



[2022] JMCC COMM 21

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN THE COMMERCIAL DIVISION

CLAIM NO. SU2021CD00393

IN THE MATTER of sections 212 and
213 of the Companies Act, 2004

AND

IN THE MATTER of an application for
leave to bring derivative action on behalf
and in the name of Bonus Parts,
Accessories & Auto Imports Limited

BETWEEN	ROBERT L. SPRAGUE	CLAIMANT
AND	BONUS PARTS, ACCESSORIES & AUTO IMPORTS LIMITED	DEFENDANT

IN CHAMBERS

Nigel Jones & Kimberly Morris instructed by Nigel Jones & Co. for and on behalf of the Claimant

The Defendant is unrepresented

Ronald Paris & Neco Pagon instructed by Paris & Co. for and on behalf of Mr. Ian Dunn, Director and Shareholder of the Defendant

Dates Heard: February 9, May 18, May 19, & July 28, 2022

Company Law – Civil Practice and Procedure – Civil Procedure Rule 27.2 (8) – Fixed Date Claims (First Hearings) –Section 212 of the Companies Act – Application for

Leave to bring Derivative Action in the name and on behalf of the company – Statutory requirements to be met (reasonable notice, good faith & appears to be in the interest of the company) – Section 213 of the Companies Act – Court’s Powers

PALMER HAMILTON, J.

BACKGROUND

[1] On the 9th day of September, 2021 the Claimant filed a Fixed Date Claim Form and Affidavit of Robert L. Sprague in support. The Fixed Date Claim Form sought the following Orders:

- (a) *An Order that the first hearing be treated as the trial of the claim and/or that the matter be determined summarily at the first hearing, pursuant to Rule 27.2 (8) of the Civil Procedure Rules, 2002;*
- (b) *An Order granting leave to the Claimant to bring a derivative action in the name of Bonus Parts, Accessories & Auto Imports Limited against Mr. Ian Dunn and Mrs. Shawna Allen-Dunn, pursuant to section 212 (1) of the Companies Act, 2004;*
- (c) *An Order authorizing the Claimant to control the conduct of the action, pursuant to section 213 (1) (a) of the Companies Act, 2004; and*
- (d) *Such further or other relief as this Honourable Court deems just.*

[2] Bonus Parts, Accessories & Auto Imports Limited, hereinafter referred to as ‘the Company’, was incorporated under the Companies Act as a Limited Company on the 22nd day of May, 2019 and issued one million (1,000,000) shares on incorporation. The Articles of Incorporation indicated that the activities of the business are ‘import and retail of auto parts, accessories, cars, buses and trucks.’ In or about November 2020, the Company expanded their activities to the buying and selling of motor vehicle oil. Mr. Ian Dunn and Mr. Robert Sprague were named as Directors and Shareholders, each issued with five hundred thousand (500,000) shares. Mrs. Shawna Allen-Dunn, the wife of Mr. Dunn, was named as the Company Secretary.

- [3] Mr. Sprague averred in his Affidavit in Support that he spearheaded the incorporation of the Company and appointed Mr. Dunn as Managing Director of same, and issued to Mr. Dunn the five hundred thousand (500,000) shares as equity. According to Mr. Sprague, Mr. and Mrs. Allen-Dunn without authorization withdrew and/or took monies amounting to **ONE MILLION FOUR HUNDRED AND FIFTY-ONE THOUSAND AND SEVENTY-THREE JAMAICAN DOLLARS (JMD\$1,451,073.00)** and **TWO THOUSAND THREE HUNDRED AND EIGHTY-FIVE UNITED STATES DOLLARS (USD\$2,385.00)** from the Company between July 2020 and December 2020. In addition, Mr. Dunn refused to provide to Mr. Sprague a customer list for the motor vehicle oil business that the Company was engaged in, pocketing revenue generated by the GPS Tracker business that the Company was engaged in, and causing the Company's sales to drop by 50% as a result of a competing business started by Mr. Dunn. Mr. Sprague alleges that Mrs. Allen-Dunn in December, 2020 changed the password to the Company's Sales and Inventory System resulting in the Company spending **NINETY-EIGHT THOUSAND FIVE HUNDRED AND FIFTY JAMAICAN DOLLARS (JMD\$98,550.00)** to recover access to same.
- [4] Mr. Sprague, in his Affidavit, contends that the Company has a valid claim to recover all of its property and funds from Mr. Dunn and Mrs. Allen-Dunn. His objective, he further contends, is to recover for the benefit of the Company, all keys, documents, intellectual property, funds and other property from which it has been deprived.
- [5] On the 30th day of November, 2021, Mr. Dunn filed an Affidavit in Opposition of the Fixed Date Claim Form. Mr. Dunn averred that at all material times, both himself and Mr. Sprague operated the Company as equal partners and it was his idea to form the Company. Mr. Sprague provided the capital and he, Mr. Dunn, provided *"everything else to make them succeed."* He further averred that he was never appointed as Managing Director nor was he allotted shares on account of services rendered. Mr. Dunn denied that he withdrew the sums alleged by Mr. Sprague without authorization and contended that no authorization was needed as he was

