[2022] JMCA Civ 21

JAMAICA

IN THE COURT OF APPEAL

BEFORE: THE HON MRS JUSTICE MCDONALD-BISHOP JA
THE HON MISS JUSTICE EDWARDS JA
THE HON MRS JUSTICE DUNBAR-GREEN JA (AG)

SUPREME COURT CIVIL APPEAL NO COA2019CV00077

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

Michael Hylton QC and Bruce Levy instructed by Randolph Cheeks of Levy/Cheeks for the appellant

Ransford Braham QC, Mrs M Georgia Gibson Henlin QC and Ms Nicola Richards instructed by BrahamLegal for the respondent

1 October 2020 and 10 June 2022

MCDONALD-BISHOP JA

[1] This is one in a series of legal proceedings brought by Mrs Sally Ann Fulton ('the appellant') concerning the respondent, Chas E Ramson Limited ('the company'), a family-owned and operated company in Jamaica. The appellant is a member of the Ramson family and one of nine shareholders of the company. There are five directors; the appellant is not one of them. Her brother, Mr John Ramson, is a director and the company's chairman. His wife is Mrs Mary Ramson. Mrs Ramson is not a shareholder or director of the company.

[2] The history of the company and the conflict between the appellant and the directors relative to the operations of the company is usefully recorded in the judgment of this court in earlier proceedings cited as **Chas E Ramson Limited v Sally Ann**

Fulton [2021] JMCA Civ 54 ('**Chas E Ramson v Sally Ann Fulton**') at paras. [5] to [10]. For present purposes, it is not necessary to fully rehearse the factual background leading to this appeal. It suffices to provide a synopsis of the history of the litigation between the parties as the necessary backdrop to the appeal.

Proceedings in the Supreme Court

a. The appellant's claims

[3] The following outlines the series of actions commenced by the appellant in the Supreme Court with respect to the company:

(i) Claim no 2015CD00107 ('the first leave application')

By this claim filed on 11 August 2015 in the Commercial Division of the Supreme Court with the company named as respondent, the appellant sought leave to bring a derivative action in the name of and on behalf of the company against its directors for breach of their fiduciary duties as directors. The appellant asserted that the directors were using two of the company's assets for their benefit and that this has caused the company to incur significant losses. On 27 May 2016, Sykes J (as he then was) granted the appellant leave to file the derivative claim. The company appealed the decision of Sykes J, but the appeal was dismissed and the judgment of Sykes J affirmed in **Chas E Ramson v Sally Ann Fulton**. This is referred to as 'the first leave application'.

(ii) Claim no 2018CD00342 ('the oppression action')

This claim was filed by the appellant on 7 June 2018 in the Commercial Division of the Supreme Court against the company and its directors. The appellant contended that the directors had carried on or conducted the business affairs of the company and/or exercised their powers as directors of the company in a manner that was oppressive or unfairly prejudicial to her. This claim is referred to as 'the oppression action'.

(iii) Claim no 2018HCV03849 ('the discontinued leave application')

On 3 October 2018, the appellant commenced this claim in the Civil Division of the Supreme Court against the company seeking leave to bring a derivative action in the name of and on behalf of the company against Mrs Mary Ramson. The appellant later discontinued this claim.

(iv) Claim no 2018CD00567 ('the second leave application')

For present purposes, this claim is referred to as the 'second leave application' and is the subject matter of this appeal. It was commenced by the appellant against the company on 3 October 2018 in the Commercial Division of the Supreme Court seeking leave to bring a derivative action in the name of and on behalf of the company against Mrs Mary Ramson. The claim was in the same terms as the discontinued leave application. The appellant asserted that the directors of the company made unlawful salary payments and/or grants of benefits in kind to Mrs Mary Ramson for many years under a sham employment arrangement as Mrs Ramson did not perform any service for the company.

b. <u>The company's application to strike out the second leave application</u>

[4] On 16 November 2018, the company applied to strike out the second leave application or, in the alternative, for a stay of the application pending the outcome of the appeal in the first leave application (**Chas E Ramson v Sally Ann Fulton**). The application was supported by the affidavit of Kathryn Silvera sworn to on 16 November 2018. The company filed an amended application on 24 January 2019, and a further amended application on 9 May 2019, to amend the orders sought to include the court's permission for the company to file its affidavit in response if the order striking out or staying the second leave application was not granted.

[5] The bases for the company's striking out application were that (i) the second leave application amounted to an abuse of process; and (ii) the statement of case disclosed no reasonable grounds for bringing the claim. The company contended that the appellant failed to file evidence in support of the second leave application as her claim was based on inadmissible hearsay statements. It further contended that the allegation of unlawful payments to Mrs Mary Ramson was already being litigated in the oppression action and the multiple proceedings concerning the same subject matter were an abuse of process.

c. The learned judge's decision

[6] The striking out application was heard by Batts J ('the learned judge'), who on 15 July 2019 arrived at his decision in favour of the company. In his written reasons for judgment, cited as **Sally Ann Fulton v Chas E. Ramson Limited** [2019] JMSC Comm 32 ('the judgment'), he made these orders:

> "1) Claim number 2018 CD00567 is struck out.
>
> 2) Costs to the Defendant to be taxed if not agreed.
>
> 3) Certificate for two counsel granted.
>
> 4) Leave to appeal granted.
>
> 5) Formal order to be prepared filed and served by the Defendant's attorneys at law [sic]."

[7] The core reasons for the learned judge's decision to strike out the second leave application were in keeping with the contention of the company. In summary, he held that:

(a) The subject matter of the second leave application (the alleged unlawful payments to Mrs Mary Ramson) is included and can sufficiently be addressed in the oppression action. The appellant will not be prejudiced. She may receive the relief sought in the derivation action as she could in the oppression action. On the other hand, the company would be in an unfavourable financial position if it had to defend the separate claims with

similar facts and allegations before another judge of the court. The company should not be put to that expense. Furthermore, the same issues of fact before different courts "runs the embarrassing risk of different findings". It is not in the interest of the company to be having multiple actions involving the same facts and allegations (paras. [22] and [23] of the judgment).

