[2026] JMCC Comm 28

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

COMMERCIAL DIVISION

CLAIM NO. SU2018CD00342

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 OPEN COURT

Appearances: Mr. Michael Hylton KC, Ms. Stephanie Ewbank, Mr. Jacob Phillips and Mr. Ronaldo Richards instructed by Myers, Fletcher & Gordon, for the Claimant

Mrs. Georgia Gibson Henlin KC and Ms. Stephanie Williams, instructed by Henlin Gibson Henlin, for the 1st to 5th Defendants

Mr. Ransford Braham KC and Ms. Ann-Marie Layne, instructed by Braham Legal, for the 6th Defendant

Heard: 3rd, 4th, 5th, 10th, 11th, 12th, 13th, 14th, 18th and 19th October 2022; 23rd and 24th January 2023; 18th and 22nd September 2026

Company Law – S.213A of the Companies Act – Shareholder Oppression Remedy – Valuation of shares – Whether to apply Minority Discount – Whether real property was a redundant asset – Beneficial Ownership of Shares – Vendor-Purchaser Constructive Trust

BROWN BECKFORD J

Would that I could be the peacemaker of your soul, that I might turn the discord and rivalry of your element into oneness and melody.

- Khalil Gibran, The Prophet

Alas, these are adversarial proceedings in which there must be a winner and a loser.

PROLOGUE

[1] It would be remiss of me not to begin this judgment with an apology to the parties and to Counsel for the delay in delivering it. The Court is mindful of the established time standards and its obligation to deliver these decisions as quickly as possible. I acknowledge that this matter falls woefully short. I acknowledge, too, that delays of this kind inconvenience and may prejudice those who wait. While the pressures of other current matters have contributed, I accept full responsibility, and I crave the indulgence of the parties and Counsel.

INTRODUCTION AND BACKGROUND

[2] This trial is the latest battle in the dispute between siblings and other family members over the ownership and management of Chas E. Ramson Limited ("the Company or Chas"). Chas is a privately held family business founded by Mr. Charles E Ramson, which commenced operations in or about 1922. It has been a patriarchal holding throughout, save for a brief period during which it was headed by Mrs. Rose Ramson, the wife of Charles E. Ramson. She was thereafter succeeded by Mr. Lauritz Ramson, the son of Charles E. Ramson and the father of Mr. John Ramson, Mrs. Sally Fulton, and Mrs. Elizabeth Susan Silvera. Mr. John Ramson succeeded Mr. Lauritz Ramson as Chairman of the Company and his son Mr. Phillip Ramson, succeeded him as Managing Director of the Company. The business, in its present iteration as Chas E. Ramson Limited, was incorporated in 2001.

[3] A Return of Allotment, filed after incorporation, reflected that the shares in the Company were distributed as follows:

Lauritz Ramson	-	18 shares
John Ramson	-	95 shares
Sally Fulton	-	95 shares
Susan Silvera	-	95 shares
Janet Sheena Ramson	-	1 share
Noel Raymond Silvera	-	1 share

[4] With changes in shareholding coming about as a result of inheritances, the current share distribution is as follows:

John Ramson	-	102 shares
Susan Silvera	-	101 shares
Sally Fulton	-	101 shares
Phillip Ramson	-	19 shares
Christopher Ramson	-	19 shares
Richard Ramson	-	19 shares
Kathryn Silvera	-	19 shares
Noel Raymond Silvera	-	1 share

[5] The 1st to 5th Defendants are the current Directors of the Company. For ease of reference, and without intending any disrespect to these persons, Christian names may be used throughout this judgment.

[6] Sally Fulton is the elder of the two daughters of Lauritz Ramson, and unlike Susan Silvera, she was never employed in the Company's operations. Susan began her employment with the Company in 1987 as an Operations Manager. She became the Company Secretary in June 2002, and a Director in April 2011, following the death of her father. Her husband, Noel Silvera, was also employed by the Company in a management capacity. Christopher Ramson and Phillip Ramson, sons of John Ramson, joined the Company in management positions, having completed tertiary studies at the Company's expense. Sally's son, Ian Fulton, was expected to join the Company following the completion of his studies, his education having been financed by it, as had been that of his cousins. He began working there but was later separated from the business following allegations that he had stolen from it. His separation appears to have been the catalyst for the asperity among family members which has, arguably, spurred the litigation between the parties.

[7] Through the administration of her father's and mother's estates, Sally became aware (her actual knowledge of her shareholding was a disputed area of this trial) of her interests in terms of her shareholding in the Company. With legal counsel, she sought to assert her shareholder rights by attending general meetings, by way of proxy, and making inquiries. She also sought to participate in the management of the Company through its Board of Directors but was not successful in being so engaged. Dissatisfied with the Board of Directors' response to her entreaties and inquiries, she commenced litigation with a view to asserting those rights. There have been several claims brought by her in this regard.

HISTORY OF LITIGATION

[8] This claim, and other claims between the parties and related persons, have been the subject of several judicial decisions delivered before this trial. An historical backdrop is therefore appropriate.

(i) **Claim No. 2015CD00107** — The Claimant sought leave to institute a derivative action in the name of the Company, against its Directors, for breach of their fiduciary duties. The Claimant asserted that the Directors were using two of the

Company's assets, real estate, for their own benefit, which had in turn caused the Company to incur significant losses. Sykes J (as he then was) granted leave to file the derivative claim. The Company appealed the decision of Sykes J, but the appeal was dismissed in **Chas E. Ramson Limited v Sally Fulton** [2021] JMCA Civ 54.

(ii) **Claim No. 2018HCV03849** — The Claimant instituted proceedings against the Company to bring a derivative action in the Company's name against Mrs. Mary Ramson. She withdrew this claim, which had been filed in the Civil Division.

(iii) **Claim No. 2018CD00567** — The Claimant renewed her leave application in the Commercial Division to bring a derivative action against Mrs. Mary Ramson. The renewed claim mirrored the earlier one, alleging that the directors had improperly awarded salaries and benefits to Mrs. Ramson without her being employed by the Company. By Notice of Application filed 16th November 2018, the Company filed an application to strike out the Claimant's application for leave on the basis that the application was an abuse of process and the statement of case lacked merit. Alternatively, the Company sought to stay the application until the appeal in Claim No. 2015CD00107 had been resolved. The application for leave to bring a derivative claim was struck out by Batts J, and upheld by the Court of Appeal in **Sally Fulton v Chas E. Ramson Limited** [2022] JMCA Civ 21.

(iv) **Claim No. SU2022CD00028** — Sally Fulton, having been granted leave to bring a derivative claim on behalf of the Company, Chas E. Ramson Limited, as Claimant, initiated a claim against the Directors of the Company on the basis that they had wrongfully and/or negligently and/or in breach of fiduciary duty used two of the Claimant's properties to its detriment. The claim was for Damages and/or an Order that the properties be sold, and the proceeds divided amongst the shareholders. Batts J ordered that the derivative claim be stayed to abide the outcome of the present oppression action.

(v) **Claim No. SU2018CD00342** — The Claimant alleges that the 1st to 5th Defendants, who are the directors of the Company, which is the 6th Defendant, have conducted the Company's business affairs and/or wielded their powers as Directors in a manner that is oppressive, unfairly prejudicial to, and/or unfairly disregards her interests as a shareholder. This is the present claim before the Court for determination.

ISSUES

[9] An immensely helpful chronology was appended to the Claimant's submissions, which I adopt and attach to this judgment as Appendix 1. There was one point of agreement between the parties. That is, the Court should grant the remedy under **S. 213A(3)(f) of the Companies Act** and direct the Company, and/or Directors, to purchase the shares of the Claimant in the Company. They differed, however, as to the basis upon which the Court should make such an Order, the value of the said shares, and the number of shares to be purchased. Thus, the following broad issues were raised on the pleadings in the Claim and Counterclaims and the evidence for determination.

Issue 1: Whether the 1st to 5th Defendants exercised their powers in a manner that was oppressive of, or unfairly prejudicial to the interests of the Claimant or unfairly disregarded her rights within the meaning of **S.213A of the Companies Act, 2004**?

Issue 2: The determination of the number of shares owned by the Claimant.

Issue 3: The valuation of the Claimant's shares, including, specifically, determining:

a. whether the property known as "Coconuts" is a redundant asset; and
b. whether a minority and/or marketability discount should apply.

THE CLAIMANT'S CASE

[10] The Claimant, Sally Fulton, commenced these proceedings against the 1st to 6th Defendants, John Ramson, Susan Silvera, Christopher Ramson, Phillip Ramson, Noel Raymond Silvera and Chas E. Ramson Limited, respectively, contending that the Company's affairs have been conducted in a manner that is oppressive of, and/or unfairly

prejudicial to her interest as a shareholder. By Claim Form filed 7th June 2018, the Claimant seeks the following Orders pursuant to **S.213A(2) of the Companies Act, 2004**:

1. An order compelling the Defendants to produce and make available to the Claimant all financial statements and other accounting and banking records of the 6th Defendant for the past 15 years;

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

3. 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;

4. A declaration that all Annual General Meetings of the 6th Defendant prior to 2014 are invalid and of no effect;

5. 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;

6. An order that Ann Fulton or her nominee be appointed as a Director of the 6th Defendant;

7. An order that the 6th Defendant serve the Claimant with all future notices convening general meetings of the 6th Defendant;

8. Costs; and

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

THE 1st TO 5th DEFENDANTS' CASE AND COUNTERCLAIM

[11] The 1st to 5th Defendants refute the Claimant's allegations and contend that the alleged conduct has not been established on a balance of probabilities. They further contend that they have committed no breach capable of giving rise to a claim for oppression.

[12] Each Defendant filed a Defence and Counterclaim on the 18th September 2018, as amended on 4th October 2018, and as further amended on 13th November 2020. The 1st Defendant counterclaims for the following:

a. A declaration that the Claimant owns seven (7) shares in the 6th Defendant;

b. An order that the Claimant's share(s) in the 6th Defendant be valued by an independent chartered accountant to be agreed between the parties and failing agreement by 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;

c. An order that the 1st Defendants 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;

d. 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;

e. Costs to the 1st Defendants to be taxed if not agreed; and

f. Such further and/or other relief and/or direction as the Court deems necessary.

The counterclaims of the 2nd - 5th Defendants were substantially the same.

<u>THE 6th DEFENDANT'S CASE AND COUNTERCLAIM</u>

[13] By Defence and Counterclaim filed 18th September 2018, as amended on 4th October 2018, and as further amended on 13th November 2020, the 6th Defendant counterclaims for the following:

a. An order that the Claimant's shares in the 6th Defendant be valued by the 6th Defendant's auditors or such other chartered accountant as determined by this Honourable Court;

b. An order that the 6th Defendant do purchase the Claimant's shares at the value so determined, at paragraph 30(a) above and the court to give such directions as are appropriate or necessary to facilitate the sale.

c. Costs to the 6th Defendant; and

d. Any order, direction or ruling as the Court deems just.

<u>SUMMARY OF THE EVIDENCE</u>

THE CLAIMANT'S EVIDENCE

[14] Sally gave evidence on her own behalf and called two witnesses, her Daughter, Anne Fulton and her Attorney and proxy, Marc Williams. Their evidence is summarized below.

Sally's Evidence

[15] Sally testified that, when she was 18 years old, her father offered to finance her training as a teacher, nurse, or secretary. She chose teaching and pursued her studies abroad. At the time, her siblings, John and Susan, were 8 and 5 years old, respectively. She said that, upon her return, she was not invited to work in the Company and did not seek to participate in its affairs until 2014. In her witness statement, Sally stated that, following the probate of her father's estate, inquiries revealed that she was a shareholder.

In her oral evidence, however, she gave a different account, stating that the matter arose upon her mother's death in 2014, when it emerged that her mother held shares to be distributed and that other persons also held shares. She did not identify those persons. Under cross-examination, Sally acknowledged that her relationship with John and Susan had been virtually non-existent since John dismissed her son in 1995. She denied, however, that this estrangement was the cause of the present proceedings.

[16] Sally maintained in her witness statement that she was the registered holder of 101 shares and that, prior to 2014, she had received no notices of meetings, financial statements, or other corporate information. After obtaining legal advice, she requested the minutes and accounts of the Company, as well as information concerning dividends, directors' remuneration, and other benefits. She also sought representation in the management of the Company by proposing the appointment of her daughter, Anne, to the Board, and regarded the rejection of that proposal as further evidence of her continued exclusion from the affairs of the Company. Under cross-examination, she accepted that the Company subsequently provided her with the accounts and minutes for the period 2008–2013 and that, from 2014, she generally received notices of meetings and attended by proxy, save in 2019 and 2020.

[17] Sally also alleged in her witness statement that the Directors received unauthorized emoluments and personal benefits and that the Company operated a prejudicial dividend policy. She specifically questioned the payment of a salary to Mary Ramson, who, to her knowledge, was not employed by the Company. Her concerns were based principally on the audited accounts and other documents, rather than on matters within her direct knowledge. Under cross-examination, Sally accepted that she had not compared the directors' remuneration with prevailing market rates, could not distinguish personal travel from legitimate business travel, and had limited knowledge of the Company's profitability. She further accepted that she had no independent basis for characterizing the payments as unlawful or the dividend policy as prejudicial. As to Mary Ramson, Sally said only that she had no knowledge of Mary working at the Spanish Town Road office and that she generally saw her elsewhere during working hours.

[18] In her witness statement, Sally further alleged that the notices for the 2019 and 2020 meetings were posted to her by regular mail, in bad condition, with the intention of impeding her participation. Given the breakdown in the relationship between the parties, she ultimately sought either to acquire the interests of the other shareholders or to have her shares purchased at fair value, with that value taking into account the Company's retained profits and the current value of its non-operational assets.

[19] In relation to the disputed ownership of the 94 shares, Sally acknowledged in cross-examination that the signatures appearing on the relevant corporate documents and the 1985 transfer instrument were hers. She accepted that the instrument appeared to describe her as the nominee or trustee of the shares for Caribbean Cutlery Limited, but stated that she had no recollection of the transaction.

Anne's Evidence

[20] Anne Fulton also gave evidence that she had assisted her mother with her business and financial affairs and corroborated her account that the shareholding was discovered in 2014. She said that, prior to that time, she had not seen her mother receive notices of meetings of the Company. In her evidence-in-chief, Anne explained that, when a bearer delivered a document to the office, security would first check the document and then direct the bearer to the front desk, where the receptionist would sign for it before it was delivered to the addressee. She said that the office handled numerous "accountable documents", including passports and cheques, and therefore maintained strict procedures for their receipt. Where her mother was absent, documents addressed to her would be passed to Anne. Under cross-examination, however, Anne accepted that her evidence was limited to documents received at their workplace and that she could not exclude the possibility that notices had been delivered elsewhere.

[21] In her evidence-in-chief, Anne also confirmed that she had agreed to represent her mother on the Board and that, although her written consent and curriculum vitae accompanied the renewed proposal in 2016, the other shareholders rejected her appointment. She testified that she had substantial experience in corporate travel and administration. Under cross-examination, however, she accepted that, although she had

worked at the Company during a few summer periods, she had no formal training or substantive experience in the distribution of consumer goods.

Marc Williams' Evidence

[22] Mr. Marc Williams, Attorney-at-Law, stated in his witness statement that he attended the Company's annual general meetings in 2017, 2018, and 2019 as Sally's proxy. He testified that, at the 2017 and 2018 meetings, he repeatedly raised questions concerning Mary Ramson's purported employment and the payment of personal expenses, but received no substantive response. At the 2019 meeting, he also sought information concerning payments for domestic staff, personal telephone and household expenses, travel, and the personal use of Company property. He stated that John declined to address those matters on the basis that they were before the Court. Under cross-examination, Mr. Williams accepted that he had no personal knowledge of whether a written response concerning Mary Ramson had previously been provided and that his evidence that no response had been received was based on instructions given to him by Sally.

[23] Mr. Williams further testified that he received instructions to attend the Company's 2019 meeting only on the preceding day. He had attended a meeting of Caribbean Foods Limited as Sally's proxy one week earlier, after which John told him that he would see him at the following year's meeting but made no mention of the Company's meeting scheduled for the following week. Mr. Williams inferred from that conversation that John was attempting to ascertain whether he knew of the impending meeting.

Preliminary Impression of the Court

[24] The Defendants challenged the credibility and reliability of Sally's evidence. The overall impression formed by the Court from her oral testimony was that she appeared to answer from convictions held, whether or not they ultimately proved to be correct or inaccurate. For example, her knowledge of her shareholding was challenged in cross-examination, which clearly called into question her recall of events. The reliability of her evidence must therefore be assessed in the analysis of the issues.

THE DEFENDANTS’ EVIDENCE

[25] The 1st to 4th Defendants each gave evidence on their own behalf and of each other. Their evidence is summarized below.

[26] The 1st to 4th Defendants’ evidence was materially consistent on the principal issues. They stated that the Company originated as a family business controlled by Lauritz, was converted into an Industrial and Provident Society (“IPS”) in 1984, and was subsequently incorporated as the present Company, with the existing shareholdings continuing upon conversion. They maintained that Sally beneficially owned only seven shares because, pursuant to the 1985 transfer instrument, she agreed to hold 94 of the 95 shares allotted to her as nominee for Caribbean Cutlery Limited. The additional six shares were subsequently transferred to her outright by Deed of Family Arrangement executed by the relevant beneficiaries under her mother’s will, as a gesture of goodwill. However, under cross-examination, both John and Susan accepted that Sally was the registered owner of 101 shares.

[27] All the Defendants were of the view that the relationship with Sally had irretrievably broken down, that continued association was impracticable, and that the appropriate remedy was the purchase of her shares by one or more of the Defendants and/or by the Company. It is necessary to examine the 1st to 4th Defendants’ evidence in a little more detail.

John’s Evidence

[28] John gave evidence that he began working in the Company as a controller in 1971, became a Director in 2002, served as Managing Director until September 2017, and thereafter continued as Executive Chairman and Management Consultant. His university studies abroad was funded by the Company. He shared that on his return to Jamaica in 1971 after completing his studies, Lauritz simply told him to sit and work. He said he did not even know if he was going to be paid or how much.

[29] John testified that, although 101 shares were registered in Sally’s name, she beneficially owned only 7 shares. He stated that pursuant to the transfer instrument dated

21st February 1985, Sally agreed to hold 94 of the 95 shares originally allotted to her as nominee for Caribbean Cutlery Limited, and that this arrangement continued when the IPS was converted into the present Company. The remaining 7 shares comprised 1 held for Sally's own benefit and 6 shares subsequently transferred to her outright under the Deeds of Family Arrangement. He therefore maintained that, of the 101 shares registered in Sally's name, 94 were held on behalf of Caribbean Cutlery Limited and 7 were held for her own benefit. John testified that he discovered the transfer instrument in his father's office in September 2017.