a signatory in his own right. Mr. Dunn admitted that he refused to provide the customer list because Mr. Sprague intended to force him out of the Company without any compensation. He further denied that his wife, Mrs. Allen-Dunn, committed any of the acts alleged as she did not possess the relevant information to access the Sales and Inventory System. On the other hand, Mr. Dunn admitted that he refused to turn over keys, documents, intellectual property, funds and other property because Mr. Sprague had decided to terminate their business relationship and forced him out of the Company.

- [6] Mr. Sprague filed a Second Affidavit in Support of Fixed Date Claim Form as a response to Mr. Dunn's Affidavit in Opposition. He denied the allegations as set out by Mr. Dunn and reiterated that Mr. Dunn and Mrs. Allen-Dunn committed wrongs against the Company

SUBMISSIONS ON BEHALF OF THE CLAIMANT

- [7] Mr. Jones, Counsel for the Claimant, submitted that Rule 27.2 of the Civil Procedure Rules, 2002, as amended, hereinafter referred to as the CPR, specifically empowers the Court to deal with matters summarily. Due to the nature of the orders being sought, Counsel Mr. Jones submitted that they verily believe that the matter seeking an order from the Court granting leave to bring a derivative action is one that should be dealt with summarily.

- [8] Counsel, in his submissions, stated that a derivative action is "*an action brought by a shareholder or other complainant in respect of a wrong done to the company where the wrongdoers are in control of the company and refuse to bring an action in the name of the company.*" He relied on the cases of **John Glenmore and Brian Plummer v Phene Anthony Plummer, Sean Fraser and Denbigh Farms Limited** [2020] JMCA App 16 and **Cable & Wireless Jamaica Limited v Eric Jason Abrahams** [2020] JMCA Civ 45 (paragraphs 10 & 11).

- [9] Counsel contends that his client, by virtue of being a Director of the Company has met the statutory requirements to be empowered as a Complainant under section

212 (3) of the Companies Act and can therefore bring a derivative action. Mr. Jones submitted that section 212 of the Companies Act also states how derivative actions should be handled. He outlined the 3 requirements as being:

- (a) reasonable notice;
- (b) the Complainant is acting in good faith; and
- (c) in the best interest of the company.

[10] In dealing with the first requirement, Counsel noted that Mr. Dunn was served by way of a letter dated July 1, 2022 titled “Notice of Intention to Pursue Derivative Action pursuant to Sections 212 and 213 of the Companies Act, 2004. Counsel contended that the Companies Act does not specifically state what is reasonable and therefore case law must be used to ascertain what the Courts have considered as reasonable. He relied on the case of **Sally Ann Fulton v Chas E Ramson Limited** [2016] JMSC COMM 14 and submitted that Mr. Sprague has given reasonable notice in the circumstances with the necessary information as evidenced in his Affidavit.

[11] Counsel relied on numerous cases in dealing with the second requirement. He submitted that the ‘non-elevated standard’ is to be used to determine good faith as was outlined in the case of **Sally Ann Fulton v Chas E Ramson Limited** (supra). In using that standard Mr. Jones submitted that based on the evidence in Mr. Sprague’s Affidavit this threshold has been met. He further submitted that if the claim does not go through it can affect the very core of the business structure and cause an end to the life of the Company as what was sustaining it has been diminished.

[12] Mr. Jones also submitted that there is not a high threshold in meeting the third requirement. He contended that the use of the word ‘appears’ implies that it does not have to be proved by a high threshold but that on the fact of it, that it is in the company’s interest. He further contended that the essence of the business has been greatly affected due to the actions of Mr. Dunn.

- [13] As Mr. Sprague is the only other director, Learned Counsel urged this Court to authorize him to control the matter in accordance with the powers vested to it under section 213 of the Companies Act.
- [14] Counsel also relied on the following cases: **Earle Lewis and Carol Lewis v Valley Slurry Seal Company, Jeffery Reed and Valley Slurry Seal Caribbean Limited** [2013] JMSC COMM 21, **Leon Forte v Twin Acres Development Ltd** [2015] CD 00004, **re Bellman v Western Approaches Ltd.** (1981) 130 D.L.R. (3d) 193, and **Ang Thiam Swee v Low Hian Chor** [2013] SGCA 11.

