[2021] JMCA Civ 54

JAMAICA

IN THE COURT OF APPEAL

BEFORE: THE HON MR JUSTICE BROOKS JA
THE HON MRS JUSTICE SINCLAIR-HAYNES JA
THE HON MR JUSTICE F WILLIAMS JA

SUPREME COURT CIVIL APPEAL NO 67/2016

BETWEEN	**CHAS E RAMSON LIMITED**	**APPELLANT**
AND	**SALLY ANN FULTON**	**RESPONDENT**

Ransford Braham QC, Mrs M Georgia Gibson-Henlin QC, Ms Stephanie Williams and Ms Kimberly Morris instructed by BrahamLegal for the appellant

Lord Anthony Gifford QC, Ms Andrea Scarlett-Lozer and Ms Melissa Thomas instructed by Bruce Levy and Randolph Cheeks of Levy/Cheeks for the respondent

16, 17, 18, 19 April 2018 and 20 December 2021

BROOKS JA

[1] On 27 May 2016, Sykes J (as he then was) granted leave to Mrs Sally Ann Fulton to institute a derivative action in the name of Chas E Ramson Limited ('the company') against its directors. Mrs Fulton is a shareholder of the company and she asserts that the directors have not been acting in its best interest. Her main complaint is that the company has been reaping no benefit from two high-value real estate holdings which it owns. The reason for this situation, she asserts, is that the properties have been used for decades by the company's directors, mainly Mr John Ramson ('Mr Ramson'), as if they were the personal property of the directors. Mrs Fulton and the directors are all related, either by blood or by marriage.

[2] The company has appealed from that decision. It contends that Mrs Fulton's quest was not for the benefit of the company, but to pursue her own personal interests, including her ill-will against at least one of the directors, her brother, Mr Ramson. It asserts that the learned judge erred in rejecting that contention. The company asserts that Mrs Fulton has failed every requirement for granting leave to bring a derivative action, and that the learned judge was wrong to have found otherwise.

[3] The appeal focuses on Mrs Fulton's compliance with the requirements of section 212 of the Companies Act ('the Act'), which allows for the court to grant leave to institute derivative actions. The issues raised by those requirements are whether:

a. Mrs Fulton gave sufficient notice to the directors of her complaint, in order for them to make an informed decision, whether one or more of them should initiate the action themselves;
b. Mrs Fulton's application was made in good faith; and
c. the proposed derivative action appeared to be in the interest of the company.

[4] The analysis of the appeal must take into account that the learned judge made findings of fact, which contributed to his finding that Mrs Fulton was acting in good faith. It must also take into account that he exercised a discretion in granting Mrs Fulton's application. An appellate court does not lightly set aside findings of fact or the exercise of a discretion by a judge at first instance. It will only do so, if it is shown that the first instance judge was plainly wrong. Those principles will be applied in this case.

The factual background

[5] The company is owned by one family. Its history goes back to 1922, having had various legal statuses, including being an industrial and provident society ('IPS'). It was incorporated in its present form in 2001. Mr Lauritz Ramson ('LOR') was at the helm of the company in 2001. LOR's three offspring are Mrs Susan Elizabeth Silvera, Mr Ramson

and Mrs Fulton. LOR died in 2011. It was after his death and that of his second wife, Mrs Janet Ramson, that Mrs Fulton started asking about the affairs of the company.

[6] According to Mrs Fulton, she was not aware, before LOR's death, that she was a shareholder in the company. She said that she received no notice of any meeting of shareholders, nor did she receive any other company documentation. On her account, it was after discovering that LOR did not own all the shares in the company that she started making enquiries and was made aware of her shareholding.

[7] Mr Ramson strenuously refuted Mrs Fulton's assertions in that regard. He said that she was a member of the IPS, and she signed the memorandum and articles of association when the company was incorporated in 2001. Its shareholding totals 400 ordinary shares. At that time, he said, she had a single share in the company but, in 2002, was allotted a total of 95 shares, as was each of LOR's two other offspring and LOR's first wife, Mrs Monica Ramson. LOR, he said, retained 18 shares, which after LOR's death, were divided equally between his three offspring. The remaining two shares were held by Mrs Janet Ramson and Mr Noel Silvera, who is Susan Elizabeth Silvera's husband. Mr Ramson asserts that he, at some point, obtained Mrs Janet Ramson's share. He said that Mrs Fulton was given notice of all general meetings.

[8] According to Mr Ramson, the situation with the company's properties existed from the time that LOR managed the company's affairs. Mrs Fulton, Mr Ramson asserts, knew of the situation then, but took no steps at that time. Her present action, he contends, is based on a long-held grudge against him. She accuses him of having fired her son from his employment with the company. She, however, he contends, waited until both LOR and Mrs Janet Ramson had died before launching this course of action.

[9] In any event, he asserts, there is nothing improper about the use of the company's two real estate properties, about which Mrs Fulton complains. The one on the North Coast (Coconuts), he says, is used mostly for the company's business as a satellite office. Mr Ramson asserts that the directors considered, but rejected, the idea

of using Coconuts for rental in the tourist industry, as the regulatory and other requirements were onerous. The other property (Sharrow Drive), which is in the Corporate Area, he asserts, is used as his residence, as part of his emoluments as the managing director of the company. The use of these properties, Mr Ramson asserts, has been approved by all the directors of the company. There is no shareholder, he contends, who gets any benefit over and above that which Mrs Fulton receives. He accepts, however, that the directors have not declared any dividends on shares and have ploughed all profits back into the company's operation.

[10] Mrs Fulton contests Mr Ramson's evidence about the use of Coconuts. She insists that the property is only used when Mr Ramson's family uses it or authorises its use by friends or other family members. She describes Coconuts as Mr Ramson's "personal playground". She has marshalled evidence from other people, who claim knowledge of the use of Coconuts, and support her contention. The use of Sharrow Drive, she asserts, has not been supported by any documentation, and she asks that Mr Ramson's explanation for that use, be rejected.

Section 212 of the Act

[11] Section 212 of the Act speaks to applications for leave to file derivative actions. Andrew Burgess (now Burgess JCCJ), in his work, Commonwealth Caribbean Company Law, at page 323, provides the following explanation of a derivative action:

> "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."

The nature of a derivative action and the reasons behind its origins were outlined in **John Glenmore Plummer and Another v Phenee Anthony Plummer and Others** [2020] JMCA App 16 ('**Plummer v Plummer**') and **Cable and Wireless Jamaica Limited v Eric Jason Abrahams** [2020] JMCA Civ 45 ('**CWJ v Abrahams**'). They will not be repeated here.

[12] The provisions of section 212 of the Act allow the court to empower a member of the company, or other stipulated complainant, to sue or defend an action in a company's name, when the court finds that the directors have improperly failed or refused to do so. Subsection (2) stipulates the requirements that the member, or other complainant, must satisfy in order to be granted leave to file a derivative action. The section states, in part:

> "(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 member or former member 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…"

[13] The Court of Appeal of Ontario, in the context of a statutory provision that is almost identical to section 212 of the Act, explained the context in which applications for the grant of leave to commence derivative actions, should be considered. It did so in **Richardson Greenshields of Canada Limited v Kalmacoff and others** (1995) 22 OR (3d) 577; 123 DLR (4th) 628; 80 OAC 98; 18 BLR (2d) 197; [1995] OJ No 941 (QL); 54 ACWS (3d) 477 ('**Richardson Greenshields**'). Robins JA, in delivering the judgment of the court said, in part:

> "In deciding whether leave should be granted, it should be borne in mind that a derivative action brought by an individual shareholder on behalf of a corporation serves a dual purpose. First, it ensures that a shareholder has a right to recover property or enforce rights for the corporation if the directors refuse to do so. Second, and more important for our present purposes, it helps to guarantee some degree of accountability and to ensure that control exists over the board of directors by allowing shareholders the right to bring an action against directors if they have breached their duty to the company…"

The learned judge's findings

[14] With that background, the findings of the learned judge may be considered. The learned judge, in his characteristically careful fashion, conducted a thorough examination of the law and the facts connected to this case. He analysed the requirements of each paragraph of section 212(2), determined the standard for each, and found that Mrs Fulton had satisfied all of those requirements. Those findings included a finding of fact that she had made the application in good faith.

The grounds of appeal

[15] The company's numerous amended grounds of appeal are:

> "1. The Learned Judge (Sykes J) was wrong on the facts or in law in holding that the Respondent had given reasonable notice under Section 212 (2) (a) of the Companies Act.

2. The Learned Judge wrongly took into account the correspondence between the Respondent's Attorney-at-Law and the Appellant's Attorneys-at-Law prior to the issue of the purported notice without appreciating that in those [sic] correspondence the Respondent indicated an intention to file a personal action against the directors under section 213A of the Companies Act and not one under Section 212 of the Companies Act.

3. The Learned Judge misconstrued the Canadian and Australian authorities including *Tremblett* [116 Nfld & PEIR 139; 363 APR; 46 ACWS (3d) 431]; *Primex* [[1996] 4 WWR 54] and *Swansson* [[2002] NSWSC 583] in holding that these authorities require an elevated standard as it relates to the requirement of good faith.

4. The Learned Judge:

   (a) failed to appreciate that the statement in *Tremblett* case 'it is necessary that an applicant bring cogent evidence establish [sic] clearly on a preponderance of evidence that the application is in fact brought in good faith' was a reference to the evidentiary standard of the balance of probabilities;

   (b) was wrong in holding that the Judge 'in the *Tremblett* case did not conduct a textual analysis of the actual words used in the Statute'. The Judge in the *Tremblett* case made reference to the 'history of the development of the statutory provision' and 'the extraordinary power vested in a shareholder or director to use corporate resources and to create legal conflict between the company and others' was not evidence that the Judge in *Tremblett* did not consider the text of statutes. In fact the considerations raised by the Judge in the *Tremblett* case is an integral part of the proper construction of any statute. **[29]**

5. The Learned Judge wrongly considered good faith merely in the context of the Respondent seeking to advance her personal interest as against that or coincident with the interests of a company (paragraphs 31, 32). In doing so the Learned Judge sought to limit the meaning and effect

of the phrase 'good faith' which is not permissible under principles of statutory interpretation.

6. The learned judge [sic] erred in fact and law by failing to take into account Sally's expressed personal interest as a factor in determining that she was not acting in good faith and that she does not 'honestly intend to serve the company's interest'. [sic] Ang Thiam Swee v. Low Hian Chor [2013] SGCA 11 cited at [61] of the reasons for judgment.

7. The Learned Judge in discussing the *Swansson* case failed to appreciate that the establishment of good faith was not a matter of mere assertion but of evidence, which is capable of being accepted by a Judge.

8. The Learned Judge in his review of the *Swansson* case failed to appreciate that the case correctly held that an applicant for leave may intend to bring an action that is prima facie in the interest of the company but nevertheless found to be acting in bad faith (paragraphs 36, 37, 39, 41).

9. The Learned Judge in defining good faith to mean 'that the applicant genuinely believes that a wrong has been done to the company and that the wrong needs to be corrected' erred in law as the Learned Judge's definition sought to restrict the usual meaning of the phrase 'good faith' without any justification provided by the statute (paragraph 49).

10. The learned judge [sic] erred as a matter of law in his interpretation and/or application of Palmer J's reasoning in **Swannson** [sic] in relation to good faith [37 – 41] and best interests of the company **[46]** while at the same time adopting parts of the said flawed reasoning. **[47 and 49]**

11. The Learned Judge in purporting to prefer the balance of probability standard failed to appreciate that even within the balance of probability standard there are degrees of proof. The Judge may properly apply this standard while requiring the evidence to achieve a high level of cogency (paragraphs 52, 53 to 60).

12. The Learned Judge in holding that the test for determining good faith was subjective without more failed to appreciate that Section 212 (2) (b) requires the court to be 'satisfied that - (b) the complainant is acting in good faith'. It is therefore the court that must be satisfied that good faith exists, the mere belief of the Respondent is not adequate to establish good faith (paragraphs 71-77).

13. The Learned Judge erred in law in using the fact that debenture holders or past debenture holders are amongst the category of persons who are entitled to seek leave to bring derivative action under Section 212 of the Companies Act, as a basis for holding that good faith is limited to the mere honest belief of the Respondent that the 'proposed derivative action is justified' (paragraphs 81-86).

14. The learned judge [sic] erred in law insofar as he failed to recognize that the debenture holder's interest is not necessarily inconsistent with or is otherwise in the interest of the company.

15. The Learned Judge erred in law in accepting the positon [sic] that 'appears to be in the interests of the company meant showing that an arguable case exists' or that 'if the claim is not frivolous and/or vexatious then surely it must necessarily appear to be in the interest of the company to bring the derivative claim.' In so holding the Learned Judge failed to appreciate or give weight to the fact that [the] statutory frame work places no limitation on the meaning of the phrase 'appears to be in the interests of the company.'

16. The Learned Judge in considering the Respondent's good faith and whether the proposed claim "[sic] appears to be in the interests of the Appellant erred in law in that the Learned Judge failed to give any weight or adequate weight to

    (a) the Respondent's clear desire to advance her personal interest

    (b) the Respondent's delay in bringing the application for leave to bring derivative action

(c) the fact that the Respondent could achieve its ultimate goal by means other than the proposed derivative action

(d) the Respondent did not bring its proposed claim against a former director of the Appellant although he would have been a party to the alleged breaches or default.

17. The Learned Judge erred in law as he gave excessive weight to the absence of documentary evidence when determining whether or not the directors of the Appellant properly exercised their judgment.

18. The Learned Judge erred as a matter of law and/or in the exercise of his discretion when he refused the Appellant's application to appoint an expert in relation to the accounting for and/or use of Coconuts and Sharrow Drive the absence of which evidence played a significant role in the judge's decision.

19. The Learned Judge erred in law and on the facts when he held that the Respondent had established the conditions precedent required for the grant of leave under Section 212 of the Companies Act and in particular when he held that the Respondent raised an arguable case or triable issues as it relates to the actions of the directors of the Appellant Company." (Italics, underlining and bold text as in original)

[16] In an attempt to curtail the length of this judgment, the grounds of appeal will be grouped and analysed under headings. There will not necessarily be any analysis of every specific ground. The analysis will be in the following order:

(a) a preliminary application (ground 18);

(b) the question of notice of the intended application (grounds 1 and 2);

(c) the question of good faith (grounds 3-14 and 16-17);

(d) the question of the interests of the company (ground 15);

(e) applying the principles (ground 19); and

(f) going forward.

A preliminary application (ground 18)

[17] At the commencement of the hearing of the appeal, Mrs Gibson-Henlin QC, appearing for the company, applied for permission to appeal from an earlier decision made by the learned judge. Learned Queen's Counsel explained that, prior to the hearing of the application for leave to file the derivative action, the company had applied for the court below to allow expert evidence to be called in support of the company's case. The learned judge, on 30 March 2016, refused the application. The company did not appeal from that decision. Mrs Gibson-Henlin explained that that decision was taken, taking into account:

a. that the date for the hearing of the substantive application had already been set; and,

b. what was considered to be the best use of the court's time.

She said that the matter would not have been pressed at this level if Sykes J had not found that the company had failed to provide evidence to support the company's use of the properties. She argued that allowing leave to appeal would not prejudice the substantive appeal.

[18] The court refused the application for leave to appeal for a number of reasons. It accepted as valid, Lord Gifford QC's submissions, on behalf of Mrs Fulton, that it was too late in the proceedings to allow the company to pursue the appeal from that decision. The company had made a deliberate decision not to appeal, and since there is no proposed affidavit from the expert, it would be wrong to allow argument as to whether the learned judge had erred in exercising his discretion, or whether the proposed evidence would have had any effect on the learned judge's decision in the substantive matter. As a result, ground 18 fell away.

The question of notice of the intended application (grounds 1 and 2)

[19] The context of these grounds of appeal is the learned judge's finding that Mrs Fulton had given reasonable notice to the directors of the company of her intention to

apply to the court for permission to file a derivative action. He based his finding on the fact that the directors had had ample time to consider their position in response to her letter of 8 April 2015. This was because, he found:

> (a) Mrs Fulton's attorneys-at-law, Cheeks & Co, were in correspondence with the company and its attorneys-at-law, Brahamlegal, for over six months prior to that letter and Mrs Fulton's grouses had, during that time, been clearly outlined to the company and its directors; and
>
> (b) the application was not filed until four months after the date of the letter, namely 11 August 2015.

The submissions

[20] Mrs Gibson-Henlin, on behalf of the company, argued that the learned judge erred in finding that the correspondence prior to 8 April 2015 could properly be calculated as being part of the notice period. She submitted that Mrs Fulton's indications up to April 2015 was that she intended to take individual action as a shareholder who had suffered oppression. The change in stance in the April letter, learned Queen's Counsel submitted, did not provide the company, even up to August 2015, with sufficient time to consider its stance. This is an emerging area of the law, she submitted, and the company could not be expected to make an informed decision in that time.

The analysis

[21] Learned Queen's Counsel is not on good ground with these submissions. There was no dispute as to the relevant principle of law that should be applied in this case. The relevant portion of section 212 is repeated for convenience. The complainant must prove 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"

[22] The purpose of notice was correctly identified by Mangatal J in **Earl Lewis and Another v Valley Slurry Seal Company and Others** [2013] JMSC Comm 21 ('**Valley Slurry**'), where she said at paragraph [25]:

> "As stated in **Intercontinental Precious Metals Ltd. v. Cooke** (1994), 88 B.C.L.R. (2d) 101, quoted at page 37 of the article 'Derivative Actions-How They Work, and How They Don't', the purpose of the notice requirement is 'to afford the directors a reasonable opportunity to consider their position before the application is heard by the Court'." (Bold and underlined text as in original)

[23] Mangatal J also cited, as relevant to this point, the case of **Re Bellman and Western Approaches Ltd** (1982) 130 DLR (3rd) 193 ('**Bellman**'). That case considered section 232 of the Canada Business Corporations Act, which, although there are some slight differences in the wording, is materially identical to section 212. In that case, while considering the issue of the sufficiency of the notice required by the section, Nemetz CJ of the British Columbia Court of Appeal, in delivering the judgment of the court said, in part, that "[f]ailure to specify each and every cause of action in a notice does not, in my opinion, invalidate the notice as a whole" (see page 201).

[24] This court in **Plummer v Plummer**, at paragraph [55] of its judgment, cited with approval, the learned judge's outline, in this case, of the law on the issue of adequate notice:

> "…As noted [by Sykes J] in the case of **Sally Ann Fulton v Chas E Ramson Limited**, the question is whether the notice gave the directors sufficient time to conduct the necessary assessment and take remedial measures to address the complaints, if they deem it necessary."

[25] In this case, there was more than ample time for the directors to consider their response to Mrs Fulton's complaint. They knew of its substance from at least 12 September 2014, when Cheeks & Co wrote asking, among other things:

> "Please advise what purpose the villa, 'Coconuts,' [sic] serves to the Company, and more specifically how it benefits the shareholders of the Company. We are instructed that Coconuts is used exclusively by Mr. John Ramson, and in any event, to the complete exclusion of our client. We are surprised that an asset as valuable as a villa on the Discovery Bay Strip could (a) be used to the exclusion of a material shareholder and (b) would not be rented or operated in a manner for which all of the shareholders would benefit…."

The letter also asked for:

a. the entire remuneration packages of each of the directors; and

b. details of the agreements and arrangements between the company and a related entity named Caribbean Foods Limited,

and threatened that Mrs Fulton would take legal action if "satisfactory remedial action does not commence in short order". Cheeks & Co said that the threatened legal action would seek, among other things, a sale of Coconuts and, "the immediate repayment to the Company of all remuneration to directors made in breach of article 79" of the company's articles of association. That article requires directors' remuneration to be approved in general meetings.