[30] Under cross-examination, John was challenged firstly on his assertion that Sally became the owner of the 6 shares from 2012. He responded that Sally knew of her position in relation to the 6 shares from a meeting at his home in 2012. He said the minutes would confirm this. He agreed that the minutes for this meeting, which were tendered into evidence, did not speak to her ownership of the 6 shares specifically. However, he maintained that the discussion about the '18 Charles E. Ramson CERL shares' related to the transfer of the shares to Sally outright. He conceded the discussion reflected what was due to the beneficiaries according to the terms of Lauritz's Will, by which Sally was given a life interest in the shares. He went on to say that the issue of the transfer was explained by Mr. Ogle, the Executor of the Estate Lauritz Ramson, but since the minutes were prepared by Mr. Ogle's daughter, they were subject to errors and omissions. He eventually said he did not recall when Sally became the owner of the shares.

[31] In addressing Sally's assertion that she had received no notices of annual general meetings from 2002-2014; he stated that these notices had been delivered by hand and recorded in the bearer books which had since been disposed of. Upon becoming aware in 2014 that Sally was contending that she had not received these notices, he instructed Susan to send subsequent notices by registered mail in order to preserve proof of dispatch. When Sally's Attorneys-at-Law complained about the method of delivery for May 2019, the Company resumed delivery by bearer and required signed acknowledgments of receipt. He further testified that Sally attended most of the general

meetings since 2014 by proxy, except for meetings held on July 14, 2020, and August 30, 2022.

[32] When challenged on cross-examination, he stated that between 2002-2014, the notices were delivered by hand. The bearer books for that period were not located as they were not kept for that length of time. Between 2014-2018 he said the notices were sent by hand and registered mail but did not recall what method was used for which years. He agreed that, for the years 2019–2020, the notices were sent by registered mail. He disagreed, however, that the notice for the annual general meeting held in May 2019 was sent by registered mail and posted on April 26, 2019, following a letter from Sally's Attorneys dated March 2019 which raised a lengthy list of questions. He further disagreed that the intention in sending the notice in that manner was to avert Sally from attending the meeting.

[33] Despite saying in his witness statement that he gave instructions for the notice to be sent by registered mail, as well as confirming this statement earlier in the cross-examination, after he was challenged with the manner of delivery of the notices and the reason for the changes made, and asked whose instruction it was to send the notice by registered mail in 2019, he said he could not recall. He also agreed that the only notice disclosed was the one for 2011 where it was announced his father had died and the other Defendants became Directors.

[34] John stated in his witness statement that, after Sally commenced the proceedings and complained that she had not received dividends, the Board obtained legal advice and introduced a formal dividend policy in 2016. In further examination-in-chief, he stated that no dividends had been paid for a five-year period. He further testified that, during the period 2010–2013, the Company sustained losses of nearly Seventy-Six Million Dollars **($76,000,000.00)**, as it had made no profit, and that the dividend declared in 2016 was based on profits earned in 2015. Under cross-examination, however, he stated that although a dividend had been declared, he was uncertain whether it had actually been paid. When asked whether Sally had been paid a dividend in 2017, he eventually stated

that the payment was made in 2020. He disagreed with the suggestion that Sally had not received the dividends due to her as at the time he gave evidence.

[35] He was also shown audited financial statements for the year 2008, bearing his and Susan's signature, which illustrated that dividends were shown payable for the years 2007-2008, which he accepted to be true. The balance sheet in the financial statements for 2009, also signed by him and Susan, showed that dividend payable figure under "current liabilities". He was also confronted with the balance sheets for 2010 where the dividend payable was no longer listed under current liabilities. He agreed that the financial statements reflected the position that dividends were declared in or before 2007, which were not paid up to 2009 but were however paid sometime between the financial statements of 2009-2010. He stated he did not recall whether Sally received those dividends, but disagreed when Counsel went on to suggest that she did not. He eventually disagreed that Sally had not received any share of those dividends.

[36] Concerning Coconuts, John's evidence-in-chief was that the property was purchased in 1983, that an office was established there in 1993 and that it was used to entertain customers and suppliers of Chas. He said that Sally and members of her family had also used the property. The Directors considered renting it commercially but decided against doing so because of the work and regulatory compliance required, and because the Company did not wish to depart from its core distribution business. He denied that the property was used as a personal family place as alleged by Sally.

[37] On cross-examination, he stated that, in 2015, the property was used as a layover point between Kingston and Montego Bay for sales and marketing purposes, as well as for directors' meetings and relaxation, among other purposes. It was also used to entertain clients of the Company. Directors and Shareholders, including Sally and her two children, also enjoyed the use of the property. By 2022, however, the property was no longer being used to the same extent for overnight stays, following the advent of the North Coast Highway.

[38] He agreed with Counsel, on cross-examination, that the 2015 valuation report prepared by the Defendants' expert, D. C. Tavares-Finson, identified the current uses of

the property as *“residence, resort villa and cottage”* and made no reference to the business use of Coconuts. He sought to explain this omission on the basis that the valuator had not determined all of the uses to which the property was put. He similarly dismissed the absence of any reference to business use in the 2022 valuation report, which reflected the same uses, as being attributable to the “standard format” of the report. He also accepted that he had not sought to modify or remove the restrictive covenant on the Registered Certificate of Title which prohibited the use of the property for business purposes.

[39] With respect to the use of Coconuts to shore up the Company’s balance sheet, he agreed in cross-examination that, at a Board of Directors’ meeting concerning the proposed expansion of the warehouse, it was recorded in the minutes that the Bank of Nova Scotia and Jamaica National had advised the Directors that financing of One Hundred and Twenty Million Dollars **($120,000,000.00)** would be available to the Company, with the Company being required to fund the balance. The Directors were advised to consider the sale of non-core or non-performing assets and, in particular, the sale of Coconuts, which was valued at One Hundred and Seventy-Five Million Dollars **($175,000,000.00)**.

[40] The minutes of the meeting held on August 30, 2017, which was chaired by John, were put to him during cross-examination by Counsel and showed that the Directors had agreed with the proposal. John maintained that he did not agree with the proposal, but accepted that the minutes accurately recorded what had transpired at the meeting. He also admitted that the Directors had contemplated selling Coconuts to Caribbean Foods, of which he is the sole director and majority shareholder. This was against the background of the Directors’ conclusion that, with the advent of the North-South Highway, Coconuts no longer served the purpose for which it had been acquired, namely, to provide overnight accommodation in Discovery Bay. Notwithstanding this, John maintained that he did not agree that Coconuts should be sold.

[41] The last contested area related to the number of shares owned by Sally. John, in his witness statement, asserted that the current shareholding of Sally was 7 shares. In

cross-examination, he agreed he had previously stated in affidavits that her shareholding was 25.25 %, equal to his. He explained that the prior statements were given before his discovery in 2017 of the Transfer of Shares executed by Sally, from which he concluded she held 94 shares in trust for Caribbean Cutlery. The documents filed at the Companies Office were subsequently changed to reflect this, noting the beneficial owners as John Ramson and Raymond Silvera, the executors of the estate of Monica Ramson, having taken advice from their Attorneys-at-Law. He agreed that Sally was thereafter paid dividends on 7 shares only. He insisted he only discovered the transfer in the year 2017 and denied that the changes were self-serving, having regard to the possibility of having to purchase Sally's shares; despite not having mentioned that he found the Transfer in 2017 before giving viva voce evidence.

Susan's Evidence

[42] Susan's testimony is that she is the Company's Director of Credit and has served as Company Secretary since 2002. Susan gave evidence that as part of her duties as Company Secretary she prepared the meeting notices, placed them in envelopes and gave them to the Company's bearer for delivery to Sally at Total Travel Services, 13 Waterloo Road. Before 2009, Lauritz sometimes directed the dispatch of the notices himself, and informed her that he had done so. The bearer ordinarily recorded receipt in a bearer book, but those books could no longer be found. In cross-examination she said the notices were not only sent to Sally, but to all the shareholders which also included her mother. In relation to the decision to send the notice in 2019 by registered mail, she said it was a decision taken by herself and John after discussion. That decision was taken to ensure they had proper records in view of the many letters going back and forth from Sally's Attorneys-at-Law having numerous complaints. She agreed there were no dispute raised by Sally about receiving notices, and within time, between 2014 and 2018.

[43] In relation to Sally's absences from meetings before 2014, Susan stated firstly that she never heard from Sally as to why she was not attending the meetings. Secondly, she later said both Sally and her mother indicated that they were not interested in attending any meetings. Thirdly, she said Sally did not indicate to her as they were not on speaking

terms. She did, however, agree that Sally attended a function for her birthday where they were photographed together. Her Counsel's attempt to reconcile these answers in re-examination was not successful.

[44] In relation to Ian's dismissal, Susan testified that Lauritz terminated his employment following an investigation. She said that she attended the meeting, together with Sally and Sally's husband, at which Lauritz informed Ian of the termination.

[45] Susan stated that she used Coconuts while carrying out duties relating to the Western Distribution Centre. She relied upon her diaries, trip reports and minutes of credit meetings as records of that business use. On cross-examination, she did accept that the use of Coconuts was not mentioned in the minutes of credit meetings. She said she gave a calendar of the Directors' use of property to her lawyers, but when Counsel asked whether her lawyers had disclosed them in this case, she said she did not know. In cross-examination she admitted to a dearth of documents in relation to her use of Coconuts for business purposes.

[46] Susan testified that she had tried on several occasions to engage Sally, including during court proceedings, but Sally refused to be civil or speak to her. She recalled attempting to speak to Sally at a funeral, where Sally did not respond, which caused her to feel embarrassed. Susan said that she later explained those feelings to Sally outside court in 2016, but Sally remained unrepentant and again refused to speak to her. She felt that Sally had distanced herself from the family and attributed Sally's ill will towards her and John to Ian's dismissal in 1995. Given Sally's continued refusal to communicate, Susan said that she would feel very uncomfortable working with her and considered a cooperative relationship within the Company impossible. She expressed her willingness either to purchase Sally's shares herself or to recommend their purchase by the Company.

[47] In relation to dividends, she stated her father had a no dividend policy and that profits were ploughed back into the business. This policy was continued after his departure from the Company. In cross-examination, she stated that the first dividend she received was in 2016 and that she was not aware of any shareholder receiving any

dividends prior; the dividends declared in 2017 were paid in February 2020. The Court notes, as pointed out by the Claimant's Counsel, that the Minutes confirming this were disclosed at the time this witness was in the witness box, after the Claimant's case was closed and suggestions to the contrary made to John. Examining Counsel countered that it was only after John's cross-examination that it was apparent that whether payment had been made was in issue.

[48] Susan agreed that she observed a decline in her father's mental health but could not recall the year. He was at the Company up to 2009. She agreed there was a discussion between herself, John and Christopher to apply to the court to be appointed a Committee of Management over Lauritz's affairs.

Phillip's Evidence

[49] Phillip stated that the Company offered to fund his tertiary education in 1996 in return for his agreement to work there for at least three years after graduation. After obtaining a Bachelor of Science degree in 2002, he joined the Company as Sales Manager for the Western Distribution Centre, later served as Area Manager and Islandwide Sales Manager, became a Director in 2011 and was appointed Managing Director in 2017. He relied upon the 1996 funding letter, his degree certificate, the notices of his appointments and his pay advices for 2011–2022 as evidence of his employment.

[50] Phillip testified that Coconuts was held as an investment, and used to accommodate Directors and senior managers conducting business on the North Coast, which accounted for approximately 30% of the Company's sales. He said that it was also used for management retreats, business strategy discussions and entertaining customers and suppliers, and that he had used it in carrying out his duties. Phillip opposed Sally's proposal to sell Coconuts, maintaining that its capital appreciation had increased the Company's equity, and that its disposal would adversely affect the Company's ability to obtain long-term financing and supplier credit. He also gave evidence in relation to the Directors' contemplation to sell Coconuts when seeking funding for expansion. He stated that their plan was to liquidate some of their long-term debts and shore up their balance sheet. On cross-examination, he admitted that he did not agree with Sally's proposal to

sell Coconuts, as her intention was to pay out to shareholders which would negatively affect their balance sheet.

[51] Under cross-examination, when asked if there were any records of the business usage of Coconuts, Phillip stated that a diary that was kept by his mother Mary year to year on the use of Coconuts and the reasons. He said these diaries were disposed of each year. He also said he could not speak to his Aunt Susan's calendar of her use of Coconuts. He did, however admit that he could not say he had any evidence of the business use of Coconuts to show the Court. In regard to his evidence in relation to whether he agreed that Coconuts was no longer useful, he ultimately accepted that since the North South Highway was built, Coconuts was no longer used as often as an accommodation, and was mostly used for personal purposes including his wedding reception, which Sally had attended.

Christopher's Evidence

[52] Christopher testified that his involvement with the Company began in 1993. Following a meeting with John, he received a letter from the Company setting out an employment and education programme, under which the Company funded his tertiary studies in exchange for his agreement to work there for at least three years after graduation. He obtained a Bachelor of Science degree and commenced employment at the Company in 2000, became Assistant Manager of Branch 4203, was confirmed as Business Development Manager on November 5, 2001, promoted to Assistant General Manager in 2006, appointed a Director in 2011 and became Director of Operations in 2017.

[53] Christopher's evidence was that, although he became a Director in 2011, the remuneration and benefits he received from the Company were paid in consequence of his employment rather than his directorship. His remuneration package included rent, staff, utilities and mileage. On the stand he testified that he had never received a Director's fee and as far as he was aware none of the other Directors did either. He maintained under cross-examination that "Directors' Emoluments" listed under the

financial statements by both KMPG, Deloitte and Touche were the salaries paid to the Directors, not Directors fees.

[54] He gave evidence that he had no service contract and stated that he was unaware that one was required until the Claimant raised the matter and the Company's Attorneys-at-Law confirmed the requirement. He was subsequently advised by John that a memorandum concerning the Directors' remuneration had been prepared and disclosed to the Claimant.

[55] In relation to Coconuts, Christopher gave evidence that it was also used as an investment property which added equity to the Company's balance sheet.

Preliminary Impression of the Court

[56] The overall impression of the witnesses, John and Susan, is that they were evasive and tetchy, particularly John. Susan, many times, sought to avoid answering the questions put to her in cross-examination and often gave answers that were not to the question posed, responded in the form of a question to the Attorney, or was evasive. She had to be urged by the Court several times to answer the question asked.

Dispute of Facts

[57] There were some substantial disputes of fact arising from the evidence. The most consequential of these was whether Notices of Annual General Meetings for the years 2001 to 2013 were delivered to Sally.

<u>SUBMISSIONS ON BEHALF OF THE CLAIMANT</u>

A. Oppressive and/ or Unfairly Prejudicial Conduct

[58] Counsel for the Claimant, Mr. Hylton KC, maintained that the 1st to 5th Defendants engaged in oppressive and unfairly prejudicial conduct, in disregard of the Claimant's interests. Relying on **S.213A of the Companies Act**, **Caribbean Paper Recycling Company Limited** Claim No. 2002 HCV 01705, **Delores Scott-Carlington v Ideal Betting** [2017] JMSC Comm 40, **BCE Inc v 1976 Debentureholders** [2008] 3 SCR 560

and **Wilson v Alharayeri** [2017] 1 SCR 1037, King's Counsel contended that the Claimant has been systematically excluded from the Company's affairs and financial benefits. Counsel argued that the oppressive conduct is evidenced in the following actions and inaction.

Failure to provide Company information

[59] The Directors did not send the Claimant Notices of Annual General Meetings or financial records between 2001 and 2014, in breach of **S.153(1) of the Companies Act**. Counsel relied on **Delores Scott-Carlington v Ideal Betting** *supra* for the proposition that even if the failure was not deliberate, it still amounted to oppression. He submitted that the Claimant only began receiving Notices after she discovered her shareholder status, and that the Defendants' inconsistent testimony and lack of documentation to support their claim that notices were delivered to Sally undermine their credibility.

Exclusion from management

[60] Counsel contended that the Company was a classic example of a quasi-partnership, where the Shareholders were Directors or senior managers, save with regard to Sally's involvement. The Defendant Directors' consistent position to purchase Sally's shares at, what was in their view, a substantially lower price than fair value while persistently blocking the efforts of Sally to participate in the decision making of the Company, amounted to unfair prejudice or unfair disregard of Sally's interest. He relied on **Re BC&G Care Homes Ltd; Crowley v Bessell** [2015] All ER (D) 115.

Unapproved emoluments

[61] The Directors paid themselves additional emoluments as directors, separate from their salaries, without shareholder approval, contrary to Article 79 of the Company's Articles of Association.

Restrictive dividend policy

[62] While the Defendants maintain that no dividends were paid before 2016, the audited financials indicate that dividends were issued around 2010, yet none were paid

to the Claimant. Since 2016, dividend payments to the Claimant have been inconsistent, inadequate, delayed, and improperly reduced. Counsel relied on **BCE Inc v 1976 Debentureholders** *supra*, contending that such actions meet the threshold for unfair disregard.

Improper use of Company funds

[63] Counsel contended that the Company's funding of the Director Defendants' legal defence is itself an act of unfair and prejudicial conduct. He relied on **Re Crossmore Electrical and Civil Engineering Ltd** [1989] BCLC 137, **Re Hydrosan Ltd** [1991] BCLC 418 and **Re a Company (No 004502 of 1989), ex parte Johnson** [1992] BCLC 701 to support his submission that shareholders should not bear the cost of directors' personal defence.

[64] As a remedy, Counsel asserted that:

1) The wrongful payments to the Director Defendants' Attorneys should be treated as distributions, with the Claimant entitled to 33.78% (her shareholding percentage).

2) Since the Company actively participated in these proceedings, it incurred excessive legal costs, and the Claimant should be compensated for 33.78% of 75% of the Company's legal expenses.

3) The assessed value of the Claimant's shares should not be reduced by any benefit recovered in the derivative claim.

B. Shareholding and buy-out

[65] Counsel submitted that the Claimant holds 101 shares, which the Defendants should be ordered to purchase. He challenged the 1st to 5th Defendants' assertion that the Claimant held 94 of those shares on trust for Caribbean Cutlery Limited, contending that, regardless of any alleged trust, she remains the legal owner and is entitled to be

paid accordingly. He relied on **Wittlin v Bergman** 1995 Carswell Ont 1204 and **McAteer v Devoncraft Developments Ltd** [2001] ABQB 917.

[66] Counsel further submitted that the 1st to 5th Defendants' claims regarding the trust are inconsistent and unsupported by evidence. The evidence from the 1st to 5th Defendants was deficient and unreliable in that:

1) The 1st Defendant claimed that the Claimant was never allotted the 94 shares, yet a signed Notice of Allotment which contradicts this.

2) The 2nd Defendant alleged that Caribbean Cutlery Limited had been a shareholder since 2001, yet no supporting share register was produced.

3) The Instrument of Transfer (1985) does not establish a trust, nor was there any evidence of a nominee agreement or trust deed.

4) The 6th Defendant's pleadings acknowledge the Claimant as the registered shareholder of 101 shares.

5) For years, the Defendants treated the Claimant as both the legal and beneficial owner of all her shares.

6) The 1st Defendant's claim that he only discovered the Instrument of Transfer in 2017 is not credible.

[67] Given the total breakdown in trust and confidence, Counsel asserted that the Court should make a buyout Order, as established in **Gloria Chung v Mikol Chung** [2018] JMCC Comm 28.