SUBMISSIONS ON BEHALF OF MR. DUNN

- [15] Counsel for Mr. Dunn, noted at the outset of their submissions that Mr. Sprague has not offered any proof, whether by supporting affidavits or contemporaneous documentary evidence, of the allegations raised by him in this claim. This is the basis for opposing Mr. Sprague's claim.
- [16] Learned Counsel submitted that Mr. Sprague's claim is not in good faith and that derivative action is not in the best interest of the Company. Counsel relied on the requirements which must be set out in order to satisfy a court to grant an application for leave to bring derivative action as was stated by Batts J in the case of **Robert Stephe v Port Royal Development Company Limited** [2021] JMCC Comm 22 (paragraph 14).
- [17] The position of Mr. Dunn is that Mr. Sprague has failed to satisfy the Court of the requirements to be met. Mr. Pagon submitted that the Affidavits of Mr. Sprague is devoid of the evidential obligation that is placed on him. Mr. Sprague has not put forward documentary evidence sufficient to show that the conduct of Mr. Dunn and Mrs. Allen-Dunn gives rise to any cause of action in relation to the company. There is no evidence that Mr. Dunn was not authorised to remove the monies as alleged by Mr. Sprague. Learned Counsel posited that the actions of Mr. Dunn can be taken as securing his and the interest of the Company by preserving the assets.

- [18] It is for those reasons that Counsel submitted that the application for leave to bring derivative action ought to be refused.
- [19] Counsel also relied on sections 212 and 213 of the Companies Act, the text Commonwealth Caribbean Company Law © 2013 by Andrew Burgess, and the case of **Earle Lewis and Carol Lewis v Valley Slurry Seal Company, Jeffery Reed and Valley Slurry Seal Caribbean Limited** (supra).

ISSUES

- [20] The main issues for determination are as follows:
- (a) Whether the First Hearing of the Fixed Date Claim should be treated as a trial of the claim and/or the matter determined summarily;
 - (b) Whether the Claimant is qualified as a Complainant under section 212 (3) of the Companies Act;
 - (c) Whether the Complainant has given reasonable notice to the directors of the company of his intention to apply for leave to bring derivative action under section 212(2)(a) of the Companies Act;
 - (d) Whether the Complainant is acting in good faith by applying for leave to bring derivative action under section 212(2)(b) of the Companies Act;
 - (e) Whether it appears to be in the interests of the company that the action be brought pursuant to section 212(2)(c);
 - (f) Whether the Complainant ought to be granted leave to commence derivative action in name of and on behalf of Bonus Parts, Accessories & Auto Imports Limited; and
 - (g) Whether the Complainant ought to be granted control of the conduct of the action pursuant to section 213 of the Companies Act;

(h) Whether costs ought to be awarded to the Claimant.

[21] I wish to thank Counsel for their very helpful submissions and supporting authorities which provided valuable assistance to the Court in deciding the issues. I do not find it necessary to address all the submissions and authorities relied on but I will refer to them to the extent that they affect my findings.

LAW & ANALYSIS

A. *Whether the First Hearing of the Fixed Date Claim should be treated as a trial of the claim and/or the matter determined summarily*

[22] Rule 27.2(8) of the Civil Procedure Rule 2002, as amended empowers the Court to treat the first hearing of a Fixed Date Claim as the trial of the claim, if the claim is not defended or where there is a defence and the Court considers that the claim can be dealt with summarily. I find merit in Mr. Jones' submissions that the claim should be dealt with summarily.

[23] Laing J in the case of **Hasheba Development Company Limited v Petroleum Corporation of Jamaica Limited and others** [2020] JMCC Comm 17 relied on the case of **Agnes Danzie et al and Cecil Anthony** SLUHCVAP2015/0009, from the Court of Appeal of the Eastern Caribbean Supreme Court in considering provisions of the Eastern Caribbean Civil Procedure Rules which are similar to the CPR which held that whereas CPR 27.2(3) (which is in the same terms as our CPR 27.2(8)) empowers the court to treat the first hearing of a Fixed Date Claim Form as a trial if the claim is not defended or where there is a defence and the court considers that the claim can be dealt with summarily, dealing with a claim summarily does not mean entering judgment. The claimant still has to prove that he is entitled to the relief sought and the court must conduct a trial albeit in a summary way.

[24] The Court of Appeal in **Chas E Ramson Limited v Sally Ann Fulton** [2021] JMCA Civ 54 (hereinafter referred to as the **Ramson Case**) outlined several guidelines

that may be considered for future cases dealing with a claim for leave to bring derivative action. Brooks JA at paragraph 81(e) noted that the hearing of the application is intended to be a summary procedure to permit the Chambers Judge to quickly determine whether a Complainant may institute a derivative claim. The Court of Appeal further outlined that the hearing of the application is not a trial and it is aimed at determining whether the applicant should be given leave to initiate derivative action, not deciding the merits of the applicant's complaint.

