[2020] JMCA Civ 45

JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CIVIL APPEAL NO 97/2018

BEFORE: THE HON MR JUSTICE BROOKS JA
THE HON MISS JUSTICE EDWARDS JA
THE HON MRS JUSTICE FOSTER-PUSEY JA

BETWEEN	**CABLE AND WIRELESS JAMAICA LIMITED**	**APPELLANT**
AND	**ERIC JASON ABRAHAMS**	**RESPONDENT**

Mrs Denise Kitson QC, Kevin Williams and Ms Anna-Kaye Brown instructed by Grant Stewart Phillips & Co for the applicant

Conrad George and Andre Sheckleford instructed by Hart Muirhead Fatta for the respondent

4, 5 November 2019 and 25 September 2020

BROOKS JA

[1] On 5 November 2019, after hearing the submissions of learned counsel, and considering the appeal by Cable and Wireless Jamaica Limited ("CWJ") from the decision of Batts J, on a preliminary point, made in favour of Mr Eric Jason Abrahams, this court made the following orders:

"1. The appeal is dismissed.

2. The decision of Batts J handed down herein on 3 October 2018 is affirmed.

3. The stay of proceedings granted in this court on 8 February 2019 is no longer in effect.

4. Costs of the appeal to the respondent to be agreed or taxed."

At that time, we promised to put the reasons for our decision in writing. This is the fulfilment of that promise.

Factual background

[2] Mr Abrahams is one of the minority shareholders of CWJ. His shareholding, however, at a claimed 63,661,018 shares, is not insignificant. He contends that CWJ's board of directors for the years 2010-2017, misconducted itself to the prejudice of CWJ and its minority shareholders. He filed an application in the Supreme Court seeking permission to file a derivative action against CWJ, as a nominal defendant, and against the directors.

[3] A derivative action is unusual in that it is an exception to the rule that individual shareholders, because a company is a separate legal person, may not sue to correct wrongs done to that company. Mr Abrahams, again unusually, seeks to file the action outside of Jamaica, where CWJ is registered. His proposal is to file it in Florida, in the United States of America, where he alleges the misconduct occurred, and where, he alleges, a number of the errant directors reside. Mr Abrahams also resides in Florida.

[4] The application came on for hearing before Batts J, but CWJ made a preliminary objection, contending that the Supreme Court had no authority to allow a derivative

action to be filed abroad. The learned judge rejected CWJ's objection. He decided to hear Mr Abrahams' application. He, however, granted CWJ permission to appeal from his order on the preliminary point. It is that appeal, which we heard and dismissed.

The legal issue

[5] The essence of the issue joined between the parties, both before Batts J and before this court, turns on the interpretation of section 212 of the Companies Act (the Act), as to whether or not it permits the Supreme Court to allow derivative actions to be filed outside of this jurisdiction. All section references hereafter, unless otherwise specified, are references to the Act.

[6] Section 212 states as follows:

> "(1) Subject to subsection (2), a complainant may, for the purpose of prosecuting, defending or discontinuing an action on behalf of a company, apply to the Court for leave to bring a derivative action in the name and on behalf of the company or any of its subsidiaries, or intervene in an action to which any such company or any of its subsidiaries is a party.
>
> (2) No action may be brought, and no intervention in an action may be made under subsection (1) unless the Court is satisfied that–
>
> *(a)* the complainant has given reasonable notice to the directors of the company or its subsidiary of his intention to apply to the Court under subsection (1) if the directors of the company or its subsidiary do not bring, diligently prosecute or defend, or discontinue, the action;
>
> *(b)* the complainant is acting in good faith; and

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

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

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

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

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

There is no dispute that Mr Abrahams, as a shareholder of CWJ, would qualify as a complainant for the purposes of the section. Whether he satisfies the other requirements of the section is an issue for analysis in the court below.

The learned judge's decision

[7] The learned judge arrived at his decision by noting that:

a. although at common law there was no jurisdictional restriction on derivative actions, there were pre-conditions that rendered derivative actions by minority shareholders, almost impossible;

b. the Act had dispensed with the common law pre-conditions, but did not affect the jurisdictional entitlement; and

c. the clear words of section 212 did not impose any jurisdictional restrictions on the orders that the court was entitled to make in respect of derivative actions.

CWJ's grounds of appeal

[8] CWJ contends that Batts J misinterpreted section 212. It asserts that he did so in two ways:

a. he applied an overly restrictive interpretation to section 212; and

b. he failed to apply the principle that, unless specifically otherwise stated, statutes do not have extra-territorial effect, that is, they do not apply outside of the jurisdiction in which they are promulgated.

