

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[3] This affidavit was responded to by Mrs Fulton by way of affidavit filed January 20, 2021

affidavits filed on July 24, 2020 and July 30, 2020 as well as the affidavit of Ketesha Bradley filed on November 12, 2020.

The 1st to 5th defendants' submissions[4]

[19] Mrs Gibson Henlin QC argued that given Mrs Fulton's inability to mount a defence with a reasonable prospect of success against the defendants' counterclaim, it is appropriate in all the circumstances for the defendants' application for summary judgment to be entered on the defendants' counterclaim.

[20] She outlined the law in relation to a summary judgment application and in so doing cited the well-known case of **Swain v Hillman** [2001] 1 All ER 91.

[21] Learned Queen's Counsel stated that the evidence before the court is that Mrs Fulton has admitted that there has been a total breakdown in trust and confidence between herself and the defendants. It was pointed out that Mrs Fulton is not opposed to the sale of her shares to the defendants. It was then stated that in light of this admission, there is no prospect that Mrs Fulton will be able to successfully defend the defendants' counterclaim.

[22] It was submitted that in light of Mrs Fulton's admissions (she is the legal and beneficial owner of 101 shares; her relationship with the 1st and 2nd defendant have been distant for over 20 years and worsened significantly; her relationship with the children of the 1st and 2nd defendants have worsened; she does not trust any of the defendants in relation to matters pertaining to the 6th defendant; a breakdown of trust and confidence in their abilities as directors of the company) a trial of the issues on the counterclaim would be an unnecessary waste of judicial time and expenses.

The claimant's submissions

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[4] The submissions herein are not stated in full

[23] Miss Ewbank submitted that this application, like the counterclaim on which it is based, is bound to fail. She stated that-that is so for the simple reason that the defendant shareholders are the majority shareholders and they do not allege that Mrs Fulton is guilty of conduct which is oppressive or unduly prejudicial.

[24] Learned counsel stated that the defendants have not pleaded the relevant statutory ground. She contended that the remedies in section 213 A of the Act are available to "oppressed" shareholders and the persons who control the company will rarely (if ever) fit the description. She cited the cases of **Re Baltic Real Estate Limited** (No 2) [1993] BCLC 503 and **Re Legal Cost Negotiators** [1999] 2 BCLC 171 to support this contention.

[25] She further stated that there is also extensive authority in Canada which indicates that one must allege oppression or unfairly prejudicial conduct in order to rely on the Canadian equivalent of section 213 A to obtain a buy-out order. She cited the cases of **Wittlin v Bergman** 1995 Carswell Ont 1204 and **McAteer v Devoncraft Developments Limited** [2001] ABQB 917 as being instructive.

[26] Miss Ewbank submitted that section 213 A of the Act provides remedies for complainants who allege oppression or unfairly prejudicial conduct by other parties. In this case those remedies are not available to the defendant shareholders and their application for summary judgment must fail.

Analysis

[27] Rule 15.2 of the **Civil Procedure Rules, 2002** ('CPR') outlines the circumstances in which the court may grant summary judgment[5]. The rule states as follows:

> *"Grounds for summary judgment*

[5] See the case of Sagicor Bank Jamaica Ltd v Taylor-Wright [2018] UKPC 12

> *15.2 The court may give summary judgment on the claim or on a particular issue if it considers that-*
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> *(a) the claimant has no real prospect of succeeding on the claim or the issue; or*
>
> *(b) the defendant has no real prospect of successfully defending the claim or the issue..."*

[28] The summary judgment 'test' was discussed by Lord Woolf MR in **Swain v Hillman** [2001] 1 All ER 91. He said:

> *"Under r 24.2, the court now has a very salutary power, both to be exercised in a claimant's favour or, where appropriate, in a defendant's favour. It enables the court to dispose summarily of both claims or defences which have no real prospect of being successful. The words 'no real prospect of succeeding' do not need any amplification, they speak for themselves. The word 'real' distinguishes fanciful prospects of success or, as Mr. Bidder QC submits, they direct the court to the need to see whether there is a 'realistic' as opposed to a 'fanciful' prospect of success."*[6]

[29] In deciding whether summary judgment ought to be granted, it is often cautioned that the court should not to embark on a mini trial of the claim. (See **ASE Metals NV v Exclusive Holiday of Elegance Limited** [2013] JMCA Civ 37 and **Island Car Rentals Ltd (Montego Bay) v Headley Lindo** [2015] JMCA App 2)

[30] In the recent case of **Sagicor Bank Jamaica Limited v Harley Corporation Guarantee Trust Company Limited** [2021] JMCA Civ 36, the Court of Appeal referred to the case of **Barbican Heights Limited v Seafood and Ting International Limited** [2019] JMCA Civ 1 wherein Sinclair-Haynes JA noted at paragraph [78]:

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[6]At page 92

> *"At page 64 of the Commonwealth Caribbean Civil Procedure, third edition, the learned authors pointed out that:*
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> > *'[On] an application for summary judgment the claimant must satisfy the court of the following:*
> >
> > > *(a) All substantial facts relevant to the claimant's case, which are reasonably capable of being before the court, must be before the court.*
> > >
> > > *(b) Those facts must be undisputed or there must be no reasonable prospect of successfully disputing them.*
> > >
> > > *(c) There must be no real prospect of oral evidence affecting the court's assessment of the facts.'"*

[31] The relevance of this passage to the case before me will soon become apparent.

[32] The 1st to 5th defendants are seeking summary judgment in respect of their counterclaims. As previously outlined, the counterclaims have sought, among other orders, declarations in respect of Mrs Fulton's shareholding.

[33] In her particulars of claim, Mrs Fulton, at paragraph 3 stated as follows:

> *"From the date of incorporation of the 6th Defendant, the Claimant was the registered holder of 95 shares and in or around July 2014, the Claimant inherited a further 6 shares from the estate of her deceased father."*

[34] In the 1st defendant's further amended defence and counterclaim, he stated in part:

> *"Paragraph 3 of the Particulars of Claim is not admitted to the extent that it states without detail that the Claimant was the registered holder of the ninety-five (95) shares and also that she inherited a further six (6) shares from her father's estate. The facts are that the Claimant is the registered holder of ninety-five shares, ninety-four (94) of which she agreed to hold as nominee on behalf of Caribbean Cutlery Limited. The annual return of 2017 are to be amended accordingly in accordance with the requirements of the new Companies law for the beneficial owners of shares to be stated."*

[35] At paragraph 7, the 1st defendant further stated:

> *"b. on the 21st February 1985 the Claimant by transfer agreed to hold 94 of her shares as nominee for Caribbean Cutlery Limited as evidenced by Transfer of Shares of the same date." (Emphasis as in original)*

[36] Similar averments can be found in the further amended defences and counterclaims of the 2nd to 5th defendants.

[37] In replying to the 1st defendant's assertions in respect of her shareholding, Mrs Fulton countered:

> *"None of the 101 Shares registered in her [sic] name are held on trust, whether for Caribbean Cutlery Limited or any other person. The registered shareholders and directors of Caribbean Cutlery Limited are Monica Ramson and Ivan Heron respectively, both of whom are deceased. Monica Ramson died in 2012 and Ivan Heron died in 2000. As far as the Claimant is aware the last recorded filings for Caribbean Cutlery Limited were made in 1993.*
>
> *The First Defendant knows the Claimant is the beneficial owner of all 101 Shares registered in her name. It is a breach of fiduciary duty for the First Defendant to cause amendments to the members register which he knows to be incorrect.*
>
> *The existence of a trust arrangement over some of the Shares owned by the Claimant, which is denied, is not relevant to this claim."*[7]

[38] The 1st defendant's response must be noted. He stated:

> *"In further response to Paragraph 3 as it relates to the 94 shares held on trust for Caribbean Cutlery Limited, the 1st Defendant repeats Paragraph 7 (b) of the Amended Defence and Counterclaim of the 1st Defendant.* ***The Claimant's claim for entitlement to shares***

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[7] See for example, the claimant's reply to amended defence and defence to counterclaim of 1st defendant filed October 30, 2018, paragraph 3

> ***makes this the [sic] "trust arrangement over some shares" relevant to this claim****."*[8] *(Emphasis added)*

[39] The 2nd defendant also had a noteworthy response. She averred:

> *"…the 2nd Defendant says that the Claimant holds 94 shares in the 6th Defendant on trust for Caribbean Cutlery pursuant to Transfer dated the 21st February 1985. The company Caribbean Cutlery is in good standing on the register of the companies. The companies [sic] last filings were in 2017. The 2nd Defendant is the Company Secretary.* ***The existence of a trust arrangement in respect of 94 shares is relevant to these proceedings insofar as the Claimant's entitlement in the event of a buy-out order is dependent on the number of shares to which she is beneficially entitled.*** *The Claimant signed the transfer of shares aforesaid to Caribbean Cutlery and as such is not in a position to allege that the 2nd Defendant knows that she is the beneficial owner of all 101 shares registered in her name."*[9] *(Emphasis added)*

[40] In her November 9 affidavit, at paragraph 16, Ms Silvera noted the issue surrounding Mrs Fulton's shareholding. She then stated, at paragraph 17, that "this question is discrete and can be dealt with separately without affecting [the buy-out] order as it only affects the multiple by which the purchase price will increase or decrease that is by seven (7) or One Hundred and One (101) unless the parties sooner resolve it amicable in any event [sic]."