[25] Having regard to the case management conference powers vested in me pursuant to Rule 27.2(7) of the CPR I hereby exercise the discretion to treat the first hearing of this claim summarily.

DERIVATIVE ACTION

[26] Andrew Burgess at page 323 in his text titled *Commonwealth Caribbean Company Law* (2013) defined derivative action as “*an action brought by a shareholder or other complainant in respect of wrong done to the company where the wrongdoers are in control of the company and refuse to bring an action in the name of the company.*” This was the rule at common law. The Companies Act (hereinafter referred to as ‘the Act’) has now replaced the common law in this area. Pursuant to section 212 of the Act, a derivative claim is an action initiated in the name and on behalf of the company brought by a person who is qualified to bring such an action, against the directors for wrongs done to the company. Before a claim for derivative action can be brought the leave of the Court is required. This is the claim that is before me, Mr. Sprague is seeking leave from the Court to bring a derivative action in the name of the Company against Mr. Dunn and Mrs. Allen-Dunn for wrongs they have committed against the Company. The claim is brought by a person who the Act defines as a Complainant and the Complainant has to meet certain statutory requirements that must be met before the Court permits that a claim for derivative action to be brought.

[27] Section 212 of the Act states as follows:

212 (1) *Subject to subsection (2), a complainant may, for the purpose of prosecuting, defending or discontinuing an action on behalf of a company, apply to the Court for leave to bring a derivative action in the name and on behalf of the company or any of its subsidiaries, or intervene in an action to which any such company or any of its subsidiaries is a party.*

(2) *No action may be brought, and no intervention in an action may be made under subsection (1) unless the Court is satisfied that—*

(a) the complainant has given reasonable notice to the directors of the company or its subsidiary of his intention to apply to the Court under subsection (1) if the directors of the company or its subsidiary do not bring, diligently prosecute or defend, or discontinue, the action;

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

(c) it appears to be in the interests of the company or its subsidiary that the action be brought, prosecuted, defended or discontinued.

(3) *In this section and sections 213 and 213A 'complainant' means—*

(a) a shareholder or former shareholder of a company or an affiliated company;

(b) a debenture holder or former debenture holder of a company or an affiliated company;

(c) a director or officer or former director or officer of a company or an affiliated company.

[28] Sykes J, as he then was, noted in the case of **Sally Ann Fulton v Chas E Ramson Limited** (hereinafter referred to as the **Fulton Case**) that the relevant section of the Companies Act is modelled on the Canadian Business Corporations Act. As a result of that, cases emanating from Canada are persuasive in interpreting the section.

[29] I find it important to note here that in the **Fulton Case** (paragraph 94), the civil standard of proof – on a balance of probabilities – is acceptable in these applications. In the **Ramson Case**, Brooks JA also noted that in determining whether the statutory requirements have been satisfied, the Chambers Judge should be guided by not only the ordinary civil standard but the principles governing hearings which are not trials and a non-elevated cogency for the standard of proof.

THE STATUTORY REQUIREMENTS (DERIVATIVE ACTION)

B. *Whether the Claimant is qualified as a Complainant under section 212(3) of the Companies Act*

[30] It is not in dispute whether or not Mr. Sprague qualifies as a Complainant under section 212(3) of the Act. Mr. Sprague falls within the definition of Complainant under section 213(3) of the Act. Upon incorporation of the Company he was named as both shareholder and director. He is therefore qualified as a Complainant under section 212 of the Act to apply to the Court for leave to bring a derivative action in the name and on behalf of the Company.

[31] The points of dispute between the parties is whether Mr. Sprague has satisfied the Court that he has met all the requirements to bring an action under the Act.

C. *Whether the Complainant has given reasonable notice to the directors of the company of his intention to apply for leave to bring derivative action under section 212(2)(a) of the Companies Act*

[32] Pursuant to section 212(2) (a) of the Act, the first requirement to be satisfied by the Complainant is that reasonable notice must have been given to the directors of his intention to apply for leave to bring derivative action under section 212 of the Act. I agree with the judgment of Mangatal J in the case of **Earle Lewis and Carol Lewis v Valley Slurry Seal Company, Jeffery Reed and Valley Slurry Seal Caribbean Limited** (hereinafter referred to as **Earle Lewis**). She made reference

to the case of **Intercontinental Precious Metals Ltd. v. Cooke** (1994), 88 B.C.L.R.(2d) 101 which quoted at page 37 of the article “Derivative Actions-How They Work, and How They Don’t”, that the purpose of the notice requirement is “*to afford the directors a reasonable opportunity to consider their position before the application is heard by the Court*”.