[9] CWJ filed the following grounds of appeal:

> "(A) The learned judge erred in law and in fact in dismissing [CWJ's] preliminary point as to jurisdiction, and finding the Court under the Companies Act has the jurisdiction to give permission to bring a derivative action in the name and on behalf of [CWJ's] in a foreign jurisdiction.
>
> (B) The learned judge erred in his finding that there was nothing in the Companies Act or the principles stated in the authorities to preclude permission being granted by a Jamaican court for commencement of a derivative claim outside the jurisdiction[.]
>
> (C) The learned judge erred in failing to apply the statutory rule of construction that there is a presumption against extra-territorial applicability of a

statute in his interpretation of sections 212 and 213 of the Companies Act[.]

(D) The learned judge failed to appreciate and/or recognize that there [sic] unless a statute indicates on its face that it is to have extra-territorial application the proper rule of statutory construction involves a presumption against such extra-territorial application."

Section 213, to which ground (C) refers, deals with the control of the derivative action, once it has been filed. That section will be quoted later in this judgment.

The derivative action

[10] In assessing CWJ's complaints of the learned judge's decision, it may be helpful to outline the nature of a derivative action and the reasons behind its origins. Andrew Burgess, in his work Commonwealth Caribbean Company Law, at page 323, provides the following definition of the term:

> "A derivative action is an action brought by a shareholder or other complainant in respect of a wrong done to the company where the wrongdoers are in control of the company and refuse to bring an action in the name of the company."

[11] The derivative action was born out of the need to correct the potential for injustice that is created by the fact of the separate legal identity which a company possesses. That separate identity, and the control of it, has been interpreted by the courts over the years. These interpretations have their foundations in the cases of **Foss v Harbottle** (1843) 67 ER 189; (1843) 2 Hare 461 and **Salomon v Salomon and Co** [1897] AC 22. The interpretations brought about a state of affairs where companies and their minority shareholders were sometimes prejudiced by the actions of the majority

shareholders, or by the actions of directors who are supported by the majority. The prejudice, initially, seemed to lack an opportunity for relief.

[12] The court eventually granted relief in such cases. In certain cases, it allowed an individual complainant, such as a shareholder, to initiate, or defend, an action, on behalf of the company, where the persons in control of the company refused to act. The two main cases are where, firstly, the action complained of is fraudulent, or secondly, is outside the authority of the company's memorandum of association. An early explanation of the development of that relief was given by the Privy Council in **Burland and Others v Earle and Others** [1902] AC 83. Lord Davey, in delivering the judgment of the Board said, in part, at pages 93-94:

> "It is an elementary principle of the law relating to joint stock companies that the Court will not interfere with the internal management of companies acting within their powers, and in fact has no jurisdiction to do so. Again, it is clear law that in order to redress a wrong done to the company or to recover moneys or damages alleged to be due to the company, the action should prima facie be brought by the company itself. These cardinal principles are laid down in the well-known cases of *Foss v. Harbottle* and *Mozley v. Alston*, and in numerous later cases which it is unnecessary to cite. **But an exception is made to the second rule, where the persons against whom the relief is sought themselves hold and control the majority of the shares in the company, and will not permit an action to be brought in the name of the company. In that case the Courts allow the shareholders complaining to bring an action in their own names. This, however, is mere matter of procedure in order to give a remedy for a wrong which would otherwise escape redress,** and it is obvious that in such an action the plaintiffs cannot have a larger right to relief than the company itself would have if it were plaintiff, and cannot complain of acts which are valid if done with the approval of the majority of the

> shareholders, or are capable of being confirmed by the majority. **The cases in which the minority can maintain such an action are, therefore, confined to those in which the acts complained of are of a fraudulent character or beyond the powers of the company.** A familiar example is where the majority are endeavouring directly or indirectly to appropriate to themselves money, property, or advantages which belong to the company, or in which the other shareholders are entitled to participate, as was alleged in the case of *Menier v. Hooper's Telegraph Works*. It should be added that no mere informality or irregularity which can be remedied by the majority will entitle the minority to sue, if the act when done regularly would be within the powers of the company and the intention of the majority of the shareholders is clear…." (Emphasis supplied)

[13] The learned authors of Mayson, French & Ryan on Company Law, 18th edition explain, at page 580, the origin of the term "derivative action":