C. Valuation of shares

[68] Counsel submitted that, while the Court must ultimately determine the price per share, it should prefer the expert evidence of Mr. Fagan over that of Mr. Jayatillake, citing

Ss.213A(3)(f) and 213A(4) of the Companies Act, **Re Bird Precision Bellows Ltd** [1984] Ch 419, **Cyprus Anvil Mining Corp v Dickson** [1986] BCJ No 1204 and **Diligenti v RWMD Operations Kelowna Ltd (No 2)** 1977 CanLII 393 (BC SC).

[69] Counsel argued that Mr. Jayatillake's report is unreliable, as he had no prior experience valuing shares in an oppression case and improperly applied discounts, such as liquidation costs and property-value reductions; he also failed to value intangible assets and omitted a fair-value assessment, contrary to established case law. He submitted that Mr. Fagan's valuation correctly follows oppression-case principles.

[70] Counsel further submitted that:

1) **Minority discount should not apply:** In **Mason v Intercity Properties Ltd** (1987) 22 OAC 161 (CA), minority discounts were deemed inappropriate unless the minority shareholder's conduct justified exclusion.

2) **Discount for lack of marketability should not apply:** As there is a strong market for the shares, applying a DLOM is inappropriate.

3) **Redundant asset recognition:** Coconuts should be valued separately from the business, as per Mr. Richard Downer's analysis and legal precedent.

4) **Financial adjustments were necessary:** Mr. Fagan accounted for financial anomalies and normalisation adjustments, which Mr. Jayatillake accepted as a standard approach but failed to apply.

5) **Comparability of selected companies:** The Defendants' objection to Mr. Fagan's comparators is unsustainable, as Mr. Jayatillake himself previously used the same companies for valuation.

D. Fair share price and interest

[71] Counsel submitted that the breakup value which would obtain if the Company were to be wound up would not represent a fair value to the Claimant and was, in any event, not applicable as the Defendants have not evinced an intention to wind up the Company. He submitted further that the lowest value or minimum price per share should be Sally's share based on her shareholding of the net asset value of the Company, which would be 25.25%. He relied on **CVC/Opportunity Equity Partners Ltd v Demarco Almeida** [2002] UKPC 15, **Sunrise Radio Limited; Kohli v Lit** and **Re Annacott Holdings Ltd** [2011] EWHC 2186 to support the contention that an appropriate valuation must reflect the Claimant's full entitlements.

[72] Counsel further submitted that the Court should award quasi-interest on the purchase price from the date of valuation, citing **Re Annacott Holdings Ltd** *supra*.

SUBMISSIONS ON BEHALF OF THE 1ST TO 5TH DEFENDANTS

A. No oppressive or unfairly prejudicial conduct

[73] Counsel for the 1st to 5th Defendants, Mrs. Gibson Henlin KC, asserted that the Claimant has failed to establish that the 1st to 5th Defendants conducted the 6th Defendant's affairs in an oppressive or unfairly prejudicial manner under **S.213A of the Companies Act.** She maintained that an assessment of unfair conduct must be contextual, having regard to the corporate structure, agreements, understandings, or any pattern of acquiescence that influenced the Defendants' actions. King's Counsel relied on **Weatherly v Weatherly** [2019] 1 BCLC 520, **Isaac v Tan** [2022] EWHC 2023 (Ch) and **Dunrose v Tagco BV** [2022] EWHC 3000 (Ch) to support this position.

[74] Counsel contended that the Claimant has failed to establish any reasonable or legitimate expectation that has been violated, as required by **BCE Inc v 1976 Debentureholders** *supra*, **Eiserman v Ara Farms** (1988), **Naneff v Con-Crete Holdings Ltd** (1995) and **Galantis v Alexiou** [2019] UKPC 15. Counsel relied on the following:

1) **Exclusion from management:** Counsel maintained that the Claimant has had no expectation of, or interest in, participating in the management of the

Company, as evidenced by her own testimony. Additionally, she asserted that the Claimant's claim of discovering her shareholder status only in 2014 was untruthful, as cross-examination revealed that she had known years earlier but had acquiesced in the status quo. She therefore should not now insist on rights she had never sought to exercise.

2) **Failure to receive notices and financials:** Counsel submitted that the Claimant's proxy form contained an incorrect postal code, which could explain any failure to receive notices. There is no evidence of any deliberate omission by the 2nd Defendant, and any alleged non-receipt of notices has been remedied. Moreover, even if the Claimant had attended meetings, she could not have influenced decisions as a minority shareholder.

3) **Failure to provide Company information:** Counsel argued that the Claimant had no legitimate expectation to receive specific Company information, such as the terms of service contracts and benefits paid by the Company. She further submitted that the 1st to 5th Defendants provided financial information before litigation commenced, and there is no evidence that Company funds were used for lavish holidays, personal expenses or luxury vehicles.

4) **Unapproved emoluments:** Counsel denied that the 1st to 5th Defendants received any unauthorized payments, maintaining that all remuneration was related to employment. A KPMG representative clarified that the term "Directors' Emoluments" in the financials referred to salaries and not separate payments. Additionally, payments to the 1st to 5th Defendants were part of their compensation packages, and expert evidence from Mr. Gladstone Lewars indicated that their remuneration was below market rate. Counsel submitted that the only available evidence contradicts the Claimant's assertions.

5) **Unlawful benefits to third parties:** Counsel contended that the Claimant lacks first-hand knowledge to challenge payments to Mrs. Mary Ramson, and that documentary evidence, including employer returns and payroll records, proves that she was employed by the Company.

6) **Restrictive dividend policy:** Counsel argued that the Claimant has failed to prove a reasonable expectation of receiving dividends. She submitted that Mr. Lauritz Ramson opposed dividends, resulting in no distributions between 2001 and 2009; that the Company operated at a loss from 2010 to 2014, preventing any dividend payments; and that the Claimant has received dividends from 2016 to 2022, undermining her claim of oppression.

B. Buy-out counterclaim

[75] Counsel submitted that, due to the irreconcilable breakdown in trust, the Court should order a buy-out, but without any premium for oppression, as none has been proven, relying on **Wright v Donald S Montgomery Holdings Ltd** (1998) 39 BLR (2d) 266. She further asserted that, in cases where oppression has not been proven, the Court may still order a buy-out under **Wittlin v Bergman** [1995] CanLII 790 (ON CA).

C. Shareholding and trust issue

[76] Counsel contended that, although the Claimant is the registered holder of 101 shares, 94 of those shares are held on trust for Caribbean Cutlery Limited, as established by the Instrument of Transfer dated 21st February 1985. The Claimant is therefore only beneficially entitled to seven shares. The conversion of the Industrial and Provident Society in 2001 into the 6th Defendant does not affect the subsistence of the trust between Caribbean Cutlery Limited and the Claimant. Counsel drew support from **Re London Housing Society Ltd's Trust Deeds; Moreland v Woodward** [1940] 3 All ER 665 and **Mount Wellington Mine Ltd v Renewable Energy Co-operative Ltd** [2021] EWHC 1486 (Ch).

D. Valuation of shares

[77] Counsel asserted that the expert valuation of Mr. Jayatillake should be preferred over that of Mr. Fagan, contending that Mr. Fagan's approach is flawed in several respects:

1) **Incorrect methodology:** Mr. Fagan failed to use the cash-flow methodology, which was more appropriate.

2) **Ignored working capital needs:** He failed to account for the Company's need to retain earnings for growth.

3) **Inconsistent adjustments:** He adjusted for depreciation and capital expenditure incorrectly.

4) **Inappropriate comparators:** He used companies such as Blue Power, Consolidated Bakeries and Jamaica Teas, which are not comparable.

5) **Contradictions in report:** His comparators are inconsistent across different sections of his report.

6) **Failure to adjust for staff compensation:** He ignored the fact that the Company's staff salaries were lower than industry peers, which should have reduced his valuation.

7) **Redundant asset treatment:** He treated Coconuts as a redundant asset but failed to factor in alternative accommodation costs.

8) **Market adjustment errors:** He incorrectly applied 10 % adjustments based on Salada Foods and Jamaica Teas, which are single-product manufacturers, unlike the multi-product 6th Defendant.

E. Coconuts as a business asset

[78] Counsel contended that Coconuts has never been a redundant asset, as it has always been used for business purposes. She asserted that Mr. Richard Downer's expert report remains unchallenged, supporting the position that Coconuts should be included in the Company's valuation.

SUBMISSIONS ON BEHALF OF THE 6TH DEFENDANT

[79] Counsel for the 6th Defendant, Mr. Braham KC, concurred with Counsel for the 1st to 5th Defendants that the Claimant has failed to establish that the 1st to 5th Defendants operated the Company in a manner that was oppressive or unfairly prejudicial to the interests of the Claimant.

[80] King's Counsel contended, relying on **Saskatchewan Inc et al** (2010) 359 Sask R 292, that the burden lay on the Claimant to prove oppression, but that she had failed to demonstrate any legitimate expectation that had been breached, as required by **BCE Inc v Bell Canada** [2008] 3 SCR 560.

[81] Counsel argued that the Claimant has failed to establish oppression on several grounds:

1) She has had no reasonable expectation of participating in the 6th Defendant's management, nor was her daughter entitled to a directorship, given her lack of relevant experience.

2) The claims that the 1st to 5th Defendants improperly accessed benefits were refuted, as remuneration decisions are within the directors' purview unless special circumstances exist (**Maple Leaf Foods Inc v Schneider Group** [1998] OJ No 4142 and **Barney v Stamford** [2001] OJ No 676).

3) Allegations of unauthorized emolument payments are unproven, and even if established, would not amount to oppressive conduct (**Mennillo v Intramodal Inc** [2016] 2 SCR 51); no evidence suggests that payments were excessive, fraudulent or unreasonable.

4) No proof was provided that the 1st to 5th Defendants received separate directors' fees in addition to their executive salaries; the financial statements did not distinguish between the two due to varying auditing practices.

5) Assertions that Company funds were used for lavish holidays or luxury vehicles are speculative, based only on social media.

6) Allegations regarding personal and family expenses were dismissed, as such benefits were included in total remuneration, which was still below market rate; the Claimant also failed to substantiate claims that an individual was paid a salary without being employed.

7) The Claimant has had no reasonable expectation of involvement in the Company or of receipt of financial statements between 2008 and 2013; even if any of this was oppressive, no detriment was suffered, and by the time proceedings commenced, any oppressive conduct had ceased, making remedies unnecessary (**Wilson v Alharayeri** *supra* and **Galantis v Alexiou** *supra*).

8) The absence of formal service contracts for the 1st to 5th Defendants did not constitute oppressive conduct, and the alleged breach has been rectified.

9) The 6th Defendant's auditors, KPMG, were not obliged to respond to the Claimant outside general meetings; financial reports were provided, and any alleged failure did not result in harm.

10) Dividend payments were lawful under **S.158(3) of the Companies Act**. The Company made losses from 2008 to 2014, and the Claimant provided no evidence of profitability between 2001 and 2007.

11) The Claimant's complaint about delayed dividend payments is unsubstantiated; if a payment was due, the appropriate remedy would be for the Claimant to receive her proportionate share.

12) The non-declaration of dividends in 2018 was justified, as funds were allocated for expansion.

13) The Company's 15 % pre-tax profit dividend policy since 2015 is consistent with market standards and is not oppressive.

14) The Claimant's challenge to the use of properties for personal purposes is unfounded. The Shadow Drive property was intended for the Managing Director, thereby aligning with corporate practices, and the Coconuts property was primarily used for business purposes.

15) Allegations regarding the Company absorbing Caribbean Foods Limited's expenses are unproven; further, oppressive conduct prior to 2014 should not be considered due to excessive delay in raising the claim, and the Claimant's assertion that she was unaware of her interest until 2014 was contradicted by documents she signed in 2001 (**Galantis v Alexiou** *supra*).

[82] Counsel argued that the Claimant has failed to substantiate her claim under **S.213A of the Companies Act**, and the claim should be dismissed. However, if the Court were to rule otherwise, Counsel made submissions regarding the requested reliefs:

1) The Claimant has no basis to demand financial records beyond what has already been provided.

2) The request for an independent forensic accountant is improper, as no documents were proven to be missing, and a prior application for such an Order had already been rejected.

3) The request to nullify prior Annual General Meetings and recover emolument payments is unwarranted; the Claimant received minutes from 2013 onwards, and the issue was already considered in a general meeting.

4) The refusal to appoint the Claimant's daughter as a director is not oppressive or unfairly prejudicial, given the lack of a reasonable expectation of managerial involvement.

5) The request for future AGM notices to be served on the Claimant is unnecessary, as she has received notices since 2014.

6) A buy-out order is excessive given the failure to prove oppression; if the Court orders a buy-out, the valuation by Mr. Jayatillake should be preferred over Mr. Fagan's, as it is more credible.

7) The Claimant's arguments against a minority discount in share valuation should be rejected. A discount should apply, as she lacks controlling interest (**Shanda Games Ltd v Maso Capital Investments Ltd** [2020] UKPC 2).

Counsel concluded that the claim should be dismissed in its entirety.

<u>ISSUE 1: OPPRESSION</u>

A. The Applicable Principles

[83] **S.213A of the Companies Act** is commonly known as the minority protection provision. This section is based on principles of equity, aiming to ensure fairness between competing interests. A shareholder's ability to influence a company's management is exercised through voting, which takes place only at general meetings. In such cases, the decision of the majority, whether by simple majority or as specified in the company's Articles of Association, prevails. As a result, minority shareholders, who own less than 50% of the voting shares, are at risk of having their interests overridden by the majority, which may act against their interests. The oppression remedy is an equitable solution that

allows the court to protect against the misuse of corporate power. **S.213A of the Companies Act**, enables shareholders to seek relief from the court where:

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

[84] **S.213A** was amended by **the Companies (Amendment) Act 2017 (S.19)** to include the ground of unfair disregard. The term oppression or oppressive conduct will be used to refer to these 3 grounds unless otherwise indicated.

[85] In the leading case of **Scottish Co-operative Wholesale Society Ltd v Meyer** [1959] AC 324 ("**Scottish Co-operative**"), Viscount Simonds described oppressive conduct as "burdensome, harsh and wrongful conduct", indicative of a "lack of probity and fair dealing in the affairs of a company to the prejudice of some portion of its members". The English Court of Appeal in **Re Jermyn Street Turkish Baths Ltd** [1971] 1 WLR 1042 accepted that definition, but added that "oppression must, we think, import that the oppressed are being constrained to submit to something unfair to them as the result of some overbearing act or attitude on the part of the oppressor".

[86] Unfairly prejudicial conduct is less onerous to make out than oppressive conduct. Wrongs which fall short of oppression are frequently considered unfairly prejudicial. The leading exposition is that of Lord Hoffmann in **O'Neill v Phillips** [1999] 1 WLR 1092, who emphasised that the assessment of unfairness, although objective, is to be made against the legal background of the corporate structure under consideration, the Articles of Association and any collateral agreements or understandings between shareholders, and that unfairness may consist either in a breach of those rules or in using the rules in a manner which equity would regard as contrary to good faith.

[87] A synopsis of the law is given by the Court of Appeal in **Michael Drakulich et al v Karibukai Limited et al** [2021] JMCA App 4.

> *[17] The relief provided by section 213A of the Act is aimed at correcting or preventing oppression and unfair prejudice in the conduct of a company's affairs. The section sets out the remedies the court may grant in cases where there has been, among other things, oppression of minority shareholders…*
>
> *[18] Mr Andrew Burgess (now a judge of the Caribbean Court of Justice), in his work, Commonwealth Caribbean Company Law, at page 330, explains that the provisions of the section "are not a codification of the common law; rather, they are intended to confer upon individual shareholders and other complainants a remedy which removes the impediments of the rule in Foss v Harbottle [(1843) 67 ER 189; (1843) 2 Hare 461] and ensures that they are insulated from conduct that is oppressive or unfairly prejudicial or that unfairly disregards their interests".*
>
> *[19] The learned author adopts the description of the oppression remedy as "a broad and flexible tool designed to protect the interests of corporate stakeholders in a variety of corporate circumstances" (see page 330). The term "oppressive conduct" has been interpreted by Lord Simonds in Scottish Cooperative Wholesale Society Ltd v Myer [1959] AC 324 as connoting "burdensome, harsh and wrongful conduct" (see page 334 of Commonwealth Caribbean Company Law). "Unfair Prejudice" has been held to be less stringent than oppression (see page 335 of Commonwealth Caribbean Company Law). It can include removal from a board, exclusion from an office or the denial of a legitimate expectation.*
>
> *…*
>
> *[20] Mr Burgess explains that the purpose of the oppression remedy is "to give relief for thwarted [reasonable] expectations of persons in the protected category" (see page 332). Although the term "reasonable expectations" is usually the preserve of public law, the term has also been used in this context as well. An alternative term, the learned author suggests, would be "equitable consideration". In most cases, the learned author contends, the expectation is based on the Company's Act, the company's constituent documents, and, occasionally, agreements, whether in writing or made orally, which give rise to equitable considerations. All these statements are accepted as being consistent with the provisions of the section and the relevant case-law.*
>
> *[21] Ebrahimi v Westbourne Galleries Limited [1973] AC 360 is one of the earlier cases that confirmed the reliance on equitable principles in providing a remedy for expulsion from office. Their Lordships in the House of Lords agreed with Lord Wilberforce, who ruled that "a limited company is more than a mere legal entity, with a personality in law of its own: that there is room in company law for recognition of the fact that behind [the company], or amongst it, there are individuals, with rights, expectations and*

obligations [between themselves] which are not necessarily submerged in the company structure" (see page 379).

…

[23] The application of equitable considerations, their Lordships ruled, enables "the court to subject the exercise of legal rights to equitable considerations; considerations, that is, of a personal character arising between one individual and another, which may make it unjust, or inequitable, to insist on legal rights, or to exercise them in a particular way" (see page 379).

[88] The most recent pronouncement by the Court of Appeal as to the difference between oppressive conduct and unfairly prejudicial conduct was the case of **Owen Chambers and Andre Johnson v Ivan Smith** [2024] JMCA Civ 9, determined after this hearing, but it contains no new dissertation on the law. It is reproduced here as the Court is not able to improve upon the simplicity and clarity of the statement of the law.