[41] Mrs Fulton, as can be gleaned from the submissions previously outlined, has opposed the summary judgment application.

[42] In the submissions of learned Queen's Counsel for the 1st to 5th defendants, under the heading 'Quantum of Shares', the following appears:

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[8] See the reply to claimant's reply to defence and defence to counterclaim of the 1st defendant filed November 15, 2018, paragraph 3

[9] See reply to claimant's reply to defence and defence to counterclaim of the 2nd defendant filed November 15, 2018, paragraph 3

> *"A factual dispute exists on whether the claimant owns 7 or 101 shares in the 6th defendant. It was submitted that the fact of this dispute does not militate against the granting of the buy out order. The number of shares to be sold by the claimant does not affect, the prices of the shares or the fact that the buy out order is the more appropriate order.*
>
> ***The trial of this discrete issue is necessary in order for the parties to give full and complete effect to the buy out order**."* *(Emphasis added)*

[43] Undoubtedly, the overall burden of proving that they are entitled to summary judgment lies on the 1st to 5th defendants. In my estimation, following a trial, if the defendants have been successful on their counterclaims, the orders they have sought would follow the grant of the declaration which they have requested. In other words, in the circumstances of this case, the declaration would operate as a launching platform for the orders requested.

[44] In the case of **Abaidildinov and another v Amin** [2020] 1 WLR 5120, Robin Vos said:

> *"30 There was a disagreement between Mr Davies QC and Mr Stuart as to the approach which the court should take in deciding whether to grant summary judgment where the relief sought took the form of a declaration.* ***This concerns the question as to what it is the claimant must show that the defendant has no real prospect of successfully defending.***
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> *31 Mr Davies submits that this relates only to the underlying facts or matters which are the subject of the declaration and that, once it is shown that the defendant has no real prospect of showing that those facts or matters are wrong, the court should approach the exercise of its discretion as to whether or not to make the declaration in the normal way.*
>
> *32 Applying this to the current proceedings, Mr Davies says that, as Mr Amin has accepted that he has been removed as CEO of London Infrastructure, that Mr Abaidildinov and Mr Khafizof remain directors of London Infrastructure and that Mr Abaidildinov is the holder of*

42% of the shares in the company, he clearly has no prospect of putting forward a successful defence in respect of these issues (and indeed has no intention of doing so) and that this is enough for the court to give summary judgment. The only remaining requirement is for the court to exercise its discretion (in the normal way) as to whether or not to make the declarations which the claimants seek." (Emphasis added)

[45] He continued:

"43 …Neuberger J [in Financial Services Authority v Rourke (trading as J E Rourke & Co) [2002] CP Rep 14] approached the question as to whether he should grant the declarations sought by way of summary judgment in two stages. The first stage was to consider whether the basis for the declarations had been made out. As in this case, the basis for the declarations in that case was purely factual. The summary judgment test had to be applied at this stage and so the question was whether the defendant had any real prospect of successfully disputing at a trial the facts which had been alleged in the absence of any evidence to the contrary. He makes it clear that the summary judgment test is being applied to this particular stage of the analysis by first of all setting out the defendant's submissions as to why the factual basis is not made out and then stating that: "At this stage, I am of course, concerned with an application for judgment under Part 24.""

[46] The learned judge further expressed that:

"47 In approaching an application for summary judgment where the relief sought is the making of a declaration, this must in my view be the correct approach. ***Whether or not the underlying facts or matters relevant to the declarations are made out is the key issue as far as summary judgment is concerned. If the defendant has a real prospect of successfully defending the points put forward by a claimant in support of the declarations, summary judgment should not be granted****.*

48 However, once it is established that the defendant has no real prospect of mounting a successful defence in respect of those facts or matters, it is unlikely to be in accordance with the overriding objective to require a full trial in order to decide whether the court

should exercise its discretion to make the declarations which have been sought." (Emphasis added)

[47] The pressing enquiry is therefore whether the underlying facts or matters relevant to the declaration have been made out.

[48] In my view, the previously mentioned extracts from the pleadings clearly establish a factual dispute in respect of Mrs Fulton's shareholding. A copy of the transfer of shares document was exhibited to Ms Silvera's November 9 affidavit. The document seemingly bears Mrs Fulton's signature and it indicates that she holds 94 shares as nominee for Caribbean Cutlery Limited ('CCL'). The document was witnessed as far back as February 21, 1985.

[49] The counterclaims of the 1st to 5th defendants have asked for declarations that Mrs Fulton "owns seven (7) shares in the 6th Defendant Company" and/or "has only seven (7) shares in the 6th Defendant Company."

[50] It is not disputed that Mrs Fulton is the registered holder of 101 shares. What is disputed is whether she has the beneficial interest in all 101 shares[10]. The transfer document has not been called into question by Mrs Fulton, she has claimed however that the shareholders and directors of CCL have died and the last recorded filings for the company were made in 1993. Implicit in these averments is that these events have now rendered her the beneficial owner of the shares.

[51] The 1985 transfer document indicates that CCL is a company duly incorporated under the Companies Act of Jamaica. The document bears the company's seal. Does it hold an incorporated status under the current company law regime? Perhaps.

[52] In **Bardi Ltd v McDonald Milligen** [2018] JMCA Civ 33, Phillips JA said:

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[10] Is Mrs Fulton in a fiduciary position? See Bristol and West Building Society v Mothew [1998] Ch 1 per Millett LJ page 18

> *"[26]...The shareholder does not own the assets of a company. If the shareholder is the beneficial owner of all the shares in a company, the shareholder is still not beneficially entitled per se to the assets of the company."*

[53] Also, in **Earle Lewis and anor v Valley Slurry Seal Co and anor** [2012] JMCA App 39, Brooks JA (as he then was) stated as follows:

> *"[6] It is clear to me that the applicants have no basis to retain possession of the pavers. As directors of the company, they have no claim of right which they can properly assert over the pavers. In addition to that, even if they are correct in asserting that VSS Caribbean has acquired an interest in the pavers, Mr Earle Lewis, as a shareholder of that company, which is a separate legal entity, has no entitlement to possession of the company's property."*

[54] It is well known that a company (company A) may have shares in another company (company B). Those shares are company A's assets (or investment). Company A may have both the legal and beneficial interest in those assets or simply the beneficial interest from which it can derive an economic benefit. Bearing in mind the law relating to the ownership of assets of incorporated bodies (helpfully declared in the passages above), the death of the directors/shareholders does not necessarily mean that the beneficial interest has been vested in Mrs Fulton.

[55] She has stated that, to her knowledge, CCL's last recorded filings were in 1993. The 2nd defendant disputes this; even in the absence of this counter, it must be acknowledged that if a company goes through a voluntary or involuntary winding up, the objective will be to bring the business to an end and the company will cease to carry on its business, except as far as may be beneficial for the winding up. All debts payable on a contingency and all claims against the company, will be admissible against the company. The assets of the company will be identified and realised; thereafter the debts of the company will be paid out of proceeds of realisation based on priority; and any remaining balance may be given to the shareholders.

[56] Notably, the 2nd defendant's assertion that CCL is in good standing on the register of companies was not supported by documentary evidence. If she is correct, who are the company's current shareholders, (because it has not been disputed that the two shareholders have passed away)? Testacy/intestacy laws may assist with this enquiry. I need not be detained with that. I will simply say that as long as the company is still in existence and operating, its assets do not belong to the shareholders. If it has gone through a process to bring its operation to an end then the situation may change complexion.

[57] Yes, it is undisputed that Mrs Fulton owns at least seven (7) shares in the 6th defendant but she may in fact own more shares in the company (if there was any form of winding up and devolution of assets to shareholders [and thereafter inheritance]). The point is simply this: given the state of the pleadings and the evidence before this court, the true position in respect of Mrs Fulton's shareholding remains unclear. To determine whether her shareholding is in fact larger than what the 1st to 5th defendants contend requires a deeper investigation into issues concerning CCL.

[58] Furthermore, to address the elephant in the room, CCL (which could be an affected company) is not a party to these proceedings. Therefore, in this sea of uncertainty, I do not believe it can be said that the underlying facts or matters relevant to the declaration have been made out.[11]

[59] Though the existence of a transfer document was initially brought to the attention of the court, in support of the 1st to 5th defendants' case, Mrs Gibson Henlin, in arguing for the grant of summary judgment on behalf of said defendants, sought to question the document's validity. She pointed out that the transfer was done in 1985 which was some years before the 6th defendant was even a company. It must

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[11] See Hyacinth Gordon v Sidney Gordon [2015] JMCA Civ 39, per Brooks JA (as he then was), paragraph 20

however be acknowledged that in the defendants' pleadings, it is mentioned that Chas was incorporated as a limited liability company in 1934. There were various changes to the corporate structure but the implications as regards the arrangement between Mrs Fulton and CCL are unconfirmed.