[33] Sykes J, as he then was, also noted at paragraph 16 of the **Fulton Case** that, “*It has been said that the purpose of giving notice to the directors is to enable them to examine all the facts and circumstances and make an informed decision.*” In dealing with the issue of reasonable notice in the said case, Sykes J noted that the ultimate question is whether there was sufficient time between the notice and the filing of the application for leave to bring derivative action. Mrs. Fulton filed her claim in August 2015 after having served the directors in the beginning of April. Counsel for the Defendant sought to persuade the Court that the four (4) month period was insufficient and relied on the case of **Allison, on behalf of General Motors Corporation v General Motors Corporation and others** 604 F Supp 1106 (1985) which found that a period of 2 ½ months which represented the time between notice and filing was too short. Sykes J noted that the Judge in the case cited by Counsel for the Defendant found that the period of time was not sufficient given the magnitude and complexity of the issues. Sykes J stated that the case before him was not complicated and Mrs. Fulton constantly expressed her concern in multiple letters. The Court held that the directors were given reasonable notice and the time period was sufficient.

[34] In the **Fulton Case**, Sykes J outlined at paragraph 98 the following principles applicable to section 212(2) of the Act:

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

(b) *whether the time between the giving of notice and the filing of the application is reasonable is to be decided by closely examining all the surrounding circumstances. This includes whether there was*

discussion between the directors and the complainant before the notice; the nature and content of those discussions; whether the issues raised required the directors to understand any complicated technical issue...”

[35] Mr. Jones submitted that Mr. Dunn and Mrs. Allen-Dunn were given reasonable notice with the necessary information required by way email exhibited at RLS 10 of the Affidavit of Robert L. Sprague in Support of Fixed Date Claim Form filed the 9th day of September, 2021. Exhibit RLS 10 reads as follows:

*July 1, 2021
Mr. Ian Dunn*

*BY HAND
URGENT*

*Director & Shareholder
Bonus Parts, Accessories & Auto Imports Limited
Chichester District
Ramble P.O.
Hanover*

Dear Mr. Dunn

***Re: Property and Funds taken from Bonus Parts, Accessories & Auto Imports Limited
Notice of Intention to pursue Derivative Action pursuant to Sections 212 and 213 of the Companies Act, 2004***

We act on behalf of Mr. Robert Sprague.

We have been informed by our client that he is a director and shareholder of Bonus Parts, Accessories & Auto Imports Limited (hereinafter referred to as the “Company”); that you, Mr. Ian Dunn, are the other director and shareholder of the Company; and that your wife, Mrs. Shawna Allen-Dunn, is the corporate secretary of the Company.

We have been informed that between July 13, 2020, and December 11, 2020, Company property (including customer files, the corporate seal, motor vehicle documents, access to social media accounts, mobile phones, keys, uniforms and intellectual property) and funds totalling J\$1,451,073.00 and US\$2,385.00, were taken from the Company by you and/or your wife. We have also been informed that on December 11, 2020, your wife changed the password to the Company’s sales and inventory system, resulting in the Company incurring the cost of J\$95,550.00 to access it.

We have been instructed by our client that he intends, pursuant to Sections 212 and 213 of the Companies Act, 2004, to apply to the Supreme Court for leave to bring a derivative action against you and your wife on behalf of the Company, if the Company’s property and funds and reimbursement for

the cost are not delivered to us within 30 days of your receipt of this letter, and if you not bring an action against yourself and your wife on behalf of the Company, to recover the property, funds and costs, within 30 days of your receipt of this letter.

We have also been instructed by our client to reserve the right to amend the details of this claim.

Please be guided accordingly.

*Yours faithfully,
NIGEL JONES & CO*

PER: NIGEL W. JONES

c.c. Mr. Robert Sprague Mrs. Shawna Allen-Dunn

- [36] Learned Counsel Mr. Jones contended that a time period of two (2) months and nine (9) days between the letter being sent and the derivative action being filed and over four (4) months between the letter being sent and Mr. Dunn being served the Court documents is a reasonable time in the circumstances to respond to the allegations. Mr. Jones also contended that the allegations against Mr. Dunn and Mrs. Allen-Dunn is a simple one, that of the return of monies and specified materials taken by the Dunns belonging to the Defendant. I find that there is merit in Learned Counsel's submission.
- [37] The letter dated July 1, 2021 clearly outlined the allegations that Mr. Sprague has against Mr. Dunn and Mrs. Allen-Dunn. In addition to that Mr. Sprague averred in his Affidavit that Mr. Dunn was aware of the allegations before the letter dated July 1, 2021 was sent to him. In my opinion the allegations do not require a complicated technical issue was as was seen in the case of **Intercontinental Precious Metals Ltd. v. Cooke** (supra).
- [38] Learned Counsel Mr. Pagon's contention was not with this limb of the statutory requirement. Mr. Pagon's main contention concerns the other 2 requirements outlined in the Act.