[68] …In Karen Stewart v Bobby Seepersaud and others [2022] JMCA Civ 40, Laing JA (Ag) who delivered the decision of the court explained the difference between "oppressive" and "unfairly prejudicial" conduct. He stated: "[35] The Act, therefore, provides relief for conduct that is oppressive or unfairly prejudicial, concepts which may overlap to some extent. Oppressive conduct was described in Scottish Cooperative Wholesale Society Ltd v Meyer and another [1959] AC 324 as 'burdensome, harsh and wrongful conduct'. Unfairly prejudicial conduct is usually of a type that is less offensive and does not rise to the level of oppressive conduct. It is difficult to identify all the conduct that might be determined to be unfairly prejudicial to shareholders, but common examples include the dilution of a minority shareholder's shareholding or the exclusion of someone who is both a director and shareholder who has a legitimate expectation to be involved in its management as in the case of very small companies or quasi partnerships (see In re a Company (No 00709 of 1992); O'Neill v Phillips [1999] UKHL 24; [1999] 2 All ER 961)."
[69] Based on Karen Stewart a more stringent approach is applied where "oppressive" conduct is being alleged. It is, however, possible, for the conduct complained of to be unfairly prejudicial whilst not meeting the threshold of "oppressive" conduct. As stated by Andrew Burgess in his work, Commonwealth Caribbean Company Law, at page 335: "Unfair prejudice is a less stringent concept than oppression. Thus, in the Canadian case of Miller v F Mendel Holdings Ltd [(1984) 26 BLR 85 Sask QB], it was held that conduct complained of which may not be burdensome, harsh and wrongful and therefore oppressive may nevertheless be unfairly prejudicial. On the other hand, in approaching unfair prejudice, 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 approach of the courts is to look at any

> *prejudicial conduct from an objective point of view, to take into account any relevant circumstances and to give the expression its natural meaning without any technical gloss."*

[89] Unfair Disregard was addressed by Straw JA in **Adam Stewart v Robert Stewart et al [2025]** JMCA App 7 as follows

> *[47] Sykes J addressed the third category; unfair disregard. At the time of that judgment, this category only applied to the Canadian law and not to our Companies Act. However, as already indicated, our Companies Act was subsequently amended (in 2017), to incorporate this third category. Sykes J's assessment of this third category is useful. At para. [33] he stated*
>
> > *"[t]he importance of this third category … is that complainants who fall short of either of the first two may be able to scrape over the finish line under the unfairly disregard". Mrs Gentles-Silvera, in her submissions, stated that the term has been interpreted to mean "unfairly or without cause, pays no attention to, ignore or treat as of no importance the interests of the [complainant]".*
>
> *The definition is taken from Sharma Persad Lalla v Trinidad Cement Holdings Limited and others (unreported decision), HCA No Cv S-852/98, judgment delivered 30 November 1998, which is quoted at para. [210] of Marcia Bellgarde.*
>
> *[48] Sykes J at para. [30] examined the concept of the oppression remedy as expressed in the Canadian case of BCE. Section 241 of the Canadian statute, the Canada Business Corporations Act is essentially reproduced in section 213A of the Companies Act, albeit there are some minor distinctions in phraseology. The distinctions are inconsequential to my deliberations of the three categories. At para. [94] of BCE, it was stated "'[u]nfair disregard' is viewed as the least serious of the three injuries, or wrongs, mentioned in s. 241. Examples include favouring a director by failing to properly prosecute claims, improperly reducing a shareholder's dividend, or failing to deliver property belonging to the claimant: see Koehnen, at pp. 83-84".*

[90] There is no significant dispute between the parties as to the applicable law. The broad principles which emerge from the authorities and scholarly works, in summary, are these:

1) It is the effect of the conduct, and not the conduct of the oppressor as such, that is determinative.

2) No dishonesty is required on the part of the oppressor.

3) The concepts of “oppression” and “unfair prejudice” and “unfair disregard” are adjectival and descriptive of the behaviour complained of.

4) The categories overlap and intermingle, and are not closed.

5) Oppression, unfair prejudice and unfair disregard lie on a scale. Oppression suggesting coercion, bad faith and abuse, while unfair prejudice may be made out where the matters complained of have been unfair and have prejudiced the shareholder, though without the colour of bad faith, and unfair disregard, the least, being the failure to have regard to the shareholder’s interests.

6) The foundation of the jurisdiction is the reasonable or legitimate expectation of the shareholder, which is to be assessed objectively and contextually, having regard to the specific facts, relationships and context of the particular case.

[91] The Honourable Mr Justice Burgess, JCCJ, revisited the issue in a presentation entitled “**The Oppression Remedy and the Demise of Classical Company Law Theory**”, delivered as part of the Mona Law Master Class Series of the UWI Mona Law Faculty on 11th February 2021. He stated that his consideration of the issue was prompted by the prevalence of oppression litigation in the Caribbean region. In his address, he said:

> *The kernel of the oppression remedy provisions is that the conduct complained of must be actionable conduct in the sense that is “oppressive or unfairly prejudicial, or that unfairly disregards the interests of a shareholder or debenture holder, creditor, director or officer of the company”. There are therefore two central focus points in determining entitlement to the oppression remedy. These are (i) the “interests” of the protected category and (ii) the conduct that is “oppressive”, “unfairly prejudicial” or “unfairly disregards” these “interests”*

[92] This view directs the Court’s focus to two questions. First, whether the evidence supports the claimant’s assertion of actionable interests; and, second, whether the

evidence establishes that those interests have been violated by conduct falling within the scope of oppression, unfair prejudice, or unfair disregard.

B. An ongoing oppressive state of affairs

[93] It is important to note, however, that in determining whether to grant a remedy under **S.213A**, the Court must be satisfied not only that the conduct alleged falls within the parameters of oppression or unfair prejudice but also that an oppressive state of affairs existed at the commencement of the claim. In **Galantis v Alexiou** [2019] UKPC 15 ("**Galantis**"), the oppression remedy in **S.280 of the Bahamian Companies Act**, a section materially mirroring **S.213A** of our **Companies Act**, was considered.

[94] In **Galantis** the respondent had sold his shares and business assets to Ali Cat Designs Ltd, a company directed by the appellants, in exchange for partial cash and a promissory note. After a portion of the debt was paid, Ali Cat ceased payments, prompting the respondent to sue and obtain judgment for the outstanding amount. Despite the judgment, the debt remained unpaid. During enforcement proceedings, the respondent discovered that the business had been effectively taken over and operated by another company controlled by one of the appellants. After learning that Ali Cat had been struck off the register, he initiated proceedings under **S.280**, alleging conduct that was oppressive of, or unfairly disregarded, his interests as a creditor.

[95] The trial court found that the appellants had acted oppressively but denied relief on the ground that no ongoing oppression existed because of the Company's removal from the register. The Court of Appeal overturned that decision, and the appellants appealed to the Privy Council. The Board's review of the authorities is helpful and is reproduced in part below:

> *16. The Board considers that conduct which gives rise to oppression need not be continuing at the time of the application to the court. … However, the wording of section 280 strongly suggests that it is directed at remedying a current oppressive or unfair state of affairs. There must be existing oppression or unfairness which is susceptible to remedy by the court interceding in the affairs of the company. … If the conditions of subsection (2) are satisfied, the court may make an order to rectify the matter complained of. … As a result, the concept of restraining oppressive action*

> *under subsection (1) must be given a wide interpretation. However, the whole section is directed at remedying existing wrongs.*

[96] Their Lordships clarified that a complainant seeking relief for oppressive conduct must demonstrate more than mere historical misconduct. The Court underscored that it is not incumbent upon the complainant to demonstrate that the oppressive conduct is actively continuing at the time proceedings are initiated. It suffices that, at the time of commencement, the oppression persists as a prevailing state of affairs necessitating judicial intervention or redress. The remedies enumerated under the oppression section are intended to address and rectify the continuing consequences of prior oppressive actions which can be rectified. This position that the remedies provided for in **S.213A** are geared towards rectifying the wrongs was confirmed in **Owen Chambers** *supra* as follows:

> *[82] The remedies prescribed by the statute are geared towards rectifying the wrong. In Pelley and anor v Pelley 2003 NLCA 6, this issue was addressed by the court. Wells, CJN having cited McDorman v American Reserve Energy Corporation [2002] NFCA 57, with approval at para. [33], stated thus: "[34] Nothing at common law permits a court to interfere with decisions or actions of a corporation or its directors that are otherwise consistent with the statutory provisions under which the corporation is created or functions, and are consistent with the articles of incorporation or by-laws of the corporation. Any such power to interfere must be found specifically in the statutory provision authorizing the granting of the remedies sought. Section 371 does not grant to a court hearing an application for a remedy, power to fashion any remedy which the court deems 'appropriate in the circumstances'. Subsection (2) confers on the court authority to make an order specifically 'to rectify the matters complained of.' The discretion conferred on the court is, therefore, limited to making such orders as it may deem appropriate to rectify the matter complained of. That is significantly different than any remedy which the court thinks 'is appropriate in the circumstances'. (Section 371 of the Corporations Act of Newfoundland and Labrador is similar to section 213A of the Jamaican legislation.)"*
>
> *[83] Wells, CJN also cited with approval at para. [36] the following passage from 820099 Ontario Inc v Harold E Ballard Ltd (1991), 3 BLR (2d) 113 at 197, where Farley J stated: "The court should not interfere with the affairs of a corporation lightly. I think that where relief is justified to correct an oppressive type of situation, the surgery should be done with a scalpel, and not a battle axe. I would think that this principle would hold true even if the past conduct of the oppressor were found to be scandalous. The job for the court is to even up the balance, not tip it in favour of the hurt party."*

Acts Complained Of

[97] The Claimant alleges that certain actions have resulted in her being oppressed and unfairly prejudiced in the affairs of the Company. These allegations pertain to a lack of access to essential corporate information, exclusion from participation in corporate governance, and financial decisions made without proper authorization. The acts complained of are the following:

1) Her not receiving notices of general meetings.

2) The failure to send her financial information relating to the Company before approval at the annual general meeting.

3) Her being deliberately excluded from participating in the Company.

4) The Company being caused to make payments to the Directors without prior approval at a general meeting.

5) The deliberate operation of a restrictive dividend policy so as to prevent her from benefiting financially from the Company.

The intention is to address each head of the oppression claim in the following paragraphs.

Notices of Meetings

[98] Counsel for the Claimant, Mr. Hylton KC, submitted that Sally, as a shareholder of the Company, did not receive notices of general meetings for a continuous period of fourteen years, specifically between 2001 and 2014. He argued that, in her capacity as a shareholder, she was entitled to receive notice of, and to attend, all general meetings of the Company.

[99] In cross-examination, John denied the allegation that notices had not been sent during that period. He asserted that such notices were delivered by registered mail. However, when pressed for documentary evidence to corroborate this claim, he conceded that the bearer books used to log hand-delivered notices could not be located.

Furthermore, he acknowledged that only a single notice had been disclosed in these proceedings: a notice relating to a meeting held in 2011.

[100] To answer the first question, as posited by Burgess, the evidence has to be examined in relation to two periods, which I will refer to as 'the time of Lauritz' and 'after Lauritz'. It is common ground that in the time of Lauritz, he ran the company as though he were a sole proprietor. Though other family members were involved in the Company, the ultimate decision-making rested with him. More importantly, this state of affairs was accepted and unchallenged by the family members who were shareholders. Sally herself confirmed that she had no expectation of participating in the affairs of the Company or in its decision-making. This supports her account and provides context for her failure to recall that she was a shareholder in both the IPS and the limited liability company into which it was subsequently converted.

[101] In the circumstances, up to Lauritz's death, Sally could have had no expectation to have participated by way of attendance at annual general meetings. But that is not exactly the end of it. Susan's and John's evidence is that notices of the annual general meetings were in fact sent to all shareholders, including Sally and Monica Ramson who were 'sleeping' shareholders. The notices were delivered to Sally by bearer. The question arises, did these circumstances create a reasonable expectation that Sally should be notified of annual general meetings.

[102] I will digress for a moment to address one of the contested factual issues in this claim, which is whether notices of annual general meetings were delivered to Sally in the period 2001 to 2013. Tied into this question is Sally's knowledge or awareness of her shareholding. The background to this latter question is in Sally's evidence. She states that in 1958, at the age of 18 years, she was mandated by her father to choose one of three occupations: nursing, teaching or secretarial, which he would pay for. There was no question of her joining the Company.

> ***MR. HYLTON:*** *Could you go back to the smaller Bundle now of your witness statement? I am now going to John Ramson's witness statement which starts at page 22, and I will ask you to go to paragraph 24, which is at page 28.*

HER LADYSHIP: *So, paragraph 24?*

MR. HYLTON: *Paragraph 24, M'Lady. Now, in paragraph 24, you will see that Mr. Ramson says, "you—*

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—had the opportunity to be employed to the company, you expressed your father did not wish for you to work in the company, you pursue your own goals and aspirations as a teacher and travel agent and so on." Would you like to comment on that paragraph?

A: *Yes, I would.*

HER LADYSHIP: *Remember to speak slowly and clearly.*

A: *When it was time for me to go to school, which is in 1958, John was eight and my sister Susan was five, my father never desired of me to work in his company.*

HER LADYSHIP: *Slow down. Hold a second for me. You said John was eight and Susan, your sister…?*

A: *She was five.*

MR. HYLTON: *May I ask how old you were?*

A: *I was 18.*

MR. HYLTON: *Continue.*

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A: *My father said that he would be willing to finance me in three different professions: teaching, nurse or secretary.*

HER LADYSHIP: *Just a moment.*

A: *Teaching, nurse or secretary.*

HER LADYSHIP: *Yes.*

MR. HYLTON: *Yes?*

A: *So, I chose teaching, the lesser of the three.*

MR. BRAHAM: *I am not hearing.*

A: *I chose teaching, and I was—*

MR. HYLTON: *No, you said something else after that.*

> ***A:*** *The lesser of the three. And I went to England where I studied and worked and when I came back—*
>
> ***HER LADYSHIP:*** *Just a moment.*
>
> ***MR. BRAHAM:*** *M'Lady, I think the witness said she went to somewhere—*
>
> ***HER LADYSHIP:*** *Went to England?*

[103] No explanation was given for this position taken by Lauritz. While the Court will not speculate as to the reason, I think the Court can take judicial notice of how society was ordered then and say that such a course as taken by Lauritz would not be unusual. The professions listed were mostly populated with women, while business enterprises were male-dominated. She was the eldest child. John was 8, and Susan was 5 years old. She therefore established herself in a career which had nothing to do with the Company.

[104] John's evidence, as given in his Witness Statement and echoed by Susan in hers, was that Sally had the opportunity to be employed by the Company and expressed to their father that she did not wish to work in the Company. Given that he was 8 years old and Susan 5 years old, the source of that information would need to be indicated, but it has not been given. Hence, the statement is not only unreliable, but is inadmissible hearsay. There is no indication that Lauritz invited Sally to change course at any time during his dominance at the Company. Despite, as she acknowledged, signing the constituting documents for the business operation twice, in 1984 and 2001, and the transfer in 1985, her lack of recall of these documents is understandable in the circumstances that she was never a part of the operation of the Company. The Court accepts Sally's evidence, on a balance of probabilities, on this issue, as more cogent and reliable.

[105] Returning to the question of whether notices of annual general meetings were sent to Sally, Susan indicated under cross-examination that, in her capacity as Company Secretary from 2002, she was responsible for issuing such notices. She testified that she did so and that the notices were dispatched by bearer to Sally at the offices of the business where she worked. Susan stated in cross-examination that notices were sent not only to Sally, but to all shareholders. Delivery was recorded in bearer books, none of which have been disclosed on the basis that they have not been or cannot be located.

Susan's evidence is that Sally attended none of these meetings. There is no evidence as to how these books were stored, or any details given of the effort to locate them.

[106] The failure to give notice is a central feature of the case against the Defendants, which they acknowledge they were aware of since 2014. One would expect that some effort would be made to prove Sally wrong, at least by taking the steps outlined above. While it may be within the realm of probability that the older bearer books could not be located, it is incredulous, given the disciplined operation of the Company, that the more recent books could not also be located. This is particularly so given that the Company maintained records of correspondence relating to its sponsorship of family members to attend university. Christopher sought to say there was a structured destruction of documents (again an example of how meticulously this Company operated). The Company's document-shredding policy required documents and books to be destroyed once they were seven years old. Phillip testified that the gate log book was also subject to this policy. The policy involved the annual shredding of documents, primarily accounting records, which had reached seven years of age. It therefore stands to reason that, in 2014, the bearer books covering the preceding seven-year period ought to have been available.

[107] The contradictions in Susan's evidence on this issue are also telling. She gave three different answers to the question in relation to Sally's non-attendance at meetings prior to 2014. This was one area where her credibility was called into question.

[108] The preponderance of the evidence, or rather the lack of it, leads the Court to the conclusion, on a balance of probabilities, that no notices were delivered to Sally in the period 2002-2014.

[109] To return to the issue of Sally's reasonable expectation. Though a family-owned company, it was operated formally and in keeping with the requirements of its constituting documents and with **The Companies Act**. That is why notices of meetings were purportedly sent to the sleeping shareholders. Susan's account was that on occasion Lauritz would himself direct the dispatch of notices prepared by her and sitting on her desk.

Q:
*Yeah. You moved on from paragraph 8 in describing what you have done for the company, to paragraph 21, where you say that, from 2002 you are responsible for preparing and dispatching Notices of general meetings". But you then say, "*prior to 2009, at times my father would direct the dispatch of the Notices himself*".*

A:
Yes.

Q:
Up to about what time did your father would do this?

A:
Up to about what time?

Q:
What year.

A:
What year. Can I explain that it was not a formal dispatch that my father would do, but the type of person that he was - I was in charge of sending out the Notices. He passed my desk and he saw it, he said, "I will despatch it for you". It was my milieu.

Q:
Do you recall my question?

A:
Up until what time? What year?

Q:
Up to about what year did you do that?

A:
(No answer)

Q:
What you just described?

A:
To me? Repeat? Prior to 2009.

Q:
So, up to about 2009, he would on occasion do what you just described?

A:
On occasion, correct.

Q:
There was some discussion during your brother's evidence, where you are Counsel used the phrase, "in charge". Up to what point would you say your father was in charge of the company?

A:
He was always in charge, whether he was there not, but I would say up until approximately 2009.

[110] If the Court were to accept this evidence, Lauritz clearly did not have the intention that Sally should be totally disassociated from the Company's operations. The effect of the notices being sent was an invitation to participate in the affairs of the Company as a shareholder.

[111] The position is even clearer in the time after Lauritz. The 1st and 2nd Defendants sought to use Sally's animus, since the 1995 sacking of her son, Ian, as the reason for this claim. Even if, out of deference to her father, she did not seek to participate while he ran the Company, she was aware he was no longer active in the running of the Company since at least 2009 or, at the latest on his death, so why wouldn't she then have exercised her shareholder right to attend and participate in the annual general meetings?

[112] Sally's behaviour was consistent with her lack of awareness of her shareholding, facilitated by the fact, and I so find, that no notices were delivered to her of the Annual General Meetings of the Company for the years 2002-2013.

[113] The 1st to 5th Defendants emphasise in their submissions the Court's reasoning in **BCE Inc v 1976 Debenture Holders** that the actual expectation of a particular stakeholder is not conclusive. An expectation could be created by the circumstances. The very formal operation of the Company, where things were done "by the book" and in compliance with legal requirements, created a reasonable expectation that Sally would be notified of the holding of any general meeting of the Company. In these circumstances, even on the Defendant's case, even if not personally held, Sally, objectively and contextually, had a reasonable or legitimate expectation of being notified of the Annual General or Special General Meetings of the Company.

2014 onwards

[114] Following her formal complaint in 2014, it is undisputed that Sally began receiving meeting notices, which were hand-delivered. Since then, she has attended all meetings, albeit by proxy. However, in April 2019, the method of delivery deviated from prior

practice, with the notice sent by registered mail. Sally contends, and it is accepted, that she did not receive that notice until after the meeting had taken place.