[60] It must be emphasised that Learned Queen's Counsel, in her written submissions, has asked for a trial on these issues. The request for a trial of "the preliminary question" even appears in the notice of application for summary judgment. In her November 9 affidavit, Ms Silvera tried to discount the magnitude of the problem by asserting that "this question is discrete and can be dealt with separately."

The 6th defendant's summary judgment application

[61] The 6th defendant company, by way of a notice of application, has sought, among others, the following orders:

i. "Summary judgment be entered in favour of the 6th Defendant against the Claimant permitting the 6th Defendant to purchase the Claimant's shares in the 6th Defendant, CHAS E. Ramson Limited.

ii. That there be a trial of the preliminary question as to whether in all the circumstances of the Claim and Counterclaim an appropriate order is to permit the 6th Defendant or any of the Defendants to purchase the shares of the Claimant."

[62] The application was supported by the previously mentioned affidavit of Ms Silvera filed November 9, 2020. She filed a further affidavit (also previously mentioned).

[63] Mrs Fulton, by way of notice of intention to rely dated November 23, 2020, indicated that, with respect to the 6th defendant's application, she would be relying on her affidavits filed on July 24, 2020 and July 30, 2020 as well as the affidavit of Ketesha Bradley filed on November 12, 2020.

[64] In her November 9 affidavit Ms Silvera stated that this is one of several matters filed by Mrs Fulton that has been occupying the 6th defendant company since 2014. She averred that the 6th defendant is prejudiced by the prolonged continuation of these matters that has caused it to expend significant resources and expenses. She stated that Mrs Fulton has never participated in the affairs of the company and it was never anticipated or contemplated that she would do so. She further stated that it is not disputed by Mrs Fulton or the defendants that they are unable to work together. Ms Silvera indicated that she was reliably informed by her attorneys that irrespective of whether there is a finding of oppression, the order that achieves the best result in these circumstances is a buy-out order. She pointed out that the discussions regarding the purchase of Mrs Fulton's shares have been ongoing; accordingly, in 2016, the 6th defendant commissioned a valuation to determine the value of the shares for the purpose of making an offer to purchase Mrs Fulton's shares. The value of the shares at that time was between $776,000 and $1,112,000.00 per share. She stated that on receiving Mrs Fulton's offer to sell her shares, the valuation was updated to J $1, 335,000.00 per share. She asserted that there is no dispute that the 6th defendant is a family company and it is in the best interest of the company that Mrs Fulton's shares be bought by the 6th defendant or any of the other shareholders in accordance with the articles. She stated that the 6th defendant will be able to pay its debts even if it required to purchase Mrs Fulton's shares.

The 6th defendant's submissions

[65] Learned Queen's Counsel, Mr Braham, submitted that Mrs Fulton has no real prospect of successfully defending the counterclaim. It was pointed out that Mrs Fulton's July 24 application makes it clear that her defence of the defendant's counterclaim is doomed to fail as she is requesting orders in similar terms to those sought by the defendants.

[66] Mr Braham stated that as Mrs Fulton has made it blatantly clear that she desires to sell her stake in the company and that there has been a total breakdown in trust

and confidence between herself and the defendants, the prospect of succeeding in defending the defendant's counterclaim is fanciful.

[67] He submitted that given that the substantial facts relevant to the counterclaim are not disputed there is no real prospect of oral evidence affecting the court's assessment of the facts. Learned Queen's Counsel therefore contended that the trial of the issues on the counterclaim are an unnecessary waste of time and expense.

[68] Mr Braham further stated that the 6th defendant is of the view that if summary judgment is granted on the counterclaim then the litigation between the parties would be at an end because the sale of the Mrs Fulton's shares would mean that she would have no basis for seeking to become involved in the company's management or seeking a review of the company's accounts as a buy-out represents a clean break from the company. He stated that this is demonstrated by the fact that it is also a remedy where oppression or unfair prejudice in fact exists. He noted that such an order is generally granted as a final remedy.

[69] He contended that the Supreme Court has an inherent equitable jurisdiction and the court in exercising this jurisdiction may order the sale of Mrs Fulton's shares. It was submitted that this is an appropriate remedy in the circumstances. Reference was made to section 48 of the Judicature (Supreme Court) Act.

[70] It was submitted that, alternatively, the court should grant judgment on admission pursuant to Part 14.4 of the CPR as the 6th defendant has demonstrated that Mrs Fulton has in writing agreed that a breakdown of trust and confidence has occurred between the parties.

The claimant's submissions

[71] Miss Ewbank did not make separate submissions in respect of the 6th defendant's application for summary judgment.

Analysis

[72] The 6th defendant's application for summary judgment concerns its counterclaim which does not expressly dispute Mrs Fulton's shareholding. There is no mention of CCL in the company's pleadings and no declaration is sought in the counterclaim.

[73] Though the director defendants and the company are separate entities, and the court should examine the case bearing this in mind, the court also cannot turn a blind eye to the issues which have been raised by the 1st to 5th defendants. Certainly, they would affect how the court treats with the 6th defendant's request to purchase Mrs Fulton's shares. Even in the absence of a request for a declaration, the court has to be satisfied of the facts surrounding Mrs Fulton's shareholding. If a trust arrangement is in existence and Mrs Fulton is in a fiduciary position then it may be said that she may not act for her own benefit or the benefit of a third person without the informed consent of the beneficial owner.

[74] I wish to point out as well that Learned Queen's Counsel for the 6th defendant seems to be of the view that summary judgment on the counterclaim will result in the main claim falling away. I certainly take no joy in being the bearer of bad news but Mrs Fulton has made it quite clear that she intends to pursue the unlawful benefits claim. Even if a buy-out order is granted, she would, strictly speaking, be entitled under the Act, as a former member, to bring a claim for oppression. Section 212 (3) of the Act provides a definition for complainant and section 213A (3) outline a plethora of remedies that can be granted pursuant to an oppression claim. Therefore, contrary to the view held by Learned Queen's Counsel, summary judgment on the counterclaim will not bring these proceedings to an end.

[75] With respect to the argument for judgment on admission, rule 14.1 of the CPR deals with making an admission and rule 14.4 speaks to applying for judgment. There was no formal application for judgment on admission; it was simply put forward in the submissions. It will not be entertained.

In conclusion (the summary judgment applications)

[76] I will mention here that in many instances matters relating to companies are 'document-heavy' and issues are often readily capable of strict proof. This case has not matured to the disclosure stage but rule 8.9 of the CPR speaks to the claimant's duty to set out his or her case. Rule 8.9 (3) provides:

> *"The claim form[12] or the particulars of claim must identify or annex a copy of any document which the claimant considers is necessary to his or her case."*

[77] Rule 10.5 speaks to the defendant's duty to set out his or her case. 10.5 (6) reads:

> *"The defendant must identify in or annex to the defence any document which the defendant considers to be necessary to the defence."*

[78] In all the back and forth between the parties and the extensive pleadings filed, it is disappointing that documents which could assist were not annexed.

[79] Furthermore, rule 15.5 (1), which concerns summary judgment applications indicates that the applicant *must* file affidavit evidence in support with the application. It then states that the respondent who wishes to rely on evidence must also file an affidavit. Broadly speaking, the defendants have asked for certain orders but the court has not even been presented with the company's articles[13], a copy of its annual returns or its share register. Though CCL is a point of great dispute on the pleadings, no further documents were presented outside of the share transfer document.

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[12] The matter was commenced by way of claim form. See Re Caribbean Paper Recycling Company Limited (unreported), Supreme Court, Jamaica, Claim No 2005 HCV 01705, judgment delivered 7 September 2006, page 4.

[13] See for example the further amended defence and counterclaim of the 1st defendant filed November 13, 2020, paragraph 35 (c)

[80] The court is mindful that it should not embark on a mini trial but it will also not make far reaching orders blindly, or make vague orders which do not deal with matters sufficiently and/or justly and lead to the parties having to return to court to get legal certainty shortly after. A burden needs to be discharged before the court can act.

[81] Sinclair-Haynes JA's endorsement in **Seafood and Ting** warrants repeating, the learned judge of appeal affirmed that:

(a) All substantial facts relevant to the claimant's case, which are reasonably capable of being before the court, must be before the court.

(b) Those facts must be undisputed or there must be no reasonable prospect of successfully disputing them.

(c) There must be no real prospect of oral evidence affecting the court's assessment of the facts.

[82] It is my view that these criteria have not been satisfied in this case and summary judgment orders will not be granted. It has not been established, to the court's satisfaction, that Mrs Fulton has no real prospect of successfully disputing, at a trial, the facts which ground the counterclaims.