> "Sometimes the court permits a right of action of a company to be pursued in proceedings brought in the name of a member of the company, as an exception to the proper claimant principle. At first such proceedings were treated, like the unsuccessful proceedings in *Foss v Harbottle*…as being brought by the company as an association of its members, and were expressed to be brought on behalf of the claimant and all other members of the company except (if they were also members) the defendants. More recently, following United States jurisprudence, a member of a company bringing proceedings to enforce a right of the company is said to be deriving a right of action from the company. Accordingly such proceedings are called 'derivative claims (*Schiowitz v IOS Ltd* (1971) 23 DLR (3rd) 102 at p. 121; *Estmanco (Kilner House) Ltd v Greater London Council* [1982] 1 WLR 2 at p. 10). The company must be joined as a co-defendant so that if its rights are vindicated it will be able to enforce the judgment…"

[14] The relief was initially granted through the equitable jurisdiction of the court. Browne-Wilkinson LJ in **Nurcombe v Nurcombe** [1985] 1 WLR 370, explained the nature of the relief. He said, in part, at page 378:

> "Since the wrong complained of is a wrong to the company, not to the shareholder, in the ordinary way the only competent plaintiff in an action to redress the wrong would be the company itself. **But, where such a technicality would lead to manifest injustice, the courts of equity permitted a person interested to bring an action to enforce the company's claim.**...Since the bringing of such an action requires the exercise of the equitable Jurisdiction of the court on the grounds that the interests of justice require it, the court will not allow such an action to be used in an inequitable manner so as to produce an injustice…."

[15] At common law, there was no requirement for prior approval by the court, for the filing of a derivative action (see **Waddington Ltd v Chan Chun Hoo Thomas and others** [2009] 2 BCLC 82 at paragraph [13]). Nor was there any restriction as to the jurisdiction where the action could be brought. The company's rights could be sought to be enforced wherever they had been breached. For example, an individual shareholder may, in the name of a company, initiate an action in any relevant place, to protect a right allegedly belonging to that company, where the directors refused to protect that right. Challenges to the shareholder's standing to bring such an action may be made either in the jurisdiction in which the company is incorporated, or that in which the action is filed. Lawrence Collins J (as he then was), in **Konamaneni and others v Rolls-Royce Industrial Power (India) Ltd and others** [2002] 1 All ER 979 (**Konamaneni)**, explained the alternatives at paragraph [55]:

> "…I consider that the correct approach would be to say that the courts of the place of incorporation are very likely indeed to be the appropriate forum, but not so overwhelmingly that they will necessarily be the exclusive forum…."

[16] The governing law for that challenge would, however, be that of the jurisdiction in which the company is incorporated. Lawrence Collins J, at paragraph [48] of his judgment in **Konamaneni** explained the basis for that approach:

> "The second candidate for the law applicable to the question whether a shareholder has a right to claim in respect of wrongs to a company is the law of the place of incorporation. There is no authority in England which is directly on point, but the question has been considered in the United States, where derivative actions are frequently brought in one state in relation to the affairs of corporations which have been incorporated in another state. The approach in these cases is that the right of the shareholder to bring the derivative action is governed by the law of the state of incorporation, but that the wrongdoers may be sued in a state which has personal jurisdiction over them, but subject to the American principles of forum non conveniens. **In the international context it has been held also that the right to bring a derivative action depends on the law of the place of incorporation**." (Emphasis supplied)

At paragraph [50], he expressed a preference for that approach. It, however, was not an issue on which he had to make a ruling.

[17] Lawrence Collins J's preference was accepted by the Hong Kong Court of Appeal in **East Asia Satellite Television (Holdings) Ltd v New Cotai LLC** [2011] 3 HKLRD 734. The case was cited by Peter Ng J in **Wong Ming Bun v Wang Ming Fan** [2014] 1 HKLRD 1108. Peter Ng J said at paragraph 36 of his judgment:

> "36. This Court is bound by the Court of Appeal decision in *East Asia Satellite Television (Holdings) Ltd v New Cotai LLC*. The legal position is clear – whether a shareholder can

> commence a derivative action in the name and on behalf of the company is a matter of substantive law, and is governed by the law of the place of incorporation ie *lex incorporationis*…."

That ruling is respectfully accepted as accurately stating the law, which governs the question of whether a derivative action has been properly commenced.

[18] Eventually legislatures of various countries intervened in order to give courts greater scope for granting relief. In this country, the efforts have evolved over time. The Companies Law of 1864 did not address the issue of derivative actions. Section 55 of that law allowed the court to appoint inspectors "to examine into the affairs of any company…and to report thereon in such manner as the Court may direct". An application for the appointment of inspectors had to be supported by membership holding not less than one-fifth of the company's shareholding.