[115] During cross-examination, Susan was questioned about the change in the method of delivery. She said it was a joint decision discussed and taken with John. She explained that they wished to keep a record of Sally receiving the notices due to her many complaints, and that there was a sufficient lead time of 21 days to comply with the law. This was despite there being no complaints on either score since 2014. John also said the notice was sent by registered mail to ensure it was received in due course, because of complaints. It was suggested to both, and they denied, that the change in procedure was intended to thwart Sally's attendance at the Annual General Meeting, even though she had attended each one since 2014, which was in fact the case. Which version is correct is inconsequential for the reasons set out below.

[116] To answer the first question, Sally had an actionable interest. The next question is whether those interests were violated by conduct falling within the terms of oppression, unfair prejudice or unfair disregard.

[117] While Sally may not have sought to actively participate in the Company in the earlier period, since at least 1995, with her less than cordial relationship with family members, she may have taken a different course. She was deprived of the opportunity to do so when she was not notified of the meetings.

[118] This was even more the case after Lauritz. It stands to reason that Sally would have acted on her interest after her father died, as she did when she became aware of her shareholding. The failure to give her notice of the Annual General Meetings in the period after Lauritz, that is, from 2009-2013, and particularly the period 2011-2013, was prejudicial to and unfairly disregarded her interest, depriving her of the opportunity to participate in the Company as a shareholder. It is no answer to say that as a minority shareholder, she could not have affected the decisions taken by her vote. There is nothing to say she could not have persuaded some or all of the directors to her views. In fact, her participation and questions raised at the meetings of the Company led the Directors to adopt and implement a dividend policy!

Failure to send financial information prior to AGM approval

[119] It stands to reason that, from the explanations above, Sally did not receive the financial documents for the period 2001-2013 which would be similarly prejudicial, unfair and in disregard of her interest.

[120] While the peculiar circumstances of 2019 are noted, it is equally clear that the general failure to send the Claimant notices of Annual General Meetings and Financial documents had been addressed following her initial complaint. And is no longer extant so as to require the Court to provide a remedy.

C. Deliberate exclusion from participation in the Company

[121] In the first place, having regard to the employment of other family members in the Company, it cannot be said that Sally's evidence that her father did not want her to participate in the Company necessarily meant that he never intended, during his lifetime, for her to participate in its affairs. Indeed, if the evidence is accepted that he personally saw to the dispatch of some of the notices, his intention that Sally be notified of the Company's General Meetings suggests otherwise. In those circumstances, the failure to send her notices of the Annual General Meetings amounted to a deliberate exclusion of her from participation in the affairs of the Company.

[122] Moreover, the Directors' joint position on the appointment of her daughter Anne as a Director is rooted in this exclusion of Sally. There is no evidence that Anne was incapable of understanding the issues that could be raised at meetings or that she was incapable of decision-making. There is also no evidence that it was a requirement that Directors of the Company had specific experience or training. Sally had, by that time, asserted her intention to be involved in the Company in which she had a significant number of shares. The Company in respect of the other shareholders could be considered a quasi-partnership. All the other shareholders had a seat on the board. Sally certainly had a reasonable and legitimate expectation that she too would be so accommodated. She cannot be taken to have acquiesced to her exclusion from the Company as submitted by Counsel for the 1st to 5th Defendants, where her awareness of her interest was blunted

by the failure to give her the required notices. The continued failure of the 1st to 5th Defendant Directors to appoint Anne as a Director, thereby excluding Sally from the management of the Company, was unfair and prejudicial to her interests and unfairly disregarded her interests.

D. Payments to Directors without approval at general meeting.

[123] This contention is based on the nomenclature of Director's salary and Director's emoluments used in the financial statements which were created by two different auditing firms. It is certainly not far-fetched when one considers the manner in which Lauritz operated the Company.

[124] The fact that Directors' salaries encompassed a significant number of perquisites, including provision of a house for the general manager, payment of rent, payments for phone bills, payment for helpers, membership of the Yacht Club and similar other payments is questionable. The expert report of Mr. Gladstone Lewars for the Defendants was requested to provide answers to the following questions:

1) What is the fair market value compensation for individuals in similar positions and similar qualifications and expertise as the Director Defendants?

2) A comparison of the total quantum of employment remuneration and benefits paid to the Director Defendants in comparison to the compensation paid and arm’s length parties for reasonableness.

3) Whether the payment for domestic assistance, utility bills and travelling expenses as unusual and or excessive.

[125] He concluded that the evidence suggests that these payments or perquisites were not typical. However, the total compensation remained below comparable positions in the Jamaican market. The Expert Report of Mr. Fagan supports this finding as he indicated that the salaries generally were comparable to companies of a somewhat similar nature, though the salary was not disaggregated to examine the Director's emoluments in isolation from other portions of the salary package.

[126] The Claimant's contention that the Director Defendants received emoluments or benefits that should have been voted on at an annual general meeting of the shareholders therefore has merit. However, the Court has ultimately rejected the Claimant's contention on the basis that some of the Directors were receiving some of these benefits from before they became Directors. The Claimant's son also received similar benefits as an employee. They therefore are more in line with employee compensation rather than Directors' benefits. On this issue, I accept the evidence of the Director employees that they received no other emolument outside of their salaries as employees of the Company.

Payment of Dividends

[127] The Defendants contend that in the time of Lauritz, the Company had no dividend policy (as opposed to a no dividend policy, even though the phrases were sometimes used interchangeably). This was because Lauritz, whom all the parties agree was in control of the Company up to at least 2006, did not believe in paying dividends, ploughing the profits back into the Company to spur its growth and expansion. There were no dividends paid while he was at the helm. The Directors continued in this position after Lauritz departed from the Company and up to after his death.

[128] On the commencement of litigation by Sally and following legal advice, the Board commenced a dividend policy declaring its dividends based on profits made in the year 2015 in 2016. The Company, John said had suffered losses over 5 years from 2010-2013 (actually 4 years). On this issue, I accept the evidence of the Defendants that there was no dividend policy in place before the time of Lauritz and up to 2014. This however is not the same as saying no dividends were declared.

[129] In cross-examination, quite contrary to the tenor of his prior evidence that a dividend was only declared in 2016, having been confronted with the financial records, John agreed that despite that there was no dividend policy in place, a dividend was declared for the years in or before 2007 and 2008. He also agreed the dividend was paid by the time of the audited financial statements of 2010. He maintained Sally was paid her share of the dividends. It was clear to the Court that John was familiar with and understood the documents shown to him, not surprising given his role as Managing

Director of the company. It is interesting to note that Sally's evidence is that Lauritz effectively stopped being in actual control of the Company from about 2006 due to health challenges. John became Chairman in 2009, on Lauritz's retirement. I make no specific finding, save to note the relevant financial records were signed by John and Susan and that the dividends were paid after John became Chairman. What is indisputable is that no record has been produced to evidence payment to Sally.

[130] Again, the Court draws an adverse inference from the absence of records. I accept the evidence of Sally on a balance of probabilities that she was not paid her share of the dividends for these years. These payments remain outstanding.

[131] Based on the findings detailed below as to Sally's share entitlement, the Directors' failure to pay Sally's share of the dividends for the years before or in 2007 and 2008 was improper and constitute oppressive conduct. The then Directors deliberately excluded Sally through their continued failure to pay her what was due to her. Even if I am wrong that the conduct did not rise to oppressive conduct, it was certainly both unfair and prejudicial to her interests. The reduction of the dividend payments to Sally from 2017 to be based on seven shares instead of 101 shares, a reduced shareholding (to be more fully discussed below), is similarly unfair and prejudicial to her interests.

[132] It cannot be gainsaid that Sally had an actionable interest in being paid what was due to her which was violated by the conduct of the Directors. This conduct is continuing. See the case of **BCE Inc v 1976 Debentureholders** *supra*.

Conclusion on Oppression, Unfairly Prejudice or Unfair Disregard

[133] The Court is satisfied on a balance of probabilities that the Claimant was unduly prejudiced by the Defendants' failure to serve notices of Annual General Meetings and financial statements for the years 2001 to 2013. This was remedied since the year 2014. Though questionable in the circumstances, I do not find that it was proved on a balance of probabilities that the notices sent in 2019 and 2020 were deliberately sent by registered mail to thwart her attendance.

[134] The Claimant was also unduly prejudiced by the 1st to 5th Defendants' refusal to permit her engagement in the affairs of the Company by a seat on the Board of Directors for her nominee. This conduct is continuing.

[135] The Court further finds that the Claimant was oppressed and/or unfairly prejudiced and/or unfairly disregarded by the failure to pay dividends that were declared and paid to other shareholders, and the withholding of the payment of dividends in relation to 94 shares. This conduct is continuing.

[136] The Claimant has therefore satisfied the Court that she is entitled to a remedy under **S.213A the Companies Act**.

THE COUNTERCLAIMS

[137] The finding that the Claimant was oppressed and/ or unfairly prejudiced by the 1st to 5th Defendants' conduct disposes of the 1st to 5th Defendants' defence. The issue of the number of shares to which the Claimant is entitled is dealt with below.

ISSUE 3: REMEDY — VALUATION OF SHARES

A. The Applicable Principles

[138] The next question is the appropriate remedy. Given the undisputed and uncontested breakdown in the relationship between the parties, it is accepted by both sides that the appropriate Order in the circumstances of this case is a buy-out order. This leads to the issue of the basis on which the Claimant's shares are to be valued for the purposes of any buy-out. To this end, the Court was assisted by several expert witnesses.

[139] It is accepted that the role of the expert is to assist the court in matters of scientific, technical or other specialized knowledge which are outside of the judge's expertise and can give evidence of fact or opinion. The judge then has a task of assessing the evidence of the expert witness for its adequacy and persuasiveness. The judge's role is to assess the quality and reasoning of the expert in deciding the case. The quality and reasoning of the expert is of prime importance. This requires the expert to explain the basis of his evidence, the basis of his opinion and his conclusions. An expert's bald statement of his

opinion is not of any real assistance. There must be shown the process of reasoning leading to the conclusion to allow for a proper evaluation of their opinion. The weight to be given to the expert report and evidence consequently comes from the reasoning and not the conclusion. The expert's duty to the court was addressed by the Privy Council in **Myers and Others v The Queen** [2015] UKPC 40 as follows:

> *59. Secondly, whilst a police officer may be an expert, by training or experience or both, if he is then he comes under the same duties to the court as does any other expert.Those duties were helpfully set out by Cresswell J in the commercial case of The Ikarian Reefer [1993] 2 Lloyds Rep 68 at 81 but apply equally in the criminal context: R v Harris [2005] EWCA Crim 1980, [2006] 1 Cr App R 55, paras 271-272, where they were summarised as including the following:*
>
> > *"(1) Expert evidence presented to the court should be and seen to be the independent product of the expert uninfluenced as to form or content by the exigencies of litigation.*
> >
> > *(2) An expert witness should provide independent assistance to the court by way of objective unbiased opinion in relation to matters within his expertise. An expert witness in the High Court should never assume the role of advocate.*
> >
> > *(3) An expert witness should state the facts or assumptions on which his opinion is based. He should not omit to consider material facts which detract from his concluded opinions.*
> >
> > *(4) An expert should make it clear when a particular question or issue falls outside his expertise.*
> >
> > *(5) If an expert's opinion is not properly researched because he considers that insufficient data is available then this must be stated with an indication that the opinion is no more than a provisional one.*
> >
> > *(6) If after exchange of reports, an expert witness changes his view on material matters, such change of view should be communicated to the other side without delay and when appropriate to the court."*

[140] The experts called in this matter were formidable professionals in their own right, leaving the Court with the difficult task of selecting preferences. The adoption of one view over another is certainly not a reflection of any deficiency in their abilities but merely the Court's view of the more appropriate application in all the circumstances of this particular case.

[141] The starting point, as Lord Millett observed in **CVC/Opportunity Equity Partners Ltd v Demarco Almeida** [2002] UKPC 15 at paragraphs 37–38, is that there are essentially three possible bases on which a minority holding of shares in an unquoted company may be valued, in descending order:

a. as a rateable proportion of the total value of the company as a going concern, without any discount for the fact that the holding in question is a minority holding;

b. as before, but with such a discount applied; or

c. as a rateable proportion of the net assets of the company at their break-up or liquidation value.

[142] Which of these is to be adopted depends on all the circumstances, the choice being one which must be fair to both parties. The break-up basis is rarely appropriate where the purchaser intends to continue the business as a going concern: as Lord Millett observed, that would give the purchaser a windfall at the expense of the seller.

[143] A more nuanced position was adopted by Mr. Mark Anderson QC (as he then was) in **Booth v Booth** [2017] EWHC 457 (Ch) at paragraph 139, where, eschewing the suggestion that there is a fixed starting point, his Lordship held: "The task is to find a fair price. That may require no discount, it may require the full discount which would be expected in an arm's length sale, or it may require something in between." In **Re Edwardian Group Ltd; Estera Trust (Jersey) Ltd v Singh** [2019] 1 BCLC 171, Fancourt J reached a similar conclusion, observing that between the "two extremes" of a pro rata share of the company's overall value and the market value of the shares lie various possibilities for specifying a basis of valuation that results in a fair price.

[144] It is also to be borne in mind that the date of valuation is itself a matter for the Court. The starting point, as Nourse J held in **Re London School of Electronics Ltd** [1986] Ch 211, is the date when the shares are to be purchased; but that is a *prima facie* position only, subject to the overarching requirement of fairness. He stated, at page 224,:

> *If there were to be such a thing as a general rule, I myself would think that the date of the order or the actual valuation would be more appropriate than the date of the presentation of the petition or the unfair prejudice. Prima facie an interest in a going concern ought to be valued at the date on which it is ordered to be purchased. But whatever the general rule might be it seems very probable that the overriding requirement that the valuation should be fair on the facts of the particular case would, by exceptions, reduce it to no rule at all. That that is so is already suggested by such authorities as there are on this question.*

[145] Finally, the question of whether the oppressed shareholder is "key person" has to be determined. A key person is an employee, owner, or executive whose skills, knowledge, or leadership are so critical that their absence would cause the business significant financial or operational harm. Where the buyer is the "key person", it is generally inappropriate to factor that risk into the valuation: **Re Scitec Group Ltd** [2012] EWHC 661 (Ch). Where the "key person" is, or has been, the minority shareholder whose departure was itself caused by the unfair prejudice, it is again difficult to see why that risk should be included in the valuation.

[146] It is, in this connection, instructive to note that the legal principles outlined above are entirely accordant with the orthodox financial-economics approach to the valuation of shares. As Wibberley and Mossios observe in their paper *"***The Correct Way to Value a Company***"*, the value of an equity interest is, in principle, the present value of the future cash flows attributable to that interest, discounted at a rate which reflects the risks of those cash flows. Asset-based methodologies are properly regarded as a floor, rather than a ceiling, save in cases of imminent liquidation. An established and continuing trading concern, such as the 6th Defendant, would ordinarily be worth more as a going concern than the aggregate book value of its assets, as its earning capacity, developed over time, is reflected in goodwill and other intangible assets that are not captured by the historical balance sheet.

[147] The same authors emphasise that, where the question is the fair value of a stake in a company being acquired by an insider who is already in control, the valuation must reflect what the seller is actually giving up: a continuing economic interest in the enterprise. It should not be based on what a hypothetical outside minority purchaser,

exposed to the very risks of oppression of which complaint is made, would notionally be willing to pay.

[148] That financial perspective sits comfortably alongside the equitable approach taken in **Re Bird Precision Bellows**, **Re Blue Index** and **Re Edwardian Group** *supra*, and reinforces the proposition that the touchstone in a **S.213A** buy-out is fairness, viewed in the round, rather than mechanical adherence to any one valuation convention.

[149] In fixing the fair value of the Claimant's shares, the Court must also have regard to the true nature of the interest held. The authorities make clear that the paradigm case in which a minority shareholder is bought out without a discount is where the company has the hallmarks of a quasi-partnership and the petitioner was a co-venturer who participated, in a relationship of mutual confidence, in the establishment and management of the business: see, for example, **Re Bird Precision Bellows Ltd Ch** 658 and **Re London School of Electronics Ltd** Ch 211, as discussed in **Re Skytours Travel Ltd: Doyle v Bergin** 4 IR 651. Contemporary Commonwealth analysis of oppression remedies emphasises that outside such quasi-partnership situations, and where the petitioner's holding is properly characterised as a straightforward minority investment acquired at arm's length, a discount for lack of control is generally appropriate because the court should not accord to a minority stake the attributes of a partner's share that it never possessed.

[150] In a minority share discount context, a discount as such denotes a deduction allocated to the value of a minority stake in a company, reflecting the disparate levels of influence and decision-making latitude wielded by minority and majority shareholders. The rationale lies in acknowledging the limited control and sway that minority shareholders possess in steering the management and trajectory of the company.

[151] In quasi-partnership cases, the position is well established by **Re Bird Precision Bellows Ltd** [1984] Ch 419 at 430, where Nourse J held that, as a sale of shares in such circumstances is invariably forced upon the unwilling vendor, it would be "most unfair" for him to be bought out on a discounted basis. The correct course, his Lordship held, is to

fix the price *pro rata* according to the value of the shares as a whole and without any discount.

[152] The position outside the quasi-partnership context is less settled. The traditional approach, exemplified by **Strahan v Wilcock** [2006] 2 BCLC 555 and **Irvine v Irvine** [2006] EWHC 583 (Ch), is that a discount will ordinarily apply, departure being justified only in “exceptional circumstances”. More recent decisions have introduced greater flexibility. In **Re Sunrise Radio Ltd** [2010] 1 BCLC 367, HHJ Purle QC held that there was “no inflexible rule”, and the Court of Appeal in **Re Annacott Holdings Ltd** [2013] 2 BCLC 46, rejected the contention that valuation as a going concern was only appropriate in quasi-partnership cases, holding that to do otherwise would result in a windfall to the purchaser. In **Re Blue Index Ltd** [2014] EWHC 2680 (Ch), Mr. Robin Hollington QC (sitting as a deputy High Court Judge) went further still, observing that it would be just as unfair to the wronged minority shareholder for his shares to be purchased by the oppressing majority with a discount as it would be in a quasi-partnership case, and that to do so would substantially defeat the purpose of the unfair prejudice remedy.

B. Review of the Expert Evidence

[153] It is against this background that the respective expert evidence for the parties will be examined. Both experts agreed that in the absence of projections, the single period capitalization method would be the primary method of valuation to be used. They differed however on whether to employ the capitalization of cash flow or the capitalization of earnings method. The single period capitalization method estimates the value of a business by determining a normalized and maintainable level of earnings or cash flow and capitalizing that amount at an appropriate rate. It assumes that the selected level of earnings or cash flow will remain constant or grow at a uniform rate into perpetuity. It is therefore a simplified form of the discounted cash flow method, suited to a mature business with stable prospective earnings.

