

Ashleigh Ximines instructed by Knight Junior and Samuels for the Applicant (in a personal and representative capacity).

Patrick Foster QC, Alexander Williams and Oderane Kerr instructed by Alexander Williams & Co. for Respondent

Heard: 23rd June and 30th July, 2021

In Chambers by ZOOM

Cor: Batts J.

[1] At the commencement of this hearing I indicated to the parties that one of the affiants, Mr. Ransford Braham queen's counsel, was a close friend of mine. It would therefore be inappropriate for me to hear the matter if I was required, in the course of doing so, to make factual findings. Both parties indicated that this was unlikely and they had no objection to my hearing the application.

[2] This is an application for permission to bring a derivative action, in the name of the Respondent, against *"its majority shareholders and/or the secretariat"* pursuant to Section 212 of the Companies Act. The factual circumstances which give rise to the application are long and detailed and occurred over many years, see paragraphs 6 to 33 of the affidavit of Robert Stephens filed on the 13th August 2020 (hereinafter referred to as the first Stephens affidavit). Essentially, the complaint is that the Respondent was formed as a vehicle to give effect to what appears to have been the policy of the government at that time. This policy involved a public and private sector partnership in order to organise, facilitate and implement the development of Port Royal. After many years, save for the building of a cruise ship pier without the Respondent's involvement, the planned development has not occurred. It is also asserted that there has not been a shareholders or directors meeting of the Respondent in years and that certain statutory filings are outstanding.

[3] Port Royal has a magnificent if violent history which is, factually and romantically, tied to the adventures of the pirates we call buccaneers. The benefits, to be obtained from its development as a tourist attraction, are anticipated to be phenomenal. The fact that most of Port Royal sunk below the sea after an earthquake, and is well preserved within dive depth, adds to its potential value as an underwater museum. I had the pleasure of reading "*In search of the Buccaneers*" by Anthony Gambrell, chapter 4 of, which recounts the history of Port Royal. I commend that publication to anyone who doubts the town's historic value. Words attributed to Don Juan Perez de Guzman President of Panama, as Henry Morgan and his buccaneers approached, give a clue to the source of Port Royal's allure:

"God", he said, "who watches us with eyes of pity, give me victory over these heretical dogs."

[4] The Applicant complains that notwithstanding the terms of a Memorandum of Understanding dated the 6th May 1998 exhibit RS 5 to which the Respondent was novated, see exhibit RS4 (both documents hereinafter referred to as the MOU) executed between the then government and the Respondent, there has been no effort to give it effect. The state agencies who own a majority of the shares in the Respondent, it is said, have not done that which they ought to have done. In particular, the Urban Development Corporation (hereinafter referred to as the UDC) which has had management responsibilities for the Respondent since 1999, see paragraph 3 of the affidavit of Ransford Braham dated 14th January 2021, has failed neglected and/ or refused to call meetings of the Respondent or to file its annual reports/returns.

[5] The UDC has also involved itself in actually developing the Port Royal cruise ship pier. This it is said was within the purview of the Respondent and constitutes a breach of fiduciary duty. The first Stephens affidavit outlines the alleged breaches of the MOU, the failure to call meetings of the Respondent's board of directors, the failure to file statutory reports and, the failure to proceed with the development of

the town. The Applicant complains also that the minority shareholders, being prominent private sector entities, invested a part of the approximately US10 million dollars paid for studies, surveys and, preparatory work connected to the proposed Port Royal Heritage Tourism Project (see paragraph 10 of the first Stephens affidavit). They stand to lose that investment (the amount allegedly spent is unclear as some of the letters exhibited reference US \$5million) if the Respondent is not involved in Port Royal's development.

[6] The Applicant asserts that neither he nor, those minority shareholders whom he represents, have remained passive during these many years of inaction by the majority shareholders. Reference is made to several items of correspondence, see exhibits RS 8,11,12,13,14,15,16,17,18,19,20,21,22,23 and,24 (a letter dated 13th May 2019 wrongly labelled as RS 22) to the first Stephens affidavit. These demonstrate continuing complaints and urgings that steps be taken to implement the planned development utilising the Respondent. It is the failure to positively respond to these complaints, as well as the recent construction of the Port Royal pier without the participation of the Respondent, that prompted this application for permission to commence a derivative action.