[39] The statutory requirement is that reasonable notice be given to the directors of the company of one's intention to apply for leave. I find that reasonable notice was given to Mr. Dunn, a director of the Company, of Mr. Sprague's intention to apply to the Court for leave to bring a derivative action in the name and on behalf of the Company.

D. Whether the Complainant is acting in good faith by applying for leave to bring derivative action under section 212 of the Companies Act

[40] The second requirement to be met by the Complainant is that he must be acting in good faith in bringing the application to apply for leave to bring derivative action. In the **Fulton Case** Sykes J, after examining in great detail the case law from Jamaica, Australia, Canada, New South Wales and Singapore, came to the conclusion that a non-elevated standard is to be taken when considering whether the Complainant has met this requirement. Sykes J concluded that good faith is an exclusively subjective matter and in the context of section 212 (2) (b) it means an honest belief. I accept this conclusion and see no need to re-examine the law in that regard.

[41] Sykes J outlined the following principles applicable to section 212 (2) (b) as follows:

- (a) *the good faith requirement is purely subjective and does not have any objective component;*
- (b) *good faith refers to the subjective state of mind of the applicant and it includes:*
 - (i) *an honest and sincere belief that the claim should be brought;*
 - (ii) *an honest and sincere belief in the legal merit of the proposed claim;*
 - (iii) *an honest and sincere intention to pursue the claim to its ultimate conclusion;*
- (c) *matters such as whether the claim is frivolous and vexatious or it lacks legal merit (objectively viewed) are not conclusive one way or the other but are factors that may be taken into account when deciding whether the complainant has met the good faith standard;*

- (d) *a conclusion that the complainant is acting in good faith but that the claim is in fact frivolous and vexatious or lacking in legal merit does not mean that the claim must go forward because those considerations can be taken into account under the 'interests of the company' criterion;*
- (e) *the presence of animosity, ill-will, personal interest and the like does not automatically mean that the complainant lacks good faith;*
- (f) *for there to be an absence of good faith where ill-will, self-interest and the like are present then these other motivations must be so dominant that they make it difficult if not impossible for there to be the existence of good faith in the complainant;*
- (g) *if the claim has good legal merit it is easier to conclude that the complainant is acting in good faith;*
- (h) *if the claim has little or no legal merit it may be an indication that good faith is lacking but that is not conclusive.*

[42] I agree with Sykes J's position in the **Fulton Case** that good faith refers to the applicant's motive for bringing the action. At the very least it means that the applicant genuinely believes that a wrong has been done to the company and that the wrong needs to be corrected. Sykes J, referred to the Canadian case of **Valgardson v Valgardson** 349 DLR (4th) 591 which states that-

"The question of good faith requires the court to ensure that the proposed action is not frivolous or vexatious: Acapulco Holdings Ltd. at para 17; First Edmonton Place Ltd. v. 315888 Alberta Ltd., [1988] A.J. No. 511 (Alta. Q.B.) at para 67, (1988), 60 Alta. L.R. (2d) 122, 40 B.L.R. 28 (Alta. Q.B.). There is both a subjective and objective component to the requirement of good faith. The subjective aspect requires that the applicant believes the proposed derivative action has merit. This guards against actions spurned by self-interest or private vendetta. But even where the applicant believes that the proposed action has merit, the court must still consider whether objectively viewed the action is not frivolous and vexatious."

[43] Mr. Sprague is alleging numerous wrongs that both Mr. Dunn and Mrs. Allen-Dunn have committed against the Company. These allegations range from theft to the infringing of intellectual property rights. However, Mr. Dunn denied that he committed any wrong against the Company even though he admits to committing some of the allegations laid out against him by Mr. Sprague.