[83] I need not analyse in any great detail the submissions about whether the court can make the orders because the defendants' are not oppressed. I will simply say that counsel, in my view, would not have been on good ground with these submissions. It is not my understanding that the defendants are seeking orders pursuant to the Act. They are seeking to invoke the equitable jurisdiction of the court. Furthermore, section 213 A seeks to remedy oppression. It empowers the court, upon making a finding of oppression, to make certain orders. Even if a position is being advanced by the majority, examining the circumstances in the round, it seems to me that the court may consider it if it is a just solution for all concerned.

The claimant's application to purchase shares

[84] By way of notice of application, Mrs Fulton has sought the following interim orders:

i."The 1st Defendant, the 2nd Defendant and/or the 6th Defendant (or any combination of them) purchase the Claimant's 101 shares in 6th Defendant for the Jamaican Dollar equivalent of Thirty Two Thousand One Hundred and Seventy Eight United States Dollars and Twenty One Cents (US$32,178. 21) per ordinary share converted at the Bank of Jamaica's published selling rate for United States Dollars on the day before the payment of the purchase price.

ii. Alternatively, that the 1st Defendant sell his 102 ordinary shares in the 6th Defendant to the Claimant for the Jamaica Dollar equivalent of Thirty Two Thousand One Hundred and Seventy Eight United States Dollars and Twenty One Cents (US$32,178.21) per ordinary share converted at the Bank of Jamaica's published selling rate for United States Dollars on the day before the payment of the purchase price;

iii. In the further alternative, that the 2nd Defendant sell her 101 shares in the 6th Defendant to the Claimant for the Jamaican Dollar equivalent of Thirty Two Thousand One Hundred and Seventy Eight United States Dollars and Twenty One Cents (US$32, 178.21) per ordinary share converted at the Bank of Jamaica's published selling rate for United States Dollars on the day before the payment of the purchase price;

iv. That the 6th Defendant pay the costs incurred in connection with and arising from the sale and purchase of the shares, including the costs incurred by the Claimant in making the bona fide offer to the Defendants which has established the purchase price to be properly paid for these shares, such costs to be taxed or agreed.

v. Such further or other relief as this Honourable Court deems fit."

[85] Mrs Fulton stated that she is seeking the orders pursuant to section 213 A (3) (f) of the Act and rules 17.1 (1) and 17.1 (4) of the CPR. Her application was supported by her affidavit filed on July 24, 2020.

[86] In her affidavit, Mrs Fulton stated that at the end of 2019, she began exploring the possibility of purchasing the shares of the other shareholders. She stated that she was able to arrange financing, with Sygnus Capital Limited, to purchase all the shares in the 6th defendant at a price of US$32,178.21 per share. She then referenced her offer to purchase either the 2nd defendant's or the 1st defendant's shares. She stated that her buyout offer included an offer to buy the shares of all shareholders if they wished to sell. According to Mrs Fulton neither the 1st defendant nor the 2nd defendant responded to her offer. Mrs Fulton asserted that she is still prepared to purchase all the shares owned by the defendants (or such amount as would give her a controlling interest) on the terms set out in the buy-out offer. She further stated that she is of the view that the 6th defendant is in a position to purchase her 101 shares out of its reserves.

[87] Notably, by way of notices of intention to rely dated November 6, 2020 and January 11, 2021, the 1st to 5th defendants indicated that, with respect to this application, they would be relying on the affidavit of Kathryn Silvera filed on November 9, 2020 and the further affidavit of Ms Silvera filed on January 7, 2021 .

The claimant's submissions

[88] Learned counsel began her submissions by highlighting four critical facts which, according to her are relevant to the application. They are as follows:

i. Mrs Fulton is a minority shareholder (25.25%) in the company and the defendant shareholders are together the majority shareholders.

ii. The defendant shareholders are 5 of the 6 directors of the company.

iii. There has been a complete breakdown of trust and confidence and the relationship between the parties.

iv. It would be appropriate for the court to make an order at this stage of the proceedings for the defendant shareholders or some of them to purchase Mrs Fulton's shares in the company.

[89] Whether the last mentioned is a fact that is debatable.

[90] Learned counsel pointed out that the parties do not agree on the other issues in the case.

[91] She contended that the only disagreement in respect of the last mentioned 'fact' is as to the price to be paid for the shares. Mrs Fulton is agreeable to accept approximately US $32,000.00 per share (or approximately J$4,500,000.000 per share) and the defendant shareholders propose approximately J$ 1,300,000.00 per share.

[92] She indicated that the authorities suggest that in determining the price at which one shareholder should acquire the shares of another, the court should seek to ascertain the market value of the shares.

The 1st to 5th defendants' submissions

[93] Learned Queen's Counsel stated that the court is empowered to make a share buy-out offer by virtue of section 213 A (3) (f) of the Act. She observed that the courts have found that there is a sufficient breakdown of confidence between the parties to warrant a share buy-out where:

i. the majority has made it clear that it no longer wishes to work with the minority and the minority does not have any particular skills to bring to a closely held corporation; and

ii. personal relationships between the parties in a closely held corporation have deteriorated to the point that continued co-operation is not possible. Learned Queen's Counsel cited the case of **Wright v Donald S Montgomery Holdings Ltd** (1998) 39 B.L.R (2nd) 266.

[94] In the case at bar[14], she stated that a buy-out order is suitable as there are irreconcilable differences between the shareholders. She contended that it is unlikely that Mrs Fulton will be appointed to the Board of Directors as she does not have the relevant skills set having regard to the nature of the company's business. Mrs Gibson Henlin pointed out that Mrs Fulton has agreed that it is untenable to work with the defendants in the company and that their personal relationships have deteriorated to the point that continued operation is not possible.

[95] In all the circumstances, both parties are *ad idem*[15] that the appropriate order in all the circumstances is for a buyout order to be made, particularly that any or all of the defendants purchase Mrs Fulton's shares.

[96] In addressing who should buy whose shares, Mrs Gibson Henlin stated that ordinarily, the party majority shareholder would purchase the minority shareholder's shares. She pointed out that in the instant case both parties have indicated an intention to buy. In such instances the court is required to make an order that is most equitable in the circumstances.

[97] Learned Queen's Counsel pointed out that Mrs Fulton has never participated in the business. In addition, she stated that her age is a factor to be taken into account. According to Mrs Gibson Henlin the reality is that the defendants have been in the business and they have had a long acquaintance with the business and their lives and livelihood are built around it. Therefore, it seems fair that in determining who should buy in this case, the court should properly take these factors into account. The court should consider an order that is in the best interest of the company which is to allow the company to be managed by experienced and competent management.

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[14] Legal terminology which means a case presently before the court; a case under argument
[15] Latin phrase which means 'at a meeting of minds' or 'in agreement'

[98] It was argued that Mrs Fulton does not have the same sentimental attachment to the business as the defendants and her offer did not include the minority shareholders who she included in her category of persons with whom she is unable to work. It was contended that the court should also observe that Sygnus is a venture capitalist, as its name suggests, its involvement further suggests that Mrs Fulton will not be keeping the shares unlike the defendants who are vested in the business.

[99] It was submitted that it is therefore appropriate, in the circumstances, for the defendants to purchase Mrs Fulton's shares. It was argued that Mrs Fulton has not put forward any special considerations that would justify a deviation from the ordinary course that the majority purchase the minority's shares.

[100] Learned Queen's Counsel also pointed out that a company possesses the power to purchase its own shares under section 58 of the Act and based on the evidence is also a better candidate for the purchase of Mrs Fulton's shares.

[101] In respect of the valuation of the shares, Mrs Gibson Henlin submitted that Mrs Fulton's valuation of US$32, 178.21 is not supported by any valuation. She pointed out that Mrs Fulton did not provide a valuation report. She then informed the court that a valuation was done by the 6th defendant and a valuation prepared by an independent chartered accountant (an expert) was submitted to support the valuation of the shares of the 6th defendant.

[102] It was contended that it is in the best interest of the company and the fair resolution of the matter that the valuation be determined by an expert. Mrs Gibson Henlin stated that questions can be put to the expert by Mrs Fulton.

[103] Accordingly, the court should accept the valuation of the 6th defendant's shares and order that the purchase be done in accordance with the said valuation.

The 6th defendant's submissions

[104] Mr Braham QC contended that the application is a mere concession of the orders sought on the counterclaim.

[105] It was pointed out that Mrs Fulton's basis for her request for orders are found in the Act and the Civil Procedure Rules. Learned Queen's Counsel submitted that though Mrs Fulton has sought these orders on an interim basis the provisions on which she relies makes it clear that the remedy sought is final.

[106] Additionally, section 213 A (3) (f) of the Act on which she relies provides a remedy for oppression and unfair prejudice. It was stated that under this section, Mrs Fulton could obtain a remedy if there is a finding of oppression or unfair prejudice. He stated that there has been no finding of oppression or unfair prejudice and so there is no basis on which this order can be granted. Learned Queen's Counsel sited the case of **Re BCE Inc v 1976 Debentures** 2008 SCR as helpful in outlining the test for oppression.