[19] The first "modern" legislative intervention to prevent misconduct within a company, in this jurisdiction, was by section 196 of the Companies Act of 1967. That section allowed complainants to apply for relief where they alleged that the company's affairs were "being conducted in a manner oppressive to some part of the [membership]". This court, in **Radcliffe Butler v Norma Butler** (1993) 30 JLR 348 addressed the application of section 196 of the Companies Act of 1967. Carey JA, at page 352, stated that the section operated as an exception to the rule in **Foss v Harbottle**. The section, however, had limitations. It did not, by name, address the matter of derivative actions, and the remedies available were restricted.

[20] The Act was passed in 2005 and repealed the Companies Act of 1967. It is the first in this jurisdiction that specifically addressed derivative actions in respect of companies' affairs.

[21] The fact that, at common law, there is no restriction on the place in which a derivative action may be brought, is demonstrated by the tenor of some of the legislative initiatives used to govern derivative actions. Indeed, in England and Wales, as in the Cayman Islands, the legislation governing derivative actions does not ordinarily mandate prior approval for filing a derivative action. The legislation requires a person, who has filed such an action, to apply to the court for permission to continue the action (see Halsbury's Laws of England Volume 14 (2016), paragraph 648, and **Top Jet Enterprises Limited v Sino Jet Holding Limited and Another** (unreported) Grand Court, Cayman Islands, Cause No FSD 106 of 2017, judgment delivered 19 January 2018).

[22] In this jurisdiction, the present legislative structure is different from that in England and Wales and in the Cayman Islands. Section 212, as has been shown above, requires prior permission before a derivative action may be brought. The term "Court", as used in section 212, is defined in section 2 to mean the Supreme Court. An application for permission must, therefore, be sought in the Supreme Court (see section 212(1)). Andrew Burgess, in his work, Commonwealth Caribbean Company Law, at page 323, points out that other jurisdictions in the Commonwealth Caribbean have sections, in their respective legislations, which are similarly worded to section 212.

[23] The contending submissions in the present case may be considered against the backdrop of that outline of the relevant law.

The interpretation of the statutory provisions

[24] Mrs Kitson QC, on behalf of CWJ, set out the principles to which a court must have regard in conducting statutory interpretation. She identified the literal and purposive interpretation methods and highlighted the requirement that the first priority should be to give legislative instruments their plain ordinary meaning. Learned Queen's Counsel argued for a particular approach to statutory interpretation. Paragraph 28 of the written submissions, which were filed on behalf of CWJ, states:

> "b. …the House of Lords case, **Secretary of State for Defence v Al Skeini & Ors** [[2007] UKHL 26], is particularly useful as in the said case the House of Lords at paragraphs 9-26 found that in interpreting a statute the court should eschew an overly literal construction, take account of the purpose of the statute, the mischief sought to be remedied and other circumstances relevant to interpretation…"

[25] Learned counsel for Mr Abrahams, in their written submissions, argued that the learned judge addressed the primary modes of statutory interpretation that have been identified by Mrs Kitson. They said at paragraph 26 of those submissions:

> "The learned judge approached the question of whether derivative proceedings may be brought in a foreign forum on the basis of Jamaican companies legislation law [sic] by analysing the provisions relevant to Jamaica's statutory derivative action. His Lordship's analysis canvassed the three primary modes of statutory interpretation – the literal interpretation, a purposive interpretation, and an examination of the mischief meant to be addressed."

Mr George reinforced those submissions during his oral arguments.

[26] Both sides agree on the approach to be taken to statutory interpretation. They, however, disagree on whether the learned judge properly utilised that approach.

[27] Contrary to Mrs Kitson's criticism set out in paragraph [24] above, the learned judge did adopt the concepts and approach that learned Queen's Counsel suggested was required. The learned judge addressed the issues that were identified in **Regina (Al-Skeini and others) v Secretary of State for Defence (The Redress Trust and others intervening)** [2007] UKHL 26; [2007] 3 WLR 33 (**Al-Skeini**). He was methodical in his approach to the issue of the interpretation of sections 212 and 213. Firstly, he applied a literal interpretation and found that there was nothing in either section 212 or 213, which precludes "permission being granted by a Jamaican court for commencement of a claim outside of the jurisdiction" (paragraph [7] of the judgment).

[28] Section 212 has already been quoted. Section 213 states:

> "(1) The Court may, in connection with an action brought or intervened in under section 212, make such order as it thinks fit, including an order-
>
> (a) authorizing the complainant, the Registrar or any other person to control the conduct of the action;
>
> (b) giving directions for the conduct of the action;
>
> (c) directing that any amount adjudged payable by a defendant in the action be paid, in whole or in part, directly to former and present shareholders or debenture holders of the company or its subsidiary, instead of to the company or its subsidiary; or

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

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

The plain meaning of the language of the section supports the learned judge's finding.