- [44] Counsel Mr. Pagon maintained throughout his submissions that Mr. Sprague has failed to satisfy the Court that this requirement has been met. Mr. Pagon relied on the case of **Earle Lewis** and brought this Court's attention to paragraph 49 to make the point that Mr. Sprague has not put forward any "cogent evidence" that the action is being brought in good faith. He noted that there are no minutes, resolutions or any other documents which would tend to show that Mr. Dunn was not authorised to withdraw the monies from the Company's bank account. Mr. Pagon went a step further to say that Mr. Sprague has operated in a similar manner regarding monies taken from the Company's bank account.
- [45] Respectfully, I find no merit in the submissions made by Mr. Pagon as cogent evidence is not what is required in these types of cases. Brooks JA, in the **Ramson Case**, concluded that Sykes J was correct to reject that the Complainant is required to provide cogent evidence of good faith. Mr. Sprague is therefore not required to provide cogent evidence of good faith. Nevertheless, Mr. Sprague is still required to prove on a balance of probabilities that he is acting in good faith.
- [46] Counsel Mr. Jones submitted that the Company ought to be put back in the position before the wrongs were committed against it by Mr. Dunn and Mrs. Allen-Dunn. He noted that it seriously affected the profitability of the business. I agree with Counsel in this regard. If in fact the Court finds that the wrongs were committed against the Company, it ought to be corrected. Mr. Sprague, being a director and shareholder of the Company, in making this application, is seeking to right the alleged wrongs committed against the said Company.
- [47] Even though Mr. Dunn opened a business which is competing with the Company, it does not prevent the Court from finding that Mr. Sprague is acting in good faith in seeking leave. A Complainant does not automatically lack good faith in the *'presence of animosity, ill-will, personal interest and the like....'* I find that whatever ill-will, animosity or personal interest that may be present on the part of Mr. Sprague is not so dominant as to make it difficult to support the existence of good

faith on his part. There is evidence to show that there is merit to the claim that Mr. Sprague is seeking leave to bring against Mr. Dunn and Mrs. Allen-Dunn.

[48] Sykes J in the **Fulton Case** noted that the Court should accept the requirement of acting in good faith as having been met where the Complainant makes the assertion that they are acting in good faith and the surrounding evidence is consistent with that. In my judgment, I find that the evidence before me supports a finding that Mr. Sprague is acting in good faith.

E. *Whether it appears to be in the interests of the company that the action be brought*

[49] Finally, unless the Court is satisfied that it appears to be in the interests of the company that the derivative action be brought, then the application for leave to bring said action must fail. The British Columbia Court of Appeal in **Bellman v. Western Approaches Ltd.** (1981) 130 D.L.R. (3d) 193, Nemetz C.J.B.C. held that under this requirement it is sufficient for the Complainant to show that an arguable case be shown to subsist. The authorities all show that in satisfying this requirement the Complainant has to raise an arguable case.

[50] I note here that Section 212 (2) (c) only requires a Complainant to prove that the claim they are seeking leave to bring 'appears' to be in the interest of the company. In the Canadian cases examined by Sykes J in the **Fulton Case** he noted that they had to deal with what is in the 'best' interest of the company. The use of the word 'best' creates a relatively high threshold for the Complainant to cross in their application for leave. Therefore, the absence of the word 'best' in the Jamaican statute creates a lower threshold than in the 'best' interest of the company. Both Sykes J in the **Fulton Case** and Mangatal J in the case of **Earle Lewis** (supra) came to the conclusion that the absence of the word 'best' in the Act creates a lower threshold and therefore it requires a lower level of cogency of evidence.

[51] However, in dealing with this requirement the Court is not only required to look at whether the Complainant has raised an arguable case but the Court is to also look at the surrounding circumstances of the case. The Court of Appeal in the **Ramson**

Case, noted that in dealing with this requirement the learned judge not only examined the ostensible validity of Mrs. Fulton's complaints against the company, he also examined the surrounding circumstances such as *"the likely propriety or otherwise of the directors' decision in respect of the property, the fact that the proposed derivative action seeks to address wrongs said to have been done to the company, and that an accounting by the directors for the use of the company's property would benefit the company."*

[52] Sykes J in the **Fulton Case** found that-

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

(b) *if the proposed claim is an abuse of process then that is an indication that it is not in the interest of the company...*

[53] I remind myself that at this stage, that I am not determining the merits of Mr. Sprague's complaint. I am to make a determination as to whether he should be given leave to initiate derivative action and it is not a trial of the ultimate issues.

[54] Learned Counsel Mr. Jones submitted that the threshold has been met. He emphasized that the actions of Mr. Dunn and Mrs. Allen-Dunn greatly affected the Company and it is therefore in the Company's interest.

[55] On the other hand, Mr. Pagon argued that Mr. Sprague's action is seeking to treat the Company property as his own which is inimical to the best interest of the Company. He also argued that the actions of Mr. Dunn can be taken as securing his and the interest of the Company by preserving the assets.

[56] Sykes J in the **Fulton Case** made reference to what is known as the business judgment rule when analysing this requirement. He examined several cases and concluded that *"...Boards of directors cannot simply make an assertion that they exercised sound business judgment they must demonstrate that they actually did. As noted already, the courts have to be careful that it does not use ex post facto*

knowledge to assess the board's actions. This will always be a difficult exercise but one that must be done if required."