[107] Mr Braham submitted that in assessing whether there is oppression or unfair prejudice the court must embark on a detailed analysis which starts with considering expectations and whether those expectations have been breached. In the end a final remedy is a buy-out. It was submitted that such an analysis requires evidence of the parties at trial and therefore a disposition on this issue is not suitable on an interim application as Mrs Fulton has proposed. It was further submitted that courts have interpreted the remedy of a buy out to be one available after the consideration of a claim. Mr Braham cited the case of **Wann v Birkinshaw** [2017] EWCA Civ 84.

[108] It was further submitted that the interim order sought by Mrs Fulton is not supported by the CPR 17.1 (1). Mr Braham contended that shares are not of a perishable nature and Mrs Fulton has proffered no reason why it is desirable to sell the shares quickly. It was submitted that as it concerns interim remedies, they

are normally made only in exceptional circumstances which are not found in this case.

[109] Mrs Braham further contended that an order that empowers Mrs Fulton to purchase the shares of the other shareholders is not in the best interest of the company as she has no experience working in the company and has no valuable experience to bring to it. It was submitted that the court should consider an order that is in the best interest of the company which is to allow the company to be managed by experienced and competent management.

[110] It was submitted that the court should therefore dismiss Mrs Fulton's application.

Analysis

[111] Mrs Fulton has sought a buy-out order as an interim remedy pursuant to the Act and part 17 of the CPR. In the circumstances of this case, the nature of a buy-out remedy does not fit neatly within the categorisation of an interim order. It does have an element of finality to it and the court is not minded to make such an order pursuant to section 213 A (3) of the Act without hearing the application for oppression and arriving at a conclusion.[16]Part 17 of the CPR does not assist.

[112] In my view, whilst the court may be empowered to grant the remedy pursuant to section 48 (g) of the Judicature (Supreme Court) Act, it will not do so. Mrs Fulton's application to have her shares purchased, does not escape the deficiency highlighted in the summary judgment applications.

[113] It is necessary that the factual context underpinning these applications be sufficiently clear and precise as to enable the parties concerned to be fully informed of their entitlements. Even a cursory look at the pleadings will reveal that

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[16] See Liew Kit Fah & others v Koh Keng Chew & others 2019 SGCA 78, para 23. The statute is somewhat different but in my view our statute is worded in such a way because it accommodates interim relief.

if vague orders are made, the parties will likely return to court shortly after. There has to be some legal certainty for the parties.

[114] I will mention, in passing, that when the words 'liberty to apply' are inserted in an order it is liberty to apply to supplement the order as a matter of working it out in unforeseen circumstances. As a general practice liberty to apply is reserved in such orders so that the parties might be able to come back to the court in the event of unforeseen or unexpected contingencies occurring so that an arrangement could be made to fit any new circumstances that have arisen. So, the court, when making orders, does strive to ensure legal certainty and completeness.

[115] With respect to Mrs Fulton's request to have the shares of the 1st defendant or the 2nd defendant sold to her, I am minded to agree with counsel for the defendants that it is not in the best interest of the parties to adopt this course. I hasten to add that I was not greatly moved by the views expressed about sentimentality or her competence. The challenge here is sanctioning a solution that is suitable in the context of family litigation. Mrs Fulton has asked, by way of this application, to purchase the shares of one of the director defendants (either the 1st or the 2nd) but it is evident that she is not on the best of terms with the other director defendants. In her July 24 affidavit, at paragraph 12, Mrs Fulton does state that she is still prepared to purchase *all* of the shares owned by the defendants; her application itself does not convey this. It is not lost on me that the director defendants work for the company. Are they all prepared to step away (as shareholders, directors and employees)? If not, will a harmonious relationship exist?

[116] Additionally, Mrs Fulton has sought funding to purchase the shares which gives rise to concerns about security interest and the implications in the event of any default.

[117] It is for these reasons that I will refuse this application.

The claimant's application to appoint an independent chartered accountant

[118] Mrs Fulton has sought the following orders by way of notice of application:

i."The claimant be entitled to appoint a qualified and independent Chartered Accountant, namely Caydion Campbell, (the "accountant") to review the financial and other relevant documents of the 6th defendant in relation to the matters set out… below and to prepare a report on these matters (the "Accounting Report"), the Accounting Report to be submitted to the claimant within three months of the date of this Order:

The travel expenses for the 1st, 2nd, 3rd, 4th and 5th defendants and/or members of their families which were paid for by the 6th defendant for the period January 2008 to the present date.

The personal bills/and or expenses (including but not limited to cellular telephone bills, general utilities, personal subscriptions and memberships) for the 1st, 2nd, 3rd, 4th and 5th defendants and/or members of their families which were paid for by the 6th defendant for the period January 2008 to the present date.

The payments made for personal domestic services provided to the 1st, 2nd, 3rd, 4th and 5th defendants and/or members of their families, which were paid for by the 6th defendant for the period January 2008 to the present date.

The net effect of any repricing which should take place if appropriate arm's length considerations are applied to the contracts and business relationships between the 6th defendant and Caribbean Foods Limited from January 2008 to the present date.

The income and expenditure related to the Villa Coconuts from January 1, 2008 to the present date, including the dates, periods and apparent purpose of occupation of Villa Coconuts.

ii. The defendants be required to supply the accountant with all financial statements and other accounting and banking records of the 6th defendant for the years 2008 to present date to enable him to carry out the review and audit necessary to prepare the accounting report.

iii. The 6th defendant pay the professional fees of the accountant, such payment to be made within 14 days of presentation of an invoice.

iv. The defendants pay the costs of this application, or alternatively the costs of this application be costs in the claim.

v. Such further or other relief as this Honourable Court deems fit.

[119] She sought the orders pursuant to sections 213 A (3) (i) and 213 A (3) (m) of the Act and rule 17.1 (1) of the CPR.

[120] Her application was supported by her affidavit filed on July 30, 2020. In her affidavit Mrs Fulton stated that the objective of the accounting enquiry is to obtain information relevant to the claim, both in terms of quantum and liability, as well as assessing whether any further protective action may be necessary to protect her interest and/or those of the 6th defendant. According to her, the accounting enquiry is necessary because the defendants have ignored her requests for information which is necessary to formulate her claims; information to which she is entitled as a significant shareholder of the 6th defendant.

[121] She stated that she is seeking, based on the accounting enquiry, an accounting report detailing the travel expenses of the defendants and the members of their family, the payment of personal bills, and the payment of domestic staff and services for the defendants and members of their families. According to Mrs Fulton, these appear to be expenses which were not properly incurred in the trade or business. Information is also being sought with respect to the use of the villa Coconuts and the net effect of any repricing which should take place if appropriate

arm's length considerations are applied to the contracts and business relationships between the 6th defendant and Caribbean Foods Limited.

[122] Mrs Fulton stated that she believed that the defendants and their families have for many years funded personal travel and family vacations out of the resources of the 6th defendant. She referenced the audited financial statements of the company and stated that they recorded extraordinarily high levels of expenses under the heading 'Travel' relative to companies in the same industry with similar turnover.

[123] She further stated that she discovered from information in legal proceedings involving the 3rd defendant and his ex-wife that the telephone bills and other personal expenses of his ex-wife were being paid by the 6th defendant. She also discovered that the 6th defendant pays for the domestic workers of all the defendants and accounts for these individuals as "casual workers" in the books of the 6th defendant. She stated that it is necessary to establish the extent to which corporate resources are being used to fund the lives of the defendants and their families, to her exclusion and significant prejudice.

[124] Mrs Fulton divulged that CFL is a related party to the 6th defendant. It is controlled by the 1st defendant; the 2nd defendant is also a shareholder. She asserted that a commercial relationship exists between the two companies. Mrs Fulton revealed that she has for a long time been concerned that the affairs of CFL and the 6th defendant have not been operated at arm's length with the consequence that the 6th defendant is absorbing expenses properly attributed to CFL. She stated that her requests for information relating to the commercial and financial relationships between the two companies have been ignored. She further stated that her request for information concerning Coconuts have also been ignored. She asked that the 6th defendant fund the cost of the accounting enquiry because it is in the interest of the 6th defendant that these issues be resolved. She stated that she has proposed that Mr Campbell undertake the enquiry because he is competent to do so.

[125] By way of notices of intention to rely dated November 6, 2020 and January 11, 2021, the 1st to 5th defendants indicated that, with respect to this application, they would be relying on the affidavit of Kathryn Silvera filed on November 9, 2020 and the further affidavit of Ms Silvera filed on January 7, 2021 .

The claimant's submissions

[126] Miss Ewbank stated that the application is being made pursuant to the statutory powers of the court under section 213 A (3) of the Act to make any interim order it thinks fit, specifically to direct an investigation and to require a company to produce financial statements or accounting in such forms as the court may determine.