[7] The Respondent, speaking through the affidavit of the Chairman of the UDC, has a rather disparate response. Mr Ransford Braham references and acknowledges that, by virtue of an agreement for the provision of management services see exhibit RB 1 to the affidavit of Ransford Braham filed on the 14th January 2021 (hereinafter referred to as the Braham Affidavit), the UDC has had "*management responsibilities*" for the Respondent. He, having summarised the Applicant's complaints, asserts that the matters occurred more than 6 years before. He says that the complaint is premised on the "*erroneous*" view that the Respondent has an exclusive right and, on "*technical breaches of statutory obligations for the filing of annual returns at the Registrar of Companies*", see paragraph 6 of the Braham Affidavit.

[8] Mr. Braham goes on to say (paragraph 9 of his affidavit dated 14th January 2021):

“While the sole purpose of the Respondent was to carry out government policy for the development of Port Royal as the Government deemed appropriate, there is no record however of any decision taken by the government, whether past or present, that the Respondent was given the mandate to be the exclusive vehicle for the implementation of that policy. The Derivative Agreement referred to at paragraph 19 of the Stephens affidavit and which is exhibited thereto as “RS5” did not contain any such undertaking given by the Government of Jamaica and, in view of clause 18.4 in the agreement, there was no, and could be no understanding or representation that the Government intended for the Respondent to have that exclusive role or right.”

[9] I pause to observe that the question, from the Applicant’s perspective, is not whether there is an exclusive right. It is whether there is a right to participate, or be part of, the development contemplated for Port Royal. The further question then emerges whether the UDC breached that right by embarking on the development of Port Royal without involving the Respondent. Further did such conduct amount to a breach of a fiduciary duty.

[10] Mr. Braham’s response also points to the existence of the Port Royal Brotherhood Act and that, the corporation thereby established in 1969, had a duty to *“undertake and encourage the reconstruction and development of Port Royal”*, paragraph 11 Braham Affidavit. He asserts that the government of Jamaica has retained the right to develop Port Royal in accordance with its policy by whatever means *“and without recourse to the Respondent.”*, paragraph 13 Braham Affidavit. At

paragraphs 15 and 16 of the affidavit, he goes on to say that the Respondent has been dormant over the period due to: “*the changing priorities and views of various Government administrations as to how that policy was to be fulfilled*”, “*national emergencies, adverse changes in the investment climate and, particularly, affected by the need to solve the problem of establishing a cruise ship pier in Port Royal which would not disturb or affect the “Sunken City”, which is a national treasure.*” Mr. Braham admits to violent eruptions in Tivoli Gardens which adversely affected the ability to access international financial support for the venture. He says at paragraph 17 of the affidavit, that in 2002 the shareholders of the Respondent met and decided to put the project in abeyance “*until the investment climate improved.*”

[11] Mr. Braham ends his affidavit by saying that the UDC is awaiting instructions from the Government of Jamaica as to the role and function of the Respondent in implementing the Port Royal Development Project as established by Government, “*which has been the case since 2007*” (paragraphs 21 and 22 of the Braham Affidavit). This latter response, by the Respondent’s affiant, certainly begs the question whether the persons who control the Respondent have a duty to advocate for the role of the Respondent. Is it not arguable that it is a breach of duty to sit back sublimely and passively awaiting government directives? This is particularly so in light of the terms of the MOU (exhibit RS 5 to the first Stephens affidavit), which is entitled “*Definitive Agreement Between the Government of Jamaica and Port Royal Development Company Limited,*” by which the Respondent and the Government agreed inter alia that:

“Clause 6.1

- 1. Subject to obtaining all relevant Requisite Consents, the Company shall carry out the following works in accordance with the Development Plan and the terms of all Requisite Consents:*

- a) *in consultation with JNHT, restore, upgrade, maintain and preserve the several monuments and historical structures in accordance with the Building Licences and Leases:*
- b) *in consultation with the NWC, the Ministry of Transport and Works, the Ministry of Water and the NRCA design, finance and construct a water supply and waste water disposal system in accordance with agreed specifications and on the basis that the system will be operated and managed as a private system by the Company in accordance with terms and conditions to be negotiated between the Company and GOJ,*
- c) *in consultation with the Port Authority design, finance, construct, operate and maintain a Cruise Ship Pier and Arrival Centre in accordance with outline port works specifications and internationally acceptable standards approved by the Port Authority;*
- *implement adequate arrangements for the collection of garbage generated by the activities associated with the Development provided that GOJ shall through Metropolitan Parks & Markets Limited (“MPM”) have the responsibility for the disposal of such garbage generally;*
 - *in conjunction with the NRCA complete any Environmental Impact Assessment for the Development that is requested by the NRCA; and*
 - *implement training classes for artisans and staff*

Clause 6.2

Subject to GOJ complying with its obligations hereunder, the Company shall undertake the Development in a timely manner in accordance with the Development Plan. Notwithstanding anything herein, it is understood and agreed that the time period stipulated in the Development Timetable may be extended in circumstances where any delay is occasioned by a Force Majeure Event.