[57] Respectfully, I do not agree with Learned Counsel's submission on his reliance on the use of the phrase 'best interest of the Company'. The word 'best' does not appear in section 212 (2) (c) of the Act. There is no evidence before me to show that Mr. Dunn and Mrs. Allen-Dunn exercised their best business judgment regarding the allegations laid out against them. I cannot accept a bare assertion that they did. Mr. Dunn and Mrs. Allen-Dunn may have exercised best business judgment especially regarding the alleged sums that were withdrawn but at this stage of the application I cannot make a determination as to same.

[58] The allegations against Mr. Dunn and Mrs. Allen-Dunn are serious allegations and it appears to be in the interest of the Company that the action be brought. The good legal merit therefore serves as an indication that it appears to be in the interest of the Company. I find that the claim is not frivolous or vexatious. I am satisfied that that it appears to be in the interests of the Company that the derivative action be brought.

F. *Whether the Claimant ought to be granted leave to commence derivative action in name of and on behalf of Bonus Parts, Accessories & Auto Imports Limited*

[59] Mr. Sprague has laid out several allegations, that have adversely affected the Company, against Mr. Dunn and Mrs. Allen-Dunn. The parties did not dispute that Mr. Sprague was a Complainant under the Act. The areas of contention surround the statutory requirements to be met by the Complainant before the Court can grant leave to apply for a derivative action. Therefore, having found that the Complainant gave reasonable notice to the directors of his intention to apply to the Court for leave to bring a derivative action, is acting in good faith and the action appears to be in the interests of the company, it is my judgment that he ought to be granted leave to commence derivative action in the name of and on behalf of the Company.

G. Whether the Claimant ought to be granted control of the conduct of the action pursuant to section 213 of the Companies Act

[60] Section 213 of the Act gives the Court the powers to make certain Orders. It states that:

213 (1) *The Court may, in connection with an action brought or intervened in under section 212, make such interim or final order as it thinks fit, including an order-*

(a) authorizing the complainant, the Registrar or any other person to control the conduct of the action;

(b) giving directions for the conduct of the action;

(c) directing that any amount adjudged payable by a defendant in the action be paid, in whole or in part, directly to former and present shareholders or debenture holders of the company or its subsidiary, instead of to the company or its subsidiary; or

(d) requiring the company or its subsidiary to pay reasonable legal fees incurred by the complainant in connection with the action.

(2) *An action brought or intervened in under section 212 shall not be stayed or dismissed by reason only that it is shown that an alleged breach of a right or duty owed to the company or its subsidiary has been or may be approved by the shareholders, but evidence of approval by the shareholders may be taken into account by the Court in making an order under that section.*

[61] Mr. Sprague being the Complainant, having met the statutory requirements to be granted leave to bring a derivative action, and he being the only other director and shareholder, is therefore authorized to control the conduct of the action. I therefore authorize Mr. Robert Sprague to control conduct of the action to be brought in the name and on behalf of the Company, Bonus Parts, Accessories & Auto Imports Limited, against Mr. Ian Dunn and Mrs. Allen-Dunn.

H. Whether costs ought to be awarded to the Claimant.

[62] Pursuant to Rule 64.6 (1) of the CPR, the decision to award costs is discretionary. The general rule on costs is that the unsuccessful party is to pay the costs of the successful party. The parties did not advance any submissions on the issues of costs and I therefore invite Counsel, both Mr. Jones and Mr. Pagon, to advance oral and/or written submissions on costs.

[63] Nevertheless, in my opinion, there is no clear winner or loser at this stage as this is just an application for leave. It would not be appropriate at this stage to make an award of costs. As such, I am minded to reserve costs pending the determination of the derivative action.

ORDERS

[64] Having regard to the forgoing, these are my Orders:

- (1) The first hearing is treated summarily pursuant to Rule 27.2(8) of the Civil Procedure Rules, 2002;
- (2) Leave is granted to the Claimant to bring a derivative action in the name and on behalf of the Defendant, Bonus Parts, Accessories & Auto Imports Limited, against Ian Dunn and Shawna Allen-Dunn pursuant to section 212 of the Companies Act of Jamaica, 2004;
- (3) The Claimant shall have control of the action pursuant to section 213 (1) (a) of the Companies Act of Jamaica, 2004;
- (4) The claim for derivative action is to be filed and served within twenty-eight (28) days of the making of this Order;
- (5) Costs reserved pending the determination of the derivative action; and
- (6) Claimant's Attorneys-at-Law to prepare, file and serve Orders made herein.