[127] In terms of the scope of the power to direct an interim investigation learned counsel cited the Canadian cases of **Argo Protective Coatings Inc, Re** 2006 NSSC 283.

[128] It was submitted that overall, in order to obtain an interim investigation order, the applicant must establish that the evidence supports a reasonable inference or the appearance that the acts or conduct complained of are likely true.

[129] She then pointed out that Mrs Fulton's affidavit evidence in support of the accounting application, which has not been disputed by the defendants, establishes that she has not been provided with access to the relevant financial information, despite repeated requests in writing.

[130] Learned counsel stated that the Court of Appeal for Saskatchewan in **Moosomin First Nation v 101061721 Saskatchewan Inc** 2010 SKCA 110 affirmed the applicable threshold for interim orders under the equivalent statutory provision as a strong *prima facie*[17] case, which is less stringent than the usual balance of probabilities standard.

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[17] Latin phrase meaning "at first appearance"

[131] Miss Ewbank also cited the case of **HSB Capital Canada Inc v First Mortgage Alberta Fund (V) Inc** 1999 ABQB 406 where it was held that a lack of disclosure raises a strong *prima facie* case of unfair disregard of the investors' interests.

[132] It was submitted that the supporting affidavit evidence (all undisputed by the defendants) satisfies the requisite threshold for the grant of an interim investigation order as:

i. there is cogent evidence of consistent requests by Mrs Fulton and corresponding failure to provide financial information on the part of the defendants;

ii. extraordinarily high levels of expenses as stated under the heading 'travel' in the company's audited accounts for numerous years;

iii. an affidavit of the 3rd defendant from other legal proceedings includes admissions that certain personal expenses were paid by the company;

iv. there is evidence of certain discrepancies between the audited financial statements of the company and those of a related company, Caribbean Foods Limited; and

v. there is evidence of a company villa being used for personal purposes.

[133] It was argued that the scope of the investigation is limited to the above issues and is therefore not a fishing expedition.

The 1st to 5th defendants' submissions

[134] Mrs Gibson Henlin cited the cases of **Cigarette Company of Jamaica Ltd v The Commissioner of Taxpayer Audit and Assessment** Revenue Appeal No 1 of 2005, **Cumins et al v Silveran Oilfield Services Limited** 2007 SKQB 228 and **Trackcom Systems Inc v Trackcom Systems International** 2014 QCCA 1136 as being relevant to this application.

[135] Learned Queen's Counsel stated that Mrs Fulton does not allege fraud as the basis for the appointment of the chartered accountant; it was argued that her application is in substance an attempt to utilise the resources of the 6th defendant in order to prove her case. It was pointed out that Mrs Fulton has done this in circumstances where the parties have not yet proceeded to disclosure where documents would be provided by all parties. Further, no basis has been provided for not waiting on discovery or utilising the procedure set out in Part 32 of the CPR if necessary.

[136] Mrs Gibson Henlin stated that Mrs Fulton's assertion that she has requested financial documents that have not been provided to her is disputed on the pleadings. Further, Mrs Fulton has financial documents in her possession.

[137] Though it was acknowledged that as a shareholder, Mrs Fulton is entitled to receive the audited financial statements of the 6th defendant, it was contended that Mrs Fulton has not established a *prima facie* right to the accounting that she has requested.

[138] It was pointed out that Mrs Fulton is asking for a review of the finances from 2008 to present, but, she is unable to identify any credible evidence of fraud or unlawful benefits that she says exists. The basis of Mrs Fulton's application is that she believes that it exists.

[139] Learned Queen's Counsel stated that Mrs Fulton has repeatedly admitted that her relationship with the defendants is strained for at least the past twenty years. This fact raises the strong inference that the purpose of her claim and the request for accounting information and investigation is fuelled by her personal vendetta against the defendants rather than the interest of the 6th defendant.

[140] It was argued that Mrs Fulton has also failed to show any urgency or that she will suffer irreparable harm if the order for the appointment of the accountant is not granted. Mrs Gibson Henlin stated that there is no evidence to support dissipation

of the 6th defendant's assets and the balance of convenience does not favour the granting of the order sought.

[141] It was submitted that in deciding whether to grant the order for the independent accountant, the court should consider the cost of ordering the investigation versus the benefit that would purportedly be gained from the exercise.

[142] Mrs Gibson Henlin contended that it is unreasonable and disproportionate for the court to order an investigation into the financial affairs of a multi-million dollar company on an unproven allegation that a domestic worker was paid as a casual worker.

[143] Learned Queen's Counsel asked that Mrs Fulton's application for appointment of accountant be refused with cost to the defendants.

The 6th defendant's submissions

[144] Mr Braham stated that although Mrs Fulton has sought a remedy that is final in nature she also seeks an accounting. He asked: to what end? Learned Queen's Counsel contended that if the shares of the 6th defendant are to be valued for the purposes of a buyout order there is no correlation for the assumption that an accounting of sums allegedly paid for travel and domestic services impacts the valuation of the company.

[145] It was submitted that it is therefore unjust to ask the 6th defendant to participate in an exercise that bears no end for which it is asked to shoulder a financial burden. Mr Braham submitted that the court does not act in vain.

[146] Learned Queen's Counsel sited the case of **Cigarette Company of Jamaica Limited v The Commissioner of Taxpayer Audit and Assessment** Revenue Appeal No 1 of 2005 and stated that orders relating to independent financial accountants are normally made where an investigation is needed in order to establish evidence relating to civil proceedings.

[147] It was submitted that the 6th defendant has disclosed its financials to Mrs Fulton. It was further submitted that she has received financials for the period 2013-2019. Mr Braham argued that to supply accounts dating back to 2008 for an accounting by a chartered accountant for which the 6th defendant must bear the cost is unjust. He stated that Mrs Fulton must bear in mind the consideration of whether potential causes of action relating to events dating back to 2008 would in any event be statute barred. Therefore, he said, the question arises again, to what end would an accounting impact the buyout order which Mrs Fulton seeks? It was submitted that such an order should not be granted as the nature of the order is in pursuance of litigation whilst a buy out order is aimed to bring an end to litigation. It was submitted that the application ought to be dismissed.

Analysis

[148] Section 213 A of the Act[18] provides in part:

> *"213 A (1) A complainant may apply to the Court for an order under this section.*
>
> *(2) If upon the application under subsection (1), the Court is satisfied that in respect of a company or any of its affiliates-*
>
> > *(a) any act or omission of the company or any of its affiliates effects a result;*
> >
> > *(b) the business or affairs of the company or any of its affiliates are or have been carried on or conducted in a manner; or*
> >
> > *(c) the powers of the directors of the company or any of its affiliates are or have been exercised in a manner,*
>
> *that is oppressive or unfairly prejudicial to or unfairly disregards the interest of, any shareholder or debenture holder, creditor, director or*

[18] See the Companies (Amendment) Act, 2017

officer of the company, the Court may make an order to rectify the matters complained of.

(3) The Court may, in connection with an application under this section make any interim or final order it thinks fit, including an order-

…

(i) requiring a company, within the time specified by the Court, to produce to the Court or an interested person, financial statements or an accounting in such forms as the Court may determine;

…

(m) directing an investigation to be made"

[149] I begin with the view that what is requested is interim relief, that is, relief without hearing the substantive application on the merits. When an applicant seeks interim relief a preliminary assessment must, however, be made of the claim.

[150] In **Argo Protective Coatings Inc., Re**, 2006 NSSC 283, a case from the Supreme Court of Nova Scotia, Warner J, in considering the onus on the applicant in an interim application, said:

> *"[56] The applicant must establish, and the Court must find, before making an interim order for an investigation, that the evidence tendered by the applicant, supports a reasonable inference that the acts or conduct complained of are, on their face, likely true. Said differently, that the evidence has the appearance of proving the facts though it may not constitute certain proof. The fact that the allegation is denied is not, per se, sufficient to defeat the inference."*

[151] Warner J was addressing an interim order for an investigation but his pronouncement may, in my judgment, be applicable in respect of other interim relief. It seems to me though that the acts or conduct complained of should be assessed against the background of the oppression claim. I will partially adopt the submission of Mr Braham that a party who desires interim relief pursuant to section

213 A of the Act must provide some evidence to support his or her contention of oppression or unfair prejudice.

[152] In the text Commonwealth Caribbean Company Law by Andrew Burgess, the learned author, on pages 333 to 334, noted the following:

> *"The provisions in the Acts in Anguilla, Antigua, the Bahamas….Jamaica….expressly stipulate that the oppression remedy is available where there is conduct that is oppressive or unfairly prejudicial to, or that unfairly disregards the interests of shareholders or debenture-holders, creditors, directors or officers of the company. There are therefore three categories of conduct that can give rise to the oppression remedy. These are 'oppressive' conduct, 'unfairly prejudicial' conduct and conduct which 'unfairly disregards' the interests of shareholders or debenture-holders, creditors, directors or officers of the company. Each of these categories introduces a separate category of conduct, which may overlap in any case, but each of which, if proven, can constitute oppression as encoded in the provisions of these Acts."*

[153] The learned author then addresses the different categories. In dealing with oppressive conduct he implicitly endorsed the interpretation of oppressive conduct as burdensome, harsh and wrongful conduct involving an invasion of a legal right.