[26] Brahamlegal wrote responding to some to the questions asked, but Cheeks & Co again wrote on 8 October 2014 along similar lines to its first letter. The later letter asserted that it was "common knowledge that Mr. John Ramson has operated Coconuts as his personal property for many years". It spoke to possible rental income that Coconuts could have been earning and requested "a detailed account of the use of the villa over the last 5 years". The letter also asked for the production of the terms of directors' service contracts.

[27] Brahamlegal provided to Cheeks & Co some documentation that the company had supplied. Cheeks & Co, by letter of 29 October 2014, asked for further details about

directors' emoluments and pointed out although the company had instructed Brahamlegal that no emoluments had been paid to the directors, the company's audited accounts stated that $69,300,000.00 had been paid as directors' emoluments over the preceding three years.

[28] The issues were again raised by Mrs Fulton's proxy at a general meeting of the company held on 21 November 2014. Her motions at the meeting, for the sale of Coconuts, and the repayment by the directors of the remuneration paid to them, were defeated.

[29] All that correspondence and the transactions at the general meeting support the learned judge's position that there was ample notice given to the company. The fact that prior to April 2015 the thrust of Cheeks & Co's letters were a personal action by Mrs Fulton is immaterial. The substance of the threatened personal action is the material for the proposed derivative action.

[30] In any event, as Lord Gifford pointed out in his submissions in reply on these grounds, the company's complaint of not having sufficient time, is untenable. This is because the directors had considered their position and had decided, even before the April 2015 letter, that they would not take the action that Mrs Fulton desired. Paragraph 63 of Mr Ramson's affidavit filed on 27 October 2015 supports Lord Gifford's submission. In that paragraph, after referring to the contents of the April 2015 letter, Mr Ramson said:

> "…It was recognised as the same issues that were dealt with by the directors previously since September 2014 and approved by the shareholders in a general meeting on the 21st November 2014. These factors guided the directors in their best judgment not to commence the proceedings to bring the claim as requested by [Mrs Fulton]."

[31] These grounds are completely without merit.

The question of good faith (grounds 3-14 and 16-17)

[32] Section 212(2)(b) requires a court, which is considering an application for leave to file a derivative action, to be satisfied that the complainant is acting in good faith. The learned judge spent a significant portion of his judgment in examining the section's requirement of good faith. He went to great pains in examining the law relating to the requirement of good faith. He examined the relevant equivalent law as it is applied in Canada, in New South Wales, Australia and in Singapore. After having done so, he identified the standard for this jurisdiction, based on his reading of the Act, and applied it to this case.

[33] His conclusions, based on that exercise, may be summarised as follows:

a. the burden of proof for the various requirements set out in section 212, including the issue of good faith, lies on the applicant (paragraph [67]);
b. the standard of proof is the normal civil standard of proof on a balance of probabilities (paragraphs [53] and [94]);
c. the cogency of the evidence that is required is not an elevated standard such as is required in cases of fraud (paragraph [96]);
d. the non-elevated standard of proof, as is used in some provinces of Canada, including Saskatchewan (where the wording of the statute is materially identical to section 212 of the Act), is to be preferred to the elevated standard that is used in New South Wales, Australia, and in some other provinces of Canada, such as British Columbia (paragraph [53]);
e. the motivation of a personal interest by an applicant, including hostility to the proposed defendants, does

not automatically disqualify the applicant from being allowed to file a derivative action (paragraph [66]);

f. the requirement of "good faith" in section 212 is totally subjective, and means "honest belief" (paragraph [76]);

g. a strong case makes it easier to find honest belief but it is possible for a belief to be honest even though it may be unreasonable (paragraph [77]); and

h. an honestly held claim, which is, however, unmeritorious, may be refused on the basis that it is not in the interest of the company to permit it to proceed (paragraph [78]).

The submissions

[34] Mr Braham QC, on behalf of the company, criticised the learned judge's approach and findings. Learned Queen's Counsel submitted that the learned judge erred in departing from the standard that requires a high level of cogency from the complainant in respect of the proof of good faith. Learned Queen's Counsel compared the provisions of paragraphs (b) and (c) of section 212(2) and contended, that since paragraph (c) included the word "appears", it meant that paragraph (b) required a higher level of cogency than the normal civil standard.

[35] Mr Braham argued that the learned judge placed too low a standard on the requirement of section 212(2)(b), when he found that the good faith requirement would be satisfied by an honest belief that a case was arguable. In addition, Mr Braham contended that the learned judge set too high a standard for determining when personal interests may constitute bad faith.

[36] In using these improper standards, Mr Braham submitted, the learned judge erred in accepting that Mrs Fulton was acting in good faith. She demonstrated, he

submitted, clear self-interest. Learned Queen's Counsel pointed to the company's various complaints against Mrs Fulton's position, including:

a. her waiting until after LOR's death before launching this initiative;

b. the fact that prior to the April letter she was seeking her own interests and a break from the company; and

c. her personal animosity toward Mr Ramson,

which showed, he argued, that she was not acting in good faith. All the correspondence prior to the April 2015 letter, he emphasised, were aimed at advancing her own interests as a shareholder, and the learned judge was wrong in not recognising that these were sufficient to demonstrate her lack of good faith.

[37] Lord Gifford argued that section 212 was not complex. It showed, he submitted, that Parliament had intended to make it easier for minority shareholders to protect the interests of the company and the section did not require courts to do more than their usual tasks in making findings of fact.

[38] He argued that the issues that Mrs Fulton raised indicated that the company was being prejudiced by the actions of the directors and supported her assertion that she was acting in good faith. The fact that she had a personal interest in the outcome, he argued, was not fatal. All the decided cases in this jurisdiction so far, he argued, indicated that the applicant had a personal grievance, and yet it was found that good faith had been demonstrated. As far as Mrs Fulton's delay in initiating the proceedings is concerned, Lord Gifford submitted that she could be excused for the delay as she was not a commercially aware person.

[39] Both counsel cited numerous cases in support of their respective positions. The learned judge analysed many of those cases in his judgment. They will not all be referred to in the following analysis. There is no disrespect to the industry of counsel. The cases and other legal authorities proved to be a wealth of information on the

various issues, but the issue of good faith in this case can be resolved without reference to them all.

The analysis

[40] The company's attempt to pick apart the learned judge's judgment in respect of this issue, through these many grounds of appeal, cannot succeed. In concentrating on the minutiae of the various portions of the reasoning of the learned judge and of the cases that he considered, the company has lost sight of the forest because of its concentration on the trees. As will be shown below, the learned judge had two established alternative approaches in law to choose from. In the absence of any decision from this court or from the Privy Council on this point, he chose one of those approaches. The fact that he was exercising a discretion makes, it very unlikely that he can be said to have been patently wrong. In any event, the analysis that will be set out below, should demonstrate that his choice is the preferable choice for this jurisdiction.

[41] The Court of Appeal of Alberta in **Valgardson v Valgardson** 2012 ABCA 124 referred to the alternative approaches to the issue of proof of good faith. The crux of that divergence is the identification of the correct standard of proof that is required by the section. At paragraphs [13]-[14] of its judgment, the court said, in part:

> "[13] The chambers judge, citing *Mackenzie v Craig* (1997), 205 AR 363, 2 WWR 106 (QB), concluded that "the law in Alberta is that there is a high onus on an applicant to establish that the proceeding is brought in good faith": para 19. The appellant submits that the chambers judge erred in elevating the standard of proof and that the correct standard is proof on a balance of probabilities. We agree.
>
> [14] Trial courts have reached different conclusions regarding the standard of proof necessary to establish good faith in the context of leave to commence a derivative action. In addition to *Mackenzie*, courts in Newfoundland and British Columbia also appear to have preferred an elevated standard: see *Tremblett v SCB Fisheries Ltd* (1993), 116 Nfld & PEIR 139, 363 APR 139 (Nfld SC (TD))... However, certain other trial level courts have explicitly declined to impose a high standard to establish good faith:

see *L & B Electric Ltd v Oickle*, 2005 NSSC 110 at para 52, 233 NSR (2d) 244…"

[42] The strongly worded reasoning in the judgment of Puddester J in the Newfoundland Supreme Court, in **Tremblett v SCB Fisheries Ltd** 1993 CanLII 8269 (NL SC); (1993) 116 Nfld & PEIR 139 ('**Tremblett**'), is the standard bearer for what has been called "the elevated standard approach". In the CanLII report of that judgment, Puddester J speaks to a substantial onus being placed on an applicant to show that his application is made in good faith. The learned judge stated:

> "61. … However, in my view the history of the development of statutory provisions such as s. 369 shows that for statutory relief against the strict common law position of non-intervention in majority decisions internal to corporations, in light of the extraordinary power vested in a shareholder or director applicant to use the corporate resources and to create a position of legal conflict between the corporation and others, **it is necessary that an applicant bring cogent evidence establishing clearly on a preponderance of evidence that the application is in fact brought in good faith**… where, I conclude, there is in fact substantial evidence bringing this aspect into question, **there is in turn a substantial obligation on an applicant, including the applicant here, to satisfy the court as to the good faith under which this application, and the proposed action to be sanctioned by it, are brought and proposed by him**.
>
> …
>
> 87. …**in an application such as this there is a substantial onus on the applicant-complainant himself to positively establish 'good faith'**. ..it seems to me that this is a logical and appropriate requirement where the remedy sought is to place in the control of an applicant who is potentially, and indeed perhaps usually, a minority shareholder or single director, the authority to cause the resources of the corporation to be directed towards pursuing a court proceeding which is not willingly pursued by the majority of shareholders or the board. Even though this matter is assessed on an application, as opposed to a trial, in my view there is a substantial onus to be met by any applicant, including the applicant here, with respect to the establishment of good faith.

> [88] In my view, while the burden is that of the civil balance of probabilities, **it is appropriate to require that there be a clearly established balance or preponderance shown**…." (Emphasis supplied)

[43] An abbreviated version of that extract from Puddester J's reasoning in **Tremblett**, is quoted, in part, at paragraph 30 of **Primex Investments Ltd v Northwest Sports Enterprises Ltd and another** [1996] 4 WWR 54 ('**Primex**'). It was said to have been cited during the submissions of counsel opposing the complainant's application in that case. Mangatal J in **Valley Slurry**, referred to the abbreviated version as having been approved in **Primex** (paragraph [26] of her judgment), but that is not entirely accurate. It, nonetheless appears that Mangatal J accepted the reasoning as representing the law on the point, because she stated at paragraph [41] that "it is for the Applicants to satisfy me that they are acting in good faith and they must do so by cogent evidence".

[44] The application of that requirement to provide cogent evidence of good faith, must however, incur difficulties. As Puddester J stated, in **Tremblett**, it is difficult to prove a state of mind:

> "[62] Obviously, the intention of an individual is a matter in the mind of that individual. Since no other witness nor the court can see into and assess the applicant's mind itself, the only direct evidence in that regard can come from the individual's own statement as to that intention. However, equally necessarily, **the only objective evidence which can be brought before the court must come from the surrounding circumstances**, including the actions and outward conduct of the individual in question." (Emphasis supplied)

Puddester J seems to suggest that the assertion of a particular state of mind must be tested by other evidence. Although that assertion is eminently logical and feasible, it must, however, be borne in mind that the existence of good faith may be independent of the reasonableness of that mental state.

[45] In **Tremblett**, Puddester J tested the applicant's assertion as to good faith by pointing to things that the applicant had previously done and said, in respect of the relevant issue. Puddester J then found that the inconsistency of those actions and statements belied the applicant's assertion of good faith. That approach, respectfully, cannot be faulted. It was followed, in part, in **Valley Slurry**, but a different approach was used in **Primex**.

[46] In **Valley Slurry**, Mangatal J found that the applicants were acting in good faith. In explaining her finding in that regard, she pointed to a number of valid complaints, which the applicants had in respect of the operation of the company in that case, that deserved a trial. She said, in part, at paragraph [45] of her judgment, that the previous, possibly inconsistent, actions of the applicants did not undermine their assertion that they were acting in good faith, in making their application to the court:

> "In my judgment, the Applicants have demonstrated that they have an honest and genuine belief that they have good causes of action with reasonable prospects of success. **Whilst, the issue of whether the Applicants may have acquiesced, or may have knowingly participated in the alleged wrongs, at first gave me pause, I think that this issue and this case is far more complicated than that and will involve mixed questions of fact and law that will have to be resolved at trial**. There are issues raised of whether the transactions were at arms' length, transfer pricing accounting principles…" (Emphasis supplied)

[47] In **Primex**, Tysoe J, although he did not expressly accept the standard of cogency set out in **Tremblett**, found that the applicant "had satisfied the onus of showing that it is acting in good faith" (paragraph 32). Tysoe J rejected the assertions of the respondents in that case, that that applicant was acting in bad faith. After analysing some of those assertions, he said, later in paragraph 32:

> "However, as I conclude when dealing with the criteria under [the equivalent of section 212], there is an arguable case that Northwest has a claim against Mr. Griffiths. **Mr. Rennison cannot be said to be acting in bad faith because he wants Northwest to pursue what he**

> **genuinely considers to be a valid claim against Mr Griffiths.**" (Emphasis supplied)

Although the logician may refer to the highlighted portion of that extract, as "begging the question", it helps to demonstrate the difficulty with applying the standard that Puddester J has sought to introduce to this situation. The issue of the existence of good faith is a question of fact for the judge hearing the application. The applicant's assertion of good faith is evidence before the judge. That assertion may be tested by examining previous actions. It may be supported by the applicant's valid complaints on the facts, or it may be undermined by entirely unreasonable complaints, but the applicant, on the wording of section 212(2)(b), cannot properly be required to provide "cogent evidence" of good faith.

[48] As Sykes J pointed out at paragraph [72] of his judgment, the issue of "good faith" or, the expression, "honest belief", which is alternately used in this context in the discussions, is not a new issue for the law. The issue of the existence of "honest belief" was previously confronted in criminal cases dealing with rape and with self-defence. In **Solomon Beckford v R** [1988] AC 130, their Lordships in the Privy Council grappled with the issue of treating with an assertion of "honest belief". It is not ignored that in the criminal law, the burden of proof is on the prosecution to disprove an assertion of honest belief, and therefore is different from the requirement of section 212 of the Act, but the learning from the judgment in **Solomon Beckford v R** is nonetheless helpful in assessing an assertion of honest belief. Their Lordships highlighted the distinction between the existence of honest belief, on the one hand, and the reasonableness or unreasonableness of such an assertion, on the other. Their Lordships set out general guidance on the issue at pages 144-145 of the report:

> "…Their Lordships therefore approve the following passage from the judgment of Lord Lane C.J. in *Reg. v. Williams (Gladstone)*, 78 Cr.App.R. 276, 281, as correctly stating the law of self-defence:
>
> '**The reasonableness or unreasonableness of the defendant's belief is material to the question of whether the belief was held by the defendant**

> **at all. If the belief was in fact held, its unreasonableness, so far as guilt or innocence is concerned, is neither here nor there**. It is irrelevant. **Were it otherwise, the defendant would be convicted because he was negligent** in failing to recognise that the victim was not consenting or that a crime was not being committed and so on....
>
> In a case of self-defence, where self-defence or the prevention of crime is concerned, if the jury came to the conclusion that the defendant believed, or may have believed, that he was being attacked or that a crime was being committed, and that force was necessary to protect himself or to prevent the crime, then the prosecution have not proved their case. If however the defendant's alleged belief was mistaken and if the mistake was an unreasonable one, that may be a powerful reason for coming to the conclusion that the belief was not honestly held and should be rejected. Even if the jury come to the conclusion that the mistake was an unreasonable one, if the defendant may genuinely have been labouring under it, he is entitled to rely upon it.'" (Emphasis supplied)

[49] Their Lordships went on to explain the practical approach to that exposition of the law. In stating that a mere assertion of an honest belief, is subject to enquiry, they said, in part, at page 145:

> "...**for no jury is going to accept a man's assertion that he believed that he was about to be attacked without testing it against all the surrounding circumstances**. In assisting the jury to determine whether or not the accused had a genuine belief the judge will of course direct their attention to those features of the evidence that make such a belief more or less probable. **Where there are no reasonable grounds to hold a belief it will surely only be in exceptional circumstances that a jury will conclude that such a belief was or might have been held**." (Emphasis supplied)

[50] The distinction between the existence of good faith and the reasonableness or unreasonableness of that state of mind is what Sykes J pointed out in assessing the opinion of Palmer J in **Swansson v R A Pratt Properties Pty Ltd** [2002] NSWSC 583 ('**Swannson**'), where Sykes J said, in part, at paragraph [37] of his judgment:

> "The other part of Palmer J's dictum, namely 'the applicant may be disbelieved if no reasonable person in the circumstances could hold that belief' needs careful analysis. If his Honour meant that in assessing whether the belief was honestly held it is appropriate to test that belief by what a reasonable person may have thought that is one thing. **On the other hand if his Honour meant that if a reasonable person could not have had an honest belief in the circumstances and therefore the applicant could not have had an honest belief it is this court's view that that is incorrect**." (Emphasis supplied)

In light of what has been expressed above, the learned judge, with respect, is correct in his rejection of a stance which contends that good faith or honest belief may only exist if that belief is reasonable.

[51] Sykes J's reason for rejecting Palmer J's reference to token shareholding as a basis for doubting the existence of good faith is also accepted. The inclusion of that factor is not warranted by section 212 of the Act. For all the reasons expressed by Sykes J, **Swansson**, it is opined, should not be followed in this jurisdiction. Mangatal J would, therefore, have not been on good ground if she was accepting a position that a token shareholding belies an assertion of the existence of good faith (see paragraph [28] of **Valley Slurry**).

[52] It is therefore arguable that, in light of the subjectivity involved, the cogency of the standard for proving good faith, should not be an elevated one as Puddester J, is found to have required. The matter of the standard of proof in civil cases was addressed by the English Court of Appeal in **R (on the application of N) v Mental Health Review Tribunal (Northern Region)** [2005] EWCA Civ 1605; [2006] QB

468. The court's comments indicate the flexibility of the standard of proof for civil cases. The court said at paragraph [62]:

> "Although there is a single civil standard of proof on the balance of probabilities, it is flexible in its application. In particular, the more serious the allegation or the more serious the consequences if the allegation is proved, the stronger must be the evidence before a court will find the allegation proved on the balance of probabilities. Thus the flexibility of the standard lies not in any adjustment to the degree of probability required for an allegation to be proved (such that a more serious allegation has to be proved to a higher degree of probability), but in the strength or quality of the evidence that will in practice be required for an allegation to be proved on the balance of probabilities."

[53] In light of the difference of opinion in the respected and respective authorities as to the place along the continuum of cogency that proof of good faith should rest, whether an elevated standard or a non-elevated standard, the courts supporting the latter cannot be said to be patently wrong. Sykes J adopted the latter approach which, he found, is more consistent with the terms of section 212(2)(b) of the Act.

[54] There is authoritative support for Sykes J's stance. The court, in **Valgardson v Valgardson**, in dealing with the requirement for proving good faith, in a statutory provision that is very similar to section 212 of the Act, took a practical approach to the issue. It found that the statute did not require an elevated standard of proof. The court said, in part, in paragraph [15] of its judgment:

> "There is nothing in the language of [the section equivalent to section 212] to indicate an intention to create a 'high' standard of proof….As there is nothing in the statutory language of [the section] to suggest a departure from the ordinary rule [of proof on a balance of probabilities in civil cases], the onus created by that section is simply proof on a balance of probabilities."