[154] Mr. Christopher Fagan was the expert selected by the Claimant. He has done an executive summary which is reproduced in part here:[1]

> ***FACTORS IMPACTING THE VALUE OF THE COMPANY'S SHARES***
>
> ***4.*** *On the basis that the Company is profitable and expected to continue to be profitable in the foreseeable future, the income-based approach was selected as the primary method adopted to determine the value of the Company's en bloc shareholding. The main factors impacting the value of the Company's shares under the income-based approach are a) estimating indicative prospective earnings and b) determining an appropriate capitalisation rate. This being the inverse of the discount rate deemed commensurate with the risk of realising the prospective earnings.*
>
> ***5.*** *The process of estimating the indicative prospective earnings involved analysing historical results with the objective of normalising the historical results. The period of the last six financial years and the nine-month interim period for the current financial year was considered sufficient to capture the typical business cycle for the Company. This covers a) a period of four and a half years prior to the announcement of COVID-19 as a pandemic in March 2020 and b) a period of two and quarter years post-pandemic.*
>
> ***6.*** *Normalisation of the historical earnings involved adjusting the results to exclude the impact of income and expenses considered abnormal, non-recurring and unusual in nature to derive indicative maintainable earnings. Expenses associated with maintaining and upkeeping the luxury villa in Discovery Bay ("Coconuts") were added*
>
> *Page 5*
>
> *back to earnings as this asset was considered redundant to the business of the Company which is defined as the distribution of fast-moving consumer goods. Details on the adjustments and estimate of the normalised maintainable earnings are set out in* ***Section 8, Valuation Overview, Approach and Calculations.***

[1] Expert Report of Christopher H. Fagan, FCCA, ABV, CEIV, dated the 28th day of September 2022.

7. *In deriving the capitalisation rate, the process involved taking into consideration the expected market conditions as it relates to the required rate of return an investor would seek within the context of macro factors affecting the general economic environment, the food distribution industry, the capital markets as well as risks unique to the business. Details of the calculations, sources and considerations are set out in* ***Section 8, Valuation Overview, Approach and Calculations.***

8. *In arriving at the overall amount to be paid to the Claimant, the proportionate share of the net realisable value of Coconuts was taken into consideration.*

9. *The conclusion of value was highly subjected to certain key considerations which a material change could have a significant impact on the value of the Company's shares. These include:*

a. Significant dependence on the historical results which were deemed as indicative of prospective earnings;

b. Assumption that salaries and compensation paid to family members are appropriate and conducted at arm's length; and

c. Significant reliance that material transactions and arrangements between the Company and related parties are conducted at arm's length.

THE APPLICABLE VALUATION METHODOLOGY

10. *The income-based approach was utilised as the primary basis with the Capitalisation of Earning before Interest and Taxes applied as the specific method. This methodology is based on the underlying premise that the business is a going-concern that is, it is the Company is expected to be financial viability for the foreseeable future. The market-based approach was utilised as a secondary method to test the reasonableness of the valuation conclusion derived under the income-based approach.*

WHETHER ANY ADJUSTMENTS OUT TO BE MADE

11. *In normalising the earnings, it should be noted that limited information was available with respect to the items noted below.*

a. Housing benefit paid to the current Managing Director. In the absence of actual amounts paid for this benefit, the amount estimated that would have been paid to the previous Managing Director of US$36K was assumed to be the likely benefit paid annually to the current Managing Director for the financial year 2018 onwards.

b. It is uncertain if Caribbean Foods Limited a) pays rental to the Company for space occupied at 449 Spanish Town Road and/or b) allocated a portion of the building-related expenses associated with the premises. As such, it is not clear the extent the Company has been absorbing any such portion of expenses.

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c. It is understood that Coconuts is available for rental when not being used for the family's personal and/or Company's purposes. However, the rental income generated was not available to exclude those amounts from earnings on the basis the asset was considered redundant to the business.

d. It is understood that an expert report may be performed to assess the reasonableness of compensation paid to family members employed by the Company. To the extent any such amounts are considered to be out of line with benchmark salary scale then earnings would require an adjustment to align the compensation package to market levels.

THE POTENTIAL IMPACT OF ANY UNLAWFUL BENEFITS OR UNLAWFUL DIRECTOR PAYMENTS FOUND TO EXIST ON THE VALUE OF THE COMPANY'S SHARES

12. *It is understood that the Claimant is making a claim on behalf of the Company with respect to derivative payments associated with unlawful benefits or unlawful director payments. The determination of such matters does not fall within the scope of the Company valuation as they are fact specific and dependent on the decisions and directives of the Courts with respect to claims filed. As with the derivative action (discussed below), these derivative payments are considered contingent assets.*

THE IMPACT OF THE DERIVATIVE PROCEEDINGS ON THE VALUE OF THE COMPANY'S

13. *A payment to the Company recovered in a derivative claim is considered a contingent asset and therefore would increase net assets in the first instance as this would likely to the form of cash. As it relates to the potential impact on the business, this would be dependent on the amount received and how the amount would be deployed in the business. In the absence of such specific information, determining the potential impact would be hypothetical.*

VALUATION OF THE COMPANY'S SHARES

__14.__ The value of the Company's shares comprises two components. The first component is the value attributable to the business as a distributor of Fast-Moving Consumer Goods. The second component is the value of the asset considered redundant by nature, that is, not required for the day-to-day operations of the business.

__15.__ After the application of a marketability discount of 20%, the value of the Company's en bloc shareholding was estimated to lie within the range of $1.7 billion to $1.8 billion. This was combined with the value of Coconuts of $494.3 million to $507.4 million, which was deemed to be a redundant asset, to yield a combined value of $2.2 billion to $2.3 billion as set out below.

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Table 1.1 — Value of the Company's Shares

Value of the Company's shares	***Low J$'000***	***High J$'000***
Value of business	*2,108,189.0*	*2,253,000.8*
Marketability discount (20%)	*(421,637.8)*	*(450,600.2)*
	1,686,551.2	*1,802,400.6*
Value of redundant asset	*494,293.0*	*507,358.8*
En bloc shareholding	***2,180,844.2***	***2,309,759.4***

AMOUNT TO BE PAID TO THE CLAIMANT

__16.__ It is concluded that the amount to be paid to the Claimant ranges from $5,452,110 to $5,774,398 per share, which includes her pro rata share of Coconuts. If a marketability discount is not applied, the amount to be paid *to the Claimant ranges from $6,506,205 million to $6,900,899 million, as set out below.*

[155] Mr. Jayatillake had the following criticisms of Mr. Fagan's report. He noted firstly, that though both had used the single period capitalization method, the difference lay in whether the capitalization of cash flow or capitalization of earnings (profits) was utilized. Using the capitalization of cash flow method, certain discount rates were developed and should be applied. Mr. Fagan, he noted, used the capitalized earnings or profit method. Mr. Fagan therefore needed to make adjustments to the discount rates developed for the capitalization of cash flow method to compute the equivalent profit or earnings-based discount rate or capitalization rate. In that regard, Mr. Fagan had not provided a computation of how he moved from the discount rate to the capitalization rate, leaving Mr. Jayatillake unable to say whether the adjustments were valid. In cross-examination Mr. Fagan pointed out that he did make the necessary adjustments using the Earnings before Interest, Taxes, Depreciation and Amortisation (EBITDA) multiple which he applied to the normalized earnings.

[156] A further criticism was that Mr. Fagan had not considered working capital which would need to be retained from profits. Not doing so resulted in an overvaluation of the Company's shares. He also considered that the use of the profit method was not appropriate, as an assumption used to adjust cash flows is that net income and net cash flow bear a constant relationship to each other over time, and there was no constant historical relationship in the Company. Mr. Fagan agreed he did not take into account working capital, as while the cash flow approach specifically takes into consideration the requirements for working capital, under the earnings method, working capital is taken into account by deducting the net debt in arriving at the value of the company.

[157] Notwithstanding these criticisms, he concluded that the hybrid of the Earnings before Interest and Taxes (EBIT) and Capitalized Cash Flow methods used by Mr. Fagan would generally yield the same as his outcome, if working capital was properly deducted from profits.

[158] His main criticism came from the normalization of expenses used to estimate profit. Normalization is a process by which companies are brought in line with industry peers. Mr. Jayatillake contended that the companies used as peers were not truly comparable to the Chas as each company's cost structure is based on its own business model, which made it unreasonable to assume Chas could operate in like manner. Further, expense ratios within the comparable companies were not consistent and were erratic, so the simple average or mean would not be useful. The more useful metric was the median. Chas' expenses already falling within the median range meant that no adjustments would have been necessary.

[159] He also noted that Mr. Fagan's average expense ratio of 10% appeared to be heavily influenced by companies with a single product range, while Chas has multiple products. This assumption would therefore be unreasonable. He further pointed out that as Mr. Fagan had identified that the salaries were lower than those in the comparable companies, an adjustment should therefore have been made in the opposite direction. This would have reduced the overall value. The point being made is that adjustments were made to reduce the value but none to increase the value. He used Appendix 6 of Mr. Fagan's report for this comment.

[160] In his report Mr. Fagan had stated that Appendix 6 reflected his analysis that staff expenses (not accounting for directors' fees and remuneration since that was not available) was generally in line with the averages of industry peers over the period. In cross-examination he stated that he specifically pulled staff and staff-related expenses and compared them to industry peers, however, there were no major differences in those ratios, leaving him to conclude that salaries were on par. He also went on to say that in looking at the overall expenses, he backed out the salaries expense and compared the residual amount to industry peers. From this explanation, not making an adjustment for salaries did no violence to his determination of the appropriate expense ratio. He, however, admitted in cross-examination that Appendix 6 showed expenses for salaries and related expenses to be lower than industry peers but that it was not significantly below. He on one occasion answered to Counsel that he ought to have made an adjustment for the lower salaries which would have decreased the value of the Company

but disagreed that adjustments were made in a discriminatory manner but did not explain further. The Court accepts the detailed explanation for why no adjustments were made for salary and related expenses as a proper exercise of professional judgment.

[161] A further criticism of Mr. Fagan was that the profit for the trailing 12 months appeared to have increased profits for the last quarter based on adjustments to expenses in the last quarter, which appeared to be a one-off. Not doing the relevant normalization adjustments of the expenses caused Mr. Fagan to have used a higher profit than should be used. This would have inflated the overall value of the Company. Mr. Fagan however indicated that he did do a normalization of expenses shown at Appendix 4. He explained that he came up with a single estimate of normalized earnings by looking at it over a period of time, from 2016 to the trailing months of 2022 taking the average of that period to determine the single point of earnings.

[162] He also noted that Mr. Fagan had not indicated the basis on which he arrived at the lower value of $242 million for him to assess its reliability. At page 134 of the Transcript of Evidence Week 2 Volume1, Mr. Fagan stated that this value was an average of the simple average and the weighted average that is of $287,000,000 and $197,000,000.

[163] He concluded that Mr. Fagan’s failure to normalize for working capital and normalizing earnings based on companies that were not true comparators led to an overestimation of the Company’s profits and thus an overvaluation of the Company.

[164] In cross-examination, Mr. Fagan was challenged that the companies chosen to normalise profits were not true comparators and were inappropriate as some of the companies were also involved in manufacturing and two companies that were highly influential in his adjustments primarily dealt with a single product range. He stated that the gross profit margins of these companies were similar to Chas, and so were adequate.

[165] Overall, he posited that his methodology was the more appropriate approach because, under the methodology utilized by Mr. Jayatillake, the income value was lower than the asset value, and, for a continuing business, the income value ought ordinarily to

reflect the greater value. In re-examination, he explained that, as the Company was a going concern, it was expected to remain financially viable within the foreseeable future. Accordingly, he considered that the value of the Company based on its earning potential should exceed the value of its assets; that is, the value of the cash flows or earnings generated by those assets should be greater than the value of the assets themselves. Mr. Jayatillake's calculations showed an asset value of 1.7 million and income at 1.2 to $1.3 million. Further intangible assets like goodwill were not included in the asset value given by Mr. Jayatillake.

[166] I note that in a number of instances Mr. Fagan either refused to answer the questions posed to him or answered them after being asked several times when being challenged in cross-examination. He appeared, as sometimes happens with witnesses, to recoil from a presumed challenge to his capability. The Court did not view these responses as adverse to his credibility.

[167] Mr. Jayatillake set the context for his report by defining Fair Market Value, which was the highest price that property would change hands between a hypothetical willing and able buyer and a hypothetical willing and able seller, acting at arm's length in an open and unrestricted market, when neither is under compulsion to buy or sell, and when both have reasonable knowledge of the relevant facts. In doing this type of valuation, an expert was required to consider more than one approaches. He would therefore need to assess the value based on the income, using the market approach and then using the cost approach.

[168] Taking account of the nature of its business operations and historical performance, he concluded that it was appropriate to value the company on a going concern basis; thus, he considered that the income approach or capitalization of earnings/cash flow was the appropriate primary valuation methodology. This method he said was most often used to value businesses with stable prospective earnings. As a mature business which had recovered from the COVID-19 pandemic, Chas was one such. He considered it more appropriate to use the cash flow method as there were already developed discount rates for normalisation, so there would be no need to make adjustments.

[169] He also considered the appropriateness of the cost (or asset) approach. This would not normally be used as the income-based value was expected to be higher than the value of the assets. He pointed out that in a distribution business such as Chas you would normally expect the income-based value to be higher than the value of the assets. However, if the valuator finds that the value using the income-based approach was lower than the assets, then valuation guidance requested the valuator to consider the value of the assets, given that the shareholders would have an option to dispose of the assets or to realise the assets and distribute the proceeds to the shareholders.

[170] The value of the Company using the income approach was less than the value of the assets. Relying only on the income approach would therefore be unfair to the shareholder who would realise more value from the assets being sold. The price to be paid to a minority shareholder should therefore have some bearing on those assets. Having regard to this finding, Mr. Jayatillake tested the validity of his income approach value using the market approach. For this, he used the EBITDA trading multiple supported by price-to-book multiples, as well as the enterprise value to revenue multiple being used by Mr. Fagan, to conduct regression analysis.

[171] Mr. Fagan's criticisms of Mr. Jayatillake report are threefold. Firstly, in the application of a minority discount, Mr. Fagan, while indicating that it was at the discretion of the Court, pointed out that it was unusual that a court would apply a minority discount in an oppression action. In an oppression action, applying a minority discount would be almost as if the minority shareholder was being penalized by deducting or making a discount on the value of the shares rather than giving the shareholder his proportion of the shares. On this basis, he declined the Court's invitation to indicate a possible appropriate discount.

[172] The second was the treatment of Coconuts. Mr. Fagan considered that Coconuts was not a business asset but a redundant asset, as it was not required for the day-to-day operations where the primary activity was the trading of fast-moving consumer goods. A luxury resort villa was not necessary to those operations. He pointed out that Coconuts was 50% to 60% of the overall assets of the Company. Besides the effect of the treatment

of the expenses relating to Coconuts, the value of the business was further understated by applying the higher selling cost of 22%, rather than the 15% average based on actual selling costs and the time taken to sell the properties, and by failing to exclude the incidental expenses associated with the property, estimated at $10 million, from the Company's earnings. The different treatment results in a $44 million impact from the former and $80 million from the latter, which would be additional value to the Company.

[173] The third and main difference related to the treatment of expenses; Mr. Fagan defended his position by pointing out that there was an inherent risk of a conflict of interest between the personal interests of the Defendants' shareholders and the Company's interests since the Defendant/Shareholders were involved in the day-to-day running of the business. He therefore carried out an objective assessment of expenses by comparison with publicly listed companies that were industry peers. This comparison showed that salary expenses were in line with industry peers, but Chas' other expense ratios over the years examined were higher than the ratios computed for industry peers. Salaries were not therefore normalized but the other expenses were. An example of a normalized expense was legal and professional fees. The industry comparison benchmarking therefore assists in showing the fair value of the Company.

[174] Mr. Jayatillake was challenged that in 2020 he carried out a valuation of the Company where he used Salada as a comparator which he was now saying was inappropriate. He pointed out that it was used to determine the market multiple to be used not to compare cost structures and make adjustments to normalise profits based on that. He admitted that he also used companies that were also engaged in manufacturing as there were no true comparators for Chas, a distribution company.

C. Findings

Minority discount

[175] While to varying degrees, the cases discussed above suggest that a minority discount would be inappropriate in unfair or oppression claims, it is clear that there is no hard and fast rule or mathematical formula for determining whether there should be a

minority discount. What is equally clear is that it is based on the facts, specific to the circumstances of a particular case. Following Lord Hoffman in **O'Neill and Another v. Phillips and Others [1999] UKHL 24; [1999] 1 WLR 1092 (20th May, 1999)**, perhaps the 1st and leading case on the oppression remedy, it would be a rare case with special circumstances where a minority discount would be appropriate. The main consideration is the consideration that of fair value in the unique circumstances of each case. As submitted by Counsel for the Claimant:

> *147. The English Courts adopt a similar approach, with the central principle of any valuation relied on by a Court being that it should be fair, and what is fair will depend on the facts of each individual case. In one of the leading authorities on the terms of buyout orders, **Re Bird Precision Bellows Ltd** (which was affirmed on appeal), Nourse J observed:*
>
> > ***it is axiomatic that a price fixed by the court must be fair, While that which is fair may often be generally predicated in regard to matters of common occurrence, it can never be conclusively judged in regard to a particular case until the facts are known. The general observations which I will presently attempt in relation to a valuation of shares by the court under section 275 are therefore subject to that important reservation.***
>
> *148. In affirming the decision of Nourse J in the Court of Appeal, Lord Justice Oliver made the following observation:-*
>
> > ***... It seems to me that the whole framework of this section, and of such of the authorities as we have seen, which seem to me to support this, is to confer on the Court a very wide discretion to do what is considered fair and equitable in all of the circumstances of the case, in order to put right and cure for the future the unfair prejudice which the petitioner has suffered at the hands of the other shareholders of the company; and I find myself quite unable to accept that that discretion in some way stops short when it comes to the terms of the order for purchase in the manner in which the price is to be assessed.***
> > Emphasis mine

[176] If ever there was a rare case in which the minority discount should be applied, this would be it. It is undisputed that Sally did not participate in founding or building up the Company and played no role in its management, growth or development. As pointed out, this was not a quasi-partnership, at least not in respect to Sally, in which case, typically, no minority discount is applied. Sally's interest is not analogous to that of a co-venturer in a quasi-partnership but is, in substance, more akin to a minority investment holding. John

says that when he joined the company in 1971, its annual turnover was One Million Five Hundred Thousand Jamaican Dollars **($1,500,000.00)**. The business is now worth over a Billion Dollars.

[177] It is acknowledged that by the time of the Company's incorporation as an IPS in 1984, John was employed by the Company, while Sally and Susan were not. Lauritz nonetheless gave each of John, Susan, Sally and his wife 95 shares. This clearly evinced an intention by Lauritz, even though not all his children were participants in the enterprise, that they should share equally in this enterprise. He therefore envisaged Sally sharing equally in the bounty of his endeavours. It cannot be gainsaid, though, that the value brought to the Company by John and Susan, in particular in the years after Lauritz departed the Company, was substantially greater than Sally. Sally had taken no part in the business up to 2014. The reasons for that were indicated prior. However, even after 2014, this lassitude continued. Her attempts to participate in the Company were clearly not directed to its growth but to maximize or retrieve from the Company its value to her.

[178] In all the circumstances of this case, the Court is of the view that it is therefore fair and consistent with principle to apply an appropriate minority discount in determining the price at which the shares are to be sold and bought.

[179] An appropriate discount of 20% indicated by Mr. Jayatillake, is based on the value of a minority share to a proposed buyer. In this wise, that Sally was not a key person in the Company would have been of some moment. The present circumstances are somewhat different. The Court accepts that an appropriate minority discount in these circumstances is without precedent. The Court is of the view that a suitable discount would be 30%.