- [12] The question also emerges whether the UDC, as an entity or through its agents, is not in the invidious position of serving two masters. If so what is its duty if the directive of the one runs counter to the best interests of the other. These questions arise, and are not answered, by the factual response of the Respondent. In addition, and this also emerges from Mr. Braham's affidavit, the question is whether the MOU constitutes an enforceable agreement between the state and the Respondent. The further question is whether that agreement has been breached. If this is so then would not those in control of the Respondent be failing in their duty should they not pursue such a claim.
- [13] I have said enough I believe to indicate that the factual response, to this application for permission to bring a derivative action, is not such as to lead to its refusal. Certainly, and at the very least, a further review of the correspondence and the various agreements signed, as well as the effect of the investment so far undertaken by the Respondent in furtherance of the MOU, will be required. There are however some legal and procedural issues raised by the Respondent's attorneys which are more meritorious.
- [14] Counsel are both agreed on the legal prerequisites for permission to commence a derivative action. These are:
- a. The Applicant must be a complainant with the meaning of Section 212.

- b. The Applicant must have given a reasonable notice of his intention to the directors of the company .
- c. The Applicant must be acting in good faith and,
- d. The derivative action contemplated must appear to be in the best interest of the company.

[15] There is no dispute that the Applicant, being a shareholder and a director, is a complainant within the meaning of Section 212. The other three preconditions are however challenged. Some of the challenges, admittedly, arose in the course of the oral submissions. It is appropriate to set out Section 212 in its entirety at this juncture.

“Section 212

- (1) Subject to subsection (2), a complainant may, for the purpose of prosecuting, defending or discontinuing an action on behalf of a company, apply to 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 part.*
- (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.”*

[16] It was submitted, by Mr. Patrick Foster QC, that the notice given did not point to the claim being articulated for. The notice is exhibit 30 to the first Stephens affidavit. It does not speak to the possibility of an action against the government of Jamaica (or its agents) for breach of the MOU or for breach of any contract at all. Neither does the notice speak to an intended claim against “*the secretariat.*” The question, for my determination, is whether permission to bring the derivative action ought to be given in these circumstances. The notice reads as follows:

*Urgent & Immediate
By Bearer and Email*

June 5, 2020

*Mr. Ransford Braham, Q.C.
Chairman
The Port Royal Development Company Limited
c/o The Urban Development Corporation
12 Ocean Boulevard
Kingston Mall
Kingston*

Attention: ALL DIRECTORS OF PORT ROYAL DEVELOPMENT COMPANY LIMITED

Dear Sirs,

**Re: Port Royal Development Company Limited:
Notice of Minority Shareholder's Intention to Apply for
Derivative Action under Section 212 (1) of the Companies
Act of Jamaica**

We act for and on behalf of Mr. Robert Stephens, Pragma Consultants Limited, Island Car Rental Limited, Restaurant Associates Limited, The Maritime and Transport Service Limited, National Property and General Insurance Brokers, K. Chandiram Limited, Manpower and Maintenance Limited, Marvin Goodman and Associates, Mrs. Fay Bangerter representing the estate of Peter Bangerter, Ms. Helena Stephens representing the estate of Mr. Earle Patrick Stephens, Ms. June Wallace, and Mrs. Gail Cook-Johnson representing the estate of Dr. Neil Johnson (hereinafter referred to as the 'the Applicant's) and reference is made to the captioned matter.

TAKE NOTICE that pursuant to section 211 of the Companies Act of Jamaica, the Applicants seek to file an application in the Supreme Court of Judicature of Jamaica within fourteen (14) days of the date hereof.

THE APPLICATION WILL SEEK THE FOLLOWING ORDERS:

1. Leave to allow the Applicant to bring a derivative action in the name and on behalf of the Port Royal Development Company Limited (the Company) for the purposes of commencing litigation on the Company's behalf against the majority shareholders of the Company pursuant to Section 212 of the Company Act.
2. Time for the service of the application be abridged.
3. Costs to be costs in the claim
4. Such further orders and/or other remedies as this Honourable Court may deem just."