The reference by that court to **Tremblett** as upholding an elevated standard, condemns ground 3 of the grounds of appeal (complaining that the judge erroneously interpreted **Tremblett**, in this regard) to failure. The court understood the **Tremblett**

approach to be distinct from the normal civil standard of proof. The learned judge, in this case, did no more than to adopt the appellate court's understanding.

[55] Support for Sykes J's position, that a non-elevated standard is to be preferred, is also to be found in the judgment of the Court of Appeal for Ontario in the case of **Richardson Greenshields**. That court rejected the restrictive approach used in considering the requirements for the grant of leave. As mentioned above, it was treating with a section which is almost identical in terms to section 212. The court said, in part:

> "It should also be borne in mind that [the section equivalent to section 212] is drawn in broad terms and, as remedial legislation, should be given a liberal interpretation in favour of the complainant. The court is not called upon at the leave stage to determine questions of credibility or to resolve the issues in dispute, and ought not to try. These are matters for trial. Before granting leave, the court should be satisfied that there is a reasonable basis for the complaint and that the action sought to be instituted is a legitimate or arguable one. The preconditions of [the section] cannot be considered in isolation. Whether they have been satisfied must be determined in the light of the potential validity of the proposed action."

[56] **Richardson Greenshields** was cited with approval, in this context, in the judgment of the Court of Appeal of British Columbia in **Discovery Enterprises Inc v Ebco Industries Ltd** 177 WAC 255 — 50 BCLR (3d) 195 — 109 BCAC 255 — [1998] BCJ No 1301 (QL) (see paragraph 5).

[57] Mr Braham's contention that section 212(2)(b) imposes a higher level of cogency than paragraph (c) may be accepted. The use of the word "appears" in section 212(2)(c) supports such an approach. The comparison does not, however, elevate the cogency required by paragraph (b) to a higher level than the usual level required in the civil standard.

[58] Having demonstrated that the learned judge did not err in his choice of the non-elevated standard for the proof of good faith, it is necessary to examine his application of that standard to the evidence provided to him. As was mentioned before, this was a question of fact for him, and is unlikely to be disturbed unless he has made a finding which is not supported by the evidence (see **Maharaj Bookstore Limited v Beacon Insurance Company Limited** [2014] UKPC 21).

[59] The evidence from Mr Ramson, in respect of the company's various complaints against Mrs Fulton's assertion of good faith, is that the situation with Coconuts and Sharrow Drive existed during the lifetime of LOR. He said that Mrs Fulton's animosity toward him arose from the fact that her son was fired from the company and she blames Mr Ramson for being instrumental in the dismissal. Thirdly, Mr Ramson points to the fact that Mrs Fulton has alleged personal loss as a shareholder as being caused by the situation with the two properties. These matters, the company asserts were well known to Mrs Fulton before LOR died. It contends that she should not be believed when she states that she did not know that she was a shareholder during all of that time. The company supports that stance by showing that Mrs Fulton was not only a member of the company's predecessor, the IPS, but she was a signatory to the articles and memorandum of association that brought the company into existence.

[60] The decided cases show that these are not matters that precluded the learned judge from accepting that Mrs Fulton was acting in good faith. In **Valgardson v Valgardson**, the court found that a complaint that a member of a family company, where all the shareholders were brothers, had waited until their father had died, before seeking leave to file a derivative action, did not undermine his assertion of good faith. Nor, the court found, did the fact that he was also seeking to enhance his own position as a shareholder of the company. In **Richardson Greenshields**, Robins JA stated in this context, that self-interest does not necessarily disqualify an applicant from asserting good faith. He said, in part:

> "…Whether [the applicant] is motivated by altruism, as the motions court judge suggested, or by self-interest, as the

> respondents suggest, is beside the point. Assuming, as I suppose, it is the latter, **self-interest is hardly a stranger to the security or investment business**. Whatever the reason, there are legitimate legal questions raised here that call for judicial resolution." (Emphasis supplied)

[61] The learned judge looked at the accusations against Mrs Fulton critically. He noted, at paragraph [62] of his judgment, that the presence of animosity only becomes relevant if it so dominates the complainant as to exclude or diminish good faith "to vanishing point". In assessing the company's accusations against Mrs Fulton, the learned judge found:

> a. there can be no finding of an automatic causative link between Mrs Fulton's son being fired in 1995 and the application for leave in 2015 (paragraph [100]);
>
> b. the personal interests that Mrs Fulton had, were not "at odds with the company's interest of seeing that its property is properly managed and used" (paragraph [103]);
>
> c. there were ostensibly valid complaints about the use of Coconuts which were not answered by the company because of the absence of records (paragraph 108); and
>
> d. there were also valid enquiries about the use of Sharrow Drive which, again, was not the subject of documentation by the company (paragraph 112).

[62] The lack of documentation, the learned judge found, does not support Mr Ramson's assertions that various matters, including the use of Coconuts and Sharrow Drive, were considered by the directors and decisions taken in respect of them. The learned judge pointed out that the previously decided cases showed that the court was not obliged to accept bare assertions by directors as to the exercise of their business

judgment on any particular issue. The edge of Mrs Fulton's complaint in this regard, had, therefore, not been blunted.

[63] On these, and other bases, the learned judge found that "this court has no basis to conclude that [Mrs Fulton] is not acting in good faith as asserted by [Mr Ramson]" (paragraph [127]). There is no basis for saying that the learned judge came to this position without evidence, or that no judge mindful of his duty would have so found.

[64] It is unnecessary to consider the complaint about the learned judge's reference to the interests of debenture holders. He had used that reference to support his view that personal interest cannot preclude a claim of good faith. Neither the point nor the complaint affect the main thrust of the learned judge's analysis or his conclusion.

[65] On that reasoning, therefore, not only do the grounds of appeal criticising the learned judge's choice of the non-elevated standard fail, but so do those, which disapprove of his finding of fact that Mrs Fulton has met the statutory standard of proving that she is acting in good faith.

The question of the interests of the company (ground 15)

[66] For convenience, it should be repeated that section 212(2)(c) disallows a derivative action, unless the court is satisfied that:

> "…
>
> (c) it appears to be in the interests of the company or its subsidiary that the action be brought…"

[67] In examining the requirements of the proof concerning the interests of the company, the learned judge noted the difference between the wording of section 212(2)(c) of the Act and the wording of some of the other statutes, which cases from other jurisdictions considered. He noted that section 212(2)(c) did not use the terminology "best interest", as some of those statutes did, but that it used the term "it appears to be", which some of the equivalent provisions did not. He seemed to accept the reasoning in **Bellman** that an applicant for leave need only show an arguable case

that the proposed derivative action is in the interests of the company in question. He concluded his reasoning on this point by finding, at paragraph [93], that:

> "At the end of the day, one of the crucial questions is whether legitimate questions have been raised concerning the directors [sic] stewardship and harm may have been caused to the company. **If the claim is not frivolous and/or vexatious then surely it must necessarily appear to be in the interest of the company to bring the derivative claim**. The enquiry does not stop there. Other factors are considered such as whether in the context of the case it may amount to an abuse of process or whether there is some other factor militating against bringing the claim." (Emphasis supplied)

The submissions

[68] Mr Braham, in his criticism of the learned judge's assessment of this aspect of section 212(2), submitted that the learned judge erred in his assessment and his conclusion. Learned Queen's Counsel argued that the learned judge erred:

a. in seeking to diminish the requirement of the statute in finding that an applicant could not reasonably be required to provide evidence of:
    i. the character of the company, that is , whether it is small or large, family owned with few shareholders or public with many etc;
    ii. the business of the company and of the effects that litigation may have on its operation; and
    iii. the ability of the proposed defendant to meet at least a substantial part of any judgment that the company may secure against that defendant; and
b. in accepting a standard that an applicant need only show that an arguable case exists that the proposed litigation is in the interests of the company involved,

> but does not consider the interests of the company in the round.

[69] Mr Braham agreed with the learned judge's assessment, following some of the Canadian authorities, particularly **Bellman**, that there was a lower threshold for cogency of evidence in respect of the interests of the company.

[70] Learned Queen's Counsel argued that the more appropriate step for Mrs Fulton would be to file an oppression action pursuant to section 213A of the Act. That action, he submitted was more consistent with her complaints that she is being prejudiced.

[71] Lord Gifford submitted there was nothing unusual in the requirements of the section. Judges in this jurisdiction, as he submitted, regularly apply that standard in considering applications for leave to apply for judicial review. He accepted that the considerations that concerned the use of Coconuts were not identical to those that applied to Sharrow Drive, but that the learned judge correctly identified that the issues raised in respect of each were such that an inquiry into their use would be in the interest of the company. Learned Queen's Counsel argued that the learned judge cannot be faulted in his determination that a derivative action is the more appropriate course for Mrs Fulton.

[72] Both Mr Braham and Lord Gifford cited a number of cases in respect of this issue. They need not be cited.

The analysis

[73] The use of the term "appears" as contained in paragraph (c) may be said to incorporate a lower cogency of proof than paragraph (b), which deals with good faith. Mr Braham argued as much in examining the effect of paragraph (b). The question is whether it is accurate to state that all that paragraph (c) requires is proof of an arguable case that the derivative claim is in the interest of the company.

[74] The Court of Appeal of British Columbia, in **Bellman**, conducted a comprehensive analysis of the requirements of a section that is materially identical to section 212. Nemetz CJ, in respect of the equivalent of section 212(2)(c), said that provision meant that "what is sufficient at [the application stage] is that an arguable case be shown to subsist" (paragraph [19] or page 201). He pointed out that the requirement was different from the relevant common law rules, where ratification by the company of the directors' decision precludes an action against the directors. In speaking to the intention of Parliament, in respect of this provision, he said:

> "...[The sections equivalent to section 212 and 213] set out a summary procedure by way of an application before a chambers judge to have a quick determination of where a complainant may institute a derivative suit. The conditions precedent, although bearing a resemblance to the prerequisites of the common law, have significant differences." (See page 203 of the DLR report)

[75] The company's complaints about Sykes J's finding, as to the level of cogency required, cannot be accepted as being valid. The learned judge cannot be faulted for referring to the standard of an arguable case. He pointed to the fact that in **Richardson Greenshields**, the court stated that the issue of "interest" was for ultimate determination by the trial judge.

[76] Nonetheless, Sykes J did not restrict himself to an arguable case when he considered the interests of the company. The extract from paragraph [93] of his judgment, quoted above, shows that he took other factors into account in considering the interests of the company. The requirement that the proposed action is not frivolous and/or vexatious is just one of those factors that he considered.

[77] In assessing the proposed derivative action in this case, the learned judge did examine matters in the round. He looked at the ostensible validity of Mrs Fulton's complaints against the company, the likely propriety or otherwise of the directors' decision in respect of the property, the fact that the proposed derivative action seeks to address wrongs said to have been done to the company, and that an accounting by the

directors for the use of the company's property would benefit the company. He considered the situation with Coconuts separately from that of Sharrow Drive. He also considered the proposed sale of Coconuts and Sharrow Drive. He was not required to make any final findings in that regard. It cannot be said that the learned judge restricted himself to saying that the proposed claim was in the interest of the company because Mrs Fulton had an arguable case concerning the use of the properties.

[78] The distinction between the requirements for pursuing a derivative action as opposed to an oppression action was accepted by the Court of Appeal for Ontario, in **Malata Group (HK) Limited v Henry Chi Hang Jung** [2008] ONCA 111, to be unclear, even "murky". There is significant overlap between the two. In the circumstances it cannot be plainly wrong for the learned judge to have found that there is sufficient basis for finding that the proposed derivative action would be in the interest of the company.

[79] Ground 15 must also fail.

Applying the principles (ground 19)

[80] Based on the analyses of the previous issues, it would be noted that the company cannot succeed on this ground, which alleges that the learned judge erred in law and on the facts, that Mrs Fulton has satisfied the three requirements of section 212(2). It has been found that there was material to support the learned judge's findings in respect of both the law and the facts.

The procedure going forward

[81] This case, thus far, has employed a significant amount of judicial time. That has been caused, largely, by the novelty of the issue. The lessons learned should not be wasted. Without being compendious, and recognising that each case will depend on its own circumstances, the following guidance may be considered for future cases:

a. applications for leave pursuant to section 212 of the Act should be made by fixed date claim form;
b. the named respondent should be the company which is the subject of the subject of the alleged abuse;
c. the claim should be supported by affidavit evidence which addresses all elements of section 212;
d. as best practice, although not a requirement, a proposed particulars of claim for the derivative action sought, should be exhibited;
e. the hearing of the application is intended to be a summary procedure to permit the chambers judge to quickly determine whether a complainant may institute a derivative claim;
f. there is unlikely to be significant cross-examination at the hearing although there may be affidavit evidence from both the applicant and the company;
g. the hearing is not a trial; it is aimed at determining whether the applicant should be given leave to initiate the derivative action, not deciding on the merits of the applicant's complaint;
h. in determining whether the provisions of section 212(2) have been satisfied, the chambers judge should be guided by:
    (i) the ordinary civil standard;
    (ii) the principles governing hearings which are not trials; and
    (iii) a non-elevated cogency for the standard of proof;
i. "[t]he granting of leave is not automatic, but requires the court to exercise a judicial discretion. In deciding

whether to grant leave, the court must balance the clear policy of the section to protect the legitimate interests of persons who fit within the definition of 'complainant' and the at least equal interest in avoiding undue interference with corporate management that is being conducted in good faith, as well as the need to avoid a multiplicity of actions" (paragraph 949 of Canadian Encyclopedic Digest, Business Corporations (Ontario) X-Shareholders 8-Derivative Actions); and

j. a distinction must be drawn between the entitlement to commence a derivative action, which is for the benefit of the company, and an oppression action, which supports an individual shareholder's interest, but the two are not mutually exclusive and the simultaneous pursuit of both is not necessarily an abuse of the process of the court (paragraphs 956 and 957 of Canadian Encyclopedic Digest, Business Corporations (Ontario) X-Shareholders 8-Derivative Actions).

[82] In considering whether to give leave to file a derivative claim, the court should also consider the provisions of section 213 of the Act. That section, in part, speaks to naming the person who should have conduct of the derivative action, and the way it should be conducted.

A consequential application

[83] This point does not seem to have been argued before the learned judge. Learned counsel for the company submitted that in the event that this court was minded to dismiss the appeal, it should appoint independent counsel to conduct the

litigation on its behalf, rather than counsel appointed by Mrs Fulton. Learned counsel pointed to the fact that such an order was made in **Leon Forte v Twin Acres Development Limited** [2015] CD 00004 (**Forte v Twin Acres**).

[84] Learned counsel for Mrs Fulton objected to the application. In written submissions, they contended that, not only had the company given no reason for its request, but that the normal order was for the applicant to be granted conduct of the derivative action that he or she had sought. It would also be more cost effective, they submitted, if Mrs Fulton's counsel were retained for the purposes of the derivative action. It would be costlier, they argued, if an independent person, and newly retained counsel, had to be briefed to allow them to prosecute the matter. Learned counsel submitted that **Forte v Twin Acres** was distinguishable on the facts. They relied on a number of authorities in support of their submissions.

[85] The submissions of learned counsel for Mrs Fulton are convincing. The decided cases suggest that the determination of the party to conduct the proposed litigation depends on the best interest of the particular company in the circumstance. The cases suggest that if the court is satisfied that an applicant for leave has established an arguable case and has shown good faith in the process, then the court will appoint that person to have the conduct of the derivative action (see, for example, **Discovery Enterprises Inc v Ebco Industries Ltd** [1998] BCJ No 2674; [1999] 4 WWR 561; 58 BCLR (3d) 105; 41 BLR (2d) 207; 114 BCAC 235, **Georbay Developments Inc v Smahel** [1990] OJ No. 111 and **Dale Henry v 609897 Saskatchewan Ltd** [2002] SKQB 491). **Forte v Twin Acres** does not depart from that principle, the court did not grant conduct to the applicant in that case, because he had a separate claim against the relevant company, in circumstances that the court considered that a conflict of interest would have existed.

[86] In the present case, there are two main reasons that Mrs Fulton should be granted conduct of the proposed derivative action. Firstly, since she has established an arguable case and has satisfied the court that she is acting in good faith and in the best

interest of the company, then it is logical that she be given control of the process. By contrast, it is the present directors of the company who would be the defendants to the derivative action. They obviously could not be given conduct of the action.

[87] Secondly, it would be less expensive for Mrs Fulton, who is already acquainted with the issues, to prosecute the matter, than for an entirely new individual to be brought up to speed for those purposes. She would be in the best position to decide on counsel, who should be retained to act for the company at that time.

[88] The learned judge's order in this regard should not be disturbed.

Costs

[89] Mrs Fulton has completely succeeded in resisting the company's appeal. She should have her costs of the appeal. Whereas the costs of an application for leave, in the court, would perhaps be ordered to await the outcome of the derivative action (the learned judge did not seem to have made any order as to costs in his ruling), the appellate process should be differently considered. In **Richardson Greenshields**, the court ordered costs of the appeal to the appellant, but left the matter of the costs in the court below to the trial judge. That seems to be the appropriate order. It is noted, however, that in **Valgardson v Valgardson** and in **Bellman**, there is no mention of costs of the appeal.

Conclusion

[90] Despite the fact that the learned judge went into a minute dissection of the requirements of section 212(2) of the Act, the provisions of the section do not require a court, in considering an application under that section, to do anything other than it would do in any civil case. The court, in considering the provisions of the section is to decide the issues on a balance of probabilities without any requirement of any cogency other than the usual standard in civil cases. It is important for the court to bear in mind that it is not the final finder of fact in the case.

[91] The learned judge's decision that Mrs Fulton had satisfied each of the requirements of section 212(2) cannot be faulted. The company has failed to demonstrate that he erred in the exercise of the discretion afforded him by section 212 of the Act. The appeal should be dismissed, with the costs of the appeal to Mrs Fulton to be agreed or taxed.

[92] I have read, in draft, the judgment of my learned sister, Sinclair-Haynes JA, but find that I cannot agree with her on her reasoning and conclusion, especially on the issue of Sykes J's acceptance that Mrs Fulton has acted in good faith.

Apology

[93] It would be improper to conclude this judgment without a sincere apology to the parties for the lengthy delay in its delivery. We deeply regret the delay and the inconvenience that it must have caused.

SINCLAIR-HAYNES JA (DISSENTING)

[94] I have read the judgment of Brooks JA, but cannot agree with some of his reasoning or his conclusion. I set out below my own reasoning on the matter.

[95] This is an appeal from the decision of Sykes J (as he then was) granting the respondent, Sally Ann Fulton, leave to bring a derivative action in the name of and on behalf of the appellant, Chas E Ramson Ltd, against its directors, for breach of their fiduciary duties. The appellant, being displeased with the decision of the Supreme Court, sought relief from this court as follows:

> "(a) The judgment of Brian [sic] Sykes J be set aside.
>
> (b) Costs of the appeal and in court below be to the appellant to be taxed if not agreed."

The background

[95] Chas E Ramson Ltd is a limited liability company owned by the Ramson family. The company commenced its operations in 1922 but was incorporated in 1934. In 1984

it became an Industrial and Provident Society ('IPS') and so continued until 2001. Thereafter, it was incorporated as a limited liability company on 26 November 2001. John Ramson ('Mr Ramson') is the managing director of the appellant. His shareholding is a little over 25%. Mrs Fulton's shareholding is also a little over 25%.

[96] The directors of the appellant are the relatives of Mrs Fulton. Mrs Fulton is the sister of Mr Ramson and the sister, aunt and in- law, respectively of the other directors. Her mother was Monica Ramson, whom her father Lauritz Ramson later divorced. In or around 1969 he married Janet Ramson. Lauritz Ramson transitioned this life in 2011, and Janet departed three years after, on 26 February 2014.