[29] The learned judge then accepted that a purposive interpretation of the legislation allowed the courts, in this jurisdiction, to grant permission for derivative actions to be filed abroad. He said, at paragraph [10] of his judgment:

> "…I am persuaded by and accept the purposive approach adopted by the courts which considered the legislation in the British Virgin Islands. Jamaica is an island and a small one. Our business interests and connections extend in many instances outwards. Our people sometimes own assets and shares locally and abroad. Persons who live abroad and are not Jamaican own shares and interests in Jamaica. It is not difficult to imagine the circumstances, including migration, which may render it convenient appropriate and/or reasonable for a derivative action to be brought or defended in a jurisdiction outside Jamaica."

[30] In identifying the issue of the mischief addressed by the legislation, the learned judge, in paragraph [12] of his judgment, stated a plain example, which is undoubtedly correct in principle. He said:

> "Section 212 applies to the commencement, defence or continuation of an action. If [CWJ] is correct it means that, if a company has a claim issued against it in a foreign jurisdiction, and its majority directors for inappropriate reasons decide not to defend the claim, there will be no

> avenue by which the right thinking minority could defend the claim."

He also identified, at paragraph [14], that section 213(2) swept away the "in-house" rule, which, at common law, prevented many deserving derivative actions.

[31] For completeness, it must be said that, although learned Queen's Counsel also cited section 213A as part of her submissions, that section does not contain any provision that supports an interpretation that is contrary to that found by the learned judge. The section sets out the remedies the court may grant in cases where there has been, among other things, oppression of a minority of shareholders. It contemplates a situation where the court itself adjudicates on the complaint. The section states:

> "(1) A complainant may apply to the Court for an order under this section.
>
> (2) If upon an application under subsection (1), the Court is satisfied that in respect of a company or of any of its affiliates-
>
> (a) any act or omission of the company or any of its affiliates effects a result;
>
> (b) the business or affairs of the company or any of its affiliates are or have been carried on or conducted in a manner;
>
> (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, any shareholder or debenture holder, creditor, director or officer of the company, the Court may make an order to rectify the matters complained of.

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

(a) restraining the conduct complained of;

(b) appointing a receiver or receiver-manager;

(c) to regulate a company's affairs by amending its articles or by-laws, or creating or amending a unanimous shareholder agreement;

(d) directing an issue or exchange of shares or debentures;

(e) appointing directors in place of, or in addition to, all or any of the directors then in office;

(f) directing a company, subject to subsection (4), or any other person to purchase the shares or debentures of a holder thereof;

(g) directing a company, subject to subsection (4), or any other person to pay to a shareholder or debenture holder any part of the moneys paid by him for his shares or debentures;

(h) varying or setting aside a transaction or contract to which a company is a party, and compensating the company or any other party to the transaction or contract;

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

(j) compensating an aggrieved person;

(k) directing rectification of the registers or other records of the company;

(l) liquidating and dissolving the company;

(m) directing an investigation to be made; or

(n) requiring the trial of any issue.

(4) A company shall not make a payment to a shareholder under paragraph (f) or (g) of subsection (3) if there are reasonable grounds for believing that-

(a) …; or

(b) ….”

[32] Learned Queen’s Counsel is, therefore, not on good ground in her criticism of the learned judge’s findings, based on his interpretation of the sections.

The principle against extra-territorial effect

[33] To be fair to Mrs Kitson, however, it must be said that she directed the bulk of her arguments to support CWJ’s assertions that the learned judge failed to apply the principle that, unless so stated, legislation does not have extra-territorial effect. She stated that a prominent part of the judgment in **Al-Skeini** was the requirement to apply the presumption of extra-territoriality.

[34] Learned Queen’s Counsel, in one of the extracts she cited from **Al-Skeini**, quoted from the judgment of Lord Rodger of Earlsferry, who stated, in part, at paragraph 45 of the judgment:

> “Behind the various rules of construction, a number of different policies can be seen at work. For example, every statute is interpreted, ‘so far as its language permits, so as not to be inconsistent with the comity of nations or the established rules of international law’: *Maxwell on the Interpretation of Statutes*, 12th ed (1969), p 183. It would usually be both objectionable in terms of international comity and futile in practice for Parliament to assert its authority over the subjects of another sovereign who are not within the United Kingdom. So, in the absence of any

indication to the contrary, a court will interpret legislation as not being intended to affect such people. They do not fall within 'the legislative grasp, or intendment,' of Parliament's legislation, to use Lord Wilberforce's expression in *Clark v Oceanic Contractors Inc* [1983] 2 AC 130, 152C-D. In Ex p Blain; In re Sawers (1879) 12 Ch D 522 the question was whether the court had jurisdiction, by virtue of the Bankruptcy Act 1869, to make an adjudication of bankruptcy against a foreigner, domiciled and resident abroad, who had never been in England. James LJ said, at p 526:

> 'But, if a foreigner remains abroad, if he has never come into this country at all, it seems to me impossible to imagine that the English legislature could have ever intended to make such a man subject to particular English legislation.'