- [17] I have considered the authority of *Earle Lewis et al v Valley Slurry Seal Company et al [2013] JMSC Comm 21 (unreported judgment of Mangatal J delivered on the 27th December 2013)* and in particular paragraph 23 of that judgment. I accept that there need not be perfect asymmetry between the notice and the intended claim. In this case however, insofar as a claim to enforce the MOU is concerned, the notice relied on is entirely inadequate. The purpose of the notice is to give the directors of the company a warning that if they don't commence or defend litigation, which is in the company's interest, an application will be made. This is to enable the directors of the company to consider and take that action. The notice in this case will, by no stretch of the imagination, have afforded the directors of the Respondent that opportunity. In my view the notice has not sufficiently or at all identified the "*transaction or conduct at issue*". It only references an unspecified potential action against the Respondent's shareholders.
- [18] I will consider the matter of good faith next. In this regard the submission seemed to be that as the intended cause of action was non-existent and, as the Applicant had waited so long and, as they had not applied when a previous political administration was in power, then good faith was absent. I disagree. The many letters over the years, see paragraph 6 above, issued by the Applicant and the minority shareholders he represents prove the consistent and strident efforts to propel the Respondent to action. I accept that it is the opening of the new Port Royal cruise ship pier, without the Respondent's input, which propelled this application. There is no mala fides that I can discern. I hold that the Applicant has demonstrated good faith.
- [19] It was submitted that the lack of clarity about the intended defendants to the derivative action, and about the proposed cause of action, also evidence bad faith. I disagree. The minority shareholder's understandable concern, that their financial input into the project be not lost (as expressed in many of the letters to which reference has been made), does not detract from their concern to see Port Royal developed with the Respondent's input as per the MOU. There is no inherent

inconsistency in a desire to see the joint venture pursued and to recover funds invested if it is not.

[20] Queen's counsel, for the Respondent, also submitted that the intended claim is not in the best interest of the company. Shareholders, he said, have no fiduciary duty to the company they own. Nor are they responsible for its actions or omissions. Leave, to bring a derivative claim, ought only to be granted against its directors and there is no such application before this court. He also submitted that the permission applied for related to shareholders and the "*secretariat*." The latter is undefined anywhere in the affidavit evidence filed. When asked the Applicant's counsel stated that the "*secretariat*" included the UDC and the directors of the company. Counsel referred to some of the correspondence which suggested that the UDC was the secretariat see, for example, the letter dated 27th March 2018 being exhibit RS 17 to the first Stephens affidavit.

[21] I considered at one time, substituting the UDC for "*the secretariat*" and giving permission for an action to be commenced for breach of fiduciary duty against that agency or its representatives on the board. However, as said earlier, the notice relied on does not articulate any such potential claim. Furthermore, the affidavits relied upon do not state that the UDC is the "*secretariat*" to which reference is made in the application. Furthermore, it would be unfair for this court to unilaterally do so as the Applicant never sought to amend to name the UDC or anyone else. Had that been done the Respondent could reasonably have asked for time to take instructions

[22] In this case there is no evidence to support a derivative claim against the Respondent's shareholders in their capacity as shareholders. A minority shareholders claim against the majority for oppression or other remedies pursuant to section 213A, and which is referenced in a letter dated 23rd October 2019 being exhibit RS26 to the first Stephens affidavit, is not one for which the permission of the court is required. On the evidence before me any derivative claim contemplated, ought to be against the members of the board, and/or the

Government of Jamaica and its agencies, for breach of fiduciary and/or contractual obligations.

- [23] In the final analysis the application fails, as, firstly, there was inadequate notice to the directors of the Respondent as to the intended action. The notice, on which reliance is placed, does not alert to a claim against the state or its agencies for breach of the MOU or against the directors for a breach of fiduciary duties. Secondly because the intended claim, against the “*shareholders*’ and an undefined “*secretariat*,” has, for the reasons stated above, no real prospect of success and is therefore not in the interest of the Respondent
- [24] The application is therefore dismissed. As my decision was arrived at primarily on technical grounds, I am minded to make no order as to costs. Counsel may however endeavour to persuade me to do otherwise.

David Batts
Puisne Judge.