Coconuts

[180] The expert witnesses disagree on whether Coconuts should be treated as a redundant asset. The importance of this question lies in whether it adds value to the Company and therefore the share price. Understanding the term is critical to determining whether Coconuts is a redundant asset. In accounting terms, redundant assets are those

assets that are not essential for the normal core operations and revenue generation of the business. Real estate, because of its passive nature and use, is generally considered a redundant asset unless the business of real estate is a core part of the business.

[181] Mr. Jayatillake, while leaving it to the Court for final determination, was of the view that its use to shore up the balance sheets suggested that it was not a redundant asset. Mr. Fagan considered that its minimal use was not in relation to the operations and core functions of the business and as such was a redundant asset.

[182] The evidence shows that Coconuts was used for three purposes. First, as accommodation for Directors and Senior Managers en-route from Kingston to the Montego Bay offices, particularly in the years before the North Coast highway was constructed. Another use was the hosting of business events to include hosting clients and suppliers. And most recently, its use was as support or financial backup for credit arrangements.

[183] In assessing this evidence, it is appropriate to refer to the comments of Sykes J (as he then was) in the first derivative claim **Fulton v Ramson** [2016] JMSC Comm 14 where he stated as follows:

> *[108] On this application the directors did not put any record before the court about the use of Coconuts. May be they exist. May be they don't. There is no denying though that on this application there is no record of use of the Coconuts. No letter. No email. No text message. No handwritten note. No minutes of board meetings. No log book. Nothing. The court cannot help but notice that the assertion that a property that is said to be used for business is not supported by single scrap of paper or electronic communication. Sally's case may be understood in this manner: the persistent absence of written evidence is more consistent with private use than being used for the company's business since the use of the company's property ought to attract some degree of record keeping if it is even a log book showing when the property has been booked for the various senior managers.*
>
> *…*
>
> *[111] John, through his affidavit, has portrayed the company as one of detailed, careful and meticulous record keeping. He has produced documents setting out the details of Sally's son's dismissal in 1995 (over 20 years ago). He produced other documents dated 1990, 1991, 1992, 1993, and 1995 relating to Sally's son. Even a receipt from the University*

of Miami's bookstore (dating back to Sally's son's time there in 1992) was produced. By contrast a property that is said to be in frequent use by the company qua company has no documentation of any kind exhibited.

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

[184] Several years have passed and the state of the evidence remains virtually the same. There is no other inference to be drawn than that Coconuts was rarely used for the above purposes and was almost exclusively for personal and leisure use.

[185] Mr. Downer addressed the question posed by Counsel and arising from the Order of the Court, namely, whether Coconuts was "redundant and serve[d] no useful purpose to the 6th Defendant". That question appears to have treated the two matters as mutually exclusive, which, in my view, is incorrect. At page 5 of his report, Mr. Downer identified the Company as having two main characteristics: first, as a high-profile distribution business; and, second, as a closely held family investment vehicle. The latter characterization, however, is not supported by the evidence.

[186] The evidence of John, repeated by Susan, is that the 6th Defendant was a family-owned Company in the business of distributing fast-moving consumer goods and had been so engaged, over several iterations, for over 100 years. Coconuts was purchased on the instructions of Lauritz as an investment which could be used by the Company for various business purposes, which he listed as adding equity to the 6th Defendant's balance sheet, providing accommodation for managers when travelling the North Coast between Ocho Rios and Montego Bay on business, and providing entertainment for customers and as a facility for Senior Managers and Directors when required, including on weekends and during holidays.

[187] Mr. Downer concluded that Coconuts would be a redundant asset, as it served no direct purpose to the distribution business in isolation. He noted, however, that the existence of such investments could have an important or even vital indirect effect on the survival of the distribution business as a going concern within the Company. A safety net. It is noted that this was a general comment with possible applicability to the 6th Defendant and not a statement about the 6th Defendant. He gives his conclusion at paragraph 33 as follows:

[188] He was taxed on this perspective in cross-examination. The discourse was as follows:

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Q: *I see. Are you hearing me clearly?*

A: *Yes. Continue, sir.*

Q: *I will try and speak more loudly and clearly. So, I was saying that I want to address the question that the court asked that is to say whether "Coconuts" is redundant and served no useful purpose to the 6th Defendant.*

A: *I understand, whether it is useful to sell "Coconuts?"*

Q: *Yes, I am concerned about your need to properly hear so I am trying to - Would it* *be a fair summary of your answer to that question that "Coconuts" is redundant in relation to the company's distribution business, but it serves various useful purposes the company.*

A: *Correct.*

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Q: *That's a fair summary of the response to my question?*

A: *Not that it is directly redundant to the distribution business, but in the context of sale of that segment of the company, that asset would be redundant.*

Q: *Which is effectively what you say in paragraph 3?*

A: *(No answer)*

Q: *Yes, is that effectively what you say in paragraph 3?*

A: *Paragraph what, sir?*

Q: *Three (3).*

A: *Yes.*

Q: *All right?*

A: *That's correct.*

Q: *No...*

A: *That's what I said in paragraph 3.*

Transcript page 252

….

rate of returns than the cost to borrow. So,
it wouldn't have changed my conclusions, in
order words.

HER LADYSHIP: *I am not hearing.*

MR. HYLTON: *All right, your primary concern in relation to*
a sale of "Coconuts" would be what is done
with the proceeds?

A: *Yes.*

Q: *And I am right in saying, that in your view in the context of the valuation of the business, the existence of "Coconuts" is redundant? In the context of the valuation of a business?*

A: *No, in the context of the valuation of the distribution business...*

Q: *Yes.*

A: *...it has to be yes, the distribution business alone by itself. So, that is an alternative aspect...*

[189] Mr. Downer at the end of the day, concluded that Coconuts was redundant to the business even though it serves various useful purposes. It is to be noted, in fairness to him, that much of his expert report was directed to whether Coconuts should be sold, a question more relevant to the derivative claim.

[190] Mr. Jayatilake was content to rest on this perspective that Coconuts was not a redundant asset.

[191] Mr. Fagan rejected this argument on the basis that there were mortgages, liens or other charges registered against the property in favour of any lender or banker extending credit terms to the Company.

[192] I am minded to accept the views expressed by Mr. Fagan that, in all the circumstances, Coconuts was indeed a redundant asset. While the asset may have been of some value to the Company in its dealings with its creditors, the evidence does not

establish that Coconuts was ever used as collateral in respect of any credit facilities extended by the Company's lenders or bankers. Furthermore, the evidence is that the bank providing the credit facilities would have been equally satisfied had the asset been converted into cash or other securities.

Marketability Discount

[193] A marketability discount, more properly a discount for lack of marketability (DLOM), is not usually applied where the behaviour of the majority has forced the sale by the minority shareholder. The 6th Defendant is a generational family Company with all its shares held within the Company. The Articles of Association require that the shares first be offered to existing shareholders. The sale of shares in the open market is unlikely to be contemplated. Possible offers to take the Company public were rejected. In these circumstances, determining a fair value would not require the application of a DLOM.

D. Valuation to be Accepted

[194] The Court is of the view that in relation to the valuation of the shares of the Company Mr. Fagan is to be preferred. In the first place, the income approach is consistent with authority as opposed to the asset approach. This "floor", which would be the midpoint of the asset value or cost approach, as accurately represented by Mr. Jayatillake, is just that. Additionally, this value did not include the intangible assets like goodwill, which would be taken into account on a sale to the market. This does not necessarily mean that it is a fair value. There is no indication that this is the direction in which the Directors are thinking. Indeed, every indication is that the Company will continue to be a going concern and along a profitable path. In fairness, the Claimant is entitled to have the benefit of this position. The Court is persuaded by Counsel for the Claimant that Mr. Jayatillake's approach of finding the fair market value instead of fair value led him to this position, instead of choosing the approach that would have resulted in the highest value to the Claimant. To be fair to him, Mr. Jayatillake's consideration of whether to apply a minority discount showed some appreciation for the difference.

[195] Secondly, the Court is of the view that the criticisms of Mr. Fagan's report, particularly with respect to inflated profits, were adequately explained and that the very restrictive approach of using cash flows instead or earning potential taken by Mr. Jayatillake led to an abnormally low value using the income approach. While it is accepted that there were no true comparators, the comparators chosen by Mr. Fagan were generally sufficient for the purposes used. This is seen from the fact that some of these comparators were previously some used by Mr. Jayatillake. Further, the admitted deficiency in not making a downward adjustment for the lower salary expenses can be compensated for by the use of the lower values provided.

[196] In addition, Mr. Fagans approach to the question of a minority discount and Coconuts as a redundant asset, have been largely accepted. He also left the question of whether to apply a marketability discount to the Court.

ISSUE 2: BENEFICIAL OWNERSHIP OF THE 94 SHARES

A. The Dispute

[197] This issue may well be the most important for the parties. The difference between seven shares and 101 shares is considerable, both in terms of voting power and monetary value. At the heart of the issue is the beneficial ownership of 94 shares, said to derive from a document signed by Sally purporting to transfer 94 of the 95 shares issued to her in the Industrial and Provident Society to Caribbean Cutlery Limited. At the time, Caribbean Cutlery Limited was owned by Monica Ramson. Following her death, her shares devolved upon John Ramson, Susan Silvera and Sally Fulton, each of whom is said to have become entitled to one-third of the shares. The document, found at page 1 of the Agreed Bundle of the Claimant's Documents, is titled "Transfer of Shares" and was executed on 21st February 1985. By it, Sally agrees that, pursuant to an agreement made between them, 94 shares are to be transferred to Caribbean Cutlery Limited.

[198] Each side argued strenuously in favour of their respective positions. For Sally, Counsel urged that:

1) The Defendants admitted that Sally was the legal owner of 101 shares.

2) If any trust existed, it related to the company formed under the Industrial and Provident Societies Act.

3) There was no evidence that a trust existed at the creation of the Company.

4) The Company itself agrees that Sally owns the shares and does not allege the existence of any trust.

B. The Credibility Examination

[199] This is one area in which the credibility of the witnesses is challenged. Although the Court has previously commented on the general reliability of each witness's testimony, an examination of the evidence in this instance is warranted.

Sally's evidence

[200] In her witness statement, Sally stated that she was the registered holder of 101 of the Company's 400 issued shares, representing approximately 25.25% of its equity. She explained that she subscribed for 1 share on incorporation, was subsequently allotted another 94 shares and derived a further 6 shares from her father's estate. She said that for most of her life she believed her father owned all the shares, and only became aware of her own shareholding in July 2014 after her daughter requested information from the Company's attorney following the probate of her father's estate.

[201] In her evidence-in-chief, Sally confirmed that the emails dated 10th and 11th July 2014 were those referred to in her witness statement and that the latter provided a breakdown of the Company's shareholding. She also stated, however, that she began making inquiries after her mother died, when it emerged that her mother had shares to distribute. She said that this discovery prompted the email inquiry.

[202] In cross-examination, Sally acknowledged her signatures on the documents by which the business became an Industrial and Provident Society, the 1985 transfer instrument and the documents converting the Society into the present Company. When it was suggested that those documents showed that she held 94 shares as nominee or

trustee for Caribbean Cutlery Limited, she responded that this was what the document stated. Although she maintained that she first became aware of her shareholding in 2014, she accepted that the earlier documents bore her signature and said that she had "obviously forgotten" about them. She did not give evidence concerning the agreement underlying the 1985 instrument, whether consideration was payable or paid, or whether the proposed transfer was ever completed.

[203] Sally was also challenged on her statement that she had inherited 6 shares from her father's estate. When shown her father's will and her pleaded case, she accepted that the Will granted her a life interest in those shares. She nevertheless explained that she understood herself to have inherited them because she was entitled to their benefit during her lifetime. This Court observed that the distinction between an outright inheritance and a life interest was a legal technicality which might not have been apparent to a lay witness.

[204] She maintained that the shares standing in her name should be treated as her shares for the purposes of any buy-out. She sought either to purchase the other shareholders' interests or to sell her own interest at fair value. Her evidence was that any valuation should account for her proportionate interest in the Company's retained profits, the current value of its non-operational real estate and any sums found to have been improperly paid by the Company.

[205] There are several matters of note. The first iteration of Chas E. Ramson Limited, a Company limited by shares, passed a resolution dated 8th August 1984 to convert itself into a registered society under the **Industrial and Provident Societies Act**, with Sally to hold 95 shares; the conversion was so certified on 25th September 1984. The purported transfer to Caribbean Cutlery Limited is dated 21st February 1985.

[206] **S.49 of the Industrial and Provident Societies Act** provides that a registered society may, by special resolution, convert itself into a company under **The Companies Act**. When Chas E. Ramson Limited was incorporated as a company limited by shares in 2001, each subscriber to the Memorandum and Articles of Association dated 16th October 2001 took 1 share. Caribbean Cutlery Limited was not a subscriber.

John and Susan's Evidence

[207] John and Susan, in their witness statements (B2/P24 page 10), state that the members of the Management Committee of the Industrial and Provident Society passed a resolution to convert the society into a limited liability company, which was so done on 16th October 2001. The document produced to the Court at page 57 of Bundle 10, said to confirm this, was not challenged.

[208] I have, however, a few observations of the document. The document preceding it is the Memorandum of Association of the Company incorporated in 2001. The Memorandum comprises seven numbered pages and concludes with a signature page. The document at page 57 is not paginated and commences with the words: "AND THAT upon its conversion to a company Chas E. Ramson Limited adopt the articles of association attached hereto and signed for identification by three members of the society". It is dated 16th October 2001 and is signed by John Ramson and Monica Ramson as committee members; Susan Silvera as secretary; Lauritz Ramson as chairman of the first general meeting and as chairman of the subsequent general meeting; and John Ramson, Monica Ramson and Susan Silvera as members of the Society.

[209] The Articles of Association that follow were signed by the seven subscribers: Lauritz Ramson, John Ramson, Monica Ramson, Susan Silvera, Sally Fulton, Noel Silvera and Janet Ramson.

[210] The document appears to be a record of the resolution required by **S.46 of the Industrial and Provident Societies Act**. It is noted that this document states that, "…the initial shareholders in the Company shall be all of the present members of this society each of whom shall continue to hold the same number of shares held by them in this society at the date of conversion."

[211] The Minutes of the First Directors' Meeting, held on 11th June 2002, reflect that a resolution was passed to register Sally as the holder of 95 shares, for which she had subscribed. The Return of Allotment filed with the Companies Office, dated 30th May 2005, reflected the additional 94 shares subscribed for by Sally from 26th November 2001,

bringing her holding to a total of 95 shares. That document was under the hand of John as Director.

[212] At the beginning of the cross-examination of John, there was a discussion between Counsel and the Bench as to the connection between the two entities. I was directed to this document, which was suggested to be part of the Memorandum of Association (page 243 of the Transcript of Evidence Week 2 Volume 1). On the basis of the observations above, this document is separate from the Memorandum of Association. That, however, does not invalidate the point that, while there were three separate legal iterations, it was the same business entity.

[213] It was further stated that it was also resolved at the first Directors' Meeting on 11th June 2002, that members of the Industrial and Provident Society would continue to hold the same number of shares they had held in the society on the date of conversion to the limited liability company. The **Minutes of the First Directors' Meeting held at the Registered Office of the Company, 449 Spanish Town Road, Kingston 11, on 11th June 2002 at 11:00 a.m.**, found at page 87 of Bundle 10, do confirm the shareholding as stated by John, but contain no such resolution. Although John and Susan were both present at that meeting of Directors, neither offered any explanation as to why so important a resolution was not captured among the several other resolutions in the minutes. That is, moreover, against the background that Clause 119 of the Articles of Association required minutes to be made of "*all resolutions* and proceedings at all meetings of the Company and of Directors and of committee of Directors" (emphasis mine). It is apparent from the voluminous documents in evidence in this case that the Company, although a closely held family company, did not operate informally, as many such companies do.

[214] I categorically reject the evidence of John and Susan that any such resolution was passed at that first meeting of Directors. In any event, such a resolution would be gratuitous as the special resolution converting the IPS to a Limited Liability Company stated the same thing. The rub is in the interpretation. I agree with the submission made on behalf of the Claimant that what this statement clearly did not say is that the members

of the IPS would hold the newly allotted shares in the Company *on the same basis* (which the 1st to 5th Defendants interpret to mean on a trust) as they held them in the IPS. The 1st to 5th Defendants were anxious for this interpretation: Sally's claim to approximately 25% of the Company would be greatly diminished if she were entitled only to 7 shares. Their case in this respect came as a windfall, arising from the discovery of the Transfer document, which John says was discovered only in 2017.

[215] The fact is that at the time of conversion, Sally held 95 shares. The subscription to 1 share and subsequent allotment of 94 shares to her (and in like manner to the other members of the IPS) was in fulfilment of and in recognition of the special resolution converting the IPS. Whether she held any of the shares on trust or not is immaterial for this purpose.

[216] This should be the end of this issue, but in the event I am wrong, I will consider the 1st to 5th Defendants' argument that Sally holds 94 shares on trust for Caribbean Cutlery.

TRUST

[217] The authenticity of the Transfer document was not challenged. The Rules of the Industrial and Provident Society relating to the transfer of shares provided, first, that the shares could only be transferred with the consent of the Committee of Management, and that any transfer should be in the form set out in the schedule (Rule 21).

> *<u>Transfer of Shares</u>*
>
> *21. Every share shall be transferable but only with the consent of the Committee of Management. The form of transfer is set out in the Schedule hereto.*

[218] There is no evidence that the consent of the Committee of Management was secured for this transfer. The secretary was also required to keep a share register book and to register every transfer of shares with the name, residence, occupation, date of entrance, the number of shares, the number and the value of the shares. The secretary was also required to enter the date at which a member ceased to hold any shares (Rule 20).

<u>Share Register</u>

> *20. A share register book shall be kept by the Secretary, in which he shall enter the full name, place of residence, occupation and date of entrance of each member, the number of shares held by him, the number and value of each share, and the date at which the member acquired any share and the date at which he ceased to hold any share. Every transfer of a share shall be registered in the same way. Where two or more persons are registered as joint holders of a share, any one of such persons may give a good discharge for any profits payable in respect of such share.*

[219] There are no such records produced. This Company, in all its iterations, even though a family company, as stated before, operated quite formally and kept meticulous records. There are receipts from a bookstore, letters, minutes of family meetings, employers' annual returns dating back to 1978, letter to the bank requesting funds for business travel. Lauritz himself was said to never throw out anything. He had an anteroom with chicken boxes of files, a credenza, filing cabinets and his desk was piled high with papers.[2] What are the odds of him keeping the transfer but not the attendant relevant documents? The legal position was summarized in the case of **Archer and another (Appellants) v Fabian Investments Limited and others (Respondents) (Bahamas)** [2017] UKPC 9 as follows:

> *22. On the other hand, their Lordships have concluded that the judge was correct to hold that the individual plaintiffs remained the legal owners of the shares, in the absence of any evidence that the transfer of title to Fabian and its nominees had been registered in accordance with Petroleum's articles of association … But the person to whom the shares are sold takes them subject to the articles of association of the company in question. If the articles require the change in ownership to be registered before it can be recognised and given effect, then a complete legal title to the shares cannot be acquired without registration (**Société Générale de Paris v Walker** (1885) 11 App Cas 20, at 28, where the Earl of Selborne contrasted "a merely inchoate title by an unregistered transfer" with "a legal estate in the shares").*

[220] I find on a balance of probabilities that there was no actual transfer of shares to Caribbean Cutlery. The ultimate acceptance of the 1st to 5th Defendants that Sally is the legal owner of the shares is consistent with this finding.