[97] Mrs Fulton was not involved in the operations of the company. She had chosen instead a career in the travel industry. In 2014, her interest in the affairs of the company deepened. She consequently enquired through her attorneys about several issues in relation to the company, in particular, certain of the company's assets. Dissatisfied with the answers she received, Mrs Fulton eventually advised the directors by way of letter dated 8 April 2015 of her intention to institute a derivative claim/action, if necessary.

The application for leave to institute the derivative claim

[98] On 11 August 2015 Mrs Fulton sought leave of the Supreme Court by way of fixed date claim form, pursuant to section 212 of the Companies Act, for permission to institute proceedings for a derivative action against the following directors: John Ramson, Susan Elizabeth Silvera, Christopher Ramson, Phillip Ramson and Noel Raymond Silvera.

Mrs Fulton's claim

[99] Mrs Fulton's application for leave to institute proceedings against the directors of the company was twofold:

> (i) to recover (alleged) losses suffered by the company consequent on the directors' failure to maximise the returns

from two of the company's assets for the benefit of all of its shareholders; and

(ii) for an accounting of all benefits received by the directors from the personal use of the company's assets."

[100] Her draft claim form alleged breaches of fiduciary and other duties owed to the company by the directors, consequent on the personal and recreational use of two properties, Sharrow Drive and Coconuts, by Mr Ramson. The following, among others, were the reliefs sought in her proposed claim:

"1. Damages for breach of fiduciary duty and other duties owed to the [Company] by the Defendants as Directors of the [Company], arising from the use of a luxury villa known as 'Coconuts', located at Discovery Bay in the parish of St. Ann and owned by the [Company's] for their personal recreational purposes.
2. Damages for breach of the said fiduciary and other duties, arising from the use of a property known as 4D Sharrow Drive, Kingston 8 in the parish of St. Andrew, owned by the [Company] as a residence occupied by John Ramson rent free.
3. Interest upon the said damages at such rate and for such period as the Court shall think fit.
4. An order for the payment to Sally Ann Fulton, the owner of 101 out of the 400 shares in the Claimant, of an amount equal to 101/400 (25.25%) of such sums as shall be found to be due from the Defendants under paragraphs 1, 2 and 3 above.
5. An order that the said luxury villa 'Coconuts' be sold on the open market and that the proceeds of sale be distributed to the [Company] shareholders pro rata in accordance with their respective shareholdings.
6. An order that the said property at 4D Sharrow Drive be sold on the open market and that the proceeds be distributed to the [Company's] shareholders pro rata in accordance with their respective shareholdings.
7. Such further consequential accounts or inquiries or directions as may be necessary or requisite."

In support of the application, reliance was placed on 11 affidavits.

The decision of the court below

[101] Sykes J acceded to Mrs Fulton's request and ordered *inter alia* as follows:

> "(1) The Claimant do have leave to bring the derivative action in the name of and on behalf of the Defendant, against its directors, being John Ramson, Susan Elizabeth Silvera, Christopher Ramson, Phillip Ramson and Noel Raymond Silvera in substantially the form set out in the Claim Form and Particulars of Claim annexed to the Fixed Date Claim Form dated the 25th day of June 2015;
> (2) The Claimant shall control the conduct of the said derivative action.
> (3) The Claim Form and Particulars of Claim in the said derivative action shall be served within 28 days from the making of this Order.
> (4) Costs to the Claimant to be agreed or taxed.
> (5) Leave to appeal is granted and stay granted for 42 days and to continue thereafter, if Notice of Appeal has been filed, until the determination of the appeal.
> (6) …"

[102] Dissatisfied with the learned judge's decision and orders, the appellant has filed the following grounds of appeal.

The grounds of appeal

> "1. The Learned Judge (Sykes J) was wrong on the facts or in law in holding that the Respondent had given reasonable notice under Section 212 (2) (a) of the Companies Act.
> 2. The Learned Judge wrongly took into account the correspondence between the Respondent's Attorney-at-Law and the Appellant's Attorneys-at-Law prior to the issue of the purported notice without appreciating that in those correspondence the Respondent indicated an intention to file a personal action against the directors under section 213A of the Companies Act and not one under Section 212 of the Companies Act.
> 3. The Learned Judge misconstrued the Canadian and Australian authorities including *Tremblett*; *Primex* and *Swansson* in holding that these authorities require an

elevated standard as it relates to the requirement of good faith.

4. The Learned Judge:
   (a) failed to appreciate that the statement in *Trernblett* case 'it is necessary that an applicant bring cogent evidence establish [sic] clearly on a preponderance of evidence that the application is in fact brought in good faith' was a reference to the evidentiary standard of the balance of probabilities;
   (b) was wrong in holding that the Judge 'in the *Tremblett* case did not conduct a textual analysis of the actual words used in the Statute'. The Judge in the *Tremblett* case made reference to the "history of the development of the statutory provision" and 'the extraordinary power vested in a shareholder or director to use corporate resources and to create legal conflict between the company and others' was not evidence that the Judge in *Tremblett* did not consider the text of statutes. In fact the considerations raised by the Judge in the *Tremblett* case is an integral part of the proper construction of any statute. **[29]**
5. The Learned Judge wrongly considered good faith merely in the context of the Respondent seeking to advance her personal interest as against that or coincident with the interests of a company (paragraphs 31, 32). In doing so the Learned Judge sought to limit the meaning and effect of the phrase 'good faith' which is not permissible under principles of statutory interpretation.
6. The Learned Judge erred in fact and law by failing to take into account Sally's expressed personal interest as a factor in determining that she was not acting in good faith and that she does not 'honestly intend to serve the company's interest'. [Ang Thiam Swee v. Low Hian Chor [2013] SGCA 11 cited at [61] of the reasons for judgment.
7. The Learned Judge in discussing the *Swansson* case failed to appreciate that the establishment of good faith was not a matter of mere assertion but of evidence, which is capable of being accepted by a Judge.

8. The Learned Judge in his review of the *Swansson* case failed to appreciate that the case correctly held that an applicant for leave may intend to bring an action that is prima facie in the interest of the company but nevertheless found [sic] to be acting in bad faith (paragraphs 36, 37, 39, 41).
9. The Learned Judge in defining good faith to mean 'that the applicant genuinely believes that a wrong has been done to the company and that the wrong needs to be corrected' erred in law as the Learned Judge's definition sought to restrict the usual meaning of the phrase 'good faith' without any justification provided by the statute (paragraph 49).
10. The Learned Judge erred as a matter of law in his interpretation and/or application of Palmer J's reasoning in **Swannson** in relation to good faith [37 – 41] and best interests of the company **[46]** while at the same time adopting parts of the said flawed reasoning. **[47 and 49]**
11. The Learned Judge in purporting to prefer the balance of probability standard failed to appreciate that even within the balance of probability standard there are degrees of proof. The Judge may properly apply this standard while requiring the evidence to achieve a high level of cogency (paragraphs 52, 53 to 60).
12. The Learned Judge in holding that the test for determining good faith was subjective without more failed to appreciate that Section 212 (2) (b) requires the court to be 'satisfied that - (b) the complainant is acting in good faith'. It is therefore the court that must be satisfied that good faith exists, the mere belief of the Respondent is not adequate to establish good faith (paragraphs 71-77).
13. The Learned Judge erred in law in using the fact that debenture holders or past debenture holders are amongst the category of persons who are entitled to seek leave to bring derivative action under Section 212 of the Companies Act, as a basis for holding that good faith is limited to the mere honest belief of the Respondent that the 'proposed derivative action is justified' (paragraphs 81-86).
14. The Learned Judge erred in law insofar as he failed to recognize that the debenture holder's interest is not

necessarily inconsistent with or is otherwise in the interest of the company.

15. The Learned Judge erred in law in accepting the positon [sic] that 'appears to be in the interests of the company meant showing that an arguable case exists' or that 'if the claim is not frivolous and/or vexatious then surely it must necessarily appear to be in the interest of the company to bring the derivative claim.' In so holding the Learned Judge failed to appreciate or give weight to the fact that [the] statutory frame work places no limitation on the meaning of the phrase 'appears to be in the interests of the company.'
16. The Learned Judge in considering the Respondent's good faith and whether the proposed claim "appears to be in the interests of the Appellant erred in law in that the Learned Judge failed to give any weight or adequate weight to
    (a) the Respondent's clear desire to advance her personal interest
    (b) the Respondent's delay in bringing the application for leave to bring derivative action.
    (c) the fact that the Respondent could achieve its ultimate goal by means other than the proposed derivative action
    (d) the Respondent did not bring its [sic] proposed claim against a former director of the Appellant although he would have been a party to the alleged breaches or default.
17. The Learned Judge erred in law as he gave excessive weight to the absence of documentary evidence when determining whether or not the directors of the Appellant properly exercised their judgment.
18. The Learned Judge erred as a matter of law and/or in the exercise of his discretion when he refused the Appellant's application to appoint an expert in relation to the accounting for and/or use of Coconuts and Sharrow Drive the absence of which evidence played a significant role in the judge's decision.
19. The Learned Judge erred in law and on the facts when he held that the Respondent had established the conditions precedent required for the grant of leave under Section 212 of the Companies Act and in particular when he held that the Respondent raised an arguable case or triable issues as it relates to the

> actions of the directors of the Appellant Company."
> (Emphasis as in the original)

Mrs Fulton's evidence

[103] The gravamen of her complaint, culled from the 11 affidavits filed in support of her application is that, as a shareholder, she has never received any dividend or any benefit from the company. Mrs Fulton averred that, since September 2014, she has been in communication with the appellant's attorneys "with a view to protecting [her] shareholder value in the company". According to her it was only in July 2014 that she discovered that she owned 25% of the shares in the company.

[104] Several letters were exchanged between her attorney and the appellant's attorney. The letter dated 12 September 2014 stated its purpose, as "to get a handle on the extent of our client's [Mrs Fulton's] losses, and to ensure that the Company acts lawfully in the future".

[105] On 8 April 2015, her attorney sent a detailed letter to the directors of the company requesting that the company's attorney confirm the company's willingness to diligently prosecute the claims which were set out in the letter. No response indicating the directors' willingness to take steps to protect her interest as a shareholder was forthcoming.

[106] Mrs Fulton further asserted that the claim was being brought in good faith as her objectives are to protect her interests as a shareholder of the company and to ensure that the company receives the income that is due to it from its assets. She also averred that it is in the company's interest that a derivative action is brought. She alleged that the company has suffered material loss consequent on the directors' wilful breach of their fiduciary duties and asserted it was for the foregoing reasons she sought the permission of the court to institute proceedings on the company's behalf.

[107] She particularly referenced two properties, Coconuts and Sharrow Drive.

Coconuts

[108] She complained that Coconuts, a luxury villa owned by the company and situated on Millionaire's Row, Discovery Bay, has been used as Mr Ramson's personal playground.

[109] It is Mrs Fulton's evidence that she attended family functions at Coconuts only on a few occasions and was under the impression that the property was personally owned by Mr Ramson because it has been utilised by him as his personal family villa and playground. The property therefore serves no reasonable commercial purpose for the business of the company. She was later informed by her mother that the property was purchased by the company.

[110] Having discovered it was owned by the company, she was of the view that its acquisition was to facilitate Mr Ramson obtaining certain accounting and taxation benefits. At the time of her discovery, she was unaware of her status as a shareholder in the company and hence was of the mistaken view that she was not entitled to question its use.

[111] According to Mrs Fulton, upon her discovery in 2014 of her shareholdings, she acted by requesting a title search and thereafter, through her attorneys, requested an explanation from the company and Mr Ramson, as to the reason the company's property (Coconuts) was being utilised for personal purposes. Mr Ramson and the company denied that it was so utilised and asserted that it was used for the purposes of the business.

[112] She found the explanation unsatisfactory and consequently requisitioned an extraordinary general meeting ('EGM') at which, via proxy, she sought to obtain further information about Coconuts and requested a resolution that the property be sold and the proceeds distributed to the shareholders. All the other shareholders, except the estate of Janet Ramson, that was not represented, voted against a sale of Coconuts.

[113] Mr Ramson, she said, advised her that records were not kept of the business use of Coconuts and there was no plan to change its use. She further averred that she was unaware of the existence of any record of the business use of the property and of any business function held there. She complained that she has never benefitted, as a shareholder, from Coconuts and the audited accounts of the company do not reflect any rental income as having been earned for Coconuts.

[114] She opined that if Coconuts were to be rented for 11 months of the year at an average of between US$8,000.00 and US$10,000.00 per week, the property could have generated an annual income of between US$384,000.00 and US$480,000.00. According to Mrs Fulton, the company has therefore been deprived of significant income which it ought to have earned if Coconuts had been used for the benefit of the shareholders.

[115] According to Mrs Fulton, from November 2001 to December 2014, Coconuts has suffered loss of income in the sum of US$3,616,268.80 thereby depriving the company of significant income which it could have obtained if Coconuts had been used for the benefit of the company's shareholders.

Sharrow Drive

[116] Mrs Fulton described Sharrow Drive as a large town house situated in a prestigious gated scheme in Norbrook, Kingston 8 where Mr Ramson has resided rent free for decades. She is of the view that his contract does not entitle him to live rent free at the premises or allow his accommodation costs to be covered by the company. She complained that the failure to rent Sharrow Drive has resulted in lost income to the company. It is her evidence that from November 2001 to December 2014 the Company has suffered loss of income in the sum of US$690,079.50 with respect to Sharrow Drive.

[117] She also complains that the directors have service contracts with the company which extend to Mr Ramson and Susan Silvera's children but, in spite of her extensive attempts, she has been unable to obtain the details of the terms of those contracts. She has been advised by her attorney that the company is required to keep the service

contracts of its directors available for inspection by its shareholders. Mr Ramson, as managing director and Susan, as company secretary, she complains, have repeatedly refused to provide this information.

[118] It is also her complaint that she has never received notice of any annual general meetings ('AGMs') or any other shareholders' meetings and neither has she received any financial or other information relating to the affairs of the company.

The appellant's evidence

[119] The appellant relied on three affidavits deponed to by Mr Ramson opposing the grant of leave, in which he explained that the company is in the business of distributing fast moving consumer goods. On the incorporation of the company, the directors were, their father Lauritz Ramson, who was the chairman, and he (Mr Ramson) was the managing director. On 21 April 2009 he became the chairman and managing director. On 27 April 2011, four new directors were appointed, these were: Raymond Silvera, Susan Silvera, Christopher Ramson and Phillip Ramson.

[120] He explained that the company became an IPS in 1984 and so continued until 2001 when the members of the Management Committee of the IPS, by resolution, applied to convert it to a limited liability company. Accordingly, it was incorporated as a limited liability company in November 2001 and the initial shareholders of the company were the former members of the IPS. It was also resolved that the members of the IPS would continue to hold the same number of shares that they held in the IPS on the date of the conversion. Mrs Fulton was then a member of the IPS and she held one share.

[121] He referred to what he described as Mrs Fulton's untruthful assertion throughout her affidavit of her ignorance that she was a shareholder in the company and that it was after her father's death and after learning of the provisions in his will that she understood that her father did not own all of the shares in the company. That assertion, he avers, was not made in good faith because Mrs Fulton, in 2001, signed the appellant's memorandum of association as an initial subscriber of one share and

therefore knew or ought to have known that she was a shareholder. It is also his evidence that on 14 June 2002, each child of Lauritz Ramson, including Mrs Fulton, was allotted ninety-five shares in the company. Lauritz retained eighteen shares, and upon his death, these shares were divided equally among his children.

[122] It is also Mr Ramson's evidence that it is not true that Mrs Fulton has never received benefits from the company. His evidence is that she has benefited both directly and indirectly. He cited as an example the financing by the company of her son's college tuition.

The response to the allegations regarding Coconuts and Sharrow Drive

[123] It is Mr Ramson's evidence that Coconuts was purchased in 1983 while Lauritz Ramson was chairman and managing director of the company. In 1984 the property was modified to make it habitable and at the time of the swearing of his affidavit, it was said to be valued at JMD$150,000,000.00.

[124] The directors, and subsequently the shareholders have, in their best judgment, he averred, decided that it would be unwise to sell it at this time because the company would be deprived of an important asset base of approximately JMD$150,000,000.00. He denied Mrs Fulton's allegation that the property is utilised as his personal playground and contends that it is used mainly for business purposes. He explained as follows:

> (a) "Coconuts is 75% for business. It has a satellite office with internet and a fax machine for all senior managers working on the North Coast. Senior Managers will spend two to three days per month working on the North Coast at which time they will stay at Coconuts instead of renting accommodation.
>
> (b) The North Coast is 35% of the company's sales and Coconuts sits in the middle of a vital part of the corridor between both offices. Coconuts are [sic]used to entertain and network with customers and suppliers and on numerous occasions business deals are done in this context.

(c) There is some personal use but this is on request when the house is not in use and the expense for this is borne by the user.

(d) Coconuts has provided a venue for important family functions such as birthdays, weddings, Christmas, Easter and family visiting from abroad some of which prior to Ian Fulton's dismissal, [Mrs Fulton] and her family have attended.

(e) Monica Ramson prior to her death regularly retreated to the location without complaint or question from [Mrs Fulton] and so did [Lauritz] Ramson prior to his illness."

[125] Mr Ramson averred that Coconuts was purchased as an investment property and was intended to be used in the above-mentioned manner. The core business of the company is the distribution of fast-moving consumer goods. Further, "fiscal prudence dictates over the past ten (10) years that, it would be unwise, in the current economic climate to deviate from the core business of the Defendant company".

[126] He further explained that not only is the resort rental business a completely different line of business from the company's business, but also that Coconuts is not ideally situated as the other properties on the "Bay", for that business because it does not have a beach. There are also regulatory and licensing requirements which must be met to bring Coconuts into conformity and standard for tourism rental status.

[127] According to Mr Ramson, Mrs Fulton's desire to change the current use of the property to rental accommodation, or have the directors sell the property and distribute the proceeds to the shareholders instead of using it as a satellite office, only surfaced after the death of Lauritz Ramson. He contends that any such change is not in the best interest of the company. He is also of view that it is a desire which is personal to Mrs Fulton to "avenge her pain" because of her view that he had something to do with the dismissal of her son from the company for allegations of dishonesty. He exhibited notes made by their father Lauritz Ramson in relation to reports and investigation made into

stock loss while her son was the distribution manager, together with a letter of dismissal dated 8 August 1995.

[128] Sharrow Drive, he explained, was purchased as the managing director's residence and is part of the managing director's emoluments. Prior to the purchase of Sharrow Drive the company rented accommodation for the managing director. The Sharrow Drive property was purchased by the company on 26 November 1990.

Regarding the service contracts

[129] Mr Ramson averred that the company commenced its business in 1922 when technology, as it is now known or used, did not exist. The hiring of employees was informal and so was their training, which was on the job. Fewer than 20 employees were on staff and sales were less than $1,500,000.00. The company then operated at 55 ½ West Street without air conditioning in a rather "primitive" one room office, far from the sophisticated operations it has become. Presently, there are still no service contracts. The appointment letters, however, set out the responsibilities for some persons upon their employment.

Was reasonable notice given?

The appellant's submissions

[130] Mr Braham QC and Mrs Gibson Henlin QC, on behalf of the appellant, contended that the learned judge erred in acceding to Mrs Fulton's request to institute proceedings in the company's name. Queen's Counsel directed the court's attention to section 212(2)(a), (b) and (c) of the Companies Act which, they submitted, requires that the following three conditions precedent be established in order to obtain leave to bring a derivative claim:

a. Reasonable notice be given to the directors of the company of the complainant's intention to apply to the court for leave to bring a derivative action;

b. The complainant is acting in good faith; and

c. It appears to be in the interest of the company (Chas) that the action be brought, prosecuted, defended or discontinued.