[154] He then turned to unfairly prejudicial conduct. Mr Burgess said that unfair prejudice is a less stringent concept than oppression. He noted that the courts have held that the conduct complained of must be prejudicial in the sense of causing prejudice or harm to the relevant interests of the shareholder (or, presumably, other complainant) and that as such both unfairness and prejudice must be proved. The learned author stated that in deciding whether conduct is unfairly prejudicial the court may take a number of factors into consideration. Additionally, he said that cases in which conduct is held to be unfairly prejudicial tend to fall into certain well-defined categories. One such category is where a shareholder is excluded from management or removed from the board.

[155] With respect to conduct which unfairly disregards, Mr Burgess pointed out that in **Stech v Davies** (1987) 53 AltaLR (2d) 373 Alta QB, the term was interpreted to mean 'unjustly or without cause to pay no attention to, ignore or treat as of no importance the interests of the security holders, creditors, directors or officers.' He noted that this too was a less stringent concept than oppression.

[156] In **Galantis v Alexiou and another** [2019] UKPC 15, the Privy Council considered various provisions of the 1992 Bahamian Companies Act. Some of the provisions are similar to our provisions. Lord Lloyd-Jones said:

> *"The nature of remedial orders under section 280*
>
> *31. In BCE v 1976 Debentureholders [2008] 3 SCR 560, a case on section 241 of the Canada Business Corporations Act 1985, the Supreme Court of Canada explained (at paras 45, 58, 59), that, unlike a derivative action which is aimed at enforcing a right of the corporation itself, the oppression remedy focuses on harm to the legal and equitable interests of stakeholders affected by oppressive acts of a corporation or its directors. It is an equitable remedy, seeking to ensure fairness. "It gives a court broad, equitable jurisdiction to enforce not just what is legal but what is fair" (para 58). What is just and equitable is fact specific and judged by the reasonable expectations of stakeholders in the context and in regard to the relationships at play. The Supreme Court explained (at paras 68, 72, 89) that it involves a dual inquiry. First, does the evidence support the reasonable expectation asserted by the claimant? Secondly, does the evidence establish that the reasonable expectation was violated by conduct falling within the terms "oppression", "unfair prejudice" or "unfair disregard"?"*

[157] Mrs Fulton by way of her pleadings and affidavits filed July 30, 2020 and January 20, 2021, outlined her efforts to obtain information about the matters previously mentioned. She exhibited various letters written to the 6th defendant and KPMG. She mentioned the payment of personal expenses from corporate resources and exhibited documents to her affidavit which she contended evidences this improper use of corporate resources. Further, she referred to a long standing no dividend policy and the rejection of a resolution that her daughter be appointed to the Board

of Directors. The affidavit of Marc Ian Williams filed January 20, 2021, indicated that Mr Williams attended Chas' annual general meetings in 2017, 2018 and 2019 as a proxy for Mrs Fulton. He stated that the directors/executives were not very specific or very direct in providing information pertaining to the affairs of Chas.

[158] I have noted the responses in the defendants' pleadings and the affidavit evidence upon which they rely. Paragraphs 7, 8, 10 and 11 of the affidavit of Ms Silvera filed January 7, 2021 are particularly relevant. These paragraphs divulge that Mrs Fulton has been provided with minutes and financial statements. It is clear that Mrs Fulton has received audited financial statements, these were referenced in her affidavit in respect of the travelling expenses.

[159] Taking it all into account, I have found that the evidence tendered by Mrs Fulton, supports a reasonable inference that the actions of oppression (or unfair prejudice) which she complains of are, on their face, likely true. There was no robust counter regarding the exhibit attached to Mrs Fulton's affidavit in support of her allegation that corporate resources are being used for the payment of personal expenses. Furthermore, it will be remembered that Mr Burgess, in his text, indicated that one category of unfairly prejudicial conduct is where a shareholder is excluded from management.

[160] Is that the end of the matter? I think not.

[161] In **Trackcom Systems International Inc. c. Trackcom Systems Inc**. 2014 QCCA 1136 (CanLII), the Court of Appeal of Quebec considered section 241 of the Canada Business Corporations Act ('CBCA'), which deals with the oppression remedy; it is similar to our provision.

[162] Gascon JA made some helpful pronouncements. The following appears in his judgment:

> *"2.* ***The applicable test for the issuance of interim orders in oppression remedies***

> *[37] Here, the trial judge was right in stating that the interim orders sought under section 241 CBCA were subject to the criteria applicable to the issuance of provisional interlocutory injunctions or safeguard orders. The Court so stated in 176283 Canada inc. c. St-Germain.* ***The criteria include a prima facie right, urgency, an irreparable harm and a balance of convenience that favours the party seeking the remedy****." (Emphasis added)*

[163] He continued:

> *"[41] It is recognized that one of the most pernicious forms of oppression is the denial of financial information to stakeholders. Martel, a well-recognized author in corporate law in this province, writes that a shareholder is entitled to audited financial statements even if the corporation never issued any. The refusal of a corporation to deliver audited financial statements has been considered as a conduct that may amount to oppression. Subsection 155(1) CBCA indeed requires the directors of a corporation to provide the shareholders with "comparative financial statements as prescribed"…*
>
> *[42] Similarly, Martel emphasizes that the following acts may amount to oppression given the circumstances: the failure to convene shareholders' and directors' meetings, the alleged wrongful appropriation of assets or funds to the benefit of a majority shareholder and the payment to a majority shareholder of excessive or potentially unjustified management fees."*

[164] The principles espoused by Gascon JA for the grant of interim relief are not unsound; generally speaking, however, given the plethora of remedies which can be granted and the differences in their nature there may be a need for the relaxation of certain criterion in specific circumstances[19].

[165] That being acknowledged, Mrs Fulton has not established urgency, or irreparable harm if the appointment of a chartered accountant does not happen at this stage.

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[19] See Murphy v Cahill 2013 ABQB 335

An investigation

[166] It is noteworthy that the submissions advanced, on behalf of Mrs Fulton, focused a great deal on an investigation. Importantly Gascon JA also considered the investigation order that had been made by the lower court judge: The following appears in his judgment:

> *"[48]…While I agree that orders should be issued with respect to the preparation of the audited financial statements of TSI and the respondents' access to information pertaining to the management fees charged to TSI and the transfer of assets or funds between TSI and its affiliates, the investigation order should be set aside.* ***It should be replaced by orders that fall short of an investigation under part XIX of the CBCA****, while still properly addressing the issues validly raised.*
>
> *[49] To order an investigation into the affairs of TSI, the judge relied on paragraph* ***241 (3) (m) CBCA****" (Emphasis added)*

[167] The highlighted portions are significant because they point to specific parts and sections of the CBCA. There is a specific part of the CBCA that deals with an investigation. It is part XIX. Before outlining it, it must be mentioned that section 241 (3) (m) provides as follows:

> *"In connection with an application under this section [application to court re oppression], the court may make any interim or final order it thinks fit including, without limiting the generality of the foregoing,…*
>
> *(m) an order directing an investigation under Part XIX to be made"*

[168] Sections 229 to 237 can be found in Part XIX. Section 229 outlines a number of grounds upon which an application for an investigation can be pursued. Fraud is but one ground. Oppressive conduct is another. It reads:

> *"229 (1) A security holder or the Director may apply, ex parte or on such notice as the court may require, to a court having jurisdiction in the place where the corporation has its registered office for an order*

directing an investigation to be made of the corporation and any of its affiliated corporations.

Grounds

(2) If, on an application under subsection (1), it appears to the court that

(a) the business of the corporation or any of its affiliates is or has been carried on with intent to defraud any person,

(b) ***the business or affairs of the corporation or any of its affiliates are or have been carried on or conducted, or the powers of the directors are or have been exercised in a manner that is oppressive or unfairly prejudicial to or that unfairly disregards the interests of a security holder****,*

(c) the corporation or any of its affiliates was formed for a fraudulent or unlawful purpose or is to be dissolved for a fraudulent or unlawful purpose, or

(d) persons concerned with the formation, business or affairs of the corporation or any of its affiliates have in connection therewith acted fraudulently or dishonestly,

the court may order an investigation to be made of the corporation and any of its affiliated corporations." (Emphasis supplied)

[169] The Jamaican Act is somewhat different in this respect. It does have inspection provisions which deal with investigations but those provisions relate to the exercise of Ministerial power.