On this general approach, for instance, there can be no doubt that, despite the lack of any qualifying words, section 6(1) of the 1998 applies only to United Kingdom public authorities and not to the public authorities of any other state."

[35] Learned Queen's Counsel also quoted extensively from the decision in **Masri v Consolidated Contractors International Company SAL and Others (No 4)** [2009] UKHL 43, in which it was held, in part:

> "(1) that whether and to what extent the presumption against extraterritoriality applied in relation to foreigners outside the jurisdiction depended on who was within the legislative grasp or intendment of the particular provision; that Parliament was to be taken as understanding and endorsing the manner in which the rule-making power in respect of extraterritorial jurisdiction had been exercised over the years and as permitting the extension of the English courts' jurisdiction over persons abroad so as to cover new causes of action and situations; and that the power conferred by section 1 of the 1997 Act was wide enough, in principle, to permit the rule-making authority to enact rules relating to the examination of an officer abroad of a company against which judgment had been given within the jurisdiction…"

[36] Mrs Kitson submitted that once the Supreme Court grants leave to bring a derivative action, the language of sections 212, 213 and 213A is such that it contemplates the conduct of the proceedings as being under the jurisdiction of that court. The tenor of the relevant provisions of the Companies Act and the Judicature (Supreme Court) Act, learned Queen's Counsel argued, is such that their operation is limited to actions being conducted in Jamaica.

[37] Learned counsel for Mr Abrahams accepted that the rules of interpretation, which are to be applied, ordinarily prevent extra-territorial effect. They stressed, however, that in this case, the application of the legislation is in respect of persons and matters within the territory of the legislature. They argued that Mr Abrahams' application does not raise extra-territorial concerns. What he seeks to do, they submitted, is to use Jamaican legislation in a convenient foreign court.

[38] Again, the difference between counsel for CWJ and for Mr Abrahams is not on principles of law, but whether the principles are applicable in this case.

[39] Mrs Kitson is correct in submitting, and it has been accepted, in the reasoning above, that the remedies that are listed in section 213A contemplates the application for relief being made to the Supreme Court. The court would therefore be applying the prescribed remedies itself. Those remedies would, of course, be applied to persons and property that are within this jurisdiction.

[40] The reasoning in **Al-Skeini** is also respectfully accepted as representing the relevant law concerning the presumption against extra-territoriality.

[41] There is, nonetheless, a basic flaw in learned Queen's Counsel's submissions on this aspect of the appeal. It is that, where the application is for permission to file the derivative action, the listed remedies that may be granted by the court are not mandatory, and further, they may be tailored to avoid any infringement of the territorial limit to the court's jurisdiction. The section uses the term "may" in setting out the various actions that the court is entitled to take. The learned judge made similar observations at paragraph [9] of his judgment:

> "…Contrary to the submission of [CWJ] I see nothing inconsistent between Section 213 and permission to bring an action outside Jamaica. In the first place the section uses the discretionary "may." This suggests that orders or directions would only be made if appropriate in the circumstances, as stated by Judge Pelling QC in the **Nova Trust** case referenced above. An applicant, for permission to bring an action outside the jurisdiction, knows that this statutory provision can give the Jamaican court no power over the foreign court which is to hear the matter. It may however be a relevant consideration, when deciding whether or not to grant permission, that the foreign court has power to make such or similar orders. In the second place the Section 213 directions are not all inconsistent with commencement of a claim overseas. So for example, authorising the complainant the Registrar or any other person to control conduct of the action pursuant to Section 213 (1) (a), is not inconsistent with that action being brought overseas. It means giving instructions and overseeing the conduct of the action. This is necessary in any action local or foreign." (Emphasis as in original)

[42] The flaw in learned Queen's Counsel's reasoning is also demonstrated at paragraph [13] of the learned judge's judgment, when he addressed similar arguments that Mrs Kitson made before the court below:

> "Jamaica is a sovereign state and Mrs. Kitson Q.C. sought support in the provisions of the Judicature Supreme Court Act. That Act she says limits the court's jurisdiction to Jamaica. I agree and so it does. **However, in giving permission for an action to be commenced overseas, the Supreme Court is exercising jurisdiction in Jamaica over person's** [sic] **resident here. The consequential action those persons bring or defend may be outside Jamaica but the source of their authority to do it will remain here. The Jamaican court will be able to exercise its coercive power, over the applicant for permission and the company, in the event its order is not obeyed; an unlikely eventuality because the order in question is permissive in nature.** I see no inconsistency between the provisions of the Judicature Supreme Court Act and the grant of permission to bring or defend an action in a foreign jurisdiction" (Emphasis supplied)

[43] The cases that learned Queen's Counsel relies upon, for this point, are distinguishable from the present case for differing reasons. In **Masri**, unlike in this case, there was an attempt to have the court exercise jurisdiction over someone who was domiciled outside of its jurisdiction. In that case, two companies, incorporated in Lebanan and domiciled in Greece, owed Mr Masri a judgment debt. He sought to have the English court use its civil procedure rules to summon two officers of the companies, who were domiciled in Greece, to attend court in England to answer questions. Importantly, those persons were not parties to the proceedings and had not submitted to the jurisdiction of the English court. The House of Lords found that the relevant rule-

making power was wide enough to enact rules in relation to the examination of an officer of a company who resided overseas. However, their Lordships found, the presumption against extra-territoriality was applicable to the English rule that permitted the court to make an order that an officer of the judgment creditor attend court, as the rule did not contemplate examination of overseas officers. They found that the court had no power to have service effected on a non-party, who was outside of the jurisdiction.

[44] In **Top Jet Enterprises**, Top Jet, a shareholder of another company, Sino Jet Holdings Limited, sought the permission of the Grand Court of the Cayman Islands to continue a derivative claim that it had already filed in Missouri, in the United States of America. The court found that the application was unnecessary as the rules, under which the application was made, did not apply to actions which had been filed outside of the Cayman Islands, and that Top Jet was entitled to have initiated the action. Segal J, said, in part, at paragraph 2 of his judgment:

> "…I have concluded, for the reasons set out below, that:
>
> (a) leave to continue the Missouri proceedings is not required.
>
> (b) I should make the orders sought by Top Jet declaring that if the facts and matters set out in its pleading in the Missouri proceedings (a petition) are proven at trial then Top Jet is entitled under Cayman law to bring the Missouri proceedings against [the third party] on Sino Jet's behalf."

[45] These cases do not assist Mrs Kitson's arguments because they concern the application of rules that do not exist in this jurisdiction and a legislative context which is

different from that which exists in this country. England and the Cayman Islands operate in the context of the derivative action being allowed to be filed without the prior permission, which the Act requires.

[46] A case which does assist this court, and on which the learned judge relied, is **Novatrust Ltd v Kea Investments Ltd and other companies** [2014] EWHC 4061 (Ch). In that case, Judge Pelling QC (sitting as a Judge of the High Court), considered the issue of whether a derivative action, in respect of a company that was incorporated in the British Virgin Islands (BVI), could be filed outside of the BVI. The relevant statute in the BVI (The Business Companies Act 2004), hereafter referred to as the BVI legislation, stipulates that permission is required from the BVI court before a derivative action may be filed. The applicant, Novatrust, sought to pursue such an action in England. It argued, before Judge Pelling QC that the effect of the BVI legislation was restricted to derivative claims that were brought in the BVI courts.

[47] Judge Pelling QC rejected the applicant's approach on that point. He said, in part, at paragraph 45 of his judgment:

> "First, there is nothing within the Act that limits the territorial scope of the Act in the manner suggested….Fifthly, although Novatrust asserted that to construe s.184C in the manner I have construed it amounted to an exorbitant assertion of extra territorial jurisdiction, I do not agree. The section provides merely that before a derivative claim can be brought anywhere leave must first be obtained. This is no different in principle from a rule that precludes double derivative claims, wherever in the world they might be brought in respect of companies incorporated in a particular jurisdiction. Once permission from the BVI Court has been obtained, whether the claim will be permitted and how it will be managed and tried are matters exclusively for the *lex*

> *fori*. Whilst Novatrust is correct to observe that there are provisions within s.184C - E that permit the BVI court to give directions in relation to permitted derivative claims, that does not help resolve the issue I am now considering because **those provisions are permissory. What might be appropriate for a case that will be litigated before the BVI Courts would not be appropriate in relation to a case to be commenced in a foreign court**." (Emphasis supplied)