[131] Learned Queen's Counsel argued that Mrs Fulton did not establish any of the conditions precedent for the grant of leave. Sykes J therefore erred in granting her permission to bring the derivative action.

The appellant's submissions regarding the reasonableness of the notice

[132] On the issue of reasonable notice, the learned judge, they posited, incorrectly found that because the parties had been in communication about the matter since 12 September 2014, sufficient notice had been given.

[133] Mrs Gibson Henlin referred the court to the Canadian case, **Intercontinental Precious Metals v Cooke** (1994) 88 BCLR(2d) 101, which explains the purpose of the notice which is to provide the directors with the opportunity to consider their position before the hearing. She relied on Tysoe J's statement at page 18 of the decision, that the purpose of the notice is to "to afford the directors a reasonable opportunity to consider their position before the application is heard by the Court".

[134] Learned Queen's Counsel pointed to the fact that prior to Mrs Fulton's letter of 8 April 2015, there was never any indication from her that she intended to bring a derivative action. Her stated intention was to institute personal proceedings for loss she allegedly suffered. Indeed, she was encouraged in that approach by senior counsel and corporate counsel who, she said, advised her that she had a "clear case for minority oppression". The appellant co-operated with her requests and provided the information on which she relied to ground her claim.

[135] Mrs Gibson Henlin posited that if reliance were to be placed on the correspondence dated 12 September 2014, the court ought to have considered, not only the nature and substance of Mrs Fulton's claim, but also the directors' response and cooperation. She posited that, in all the circumstances, it could not reasonably be

asserted that the directors were able to fully or appropriately consider their position in relation to the terms of the notice before the court hearing simply because there was no response between the 8 April 2015 letter and the filing of the claim on the 11 August 2015. Learned Queen's counsel relied on **Allison on behalf of General Motors Corporation v General Motors Corporation and Others** 604 F Supp 1106 (1985) and **Bellman v Western Approaches Limited** (1981) 130 LR (3d) 193 in support of that submission.

[136] It was also Mrs Gibson Henlin's contention that the learned judge erred in taking into account and applying the facts of the **Allison** case because those facts were only an example of a circumstance which could render the notice insufficient. It was not the only type of circumstance which would render the notice insufficient.

[137] Queen's Counsel is of the view that, in the circumstances, the learned judge failed to take into account the nature and substance of the correspondences between the appellant and Mrs Fulton. This lack of consideration, she submitted, resulted in the judge falling into error by his finding that Mrs Fulton had given reasonable notice.

Submissions on behalf of the respondent

[138] Lord Gifford QC submitted however that the letter of 8 April 2015 satisfied the notice required by section 212(2)(a) of the Companies Act. Learned Queen's Counsel pointed the court's attention to the fact that the claim was filed on 11 August 2015 and argued that four months is a reasonable period as the issues which arise in the instant case are not complex and the grievance concerning the use of the company's property for the directors' personal enjoyment had been raised with the company from 12 September 2014.

[139] The learned judge, he submitted, rightly distinguished the **Allison** case on which the appellant relied because that case involved complicated facts which required time to investigate. He pointed to the absence, from the three affidavits filed on the appellant's behalf, of any suggestion that more time was needed to consider the company's position regarding the claim. He further drew the court's attention to the fact that Mr

Ramson, in his first affidavit, confirmed that upon receipt of the letter, the directors considered the issues in the notice letter and decided against prosecuting the claim. At paragraph 63 of his first affidavit, Mr Ramson averred:

> "… the contents of the letter of 8th April 2015, save and except the matter relating to Sharrow Drive were considered by the directors on receipt. It was recognised as the same issues that were dealt with by the directors previously since September 2014 and approved by the shareholders in a general meeting on the 21st November 2014. These factors guided the directors in their best judgment not to commence the proceedings to bring the claim as requested by the claimant."

[140] It was Lord Gifford's submission that, having confirmed that it had considered the issues in the notice letter upon receipt and, had taken a decision not to institute proceedings, it is disingenuous for the appellant to now challenge the adequacy or reasonableness of the notice.

Law and discussion

[141] A company is a legal entity empowered to sue and be sued in its own name. The general rule is that individual shareholders (members) are not authorised to initiate actions on the company's behalf. The board of directors is generally the appropriate organ. **Foss v Harbottle** (1843) 67 ER 189 is considered the *locus classicus* on the issue.

[142] The complaints levelled against the directors in **Foss v Harbottle** were that they had misapplied the company's assets and had also improperly mortgaged the company's property. The claimant's quest to recover the losses which the company sustained, by compelling the directors and promoters to make restitution and to appoint a receiver, was unsuccessful because the injury suffered by the claimants was not exclusive to them. It was an injury against the whole company. It was further held that the fact that a majority at a general meeting was able to approve the defendants' conduct, the claimants could not succeed in those circumstances, because to allow the minority to bring an action, risked frustrating the wishes of the majority.

[143] The rationale for the rule, as explained by the learned authors of Company Law (9th edition) Alan Dignam and John Lowry is:

> "If the law were to allow minority shareholders unfettered standing to sue, there would be a real risk of multiplicity of suits and vexatious litigation. As we see, practical difficulties arise where the alleged wrongdoers are themselves members of the board and are in a position to prevent action being taken by the company to obtain redress for their wrongdoing."(page 175)

[144] At page 176, the learned authors noted:

> "The anxiety of the law is to strike the optimum balance between the principle of majority rule on the one hand, and safeguarding minority shareholders against abuses of power, on the other. If the pendulum were to swing too far in favour of the minority, such shareholders could become the oppressors of the majority in so far as they could impede the carrying on the proper business of the company."

[145] As explained by Lord Davey in **Burland and others v Earle and others** [1902] AC 83 at page 93:

> "[I]t is clear law that in order to redress a wrong done to the company or to recover money or damages alleged to be due to the company, the action should *prima facie* be brought by the company itself."

[146] Distilled from the authorities is that the company is *prima facie* the proper claimant. In **MacDougall v Gardiner** (1875) 1 Ch D 13 the complainant instituted proceedings against the company because the chairman had adjourned a general meeting without first putting the question of the adjournment to a vote as the appellant, a shareholder had requested. The complainant sought a declaration that the chairman's conduct was improper and an injunction to prohibit the directors from taking further action.

[147] The Court of Appeal was of the view that the issue was one of internal management to be decided by the majority members. Mellish LJ expressed the view

that allowing the matter to proceed would have been an exercise in futility because the conduct of which they complained could be ratified by the majority in a general meeting.

[148] Greer LJ in **John Shaw and Sons (Salford) Ltd v Shaw** [1935] All ER 456 explained the law, at page 464, thus:

> "If powers of management are vested in the directors, they and they alone can exercise these powers. The only way in which the general body of the shareholders can control the exercise of the powers vested by the articles in the directors is by altering their articles, or, if opportunity arises under the articles, by refusing to re-elect the directors of whose actions they disapprove. They cannot themselves usurp the powers which by the articles are vested in the directors any more than the directors can usurp the powers vested by the articles in the general body of shareholders."

[149] The law in its wisdom however provides an avenue for a shareholder or other complainant to institute proceedings for relief on a company's behalf to correct a wrong committed against the company in circumstances where the offender controls the company and refuses to take action for redress. Such actions are classified as derivative claims. The authors of the above-mentioned text, Company Law 9th edition, explain the circumstances in which such actions can be brought by the shareholder. They explained the circumstances as follows:

(1) the claims must arise from the omission or risk of omission either actual or proposed;

(2) breach of trust by a director;

(3) breach of duty owed to the company.

[150] Derivative actions are governed by section 212 of the Companies Act, which outlines the conditions to be satisfied prior to the grant of leave to bring a derivative action.

> "212 (1) Subject to subsection (2), a complainant may, for the purpose of prosecuting, defending or discontinuing an action on behalf of a company apply to a Court for leave to bring a derivative action in the name and on behalf of a corporation 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 corporation 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." (Emphasis added)

Were the directors given reasonable notice?

[151] Mrs Fulton sought to notify the directors of her intention to institute proceedings by way of two letters, of 12 September 2014 and 8 April 2015. The complaint registered in the first letter dated 12 September 2014, cannot be considered notice to the directors of an intention to bring a derivative claim. It concerned compensation for Mrs Fulton. By way of that letter, Mr Cheeks, Mrs Fulton's attorney, informed the appellant of what he considered to be breaches by the directors of their duties, and threatened to institute proceedings, if answers to certain questions relating to the alleged breaches were not provided. Mr Cheeks also indicated that "…the need for legal proceedings, (or indeed the threat)" would "be averted if a suitable arrangement" could be arrived at to compensate his client.

[152] Mr Braham QC responded on behalf of the appellant and advised that he was taking instructions and asked that no "adverse steps" be taken without first informing

him. In response, Mr Cheeks assured Mr Braham that legal proceedings would not be issued without first advising him.

[153] The letter of 12 September 2014 threatened legal action on Mrs Fulton's behalf for, *inter alia;*

> "(a) an accounting of all dividends to which our client is lawfully entitled since the inception;
> (b) an immediate open market sale of Coconuts and a distribution of the proceeds to the Shareholders pro rata in accordance with their shareholding;
> (c) the immediate appointment of our client (or her chosen representative) as a director of the Company;
> (d) such other 'protective orders' as we consider appropriate to protect our client's interest as a minority shareholder;
> (e) the immediate repayment to the Company of all remuneration to directors made in breach of article 79;
> (f) [Sic] **a compulsory buy out and/or a winding up of the Company**." (Emphasis added)

[154] There was other correspondence subsequently, between the parties concerning Mrs Fulton's complaints, which did not constitute notice pursuant to section 212. Those letters were of a similar tenor. She complained of the denial of benefits personal to her and requested information about the company's operations and assets and one complained of minority oppression.

[155] The letter of 8 April 2015, however, notified the appellant of Mrs Fulton's intention to institute proceedings for a derivative claim. Indeed, the letter was headed: "Notice of Derivative Claim". The letter outlined her grouses regarding the use of the company's properties and asserted that if Coconuts had been rented, the company would have been better off financially and she would have been entitled to the benefit of approximately 25% of the increased value.

[156] Regarding Sharrow Drive, the complaint was that:

> "…**It is not in the best interests of the Company for its assets to be used for a purpose for which there is no benefit to our client,** but which is enjoyed exclusively by one of its directors and shareholders.
> **Accordingly, the Company also** has a claim against John Ramson to account for all of the personal benefit received from living rent free at the Sharrow Drive Property, and against the Directors who approved this situation in breach of their fiduciary duties." (Emphasis added)

[157] Although a complaint registered in that letter was that it was not in the best interest of the company for the property to be used for its present purpose, the primary concern was the benefit of which Mrs Fulton was allegedly being deprived. The overarching reason registered in those letters for her application to institute proceedings for a derivative claim for her benefit. That issue will however be dealt with below under the heading "Personal interest". That letter, however, constituted adequate notice of her intention to institute a derivative claim. In fact, the application for leave to bring the derivative claim was filed four months after that notice. Grounds 1 and 2 therefore fail.

The good faith issues

[158] These grounds, as outlined in Brooks JA's judgment, seek to impugn:

A. the learned judge's interpretation of the cases, **Tremblett v SCB Fisheries Limited** (1993) CanLII 82689 (NL SC), **Primex Investment Limited v Northwest Sports Enterprises Limited and another** (1995) CanII 717 (BC SC) and **Swannson v Pratt** [2002] NSWSC 583;

B. his consequent enunciation of the law on good faith; and

C. his interpretation of section 212;

Submissions on behalf of the appellant

[159] Regarding the requirement for establishing good faith, Mr Braham disagrees with the learned judge's interpretation of the Canadian and Australian authorities, (**Tremblett**, **Primex and Swansson**) as importing an elevated standard of proof. He submitted that the interpretation ascribed to the reasoning in various cases by the learned judge, in particular, **Valgardson v Valgardson** 2012 ABCA 124 (CanLII), which referred to an elevated standard or a higher threshold was a misinterpretation by the learned judge. Mr Braham argued that to the extent that the case referred to a higher threshold, it was referring to whether the statute used the words "best interest" as against "the interest" of the company.

[160] Learned Queen's counsel further submitted that Puddester J's statement in **Tremblett,** referred to the quality of the evidence required to establish the petitioner's application on a "preponderance of evidence" which is the evidential standard, "on a balance of probabilities" and nothing else. The reference to "substantial" evidence was based on the facts of that case which he distinguished from the instant by pointing to the fact that the petitioner's application in **Tremblett** was met with formidable evidence that the application was not brought in good faith. It was those facts, he submitted, which led the learned judge to the conclusion in those circumstances that substantial evidence was required to controvert the respondent's evidence.

[161] It was also Mr Braham's submission that the suggestion that Puddester J's statement in **Tremblett**, in the context in which it was made, is authority that an elevated or high onus is to be applied on an application for a derivative action, is a misinterpretation by Sykes J of the learned judge's statement. The approach to good faith, learned Queen's Counsel posited, is based on the facts and is case specific.

[162] He also referred the court to Palmer J's dictum in **Swansson** at paragraph 32 in support of that argument.

> "[t]here is no elaboration in s. 237 as to what matters the court should take into account in determining whether an

> applicant is 'acting in good faith'. That phrase is one which occurs in very many different contexts in the law: **it must take its content in any particular case from the context in which it is used**." (Emphasis added by Mr Braham)

[163] By way of his written submissions, Mr Braham pointed to the similarity between Puddester J's approach in **Tremblett** and Palmer J's in **Swansson**. Both, he submitted, reviewed the background to the statutory provisions, and gave several examples of the matters which could have constituted a lack of good faith and neither approach, he contended, was restrictive on the point as Sykes J suggested.

[164] Mr Braham further posited that Palmer J's discussion concerned the context in which the legislation was passed and the reason permission is still required although, the category of persons eligible to apply, has been expanded.

[165] Queen's Counsel further postulated that in **Swansson** Palmer J was certainly not advocating an elevated or high standard. In support of that argument, he directed the court's attention to paragraphs [20] and [24] and [32] – [43] of the judgment which Mr Braham submitted, "particularly eschew any reliance on the Canadian authorities" and which puts the onus on the claimant to establish good faith.

[166] At paragraphs 20, 24, 32 to 43 of **Swannson**, Palmer J said:

> "20 Pt. 2F.1A was introduced into the Corporations Law, now the Corporations Act, by the Corporate Law Economic Reform Program Act, 1999 (Cth) ('CLERP'). Its inspiration was s.165 of the New Zealand Companies Act, 1993, a section derived, in turn, from the Canada Business Corporations Act 1985. However, the terms of Pt 2F.1A are so different from the provisions of the New Zealand and Canadian legislation that the case law in those jurisdictions is of little assistance. There has been scant judicial consideration in Australia of the requirements which must be satisfied before leave is granted to bring a derivative action in the name of a company pursuant to Pt. 2F.1A.
> …
>
> 24 It is clearly the intent of Pt 2F.1A that leave to bring a

derivative action must not be given lightly. An application under s.237(2) is not interlocutory in character; the relief sought is final and the applicant bears the onus of establishing the requirements of the subsection to the Court' satisfaction.

…

32 There is no elaboration in s.237 as to what matters the Court should take into account in determining whether an applicant is 'acting in good faith'. That phrase is one which occurs in very many different contexts in the law: it must take its content in any particular case from the context in which it is used.

33 As I have observed, prior to the commencement of Pt 2F.1A only current shareholders could take advantage of the exceptions to the rule in **Foss v Harbottle**. Pt 2F.1A now gives a right to initiate proceedings to some persons who, but for those provisions, would have had no such right at all under the general law. Such persons are all those within the categories created by s.236(1)(a) who are not shareholders of the company when the application for leave is made. Further, there is no requirement in s.236 that a person seeking leave must have been a shareholder or officer when the alleged wrong was committed against the company. Accordingly, under Pt 2F.1A a former shareholder or director may seek to sue in the company's name for a wrong which was committed after he or she had disposed of all shares in the company or had ceased to hold office.

34 The Court is not given power in Pt 2F.1A to grant final relief in a suit instituted in a company's name to any person other than the company itself. Accordingly, applicants for leave who are not current shareholders of the company cannot gain by increase in the value of their shares if the derivative action succeeds and the company recovers compensation. Likewise, applicants who are former officers of the company cannot obtain orders resolving conflicts in which they themselves are engaged. Yet such persons are entitled to be given leave if they satisfy the requirements of s.237(2). The section, therefore, suggests that it must be possible for persons to satisfy the requirement of good faith even when they have no financial interest in the company and no present involvement in its management.

35 At this early stage in the development of the law on the statutory derivative action created by Pt 2F.1A it would be unwise to endeavour to state compendiously the considerations to which the Courts will have regard in determining whether applicants in all categories defined by s.236(1) are acting in good faith. The law will develop incrementally as different factual circumstances come before the Courts.

36 Nevertheless, in my opinion, there are at least two interrelated factors to which the Courts will always have regard in determining whether the good faith requirement of s.237(2)(b) is satisfied. The first is whether the applicant honestly believes that a good cause of action exists and has a reasonable prospect of success. Clearly, whether the applicant honestly holds such a belief would not simply be a matter of bald assertion: the applicant may be disbelieved if no reasonable person in the circumstances could hold that belief. The second factor is whether the applicant is seeking to bring the derivative suit for such a collateral purpose as would amount to an abuse of process.

37 These two factors will, in most but not all, cases entirely overlap: if the Court is not satisfied that the applicant actually holds the requisite belief, that fact alone would be sufficient to lead to the conclusion that the application must be made for a collateral purpose, so as to be an abuse of process. The applicant may, however, believe that the company has a good cause of action with a reasonable prospect of success but nevertheless may be intent on bringing the derivative action, not to prosecute it to a conclusion, but to use it as a means for obtaining some advantage for which the action is not designed or for some collateral advantage beyond what the law offers. If that is shown, the application and the derivative suit itself would be an abuse of the Court's process: **Williams v Spautz** (1992) 174 CLR 509, at 526. The applicant would fail the requirement of s.237(2)(b).

38 Where the application is made by a current shareholder of a company who has more than a token shareholding and the derivative action seeks recovery of property so that the value of the applicant's shares would be increased, good faith will be relatively easy for the applicant to demonstrate to the Court's satisfaction. So also where the applicant is a

current director or officer: it will generally be easy to show that such an applicant has a legitimate interest in the welfare and good management of the company itself, warranting action to recover property or to ensure that the majority of the shareholders or of the board do not act unlawfully to the detriment of the company as a whole.

39 However, where the applicant is a former shareholder or officer with nothing obvious to gain directly by the success of the derivative action, the Court will scrutinise with particular care the purpose for which the derivative action is said to be brought.

40 For example, a creditor may happen to be a former shareholder of the company and may seek, by the derivative action, to place the company in a financial position to repay the debt. There would be no abuse of process in commencing and maintaining the derivative action itself in that the action is commenced and maintained in order to achieve the purpose for which it is designed, namely, to recover property for the company. However, it may well be said that, in making an application for leave under Pt 2F.1A, the applicant is not acting in good faith because he or she is, in reality, seeking to vindicate his or her interest as a creditor and not whatever interest he or she may have as a former shareholder.