[170] Notwithstanding these differences, I am of the view that many of Gascon JA's observations are useful. He said:

"[51] Martel characterizes the investigation ordered pursuant to these provisions as a drastic and exceptional remedy. There are indeed few judgments rendered throughout the years that have ordered investigations under these sections. There are many reasons for that. These investigations may easily prove to be very costly if not properly circumscribed from the outset. It goes without

> *saying that they should not amount to an authorisation to carry out fishing expeditions. In that regard, the case law has indicated that these investigations exist to enquire into facts, not to assess rights. They should not be ordered to assist parties to prepare for litigation. In fact, once the report of an inspector appointed to carry out an investigation pursuant to these sections is filed, its content may still be contradicted in subsequent litigation and the facts that form the basis of the report must still be validly proven if litigation develops afterwards.*
>
> *[52]… In my view, it is fair to say that, before ordering such an investigation, the judge must apply a three-prong test.*
>
> *[53] First, the judge must be satisfied that the application is made by a security holder or the Director.*
>
> *[54] Second, the judge must be satisfied that one of the situation listed in subsection 229(2) has been established prima facie (in particular, the carrying on of the business of the corporation fraudulently or dishonestly, or with the intent to defraud, or for a fraudulent or unlawful purpose, or in a manner that is oppressive or unfairly prejudicial, or that unfairly disregards the interest of a security holder).*
>
> *[55] Third, the judge must consider the appropriateness of the investigation, bearing in mind its usefulness and reasonableness under the circumstances, with due consideration to its expected costs and benefits."*

[171] The learned judge of appeal emphasised the importance of assessing whether other less drastic and more reasonable means were available to achieve similar results. He said:

> *"[58]…As the act uses the term "may", it denotes a measure of discretion. A judge must therefore assess whether or not an order for an investigation is an appropriate remedy. Amongst the criteria to consider are the existence or not of better or equally good other remedies by which the same goals can be accomplished and whether other less expensive and as effective means exist to achieve a similar result."*

[172] The learned judge made further statements which I believe ought to be quoted extensively. He said:

> *"[61] In the investigation order, Ernst & Young (Caroline Phisel) was called upon to conduct a wide investigation of the affairs of TSI since 2009 without a budget or even an estimate. The only information available in a letter filed in the record was that professionals at this firm worked at hourly rates ranging from $200 to $500. While there was no budget or estimate provided, the majority shareholder Kavveri was still ordered to pay for the costs of the investigation, whatever the amount. The respondents were, in essence, ordered to issue a blank cheque to that end.*
>
> *[62] In an era where all participants in the judicial system should be concerned with the control of the costs of litigation, access to justice and principles of proportionality,* ***it is not acceptable in my view for a judge to so order an investigation at the cost of the opposing party with no idea as to its real or expected exposure****.*
>
> *[63]* ***Before granting it, the judge should have insisted upon an evaluation of the cost of the investigation and the order should have included precisions on the financial parameters of the mandate. While he properly identified the inspector appointed once satisfied with her credentials, he should have also required, at the very least, a budget, with clear indications as to the precise hourly rates, the timing of any invoicing, the necessity or not for advances, and a maximum amount after which a return to the authorizing judge for further approval would be required. There is simply no evidence in the record in this respect****." (Emphasis added)*

[173] He continued:

> *"[64] As well, while the investigation order circumscribed, to some extent, the mandate and rightly fixed a deadline for the filing of a report, clearer modalities with respect to access to documents should have been set forth considering the peculiar context in which some of the affiliates' operations were being conducted in Ontario and even abroad. These modalities are unfortunately absent in the*

order as issued and would have triggered large and unrestricted expenses.

[65] Besides this, and perhaps more importantly, had the judge considered the other means available to achieve the investigation's objectives, it would have been obvious that there were simpler and less expensive remedies, equally good if not better, by which the respondents could attain the same goals and obtain the same information.

[66] With respect to the financial statements of TSI, paragraph 241(3)(i) CBCA specifically provides for the power of the court to order a corporation to produce the financial statements required by section 155. Simply put, there was no need to order an investigation under part XIX for that purpose. A separate order for their preparation would have sufficed.

[67] As stated before, the respondents have a clear entitlement to these audited financial statements pursuant to sections 155 CBCA and 70 to 72 of the relevant regulations…"

[174] He then said:

[69] Pursuant to section 155 CBCA, the preparation of the financial statements is the responsibility of TSI and its directors.

…

[71] Turning to the order for an investigation on the transfer of funds, the wrongful appropriation of assets and the relevance of the management fees identified by the trial judge, ***I also agree with the appellants that, in the context of an ongoing litigation as in this case, there were more efficient and less costly remedies available to achieve the same result through a normal discovery process****.*

[73] ***Pursuant to the vast powers of the court under subsection 241(3) CBCA, the judge could have immediately ordered the appellants, at their cost, to provide the respondents all the documentation required in this respect,*** *with the possibility, if need be, for the latter to complete the documentation received through depositions.* ***The appellants are correct in stating that***

> ***courts have recognized that when information is otherwise available through the normal litigation process, to order an investigation under sections 229 and 230 to attain the same objective is not the appropriate remedy****." (Emphasis added)*

[175] I have borne in mind that it may be said that the requirements are onerous in the Canadian context given that the CBCA dedicates an entire part to an investigation. The Jamaican Act did not adopt that route. This notwithstanding, I believe that requiring evidence in respect of likely costs of an investigation is just. I am also of the view that it is important to determine whether there are more efficient and less costly remedies available to achieve the same result.

[176] Mrs Fulton has not satisfied the court that the orders sought are required at this stage. I am convinced that granting these orders would be premature given that the case has not gone on to the disclosure stage. Furthermore, she has asked that the 6th defendant bear the cost but she has not provided evidence of the likely cost of this exercise.

[177] I must point out that sec 213 A (3) of the Act states that the court may make any interim or final order it thinks fit, so it gives the court a broad discretion to make orders of the kind sought by Mrs Fulton; that being said, section 213 A (3) (i), on which she relies, speaks to an order requiring a company to produce to the court or an interested person, financial statements or an accounting. It states that it would be the company producing the accounting.

Before concluding

[178] Though the parties were at pains to highlight commonalities, it is interesting that all applications were opposed. The parties have found common ground in certain respects. The position has changed from what it was when litigation started (although to be accurate, Mrs Fulton had proposed share purchase before). Maybe the best way forward is a solution crafted jointly. In **Winsome Brown v Cleveland Scarlett** [2019] JMCA Civ 41, Straw JA said, in part:

> *"[58]…Although this issue was not advanced by either counsel, it has been recognised that the learned judge failed in particular to exercise her power on an application for summary judgment as prescribed by the CPR. The court, having refused the summary judgment application, is to treat the hearing as a case management conference. Rule 15.6(3) states:*
>
> > *"Where the proceedings are not brought to an end the court **must** also treat the hearing as a case management conference."*
> >
> > *(Emphasis added)*
>
> *[59] The wisdom of rule 15.6(3) is that where summary judgment is refused (whether on the claim or on a particular issue) and the matter is not brought to an end, the court is compelled to recognise that it should chart the way forward by making orders for the purpose of managing the case and furthering the overriding objective. In so doing, the court will be clothed with the extensive powers of case management (as laid out in Part 26 of the CPR)."*

[179] Given the current position, I believe the parties should pursue mediation again. Rule 74.3 (5) of the CPR states that a matter may be referred to mediation at any time by order of a judge or master. Of course, the position in respect of CCL ought to be ascertained and supported by adequate documentary evidence. The parties can discuss Mrs. Fulton's unlawful benefits claim which she has said she wants to pursue. The parties are miles apart in respect of the valuation of the shares and this is an issue that can also be brought to the mediation table, perhaps the parties can agree on an independent valuator to value the shares of the 6th defendant. If the parties have found success, they could then ask the court for a consent order pursuant to the mediation agreement.

[180] On the rule of costs, I make this order in light of the fact that there have been competing applications and had I ordered costs against each of the losing parties, or for the successful party in each case, in my view, it would have the effect of cancelling out each one or being evened out as between the parties. As such, there would be no real benefit to any party, in the costs order in such

circumstances. This would also involve additional and unnecessary work for the taxing Master. Therefore, it is for these reasons that I have made the order for each party to bear their own costs. It is trite Law that the general rule is that one is entitled to one's costs if one succeeds but the exception applies in this case.

[181] I remain hopeful that relationships will be mended and peace will prevail.

Conclusion

[182] Having regard to the foregoing, my orders are as follows:

(i) The 1st to 5th defendants' application for summary judgment is dismissed;

(ii) The 6th defendant's application for summary judgment is dismissed;

(iii) The claimant's application to purchase shares (or alternatively have her shares purchased) is refused;

(iv) The claimant's application for interim orders pursuant to section 213 A of the Companies Act is refused;

(v) The parties are again referred to mediation to be completed before the next date for further Case Management Conference Orders;

(vi) Further Case Management Conference Orders to be made on December 16, 2021 at 12 noon for 1 hour;

(vii) Each party to bear their own costs;

(viii) Leave to appeal granted to all parties.