[2] Transcript of Evidence Week 2 Volume1, at page 258 and 259.

[221] What then is the correct position in relation to the shares? The 1st to 5th Defendants' contention is two-pronged. Firstly, that Sally holds the shares on trust. They seem to rely on the maxim that Equity treats as done that which should have been done. Secondly, that the beneficial interest survives the change in the legal status of the Company.

[222] The first question is academic unless the second is answered positively. The submission on behalf of the 1st to 5th Defendants is well-founded. In **Re London Housing Society's Trust Deeds** [1940] Ch 777. Farwell J described them as the same thing in different costume. I accept as the common law applicable in this jurisdiction the reasoning of the court as follows:

> *In my judgment, the only practical way of dealing with a question of this sort, is to treat the two things, the registered society and the limited company, as the same thing. The employees of the society are, as it were, carried on and continued in the same form as before, except that the entity which employs them has a different name and a different structure from that which the society had. In truth and in substance the society and the company are the same thing, and, therefore, the trustees, if they continue to apply the trust funds for the benefit of the persons for whom they would have employed them had the society not been converted, will not be committing any breach of trust, but will in fact be carrying out the purposes of the trust. In my judgment, therefore, the trustees have now the same duties and obligations as existed before the conversion.*

[223] This position is bound up in the reality that a share of a company is not a stand-alone extrinsic object. It is the embodiment of the capital of the company the nature of which does not change/ remains with the change in status from one form of legal entity to another. Counsel for the 1st to 5th Defendants was content to rest on the existence of a trust to defeat Sally's claim to the entirety of 101 shares.

[224] The first issue was recently discussed (at about the same time this matter was being heard) by the UK Supreme Court in **Frenkel v LA Micro Group (UK) Ltd and Others and LA Micro Group Inc v LA Micro Group (UK) Ltd and Others** 2024 UKSC 42. Lord Briggs, with whom the rest of the court agreed, delivered the judgment. The particular facts, being dissimilar to this case, will not be recited, accepting as Lord Briggs said that *"The issue of principle for decision in this appeal is not particularly fact-sensitive…"* The introduction defines or describes the context of the present

circumstances of whether the transfer of shares created a vendor-purchaser constructive trust (VPCT) (adopting the acronym used by the UKSC).

> *1. This appeal raises an important but undecided question about the vendor— purchaser constructive trust ("VPCT") which typically arises whenever there is an agreement for the sale of property of which equity would grant specific performance. It is one of the ways in which effect is given to the maxim that equity treats as done that which ought to be done.*

[225] His Lordship points out that shares in privately held companies meet this definition stating:

> *25. However that may be, the question whether a contract for the sale of property other than land gave rise to a VPCT always depended upon whether the uniqueness of the subject matter justified an order for specific performance: see Snell's Equity, 34th ed (2019), at para 24-004. It is common ground that an interest in shares in a private company satisfies that requirement of uniqueness, whereas shares in a quoted company, being available on the market, generally would not. The classic example of the creation of a VPCT over shares is Neville v Wilson [1997] Ch 144.*

[226] The core principle of law regarding a VPCT is that once there is a specifically enforceable contract for the sale or transfer of an interest in identified property, equity regards the vendor as holding that interest on constructive trust for the purchaser from the moment of the contract, and the purchaser as having the beneficial interest, subject to payment of the price. This is equity "treating as done that which ought to be done".

[227] The VPCT is said to be primarily for the benefit of the purchaser.

> *28. The statistical fact that most cases about the VPCT concern contracts which require some further step (such as a conveyance or other writing) to be completed has led to the purpose of the trust being described as to protect the parties (mainly but not exclusively the purchaser) during the interval between contract and completion (see eg Meagher, Gummow and Lehane, Equity, Doctrines and Remedies, 5th ed (2015) at para 6-055). This is so whether the contract expressly contemplates such a further step, eg a typical contract for the sale of land, or because a transaction which is intended or assumed to be selfexecuting (ie to need no further step to complete it) is ineffective for that purpose (eg because it is oral rather than written) and needs to be completed, and is therefore treated by equity as if it were a contract to take that further step, of which specific performance will be granted: see eg Parker v Taswell (1858) 2 De G & J 559; Gilbey v Cossey (1912) 106 LT 607 and Bridges v Mees [1957] Ch 475.*

> *35. More fundamentally the supposed added benefit fully accords with the underlying objective of equity in this context, which is to treat as done that*

> *which ought to be done. Interim protection between contract and completion is just an aspect of the achievement of that objective. Where the contractual objective is the conveyance or transfer of legal title, nothing that equity can do short of securing compliance with an order for specific performance (by the vendor or by a master of the High Court if the vendor refuses) will achieve that outcome. Interim protection is all that equity can provide by means of a VPCT.*

[228] There are two other principles of note before turning to the facts of the instant case. Equity will not aid a volunteer nor perfect an imperfect gift.

> *49. … Specific performance and the VPCT are prime examples of the readiness of equity to come to the aid (further than does the common law) of those with contractual rights for which damages for breach or interference would be an inadequate remedy. But equity does not assist a volunteer, nor does it perfect an imperfect gift.*

[229] Caribbean Cutlery Limited, as a limited liability company, is a distinct and separate legal person from its shareholders, directors and members. This is an established legal principle accepted in this jurisdiction. **Salomon v Salomon** [1897] AC 22 is the well-known case that explains this doctrine of corporate personality. The company acts through its directors and shareholders at a general meeting. The sole, or at any rate majority shareholder, was Monica Ramson. She is described by Susan as the owner of Caribbean Cutlery.

[230] The transfer of shares executed by Caribbean Cutlery and Sally Fulton is prima facie evidence of the existence of a constructive trust in its favour of 94 shares in the IPS but there is insufficient evidence for this Court to give recognition to any such trust. The terms of the agreement between Sally and the company are not known: that is, whether it was a purchase for value, if so what was the purchase price and, whether the purchase price was paid. This information is clearly not known by John or Susan or Noel or any of the Defendants since none of it is contained in their witness statements. Their knowledge of the transaction seems to stem from John's discovery of the transfer, only referring to the transfer instrument itself. More importantly, the only person in this claim with first-hand knowledge of the transaction, Sally, was not asked any questions in cross-examination about the nature of the transaction leading to the transfer being executed. Monica and Lauritz, who it could be inferred would have direct knowledge, are both deceased.

[231] There is no evidence that Caribbean Cutlery Limited, as beneficial owner, had, in the years between the transfer being signed in 1985 and the conversion into a company in 2001, sought to perfect the transfer or make any claim to the shares. More importantly, there is no evidence that the transfer was for valuable consideration. Equity will not assist a volunteer nor complete an imperfect gift. There is in the final analysis no evidence of a trust being created or being in existence at the time the IPS was converted to a limited liability company.

[232] There is one final word on this issue. Even if I am wrong in the above conclusion, until and unless Caribbean Cutlery asserts its rights to the beneficial interest in the shares that is accepted by Sally, the legal owner, or is determined by a court, Sally is legally and beneficially entitled to the benefit or profit emanating from the shares. It is not, however, open to the 1st to 5th Defendants to assert that company's right to them. Any filing under **The Companies Act** to otherwise effect is wrong and must be corrected.

Resolution of Issue 2

[233] For any or all of the reasons above, Sally is presently the legal and beneficial owner of 101 Shares. The 1st to 5th Defendants are not legally entitled to assert any possible beneficial interest of Caribbean Cutlery Limited (an issue of standing as well as the company being a distinct legal entity). In addition, such a claim is likely to be defeated given the available evidence. The buy-out is therefore to be transacted based on the sale and purchase of 101 shares standing in the name of Sally Fulton.

FEES

[234] The Claimant asks the Court to Order that the fees paid by the Company for its legal defence constituted a distribution, on the basis that the Company took an active role in supporting the case advanced by the 1st to 5th Defendants against the Claimant, when it ought to have remained a neutral and nominal party. The Court is not persuaded that the Company's role was so limited in the circumstances of this case. Accordingly, the Court will not penalise the Company for conducting its case as it saw fit, notwithstanding that its position was plainly aligned with that of the other Defendants.

[235] The Director Defendants however are a different story. To the extent that the Company paid any legal fees for these Defendants, it is to be treated as a distribution as their actions which have been found to be oppressive and/or unfairly prejudicial and/or unfairly disregards the interests of the Claimant cannot be treated as being done on behalf of the Company. Sally should therefore be paid a portion of the fees equivalent to her shareholding stake as submitted by her Counsel.

INTEREST

[236] The 6th Defendant has had the benefit of the value of the dividends that ought to have been paid to Sally. That sum should properly reflect its benefit by payment of interest. The Claimant continued to benefit from her ownership of shares, being entitled to any dividends declared. Interest would seem to be in those circumstances a double recovery. By the same token, the value of the shares is likely to have appreciated given economic realities. This reality may be best taken care of by making the necessary adjustment based on the Consumer Price Index.

COSTS

[237] The applicable principles are settled. **Rule 64.6(1) of the Civil Procedure Rules** provides that, where the Court makes an order as to costs, the general rule is that costs follow the event, with the unsuccessful party being required to pay the successful party's costs. The award of costs nevertheless remains a matter for the Court's discretion, to be exercised judicially having regard to all the circumstances identified in **Rules 64.6(3) and (4)**. Morrison JA (as he then was) in **Branch Developments Limited t/a Iberostar v Industrial Tribunal and another** [2016] JMCA Civ 26 applied the general rule and stated:

> *[12] In my view, rule 64.6(1), which enshrines the long-established principle that costs should ordinarily follow the event, is the applicable rule for present purposes. It accordingly seems to me that, as the undoubted winner in the contest, the appellant is on the face of it plainly entitled to its costs, both here and in the court below. I will therefore approach the matter on this basis, nothing having been shown, along the lines indicated in rule 64.6(4), to displace the general rule.*

[238] **Rule 84.6(4)** sets some of the matters for the Court to consider in this regard. As Sykes J explained in **Stewart v Goblin Hill Hotels Ltd and others** [2016] JMCC COMM 39 (No 2: Costs), applying **Capital & Credit Merchant Bank Ltd v Real Estate Board** [2013] JMCA Civ 48, the Court must first identify the successful party and then apply the general rule, unless circumstances exist which justify a different result. Relevant considerations include the parties' conduct before and during the proceedings, their success or failure on particular issues, any payment into court or offer to settle, the reasonableness of pursuing particular allegations or issues, and the manner in which the case was conducted. The Court may therefore make a proportionate or issue-based costs order, or make no order as to costs, where the circumstances warrant a departure from the usual rule. The Court sees no reason to depart from the general rule.

DECISION

[239] It follows from the reasons given above that the Claimant succeeds in her claim, and the Defendants fail in their counterclaim. The Company or the Directors are to purchase the 101 shares standing to the name of Sally Fulton utilizing the lower value of $6,506,205.00 per share, less 30% for minority discount. The Claimant is entitled to be paid the dividends unpaid and withheld, with interest. Interest is to be paid at the statutory judgment debt rate. The legal fees, if any, paid by the 6th Defendant for the 1st to 5th Defendants are to be treated as a distribution and the Claimant is to be paid the amount proportionate to her shareholding. The Claimant being successful in her Claim is to have her costs as against the 1st to 5th Defendants.

ORDERS

I. The 1st, 2nd, 3rd, 4th, and 5th Defendants have exercised their powers in a manner that was oppressive or unfairly prejudicial to the Claimant or unfairly disregarded her rights as a shareholder in the 6th Defendant;

II. The Claimant is the legal and beneficial owner 101 shares in the 6th Defendant;

III. The 1st to 5th Defendants or any of them, or the 6th Defendant, must purchase the Claimant's 101 shares in the 6th Defendant at the price of J$6,506,205.00 per share, less 30% per share, subject to the CPI adjustment provided for in Order IV below;

IV. The price specified in Order III shall be adjusted by reference to the All-Jamaica Consumer Price Index (All Divisions), using the June 2022 index as the base index and the latest published index available on the 22nd September 2026 as the end index;

V. Statutory interest at 6% per annum shall run on the adjusted purchase price determined in accordance with Order IV from the date of Judgment to the date of payment;

VI. Within 30 days of the date of this Order, the 1st to 6th Defendants shall notify the Claimant in writing whether one or more of them will purchase the Claimant's 101 shares and, if so, identify the purchaser or purchasers. If no such notice is given within that period, the 6th Defendant shall purchase the shares. The purchase shall be completed by 31st December 2026, upon payment of the purchase price in cleared funds and delivery by the Claimant of the documents necessary to transfer the shares to the purchaser or purchasers. The times set out in this paragraph may be extended by the agreement of the parties or by an order of the Court;

VII. For the avoidance of doubt, it is declared that this Order does not account for any benefit recoverable under Claim SU 2022 CD 00028;

VIII. The 6th Defendant must pay the sum of $4,857,812.5 to the Claimant, with interest at 6% per annum as follows: on $157,812.50 from 31st December 2007; on $2.35 Million from 31st December 2021; and $2.35 Million from 31st July 2022 to the date of payment;

IX. The 6th Defendant must pay the Claimant a sum equivalent to 33.78% of the legal fees it paid to the Attorneys of the 1st to 5th Defendants in relation to these proceedings;

X. The parties have liberty to apply for further Orders or directions if they are unable to agree the amounts payable pursuant to orders;

XI. The counterclaims are dismissed.

XII. The Defendants must pay the Claimant’s costs which are to be taxed if not sooner agreed.

XIII. The judgment is stayed for 42 days from the date of this order.

Appendix I – Chronology

DATE	EVENT	REFERENCE[186]
	1922 - 2000	
1922	Charles Ramson starts a business as a sole trader	**B2/P23/p5**
1928	Charles E Ramson dies	**B2/P23/p5**
1933	Lauritz Ramson joins the business	**B2/P23/p5**
1934	The sole trader business Limited is incorporated as a limited liability company under the Companies' Act	**B2/P23/p5**
1984	The company is converted to an Industrial and Provident Society (IPS)	**B2/P23/p5**
21/2/1985	Sally signs an instrument of transfer in relation to 94 shares in the IPS	**B7/P1**
1993	Ian Fulton is hired as Distribution Manager of Chas E. Ramson (the IPS)	**B2/P30/p30**
June 1995	Ian Fulton's employment with Chas E. Ramson is terminated	**B2/P30/p30**
	2001	
October 16	The Company is incorporated; Sally is one of the subscribers to the memorandum of association (1 share)	**B7/P2**
November 26	94 shares in the Company are allotted to Sally	**B9/P1156**

[186] References are to Bundle/ Page/ paragraph

DATE	EVENT	REFERENCE[186]
	2002	
June 11 (2)	First directors' meeting of the Company; Lauritz and John are appointed directors and Susan is appointed the secretary	**B2/P26/p16** **B2/P27/p19**
	John is appointed Managing Director	**B16/P291-2**
	2003 - 2013	
	Dividends in the Company are declared	
	Dividends in the Company are declared	
	AGM takes place	
2009	Lauritz Ramson retires and John becomes chairman	**B16/P292**
23/4/2011	Lauritz Ramson dies	**B2/P27/p20**
27/4/2011	Raymond, Susan, Phillip and Christopher are appointed directors	**B2/P27/p20**
13/12/2011	Grant of Probate issued in the estate of Lauritz Ramson	
11/6/2012	Meeting with Philmore Ogle, executor of Lauritz Ramson's estate	**B2/P25/p12** **B10/P94**
28/10/2012	Monica Ramson dies	

DATE	EVENT	REFERENCE[186]
2014		
July 11	Attorney Roberta Matthies informs Sally and her daughter that Sally holds 95 (out of 400) shares in the Company and will receive 6 more from her father's estate	**B2/P17/p5** **B10/P110**
September 12	Sally's attorneys assert that she never received notices of meetings and requests information	**B7/P57-59**
September 19 – October 1	The Company's attorneys send detailed response	**B7/P60** **B7/61** **B10/P117**
November 21	Sally attends 1st AGM (by proxy)	**B2/P29/p29**
2015		
December 3	Sally attends 2nd AGM (by proxy)	**B2/P29/p29**
2016		
27/5/2016	Sykes J delivers judgment in first derivative claim	**B13/Tab A**
21/6/2016	Sally attends 3rd AGM (by proxy)	**B2/P29/p29**
30/6/2016	Sally receives 1st dividend payment of $808,000.00 for 101 shares (for profit made by the Company in 2015)	**B2/P9/38** **B2/P35/p42d**
2017		
May 31	The Company submits annual return indicating that Sally holds 101 shares	**B7/P219**
June 21	Sally attends 4th AGM (by proxy)	

DATE	EVENT	REFERENCE[186]
		B2/P29/p29
August 13	Directors' meeting re Scotia Bank and Coconuts	**B10/P207**
August 30	Kathryn Silvera appointed a Director of the Company	**B2/P27/p20**
September	John retires as Managing Director	
Late September	John allegedly "finds" 1985 Transfer of Shares among his father's documents	**B16/P386**
	Phillip is appointed Managing Director	**B2/P72/p6**
	Dividends declared	
	2018	
May 31	The Company submits annual return indicating that Sally holds 101 shares	**B9/P1163**
June 7	Sally files this claim	**B1/P1**
June 26	Sally attends 5th AGM (by proxy)	**B2/P29/p29**
December	The Company files amended annual return indicating for the first time that Sally holds 94 shares on trust	**B9/P1176**
	2019	
April 26	Notice of AGM sent to Sally Fulton by registered mail for the first time.	**B11/P529**

DATE	EVENT	REFERENCE[186]
May 22	Sally complains (by a letter from her Attorneys-at-Law) about receiving notice of meeting in an envelope in bad condition	**B7/P385**
May 28	Sally attends 6th AGM (by proxy)	**B2/P29/p29**
	At AGM John says he and Sally have the same amount (*sic*) of shares	**B9/P1205**
	2020	
2020	Notice of AGM sent to Sally by registered mail.	**B11/P528**
February 19	Sally receives dividend payment of $432,511.00 for 101 shares (this was the dividend declared in 2017)	**B2/P9/38** **B2/P35/p42d**
July 14	7th AGM held. Sally was unable attend as the Notice was not received with sufficient time	**B2/P11/p46** **B9/P1376-1377**
September 30	Sally receives $87,500 representing half of the dividend payment for profit in 2020 for 7 shares	**B2/P9/38** **B2/P35/p42d**
	2021	
March 31	Sally receives $87,500 representing half of the dividend payment for profit in 2020 for 7 shares	**B2/P9/38** **B2/P35/p42d**
October 12	Sally attends 8th AGM (by proxy)	**B2/P29/p29**
	2022	
February	DCTF values Coconuts for $585M	**B5/P587** (Appendix 2)
July 29	Sally receives gross dividend payment of $175,000 (net = $148,750) for 7 shares for profit of the Company in 2021	**B9/1446**