41 To take another example: a derivative action sought to be instituted by a current shareholder for the purpose of restoring value to his or her shares in the company would not be an abuse of process even if the applicant is spurred on by intense personal animosity, even malice, against the defendant: it is not the law that only a plaintiff who feels goodwill towards a defendant is entitled to sue: … . On the other hand, an action sought to be instituted by a former shareholder with a history of grievances against the current majority of shareholders or the current board may be easier to characterise as brought for the purpose of satisfying nothing more than the applicant's private vendetta. An applicant with such a purpose would not be acting in good faith.

42 If a wrong appears to have been done to a company and those in control refuse to take proceedings to redress it, the Court should permit a derivative action to be instituted only

> by those within the categories allowed by s.236(1) who would suffer a real and substantive injury if the action were not permitted. The injury must be necessarily dependent upon or connected with the applicant's status as a current or former shareholder or director and the remedy afforded by the derivative action must be reasonably capable of redressing the injury.
>
> 43 Further, if an applicant for leave under s.237 seeks by the derivative action to receive a benefit which, in good conscience, he or she should not receive, then the application will not be made in good faith even though the company itself stands to benefit if the derivative action is successful. Such a benefit would include, for example, a double recovery by the applicant for a wrong suffered or recompense for a wrongful act inflicted upon the company in which the applicant was a direct and knowing participant with the proposed defendant in the derivative action. In such a case the law would not permit the applicant to derive a benefit from his or her own wrongdoing."

[167] Mr Braham submitted that Sykes J misinterpreted Tysoe J's finding in **Primex**. Tysoe J, Mr Braham indicated, had only quoted an extract from the respondent's submissions alleging, in reliance on **Tremblett**, that the petitioner had a substantial onus. Learned Queen's Counsel submitted that the learned judge in **Primex**, having analysed the application, arrived at the view that the petitioner had satisfied the "onus of showing that [the applicant] was acting in good faith".

[168] Learned Queen's Counsel directed the court's attention to the absence of any reference by the learned judge in **Primex** to "a substantial" onus. He argued that it is a misinterpretation of Tysoe J's finding to conclude that he was of the view that **Tremblett** imposed an elevated standard merely because the learned judge did not expressly disapprove of counsel's submission.

[169] Learned Queen's Counsel also drew the court's attention to the fact, which he submitted was significant, that Tysoe J's decision was approved on appeal to the Supreme Court of Canada and leave to appeal was refused. A comparison was made

with **Valgardson** which referred to **Tremblett** and **Primex** as preferring an elevated standard. It was however his submission that a true construction of those cases do not reveal that an elevated standard was introduced. The learned judge, he contended, therefore erred in his interpretation of the authorities. Queen's Counsel also contended that this error affected the learned judge's analysis of the facts of the instant case. It was his further submission that, in any event, the application of the balance of probabilities standard does not affect the basis on which the appeal is brought because of Mrs Fulton's failure to meet the required standard.

[170] Mr Braham submitted that in **Tremblett** Sykes J referred to the wording of the particular provision in the Act which states that, "no action shall be brought unless the Court is satisfied that … the complainant is acting in good faith". It was that provision, learned Queen's Counsel, submitted, which led Puddester J to the following view:

> "it is necessary that an applicant bring cogent evidence establishing clearly on a preponderance of evidence that the application is in fact brought in good faith."

[171] Queen's Counsel submitted that the order sought by Mrs Fulton was not interlocutory. Cogent evidence was therefore necessary to determine whether or not the application was made in good faith. He relied on a number of authorities including Australian decisions, which he submitted that notwithstanding some differences, fortified his submission. He referred to the Australian case, **Chahwan v Euphoric Pty trading as Clay & Michel** [2008] NSWCA 52, and submitted that the learned judge of appeal, Tobias JA, in that case, did not suggest or refer to an elevated standard of proof.

[172] Mr Braham however agreed that the learned judge in the instant case correctly accepted the analysis of Rajah JA in **Ang Thiam Swee v Low Hian Chor** [2013] 2 SLR 34 that an applicant for permission bears the burden of proof. He also pointed to the Court of Appeal of Singapore's affirmation of the view that:

a. more than a "bald assertion" was required to establish good faith; and
b. there is a "substantial onus" on the applicant to "positively" establish good faith.

[173] Queen's Counsel contended that although Sykes J accepted Rajah J's analysis, which is similar to that of the Australian and Canadian authorities which hold that a "bald assertion" is not sufficient to discharge the standard of proof, the learned judge had earlier suggested in his judgment, that Palmer J's approach in **Swansson** was not the proper approach. The learned judge's reasoning, he submitted, is therefore unclear in relation to what he finds to be the appropriate evidence required to determine whether or not the applicant discharged the standard of proof.

[174] Mr Braham further contended that the learned judge failed to place the appropriate emphasis on Mrs Fulton's duty to establish good faith by cogent evidence and he overlooked the importance of the burden cast on her in the instant case. The learned judge, he argued, was more focused on the requirements to prove good faith and the link between good faith and the interest of the company without reference to the fact that an applicant, by the terms of the section, must prove that the application is made in good faith. Queen's Counsel submitted that the question of the standard of proof and what is required by the applicant to discharge it, are separate points.

[175] According to Queen's Counsel, good faith was a mere assertion in Mrs Fulton's affidavit. She has therefore failed to discharge a substantial or any burden of proof. Learned Queen's Counsel also contended that the learned judge's analysis of the standard of proof which required Mrs Fulton to establish good faith, is against the weight of authority. As a result of that approach, the learned judge's conclusion was negatively impacted in relation to the appellant's arguments, which, he contended, led to his rejection of three of the stated factors which were relevant to the question, of whether the application is in the interest of the company.

[176] Mr Braham referred to the learned judge's analysis in **Swansson** and **Tremblett**, which commenced with the historical context in which the legislation was passed, which, he postulated, was the correct approach. In so doing, the learned judges were establishing the context in which the legislation was passed with a view to identifying its purpose. That purposive construction is the modern approach to statutory interpretation whereby the historical context in which the legislation was passed, is taken into consideration. This approach, he argued, does not detract from the literal meaning or the natural and ordinary meaning of the text of the statute. In support of that submission, he cited the following statement of Harris JA in **Digicel Jamaica Limited v The Fair Trading Commission** [2014] JMCA Civ 48:

> "[66] Before proceeding with a review of this appeal, it would be useful to make brief reference to the general principles of statutory interpretation. In constructing a statute, the object is to ascertain the intention of Parliament as expressed in the statutory instrument. The legislative intent is primarily to be found in the statute itself. A statute must be constructed as a whole and must be interpreted to avoid any repugnancy or inconsistency with any part thereof.
>
> [67] If the words of the statute are plain and unambiguous, they must be taken to indicate the legislator's intent. **Where the statute is challenged, the court must take into account the purpose of the statute and the particular provision or provisions which are challenged. Although words should be given their natural and ordinary meaning, they must be** construed within the ambit of the scheme devised by the Act. At all times, the question for the court is whether the words are apt to cover or describe the circumstances in any particular case- see Bath v British Transport Commission [1954] 2 All ER 542 and Kimpton v Steel Co of Wales Ltd [1960] 2 All ER 274.
>
> [68] The principles relating to the interpretation of a document are different from those in relation to a statute. In Investor Compensation Scheme Ltd v West

> Bromwich Building Society [1998] 1 WLR 896 Lord Hoffmann, speaking to the principles of interpretation of a document, pronounced that, in interpretation, adopting a contextual approach achieves greater meaning of a word than just simply finding the natural and ordinary meaning of the word in the document." (Emphasis added by Mr Braham)

[177] He also referred the court to **Commissioner of Tax Payer Audit & Assessment v CIBC Trust & Merchant Bank Jamaica Limited** (unreported), Court of Appeal, Jamaica, Supreme Court Civil Appeal No 3/2004, judgment delivered 8 November 2006, in which McCalla JA (as she then was) similarly opined that the modern approach to statutory interpretation is to have regard to the purpose of a particular provision and interpret its language, so far as is possible, in a way which best gives effect to that purpose. Queen's Counsel submitted that the learned judge erred by discounting the reasoning in **Tremblett** because Puddester J reviewed the historical context and purpose of the provision referred to in the legislation.

[178] He further argued that Robins JA's opinion in **Richardson Greenshields of Canada Limited v Kalmacoff** (1995) 123 DLR (4th) 628 does not support the respondent's contention that Puddester J and Palmer J were wrong to have adopted an approach which took into account the historical context and purpose of the legislation as an aid to construction.

[179] It was Mr Braham's submission that the learned judge erred in his analysis of the facts in arriving at his decision that good faith exists in the instant case. Mrs Fulton, he submitted, must demonstrate that her motive is not influenced by spite, ill-will or vendetta or is not clouded by personal considerations which could lead to the conclusion that she is not acting in good faith.

[180] Learned Queen's Counsel submitted that the learned judge failed, in his analysis to consider whether Mrs Fulton's judgment was clouded by personal considerations. The learned judge's focus was, he submitted, on discounting any suggestion that Mrs Fulton's motive, by itself, was sufficient to arrive at a finding of bad faith, although that

submission was not advanced on her behalf. He contended that the learned judge failed to have regard to the significance of Mrs Fulton's reason for bringing the action and the impact an assessment of her motivation would have had in assisting in determining whether she was acting in bad faith.

[181] Learned Queen's Counsel argued that, when appropriately considered, Mrs Fulton's motivation and purpose confirm that the application was brought for her personal interest and those interests dominated and clouded her judgment in a manner suggested by the decisions including **Ang Thiam Swee**.

[182] Mr Braham also directed the court's attention to paragraph 36 of Palmer J's dictum in **Swansson**, in support of his submission that in conducting the good faith inquiry, the court should have regard to at least two factors:

> 1. whether the applicant honestly believes that a good cause of action exists which has a reasonable prospect of success; and
>
> 2. whether the applicant is seeking to bring the derivative action for a collateral purpose which would constitute an abuse of process.

[183] Queen's Counsel firmly submitted that Sykes J's view that Palmer J restricted the meaning of good faith was also incorrect. Sykes J, he postulated, failed to consider the issue of whether Mrs Fulton had a collateral purpose as distinct from, or evidenced by, her primary or substantial motivation. Reliance was placed on the **Chahwan** case in which Tobias JA, relying on the Australian Explanatory Memorandum to the Corporate Law Economic Reform Bill 1998 and to various passages from **Swansson**, held as follows at paragraph [42]:

> "(a) A derivative action should be permitted to be instituted by those persons within the categories allowed by section 236 (1).

(b) Those persons ought to demonstrate that they would suffer a real and substantive injury if permission to bring the action was refused, and the injury must necessarily be dependent upon or connected with the applicant's status as a current or former shareholder or director.

(c) The remedy afforded by the derivative action must be reasonably capable of redressing the injury."

[184] Mr Braham submitted that in the instant case, there was no evidence that real or substantial injury would result to Mrs Fulton as a shareholder if the action was not brought. He listed the following as reasons in support of his contention that she has not demonstrated good faith:

(i) "There is no arguable case (**Swansson** paragraph 36); the Canadian authorities also support the need for the existence of this factor.

(ii) The derivative claim is being brought for the properties to be sold and proceeds immediately divided between the shareholders. The letters leading up to the 'notice' of 8 April 2015 are evidence of Mrs Fulton's motivation as distinct from proof that the directors were unwilling to pursue a claim against themselves.

(iii) The moneys to be recovered for the alleged non-payment of rent is to be similarly treated. This shows that Mrs Fulton is pursuing a purely personal interest that is not intended to benefit the company. She is not genuinely concerned that the company is being harmed. In fact, there is no evidence other than her assertion that John as managing director is not entitled to occupy Sharrow Drive.

(iv) Mrs Fulton's desire to obtain an immediate pay-out conflicts with her assertion of good faith (see the statements at paragraph 38 of **Swansson** and paragraphs 74 to 77 of **Chahwan**), in that Mrs Fulton does not 'seek recovery of property so that the value of the applicant's shares would be increased.' Her desire is to benefit personally.

(v) Mrs Fulton was aware of the use of the properties by the company/directors for what appears to be decades. It was so utilized during the lifetime of her father and subsequently. She was aware that she is a shareholder from the outset including

during her father's lifetime and she did nothing. The delay and inactivity amounts to lack of good faith evidenced by her intention to cash out of the company now that her father has **died. This was taken into consideration in the Chahwan case, paragraphs 51 and 52.**

(vi) **In any event, Mrs Fulton is entitled to pursue her claim under the oppression and unfair prejudice section of the Companies Act. Therefore, she does not need to bring the claim in the name of the company (see Gozee v Graphic World, paragraphs 62 to 68)**" (Emphasis added)

[185] Mr Braham contended that the real purpose of the action is confirmed by the personal reliefs or remedies being sought by Mrs Fulton in the proposed action and evidenced by her letter of 8 April 2015.

[186] For these reasons, learned Queen's Counsel submitted that the learned judge erred in finding that there was sufficient evidence of good faith or failing to find that Mrs Fulton's personal interest clouded her judgment such as to amount to bad faith.

Submissions on behalf of the respondent

[187] Lord Gifford pointed to the significant overlap among the grounds of appeal in respect of the good faith element and contended that the learned judge correctly rejected any notion of an elevated standard of proof. He asserted that there was no special test to be applied in determining what is meant by "good faith".

[188] It was his submission that the learned judge was correct in his observation that the fact that an applicant for leave has a personal interest in the outcome of the derivative action was not a basis for a finding that he was not acting in good faith. Reliance was placed on **Leon Forte v Twin Acres Development Limited** [2015] CD 0004 in support of that argument.

[189] It was Lord Gifford's further submission that by any standard of interpretation of the good faith requirement, the learned judge correctly held that Mrs Fulton was acting in good faith. He pointed to Mrs Fulton's first affidavit in which she deposed that the claim is brought in good faith with the objective of protecting her interests as a

shareholder; in direct response to the allegation by the appellant that the motive behind the action was spite because of the termination of the employment of her son in 1995. He directed the court's attention to Mrs Fulton's response, that her son's dismissal was irrelevant to her bringing the claim. It was Queen's Counsel's submission that the learned judge correctly found that her son's dismissal cannot automatically lead to any conclusion that the derivative action is connected to his dismissal.

[190] It was also his submission that the learned judge correctly determined that good faith must be considered in the context of the effect the claim will have on the company. Learned Queen's Counsel submitted that the method adopted by the Canadian courts, which found favour with the learned judge, is correct. That method seeks to determine whether the claim has legal merit and if it has, the courts will find it easier to conclude that the applicant is acting in good faith.

[191] Lord Gifford submitted that Mrs Fulton's evidence confirms a strong belief that the derivative claim has a good chance of succeeding. He contended that the supporting documentation to her application for leave is not limited to a brief claim form, it includes particulars of claim which:

> (a) set out in clear terms, the claim she wishes the appellant to pursue; and
>
> (b) are very detailed in quantifying the damages suffered.

[192] Mrs Fulton, he argued, has also provided extensive evidence which supports the basis upon which the damages are calculated. He submitted that at the time the application was issued, Mrs Fulton sought leave for the company to pursue the directors for the recovery of damages which she quantified in excess of US $4,000,000.00.

[193] Learned Queen's Counsel submitted that if it were that Mrs Fulton's application for leave to bring the derivative action had strong legal merit but the damages were considered to be *de minimis*, it is likely that the court would infer that she has not passed the good faith requirement. If, however, there is *prima facie* evidence of a

claim with legal merit, and the damages cannot obviously be assessed as *de minimis*, in those circumstances, it is difficult for the court to infer that the application was not made in good faith.

[194] Lord Gifford further relied on the **Leon Forte** case and on **Debbian Dewar v Ervin Moo Young and Others** [2015] JMCC Comm 23 which cases, he submitted, confirm the approach of the Jamaican courts on the good faith element. He submitted that proof of bad faith is required to refuse an application on the ground of the absence of good faith.

[195] An applicant, he submitted, often can do no more than provide the court with details of the claim he or she wishes the company to pursue and explain the reason he or she considers it is in the interests of the company to do so. In any event, he contended, Mrs Fulton did not simply make a bald assertion that the action is brought in good faith. She unequivocally stated that the action is brought in good faith and provided evidence which supports her application. Her evidence not only supported an obvious belief as to the strength of the derivative action, but also provided the court with sufficient information to understand the substance, value and importance of the claim to the appellant company.

[196] Lord Gifford referred to, what he described as, the significant effort and costs incurred in preparing the application which, he opines, are obvious from a simple review of the record and which is also to be evaluated in the context that Mrs Fulton is a material shareholder of a company that admitted to operating a no dividend policy.

[197] It is Lord Gifford's submission that there is no evidence that Mrs Fulton does not intend to pursue the derivative action to the fullest or that she will achieve any collateral objective which would not be in the company's interest. He relied on Batts J's finding in the **Leon Forte** case that a collateral advantage of securing payment of a debt did not amount to an abuse of process. He contended that there is no evidence that Mrs Fulton will receive any collateral advantage. The benefits of the derivative action will be enjoyed equally by all of the shareholders.

Law and discussion

Whether the learned judge misconstrued the Canadian and Australian authorities

[198] Skyes J, in disapproving of Puddester J's statement in **Tremblett**, expressed the following view:

> "[29] His Lordship was referring to section 369 of the Corporations Act. It is noteworthy that his Lordship did not conduct a textual analysis of the actual words used in the statute but relied on the (a) the history of the development of the statutory provision; (b) the extraordinary power vested in a shareholder or director to use corporate resources and to create legal conflict between the corporation and others in order to come to the conclusion that the claimant must bring 'cogent evidence' in order to meet the 'substantial obligation' on him to meet the good faith standard. **His Lordship never said that the actual words of the statute led him to this view.** This approach is not accepted." (Emphasis added)

[199] It is necessary to quote Puddester J's statement on the matter. At paragraph 61, the learned judge said:

> "In my view, the concept of good faith encompassed by the statutory requirements under **s. 369 relates to the intention of the applicant- whether the application is brought with the motive and intention of benefitting the corporation, or for some recognized or subliminal purpose or benefit outside that interest**. This not to say, of course, that an action for the benefit of the corporation may not also have a subsidiary benefit for the applicant, even beyond the applicant's benefit as one of a number of shareholders. However, in my view the history of the development of statutory provisions such as s.369 shows that for statutory relief against the strict common law position of non-intervention in majority decisions internal to corporations, **in light of the extraordinary power vested in a shareholder or director applicant to use the corporate resources and to create a position of legal conflict between the corporation and others, it is necessary that an applicant bring cogent evidence establishing clearly on a preponderance of evidence**

> **that the application is in fact brought in good faith**, It must be noted that this obligation is a positive requirement on any applicant for relief under s. 369. It is not one which arises only where there may be evidence to the contrary adduced**.**
>
> **In circumstances such as here where, I conclude, there is in fact substantial evidence bringing this aspect into question, there is in turn a substantial obligation on an applicant, including the applicant here, to satisfy the court as to the good faith under which this application, and the proposed action to be sanctioned by it, are brought and proposed by him**." (Emphasis added)

[200] Puddester J's statement requiring cogent evidence at the leave stage, which, stated another way, is "forcefully convincing" evidence, is in my view incorrect. At the leave stage what is required is evidence to support an arguable case. In that case, the applicant claimed that his dominant purpose for seeking leave was to benefit the corporation. However, the learned judge found that there was substantial evidence of questionable activities by the applicant which brought his motives for bringing the application into question. In particular, the evidence suggested that the applicant's true motive for bringing the action was to maximize and capitalize on his shareholdings in a subsidiary corporation of the respondent. The learned judge found that serious doubt was raised as to whether the applicant was separating his personal interests from the interest of the corporation.