[48] Batts J, in response to submissions by Mrs Kitson, addressed the issue of differences between the Act and the BVI legislation. He stated, at paragraph [11] of his judgment:

> "Mrs Kitson QC sought to distinguish the legislative provisions between Jamaica and the British Virgin Islands (BVI). I agree they are not identical. However in the important respects their effect is the same. The Jamaican statute says 'No action may be brought' (Section 212(2) whereas the BVI statute says, 'Except as provided for…a member is not entitled to bring' (section 184C (6)[)]. The words are different but the effect is the same. Permission is a condition precedent to the ability to bring the claim. **Section 184E of the BVI statute also gives the court power to make orders in relation to the conduct of the action not dissimilar to those provided for in section 213 of the Jamaican statute. I am not persuaded that the differences between the statutes impact the applicability of the authorities relied on by the Applicant**." (Emphasis supplied)

[49] Mrs Kitson argued that the learned judge erred in this comparison of the two statutes. She submitted that the BVI legislation, by its very nature, has extra-territorial application and that is not the case with the Act. She argued that the BVI legislation, in referring to "companies", contemplates all companies, whether registered in BVI or in a

foreign country, and thereby, facilitates international business. Learned Queen's Counsel submitted that that context necessarily involves extra-territoriality.

[50] Mr George however argued that the Act does not have the restrictions that learned Queen's Counsel submits.

[51] There is some support in the BVI legislation for Mrs Kitson's assertion. She is correct in saying that, in the BVI, the definition of "company" also includes a foreign company which has "continued as a BVI business company" (see sections 2, 3(1) and 182 of the BVI legislation), unlike Jamaica where "company" refers to those entities that are "formed and registered" under the Act. In this jurisdiction, foreign companies are only registered (see Part X, section 362) and are not deemed to be formed in accordance with the formation procedure (see section 3(1)).

[52] The BVI legislation allows for foreign companies to be registered as "continuing" in the BVI. There are also several sections in that legislation that deal with foreign companies. Section 184 of that legislation allows such companies, if the directors so desire, to continue to be incorporated outside of the BVI. The relevant portion of the section states:

> "184. (1) Subject to its memorandum or articles, a company for which the Registrar would issue a certificate of good standing pursuant to section 235(1) may, by a resolution of directors or by a resolution of members, continue as a company incorporated under the laws of a jurisdiction outside the Virgin Islands in the manner provided under those laws.
>
> (2) A company that continues as a company incorporated under the laws of jurisdiction outside the Virgin

> Islands does not cease to be a company incorporated under this Act unless the laws of the jurisdiction outside the Virgin Islands permit the continuation and the company has complied with those laws."

There is, in that country, therefore, as Mrs Kitson submits, an environment where more international organisations are likely to exist, than in this jurisdiction.

[53] But there is a twist.

[54] Importantly, in the BVI, once a company is registered as "continuing", it is to be treated as a "local" company for the purposes of that legislation. Section 183 of that legislation states, in part:

> 183. (1) When a foreign company is continued under this Act,
>
> (a) this Act applies to the company as if it had been incorporated under section 7 after the commencement date;
>
> (b) the company is capable of exercising all the powers of a company incorporated under this Act;
>
> (c) **the company is no longer to be treated as a company incorporated under the laws of a jurisdiction outside the Virgin Islands**; and
>
> (d) …" (Emphasis supplied)

[55] It is in that context, therefore, that Part XA (introduced by the Business Companies (Amendment) Act 2005), of that legislation, dealing with members' remedies, must be considered. That Part includes sections 184C and 184E, to which

Batts J referred, in his judgment. The distinction as to the legislative environment is not as great as learned Queen's Counsel has argued.

[56] In addition to that similarity, it must also be said that the Act contemplates companies having business overseas (see section 32) and accordingly Mrs Kitson's submissions also suffer in that regard.

[57] For those reasons, the learned judge's comparison of the two statutes cannot be faulted.

Conclusion

[58] Based on the reasoning set out above, the learned judge cannot be faulted on his interpretation of sections 212 and 213. He is also, with respect, correct in his rejection of CWJ's assertions that those provisions restrict the Supreme Court to only permitting derivative claims that are to be filed in this jurisdiction.

[59] It is for those reasons that I agreed with the decision that is outlined at paragraph [1] above.

EDWARDS JA

[60] I have read, in draft, the judgment of Brooks JA. I agree with his reasoning and conclusion and have nothing to add.

FOSTER-PUSEY JA

[61] I too have read the draft judgment of Brooks JA and agree with his reasoning and conclusion. I have nothing to add.