[201] As the old adage states: 'circumstances alter cases'. Puddester J ought to have confined his statement to the facts of that case. The strength of the evidence adduced by the complainant regarding the obvious self-interest had to attain a certain level in light of the cogency of evidence provided by the respondent. However, the learned judge's statement was general, hence, in my view, he erred. Sykes J was therefore correct to reject the requirement for cogent evidence.

[202] Regarding **Primex**, as observed, correctly outlined by Mr Braham, and as acknowledged by Sykes, J, Tysoe J did not expressly opine on the question of "good faith" and the standard or considerations to be applied in determining whether an

applicant has established it. Instead, at paragraph 30 of his judgment, he outlined the submissions of the respondent, who, in reliance on **Tremblett**, argued that the petitioner had a "substantial onus" to establish good faith. Tysoe J did not disapprove of this argument. It was, therefore, not unreasonable for Sykes J to conclude that Tysoe J accepted as the law, the statement from **Tremblett**. Sykes J's precise analysis of the case was as follows:

> "[30] In **Primex** Tysoe J did not disapprove of the submission of counsel who urged the court to accept the elevated standard. **Primex** is from British Columbia. Counsel in **Primex** relied on Puddester J in **Tremblett**. Tysoe J was affirmed on appeal except for one small point which need not concern us … As far as this court has been able to determine this case is still the law in British Columbia. Supreme Court of Canada refused leave. The practical effect is that the Court of Appeal of British Columbia has affirmed the elevated standard test."

[203] I am therefore unable to agree with learned Queen Counsel that the learned judge misconstrued the Canadian authorities.

[204] **Swansson** is a case from New South Wales. The statute in that jurisdiction is substantially different from the Canadian and Jamaican statutes. The differences in the New South Wales statute are, among others, the requirement to prove that:

> (1) it is probable that the company will not bring the proceedings of its own volition;
>
> (2) there is a serious question to be tried; and
>
> (3) the action is in the BEST interest of the company.

These requirements are not in the Jamaican legislation.

[205] It is because of those significant differences that Sykes J expressed the view that the **Swansson** case should be treated with caution. He also expressed the view that the learned judge in **Swansson**, Palmer J, applied a restrictive approach, which Sykes J opined, may well have been justified on the words of the statute in that jurisdiction.

[206] The restrictive approach to which Sykes J referred is evident in the paragraphs of **Swansson**, on which Mr Braham relied, that is, paragraphs 20, and 24 and 32 to 43 (as outlined at paragraph [166] above) for these purposes.

[207] Having commented as he did, he further observed that:

(i) Palmer J refused to adopt a liberal interpretation of the words of the statute, although it was arguable that the statute was designed to be "remedial" and to make applications for leave to bring derivative actions easier (paragraph 35);

(ii) Palmer J's reasoning suggested that if an applicant has multiple motivations for his application, then he or she would be disqualified under the good faith requirement (paragraph 36);

(iii) Palmer J's reasoning suggested that if an applicant simply asserted that he was acting in good faith, that would be insufficient, even if there was no evidence to take away from that assertion (paragraph 37);

(iv) Palmer J observed that the reasonableness of the belief held by the applicant may be determinative of whether the applicant holds an honest belief in the action brought (paragraphs 37 and 38);

(v) Palmer J makes a distinction between a current shareholder "who has more than a token shareholding", versus a former shareholder or director, when no such distinction is made in the statute (paragraph 39);

(vi) Palmer J also restricted derivative actions to being brought only by persons who would suffer "a real and substantial

> injury if the action were not permitted" when such a distinction does not appear in the text of any of the statutes (paragraph 41).

[208] It was for those reasons the learned judge hesitated "to accept the recommendation of relying on this case". The learned judge's review of the **Swansson** case, and his observations are supported by Palmer J's statement.

Whether the learned judge's definition of good faith was correct

[209] Sykes J examined a number of cases on the matter of good faith and at paragraphs [70] – [73] and [76] – [80] he said, *inter alia*:

> "[70] … Good faith, in this court's view, is a purely subjective matter. The requirement of good faith requires the court to find out whether the particular applicant is in fact acting in good faith. The way that the objective part of the test in `Canada and Singapore is used suggest that once the proposed claim has good legal merit then it means that the person is acting in good faith. It is this court's position that what is referred to as the objective portion of the good faith test should no [sic] be referred to in that manner. Rather the evidence should be used as a tool of analysis in order to determine the existence of good faith. ...
>
> [71] This court takes the view that there is no objective component to the good faith requirement. Under the Jamaican statute leave is not granted unless the court is satisfied that 'the complainant is acting in good faith.' It does not say 'good faith exists if a reasonable man in the applicant's position would have thought that the case had good legal merit.' The language is totally subjective. The focus is on the applicant in the particular case not an abstract reasonable complainant. Thus any analytical process that says that a reasonable man in these circumstances would believe so and so then it must be that the complainant here thought the same thing as the reasonable man is incorrect. When one speaks of an objective component and includes it as an integral part of the good faith test then the test is no longer purely subjective as the statute strongly implies. The test becomes

partly subjective and partly objective but with this twist as pointed by Rajah JA, the objective part becomes so dominant that the danger is what has actually happened in Singapore, namely, 'that local jurisprudence has been sparse on the substantive relevance of the applicant's motives to the assessment of his good faith.' This development is undesirable and should not become part of Jamaican law.

[72] The error made is that which was made in the criminal law for many years until the cases of **R v Morgan** [1976] AC 182; **R v Williams (Gladstone)** (1983) 78 Cr App R 276 and **Solomon Beckford v R** [1988] AC 130. The criminal law up to the time of those cases despite speaking the language of seeking to find the intent of the criminal defendant who was actually before the court had actually developed a judicial technique that was in practical terms a severely deformed mutation [of] the subjective belief of the defendant. In all three cases the issue was whether a defendant should be acquitted of the crimes charged if he in fact had [an] honest belief in a state of facts, which if true would lead to an acquittal even if the belief was based on unreasonable grounds. All three cases said yes he could be acquitted. The argument raised against this position was that it would [be] so easy for a defendant to assert honest belief and there would be no way to test it. All three courts allayed those fears by saying that the honest belief can be examined against the external facts. The court held that the more unreasonable (objectively viewed) it was to hold that belief, the finders of fact may (not must) conclude that the belief was not honestly held, and conversely the more reasonable it was to have the belief (objectively viewed) the easier it is to find that the belief was in fact honestly held. The cases all cautioned that at the end of the day, the quest must be to find the subjective intention of the defendant and it was indeed possible that a defendant can in fact have an honest belief in a state of facts even though objectively viewed that belief was unreasonable in the extreme. The defendant may be plainly silly but silliness does not negate the existence of honest belief. He may be obtuse but that does not negate the existence of honest belief.

[73] It is the view of this court that the analytical process in those cases should be applied to the good faith requirement. This means that it is quite possible that objectively viewed the proposed derivative claim has no legal merit but that

cannot mean that the complainant could never ever have had or does not have an honest belief that his claim is arguable and that it should be brought. The complainant may be severely misguided but that does not bar his or her mind from coming to an honest conclusion that he or she has a good case.

…

[76] This court's conclusion, relying on the analytical technique from **Morgan**, **Wiliams** [sic] and **Beckford**, is that when one speaks of good faith in the Jamaican statute it is an exclusively subjective matter because good faith in the context of the statute really means honest belief. Good faith is the language used in civil law to describe the same state of **mind in that the criminal law calls** honest belief. For those who have visions of the proverbial flood gates or gates of hell opening and the demons are let loose, comfort can be taken from the fact that the criminal law in Jamaican [sic] since those cases have been decided has not seen a rise in acquittals because the defendant simply stands and says 'I honestly believed this or that.' The juries have applied large amounts of common sense to the assessment of that belief and no rumblings have been heard that they have gotten wrong [sic] to the extent that the law needs to be change. The same test has been applied by judges in bench trial without difficulty. On this basis there is no good reason to fear that it cannot be sensibly applied in these applications which are heard by judges only.

[77] It is this court's view that the closer the case is to being frivolous and vexatious the easier it is to infer an absence of good faith and the stronger the case, the easier it is to infer the presence of good faith. However, the fact that a case is frivolous and vexatious does not mean that the complainant does not have a genuine and honest belief in the case and that it should be brought. The complainant may be sincere and honest in his or her belief but misguided. A complainant can also have an honest belief in the case and the case may have good and sound legal merit but the complainant may have brought the claim in order to extract some concession from the company. It is entirely possible that the complainant has no intention of seeing the case through to completion.

> [78] What if the complainant is sincere but the case has little or no legal merit? It is this court's view that the good faith test would still be met but the court could say that it is not in the interest of the company to bring the claim because it has no legal merit.
>
> [79] This may well mean that the good faith test is easily satisfied and thereby confirms Mr Bruce Welling's view that the good faith requirement is virtually meaningless (see para 24 of Rajah JA's judgment). Implicit in Mr Bruce Welling's conclusion is the hint that it should be done away with.
>
> [80] But what if the good faith requirement is met but the court finds that the claim is frivolous and vexatious or lacking in merit? That can easily be accommodated under the third requirement of 'interests of the company.' It can never be in the interest of the company for the court to permit a claim that is frivolous, vexatious or lacking in legal merit." (Underlining supplied)

Discussion and law

[210] I agree with Sykes J's view that "it is the evidence which ought to determine the existence of good faith". I however disagree with his view that the evidence required to establish good faith is "purely subjective".

[211] Good faith, in my view, must be considered in context. His reliance on the view enunciated by Lord Griffiths in **Solomon Beckford v R** [1988] AC 130, a criminal case is, in my view, misplaced. The law applicable to the state of mind of persons charged criminally is different from the standard of proof applied in civil matters.

[212] "Appearing" to be in the interest of the company cannot be "purely" the "subjective view of Mrs Fulton". Her motives must accord with the "reasonable expectation of the shareholders and directors". What is deemed reasonable must accord with what "appears" to be in the interests of the company to the "informed and reasonable person".

Whether the learned judge failed to consider that Mrs Fulton's motivation for the application is merely to advance her personal interest, which does not appear to be in in the company's interest and which demonstrates that she does not honestly intend to serve the company's interest

[213] Lord Gifford contended that the learned judge was correct in his observation that the fact that an applicant for leave has a personal interest in the outcome of the derivative action was not a basis for a finding that he was not acting in good faith. Reliance was placed on the **Leon Forte** case in support of that argument.

[214] It was learned Queen's Counsel's submission that the learned judge was correct in his finding that Mrs Fulton's personal interest is not at odds with the company's interest of ensuring that its property is properly managed and used. He submitted that this is a straightforward situation in which the directors of the appellant are using two expensive corporate properties for personal use rather than using them to earn value for the company with the ultimate effect of gaining shareholder value. He argued that shareholders in any company will necessarily be keen to ensure that their shareholder's value is maintained and that directors do not misappropriate or misuse the company's benefits.

[215] Learned Queen's Counsel directed the court's attention to the learned judge's statement that:

> "the authorities indicate all that Sally has to do is raise an arguable case. She does not have to prove, at the leave stage, that the claim is in fact in the interest of the company. She only needs to prove that it appears to be in the interest of the company".

[216] Lord Gifford also directed attention to the learned judge's following rhetorical statement,

> "How is it not in the interest of the company for the directors to account for their decisions relating to the use of the company property?"

[217] He submitted that in applying that test to Mrs Fulton's case, the learned judge's approach is correct as it obviously appears to be in the interests of the appellant for its directors to account for their decisions relating to two expensive corporate properties.

Discussion and law

[218] In the decision of **Ang Thiam Swee v Low Hian Chor**, a decision of the Court of Appeal of Singapore to which Sykes J referred and relied, Rajah JA, having reviewed the relevant Singaporean statute which is modelled on the relevant Canadian statute, and which is also *pari materia* with the Australian Corporations Act 2001, on behalf of the court said at paragraph 12:

> "In *Pang Yong Hock and another v PKS Contracts Services Pte Ltd* [2004] 3 SLR(R) 1 ('*Pang Yong Hock*'), this court began the process by directing at [20] that:
>
> > 'The best way of demonstrating good faith is to show a **legitimate claim** which the directors are **unreasonably reluctant to pursue** with the appropriate vigour or at all. Naturally, the parties opposing a s 216A application will seek to show that the application is motivated by an ulterior purpose, such as dislike, ill-feeling or other personal reasons, rather than by the applicant's concern for the company. **Hostility** between the factions involved is bound to be present in most of such applications. It is therefore generally insufficient evidence of lack of good faith on the part of the applicant. However, if the opposing parties are able to show that the applicant is so motivated by vendetta, perceived or real, that his judgment will be clouded by purely personal considerations that may be sufficient for the court to find a lack of good faith on his part. **An applicant's good faith would also be in doubt if he appears set on damaging or destroying the company out of sheer spite** or worse, for the benefit of a competitor. It will also raise the question whether the intended action is going to be in the interests of the company at all. To this extent, there is an interplay of the requirements in s 216A (3) (b) and (c).

He continued at paragraph 13:

> "It is clear from the above passage that the court ought to assess the motivations of the applicant in order to determine whether he is acting in good faith. **It ought to be emphasised, however, that the motivations of an applicant will only amount to a lack of good faith in so far as they go to show that 'his judgment [has been] clouded by purely personal considerations'** (see *Pang Yong Hock* at [20]). This creates a crucial link between the requirement of good faith in s 216A(3)(b) and the requirement in s 216A(3)(c), in that an applicant whose judgment is clouded by purely personal considerations may not honestly intend to serve the company's interests, and also may not be the proper party to represent the company's interests. As such, it is not the questionable motivations of the applicant per se which amount to bad faith; instead, bad faith may be established where these questionable motivations constitute a personal purpose which indicates that the company's interests will not be served, i.e., that s 216A (3) (c) will not be satisfied…." (Emphasis and underlining supplied)

[219] Relying on Rajah JA 's statement, Sykes J said:

> "[62] The careful wording of Rajah JA is to be observed. His Lordship stated the best way (not the only way) of showing good faith is show that there is a legitimate claim that the directors refuse to pursue and that such a decision is unreasonable. Of course, the caveat there is that if the directors are themselves the wrongdoers then good faith will be easier to establish if there is indeed a legitimate claim against them. That is to say one that is not frivolous or vexatious. His Lordship noted the obvious that hostility between the parties is expected. Thus evidence of hostility is not sufficient to deflect a conclusion of good faith. Rajah JA recognised that a person can in fact have a legitimate claim but his objective is destruction of the company or his personal vendetta is so great that there is little doubt that he has any interest in the company's welfare. Having regard to the fact that the jurisprudence is clear that the presence of personal interest, animosity and the like does not mean an absence of good faith, it must be that for Rajah JA for the conclusion to be arrived at that the complainant's judgment

> is clouded to the extent that he or she lacks good faith the evidence must be of **great cogency**. Mere presence of ill will, spite, animosity will not do. It must not only be present but so dominating the complainant that there is little room for any conclusion other than spite that either excludes or diminishes any existent good faith to vanishing point."

[220] See also paragraphs [70] and [76] through [80] of Sykes J's judgment set out at paragraph [209] above.

[221] It is settled law that personal interest as a motive *per se* is not a disqualifier or bar to permission being granted to a complainant to institute proceedings for a derivative claim on behalf of a company. The issue is whether such interest outweighs the interest of the company in manner that is inimical to the interests of the company.

[222] It is the appellant's case that Mrs Fulton's real motivation for the application is the dismissal of her son from the company for dishonesty and also her personal interest which are not in the company's interests. Scrutiny of the evidence is necessary.

Her son's dismissal from the company

[223] Mrs Fulton's son was in fact separated from the company arising from allegations of dishonesty. Assuming Mrs Fulton is pursuing a vendetta, or is motivated by spite or ill-will arising from this incident, that is not, without more, a reason to conclude that she is acting in bad faith. In **Valgardson v Valgardson** 349 DLR (4th) 591 Berger, Martin and Rowbotham opined as follows:

> "41 To take another example: a derivative action sought to be instituted by a current shareholder for the purpose of restoring value to his or her shares in the company would not be an abuse of process even if the applicant is spurred on by intense personal animosity, even malice, against the defendant: it is not the law that only a plaintiff who feels goodwill towards a defendant is entitled to sue: see e.g. Dowling v Colonial Mutual Life Assurance Society (1915) 20 CLR 509, at 521-522; IOC Australia Pty Ltd v Mobil Oil Australia Ltd (1975) 11 ALR 417, at 426-427. On the other hand, an action sought to be instituted by a former shareholder with a history of grievances against the current

> majority of shareholders or the current board may be easier to characterise as brought for the purpose of satisfying nothing more than the applicant's private vendetta. An applicant with such a purpose would not be acting in good faith." (Emphasis added)

[224] The learned judges, further explaining the factors to be considered for the grant of leave to bring a derivative claim, said:

> "42 If a wrong appears to have been done to a company and those in control refuse to take proceedings to redress it, the Court should permit a derivative action to be instituted only by those within the categories allowed by s.236(1) who would suffer a real and substantive injury if the action were not permitted. The injury must be necessarily dependent upon or connected with the applicant's status as a current or former shareholder or director and the remedy afforded by the derivative action must be reasonably capable of redressing the injury.
>
> 43 Further, if an applicant for leave under s.237 seeks by the derivative action to receive a benefit which, in good conscience, he or she should not receive, then the application will not be made in good faith even though the company itself stands to benefit if the derivative action is successful. Such a benefit would include, for example, a double recovery by the applicant for a wrong suffered or recompense for a wrongful act inflicted upon the company in which the applicant was a direct and knowing participant with the proposed defendant in the derivative action. In such a case the law would not permit the applicant to derive a benefit from his or her own wrongdoing."

[225] Assuming Mrs Fulton is aggrieved by the dismissal of her son, that factor without more would be insufficient to disqualify her. Although Mrs Fulton asserts that the claim is being brought in the company's interest, scrutiny of the evidence is important to determine whether in fact the benefit to be derived from the sale of Coconuts and Sharrow Drive "appears to be in the interest of the company"; or whether any detriment to the company will outweigh any benefit that it would receive.

[226] Importantly also, is whether Mrs Fulton's motive to benefit herself, not only supersedes the interest of the company, but "appears" not to be in the company's interest. It is important, before embarking on any analysis to be cognizant that findings of facts are entirely within the purview of the trial judge. An appellate court is therefore cautious about interfering with a trial judge's findings of fact. The fact that this court would have exercised its discretion differently is not a reason to interfere. Lord Diplock in **Hadmor Productions Ltd and others v Hamilton and another** [1982] 1 All ER 1042, 1046, enunciated the following circumstances which justify interference by an appellant court. An appellate court ought only to interfere if it is demonstrated that the exercise of the judge's discretion

> "... was based on a misunderstanding of the law or of the evidence before him or on an inference that particular facts existed or did not exist, which, although it was one that might legitimately have been drawn on the evidence that was before the judge, can be demonstrated to be wrong by further evidence that has become available by the time of the appeal, or on the ground that there has been a change of circumstances after the judge made his order that would have justified his acceding to an application to vary it…."

Lord Diplock stated further:

> "…Since reasons given by judges for granting or refusing interlocutory injunctions may sometimes be sketchy, there may also be occasional cases where even though no erroneous assumption of law or fact can be identified the judge's decision to grant or refuse the injunction is so aberrant that it must be set aside on the ground that no reasonable judge regardful of his duty to act judicially could have reached it. It is only if and after the appellate court has reached the conclusion that the judge's exercise of his discretion must be set aside for one or other of these reasons that it becomes entitled to exercise an original discretion of its own."

<u>Does it appear to be in the company's interest to sell Sharrow Drive and Coconuts?</u>

[227] Mrs Fulton has moved the court to have Coconuts and Sharrow Drive sold and the proceeds of the sale divided among the shareholders. It was the applicant's

evidence that prior to the company's acquisition of Sharrow Drive, accommodation was rented by the company for that purpose. Sharrow Drive was specifically purchased as accommodation for the managing director as part of his remuneration. As explained by Mr Ramson, and not controverted, the arrangement, that is, the provision of accommodation for the managing director existed prior to the company purchasing the Sharrow Drive property. At paragraph 6 of his third affidavit Mr Ramson averred as follows:

> "The decision to provide the Managing Director with a residence is based in part on the need to retain and attract talent, to preserve the image and status of the Company in relation to its Managing Director and also to provide a part of the salary in kind rather than cash. … Prior to purchasing Sharrow Drive, the Managing Director's residence was rented. One of those premises at which I resided was 12 Norbrook Way, Kingston 8….The decision to purchase was also influenced by the need for stability in relation to the position and residence of the Managing Director. Immediately prior to the purchase of Sharrow Drive, the Defendant rented 12 Norbrook Way as my residence. It got a notice to quit 12 Norbrook Way and while looking for alternative accommodation Sharrow Drive became available and presented an opportunity for stability as aforesaid."

[228] Mr Ramson's explanation is that the north coast is 35% of the company's sales and Coconuts sits in the middle of a vital part of the corridor between both offices. Coconuts is used to entertain and network with customers and suppliers and on numerous occasions business deals are done in this context.

[229] Mr Ramson's evidence is that Coconuts is an important asset to the company, not only because it is centrally located in relation to the company's business interests, it saves the company the cost of hotel expense for its employees/directors, and also that of overseas business associates. Senior managers, he explained, spend two to three days per month working on the North Coast and are accommodated at Coconuts instead of renting accommodation.

Mrs Fulton's evidence

[230] In support of Mrs Fulton's assertion that Coconuts is utilised solely as Mr Ramson's playground and serves no commercial purpose, Mrs Fulton's daughter Anne Fulton and her son Ian Fulton sought to corroborate her evidence that that the property serves no useful commercial purpose. Her daughter's evidence is stated, *inter alia*, as follows:

> "6. I have personal knowledge of the occupation and use of Coconuts for several reasons. I manage a neighboring Villa on the 'Discovery Bay Strip' (called 'Sea Haven') for its owner, so am frequently in Discovery Bay. Sea Haven is located immediately beside the villa neighboring Coconuts and the layout is such that it is generally easy to identify when Coconuts is occupied and who are its occupants.
>
> 7. I visit Discovery Bay to attend to matters at Sea Haven by visiting the property on average twice per month. … The owner allows me to vacation at Sea Haven when it is not rented, which tends to be outside of the high season, and which can range anywhere from 2 to 6 vacations per year, usually for between 3 days and a week at a time. I also sometimes overnight at Sea Haven if it is not rented, when I have need to be on the north coast.
>
> 8. I also tend to know the movements of the Ramson family (i.e. the family of [John Ramson] and [Elizabeth Silvera]) fairly well as it related to their trips down to Coconuts, as they are blood relatives and everyone in our social circles tend to know the movement of others. One of my work colleagues, with whom I am friendly, also owns a villa on the Dbay Strip, and from general chats with her I will usually learn if [John Ramson] and [Elizabeth Silvera] are in Discovery Bay when she is vacationing at her villa, if I was not otherwise aware.
>
> 9. It is useful to understand the layout of the DBay Strip, to appreciate how easy it is for occupants of all villas (whether owner or guests) to be aware of who is staying at the other villas on the strip. Coconuts is one of about 14 or 15 villas on a strip of landing facing Kaiser Port. The villas adjoining each other, some with only plants as separating boundaries, and all front on to the Discovery Bay Harbour. Swimming

only a few meters out from any villa will give a clear view into the neighboring villas, and a slightly further swim (very easy as the sea is calm) will give a view of pretty much all of the villas on the strip.

10. Leaving aside viewing access via swimming in the sea, most of the villa owners actively participate in watersports activities (e.g. boating, skiing, hydro sliding etc.), which involve travelling parallel to the beachfront of all villas along the D Bay Strip. It is therefore easy to assess from the watersports activity in the harbour which families are staying at 'their' villas. In the case of Coconuts, when staying there, [John Ramson's] children and grandchildren are frequently out in the harbour. … [Exhibits picture of the harbour]

11. Once I am at Sea Haven, I am therefore able to easily ascertain whether Coconuts is occupied and who are the occupants.

12. I would estimate that [John Ramson] and/ [Elizabeth Silvera] (or their immediate families and friends, who I shall hereinafter refer generally to as 'the Ramsons') are staying at Coconuts over 90 percent of the time that I visit Sea Haven during standard seasonal holidays, public holiday weekends and/or recognized school vacations (i.e. half term holidays). It is very rare that I visit Sea Haven, other than the odd midweek visit, that the Ramsons are not staying at Coconuts.

13. Whenever Coconuts is not occupied by [John Ramson] and/ [Elizabeth Silvera] (or their family or friends), it remains unoccupied. I have never seen tourists staying at Coconuts nor have I ever seen Coconuts used for any purpose resembling any form of business or staff function. I consider it unlikely if not impossible for any form of social or business function to take place at Coconuts without my being aware, while I am visiting Sea Haven."

[231] Further, it was her son's evidence that:

"I work approximately 15 minutes by car from Discovery Bay. My job involves a lot of travelling, and I pass through Discovery Bay most days of the working week. I also visit the villa of friends on the Discovery Bay Strip**. I was at Coral Cove on March 27th, which is a villa owned by the** Croskery family.

> 4. In or around the middle of last year, my sister Anne asked me to assist in the increased surveillance of Coconuts.... On many occasions during the "increased surveillance period" ..., Anne asked me to check if anyone was staying at Coconuts when I was passing by Discovery Bay. I did this by driving down to the entrance of Coconuts and looking to see if any cars were there (or if there was any other sign of activity). **On each occasion I advised Anne if I thought anyone was staying at Coconuts. The villa was rarely occupied on these visits.**" (Emphasis added)

[232] Mr Eric Abrahams, a friend of Anne Fulton and a resident of Florida, also sought to corroborate Mrs Fulton's evidence regarding the use of Coconuts. His evidence is that he spends considerable time in Jamaica. He owned property on Millionaire's Row up to 2008. His evidence is that from the late 1990's to "maybe 2005", he spent considerable time visiting the Discovery Bay trip. Many public or "recognized" holidays, he deposed, were spent in one of the family villas on the Strip. He also visited the Strip on many weekends if he had no other plans. After he migrated to Miami, his visits to the Strip were less frequent. He, however continued to visit the Strip a few times per year.

[233] He was surprised to learn that Coconuts was not beneficially owned by Mr Ramson because from his observation over the years, "Coconuts had always seem [sic] to be operated as the personal property of John Ramson". He supports Mrs Fulton's evidence that "it is easy to ascertain which villas on the Discovery Bay Strip are occupied, and who are the occupants". It is his evidence that he has never seen Coconuts used for any other purpose other than recreational. Based on his observation while he resided permanently in Jamaica, he "does not think it could reasonably be suggested that Coconuts was used principally for business purposes".

The learned judge's findings

[234] Sykes J expressed the following view of the appellant's evidence regarding the business use and value to the company of Coconuts. The learned judge said:

> "[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 per se 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." (Emphasis added)

Discussion

[235] The maxim is, "he who asserts must prove", and Mr Ramson has indeed not provided any documentation in support of the use of Coconuts as accommodation for senior managers and overseas business partners. Although such would have been desirable, Mr Ramson's evidence that the company has branches located on the north coast, has not been controverted. It is his evidence that the company provides Coconuts as accommodation for its senior managers whilst working on the north coast who would otherwise have had to incur the cost of hotel or other accommodation. It is also used as accommodation for overseas business associates and prospective associates thereby saving the company the expense it would have incurred.

[236] There is no evidence that accommodation fees are charged for either the visiting prospective associates or the employees, nor is it improbable that such employees and prospective associates would be accommodated without formal record being kept. Although records evidencing such occupation were desirable, the absence of such ought not to have been determinative at this stage. Mr Ramson's evidence ought not to be rejected on the bases of the absence of records of the usage by those persons.

[237] It is not his evidence that the property is always occupied. His evidence is that it is utilised for business two to three days per month. It is therefore not improbable that the time Mrs Fulton's scouts had the property under surveillance, were the periods it was in fact unoccupied or the occupants might have left to attend to the company's business.

[238] The evidence is that the property is used for pleasure and to accommodate employees visiting the area on the company's business as aforesaid. It is therefore not improbable or unreasonable that on the occasions her son drove past the property on 4, 5, 6, 7 and 8 April 2016 and saw no cars or activity at the villa, or the times her daughter and Mr Abrahams observed the property, were the times the occupants were elsewhere on the company's business or it was in fact unoccupied.

[239] The evidence is not that the meetings or business are conducted on the property. Mrs Fulton's son's, her daughter's and Mr Abrahams' evidence regarding the occupation of the property is insufficient to support a conclusion at this juncture that the property is not utilised as stated by Mr Ramson. So too is the evidence provided by her daughter and Mr Abrahams. The evidence provided by Mrs Fulton in support of her contention that Coconuts is utilized solely as Mr Ramson's playground, is in my view insufficient.

[240] Moreover, and of importance, is the unchallenged evidence that Mrs Fulton is also not *au fait* with the operation of the business. Indeed, it is her evidence that she has only visited Coconuts on a few occasions which is understandable because she is engaged in another business.

[241] Although findings of fact are usually within the purview of the judge at first instance, given Mrs Fulton's declared lack of knowledge regarding the operation of the business, Mr Ramson's evidence should not have been rejected and Mrs Fulton's accepted, at this juncture. The evidence is that besides the property accommodating employees working in the area, it is also utilized for pleasure.

[242] The fact that a secondary use of the property is for pleasure and family gatherings does not diminish its business importance to the company.

[243] Its sale and distribution of proceeds would benefit Mrs Fulton and not the company. It is evident that the dominant purpose for the request for the sale of both properties is to benefit Mrs Fulton. She therefore has not fulfilled the requirement that the sale of properties "appear" to be in the interest of the company. To assert that Coconuts is solely used as Mr Ramson's playground is not supported by the evidence.

[244] To dispose of Coconuts and apportion the proceeds among the shareholders, would inure not to the company's benefit but to Mrs Fulton, as the company would not only be deprived of a valuable asset base, but also saddled with the expense of providing alternative accommodation for its staff while working in that area. The fact that the property is not utilised for business 12 months per year, seven days per week does not derogate from its value to the company.

[245] Mrs Fulton has not demonstrated on the preponderance of the evidence, that the sale of Sharrow Drive appears be in the interest of the company. Rather it is Mrs Fulton who stands to benefit from the receipt of her share of the proceeds of sale. It certainly is neither unusual or unreasonable for accommodation to be provided for senior employees at the expense of their employers as part of their emoluments. Indeed, with many companies, it is the norm. Of course, consideration must be given to the interest of the company which is paramount. Moreover, if the property is sold, the company would, in any event, have to incur the cost of renting accommodation for its managing director which certainly would not be economically prudent.

[246] Although it is Mr Ramson's evidence that the company has grown since its incorporation, what is apparent, is that its operation still lacks the formality expected and required of company.

The appointment of an expert

[247] Ground 18 challenges the learned judge's refusal to appoint an expert. Lord Gifford, however, argued that this ground of appeal was submitted out of time. He directed the court's attention to Sykes J's refusal to appoint an expert which decision was made on 30 March 2016 and the appellant's failure to apply to the Court of Appeal for leave to appeal within 14 days, required by the rules. The application for leave to file a derivative action was heard by Sykes J on 10 and 11 May 2016 and decision was given on 31 January 2017. The appellant's application for leave to appeal his refusal to grant their application was not made until after the learned judge had ruled on the application for leave to file the derivative action.

[248] Lord Gifford contends that this ground ought to be struck out and the application should be refused for the following reasons:

> 1. the original application for an expert was totally misconceived; and
>
> 2. the appellant should have sought leave to appeal before the hearing of the substantive application."

[249] Lord Gifford argued that the purpose of the application to appoint an expert was to rely on Mr Richard Downer's view that on the appellant's version of the history, the directors had acted with prudence. Mrs Fulton had, however, put forward a wholly different history. It was his submission that it would be a futile exercise for the judge, on an application for leave under section 212, to hear evidence, for example/such as, whether Coconuts had been used for 75% of the time for business purposes it would be within the range of prudent business decisions.

[250] Learned Queen's Counsel postulated that at most, such evidence, might be relevant at the trial of the derivative claim. According to Queen's Counsel, it was quite inappropriate, on an application for leave, as one of the criteria for granting leave was whether the judge was "satisfied that it appears to be in the interest of the company" to initiate the derivative action. He submitted there is no arguable case for reversing the decision of Sykes J.

[251] Learned Queen's Counsel also contended that the delay of 10 months is not only excessive in itself, but in the context of this case, it is inordinate. He also argued that the appellant ought to have sought leave to appeal before the hearing of Mrs Fulton's application for leave to proceed with the derivative action. To have waited until after the grant of leave in the Supreme Court, is grossly prejudicial. He contended further that if the application for leave being sought by the appellant is granted, the entire case will have to be remitted to the Supreme Court for rehearing of the matter with the inclusion of Mr Downer's evidence which will result in much time and costs being wasted. If, however, the application for leave to appeal the decision had been made within the prescribed time or at least before 10 May 2016, different solutions would have been available.

[252] According to Lord Gifford, the reason the appellant proffered for the delay, that is, the company only became aware of the learned judge's reliance on the absence of documentary evidence on 27 May 2016, when his decision was delivered, is untenable. The issue of the absence of documentary records was a known and clear plank of Mrs Fulton's case. The appellant therefore cannot claim to have been taken by surprise by the learned judge's observations regarding the lack of documentary evidence, he contended.

Discussion

[253] Regarding the failure to appoint an expert, the learned judge's exercise of his discretion cannot be faulted. Lord Gifford's submissions in respect of the matter are accepted. That ground therefore fails.

The failure to appoint independent counsel

The appellant's submissions

[254] Mr Braham posited that, in the event the appeal is unsuccessful, independent counsel should be appointed to have conduct of the litigation, to represent the company. Learned Queen's Counsel accepted the fact that there is no application to disqualify Levy Cheeks from appearing for Mrs Fulton in the matter.

[255] Counsel, Miss Morris, submitted that Mrs Fulton relies on section 213(1)(a) of the Act. There is no presumption in favour of Mrs Fulton by virtue of the Act which confers upon the court wide discretion to order the appointment of the applicant, the registrar, or any other person to control the conduct of the action.

[256] Counsel posited that the independent counsel fits in the latter category, that is, 'any other person'. In light of the breadth of the discretion conferred by the Act, the court is not prevented from selecting the registrar or any person other than/beside the applicant or "independent counsel."

[257] It was also Miss Morris' submission that the cases relied upon by counsel for the applicant, do not support her objection to the appointment of independent counsel. The cases provide guidance to the court regarding the manner in which its discretion is to be exercised. It was also her submission that the cases show that good faith and best interest of the company are live considerations in determining who should have conduct of the litigation.

[258] Queen's Counsel Mr Braham submitted that Mrs Fulton's good faith is at best borderline and ought to be a factor to be considered in deciding to appoint someone other than her to conduct the litigation. It was also Queen's Counsel's submission that Mrs Fulton might not be best placed to conduct or have control of the litigation, in light of:

a. the reason for the litigation which is to ensure that the matter is prosecuted with due diligence and in a

manner that does not harm the company's interests; and

b. the legitimate concerns regarding her good faith.

[259] Queen's Counsel sought to distinguish the cases relied upon by Mrs Fulton and submitted that there is sufficient evidence of her bad faith to ground the exercise of the court's discretion in favour of the registrar or some other person such as independent counsel agreed by the parties.

The respondent's submissions

[260] In opposing the application, Lord Gifford submitted that no request for an order that independent counsel be appointed was raised before Sykes J, nor was there any such indication in either the notice and grounds of appeal or in the appellant's written submissions and speaking notes. Learned Queen's Counsel also pointed to the absence of reasons for the order sought and argued that the application is misconceived. He submitted that the otherwise invariable practice ought to be followed, whereby the applicant who has obtained leave, has conduct of the derivative action subject to any directions of the court under section 213(1)(b).

[261] The relevant words of section 212(1), he submitted, are that "a complainant may, for the purpose of prosecuting…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…". The effect of a grant of leave is that the applicant may bring the proposed action on behalf of the company. The person authorised to bring the claim for a derivative action is thereby conferred with the power to control the conduct of the action.

[262] Lord Gifford submitted that the Act included two kinds of protection which are intended to safeguard the interests of the company if the person who controls the conduct of the action is unable to do so or is failing to do so with diligence or reasonable care.

[263] The first protection is provided by section 213(1)(a) which, Lord Gifford submitted, empowers the court to appoint the registrar or "any other person" to control the conduct of the action. There must, however, be good reason why an applicant who obtained leave, should not control the conduct of the action. He cited the following examples as good reasons:

1. the death of the applicant to whom leave was granted;

2. incapability/inability to give instructions; or

3. conflict of interest or conduct of the action in a manner which was not in the interest of the company.

[264] Learned Queen's Counsel likened the conduct of the proceedings to that of proceedings by a next friend on behalf of a minor or patient. He referred the court to the second protection provided by section 213(1)(b) and the directions which the court may give for the conduct of the action.

[265] It was his submission that the facts of the case of **Leon Forte v Twin Acres Development Ltd** are distinguishable from the instant case, as there is no conflict or complication and no separate suit to be considered.

[266] Lord Gifford also submitted that if Sykes J's order granting leave to the applicant is upheld, any further order or direction should properly be determined by the Supreme Court where the claim was filed. Lord Gifford cited the following scenario as an example, that is, if subsequent to the filing of the claim and the defence, the matter is referred to mediation and it is alleged that a ground or grounds exist/s which could justify some other person having conduct of the litigation, that application should be made at case management at which hearing, the evidence and submissions are considered by the learned judge. If there is disagreement with the Supreme Court's order, the aggrieved party, at that juncture, has the right to appeal to the Court of Appeal.

[267] Lord Gifford further postulated that if the Court of Appeal were to take the "drastic step" of directing that someone, other than the applicant control the conduct of the case, Mrs Fulton's only remedy would be to apply for leave to appeal to the Privy Council. The appropriate course, he contended, is for the matter to be raised before the Supreme Court in the course of the derivative action.

Discussion

[268] As already observed/stated, Mrs Fulton's desire to bring a derivative claim does not appear to be in the interest of the company but rather in her interest. She has therefore not satisfied the requirement that she is acting in good faith. Indeed, it is pellucid that her motive is her self-interest which, as indicated, does not appear to be in the company's interest.

[269] In light of the foregoing, it is my view that the appeal ought to be allowed, the judgment of Sykes J set aside, and Mrs Fulton's application for leave to file a derivative action be refused. Costs should be awarded to the appellant.

F WILLIAMS JA

[270] I have the opportunity to read the draft judgments of both Brooks JA and Sinclair-Haynes JA. I am in agreement with the reasons and conclusions of Brooks JA.

BROOKS JA

ORDER

By majority (Sinclair-Haynes JA dissenting):

(1) The appeal from the decision of Sykes J, made herein on 27 May 2016 is dismissed and the judgment is affirmed.

(2) The application for the appointment of independent counsel is refused.

(3) Costs of the:

a. appeal;

b. application for leave to appeal; and

c. application for the appointment of independent counsel,

to the respondent to be agreed or taxed.