(b) Due to lack of evidence, the appellant has failed to show any reasonable ground for the grant of leave to bring a derivative action. Her use of hearsay evidence to support her claim, as well as the absence of evidence in proof of her assertions, precludes an order granting leave to bring a derivative action (paras. [25] and [26] of the judgment).

The appeal

[8] The appellant is seeking an order from this court to set aside orders 1), 2) and 3) of the learned judge on the following grounds:

> "(i) The Learned Judge erred in fact and law in ordering that the Appellant's application for leave to bring a derivative action on behalf of the [company] against Mary Ramson under section 212 of the Companies Act (the 'Leave Application') should be struck out as an abuse of process.
>
> (ii) the learned Judge erred in fact and law in finding that there was not enough evidence for the appellant to proceed with the application for leave to bring the Derivative action in the Supreme Court.
>
> (iii) The learned Judge erred in fact and law in refusing to exercise his discretion to stay the Application for leave to bring the derivative action pending the outcome of the 'Oppression Action' (Claim No. 2018 CD 00342 which is a claim pursuant to section 213A of the Companies Act in which it is alleged that the affairs of the [company] are being conducted in a manner which is unfairly prejudicial and/or oppressive to the

Appellant's interests as a shareholder), instead of striking out the application in its entirety.

(iv) The learned Judge erred in fact and law in finding that the issue of wrongful payments to Mary Ramson and the recovery ought to properly be ventilated and determined in the Oppression Action;

(v) The learned Judge erred in fact and law in ordering costs to the [company];

(vi) The learned Judge erred in fact and law in granting a Certificate of costs for 2 Counsel to the [company]."

[9] For ease of analysis, the grounds of appeal have been reduced to the following three broad issues:

(1) whether the learned judge erred in striking out the second leave application (grounds ((i), (ii), and (iv));

(2) whether the learned judge erred in not granting an order staying the second leave application pending the outcome of the oppression action (ground iii); and

(3) whether the learned judge erred in ordering costs to the company and in granting a certificate for two counsel (grounds (v) and (vi)).

[10] In considering whether the learned judge was wrong to strike out the claim for leave to bring the derivative action with costs to the company, it is imperative to bear in mind the guidance of Lord Diplock in **Hadmor Productions Ltd and others v Hamilton and others** [1982] 1 All ER 1042 ('**Hadmor**'), regarding the standard of review of an appellate court in treating with the exercise of the discretion of a judge at first instance. In **The Attorney General of Jamaica v John MacKay** [2012] JMCA App 1, this court expressly embraced and adopted the **Hadmor** principles with Morrison JA (as he then was) stating at para. [20] of the judgment:

> "[20] This court will therefore only set aside the exercise of a discretion by a judge on an interlocutory application on the ground that it was based on a misunderstanding by the judge of the law or of the evidence before him, or on an inference – that particular facts existed or did not exist – which can be shown to be demonstrably wrong, or where the judge's decision 'is so aberrant that it must be set aside on the ground that no judge regardful of his duty to act judicially could have reached it'."

[11] These principles have been routinely applied by this court and have been extended to cover all situations in which this court is reviewing the exercise of discretion of a judge or tribunal at first instance. Accordingly, in the instant case, this court could only justifiably interfere with the exercise of the learned judge's discretion if his decision falls within the four corners of the **Hadmor** principles. I have been guided accordingly.

Analysis

[12] All the submissions advanced and supporting authorities cited by counsel on both sides have been duly noted and considered during the course of my analysis. There is, however, no necessity to rehearse all facts and principles derived from the authorities or counsel's submissions. They have, nevertheless, guided the analysis of the issues at hand and some expressly applied where appropriate. Therefore, no disrespect is intended by my omission to indicate the specific attention given to every argument and authority cited by the parties. I am grateful to counsel for their industry and clarity of expression, which have rendered the task of the court much easier. I will now undertake an analysis of each issue.

<u>Issue (1) – whether the learned judge erred in striking out the second leave application (grounds (i), (ii) and (iv))</u>

[13] This broad issue concerning the learned judge's order striking out the appellant's second leave application will be addressed by an examination of the following sub-issues:

(a) whether the second leave application was amenable to striking out proceedings;

(b) whether the learned judge erred in finding that the second leave application was an abuse of process as the allegations it contained ought properly to be ventilated and determined in the oppression action; and

(c) whether the learned judge erred in his finding that there was insufficient evidence for the appellant to proceed with the second leave application and, thus, there were no reasonable grounds for bringing the claim.

(a) Whether the second leave application was amenable to striking out proceedings

[14] The company's application to strike out the second leave application was made pursuant to rules 26.3(1)(b) and (c) of the Civil Procedure Rules 2002 ('CPR'), which state:

> "26.3 (1) In addition to any other powers under these Rules, the court may strike out a statement of case or part of a statement of case if it appears to the court –
>
> (a) …
>
> (b) that the statement of case or the part to be struck out is an abuse of the process of the court or is likely to obstruct the just disposal of the proceedings;
>
> (c) that the statement of case or the part to be struck out discloses no reasonable grounds for bringing or defending a claim; or
>
> (d) …"

[15] The appellant has raised the question as to whether the application was amenable to striking out proceedings. This question arises because even though the application was made using a fixed date claim form, there was no "claim" contained therein. It was a

preliminary step that the appellant had to take to satisfy the provisions of the Companies Act in order to bring the proposed derivative action.

[16] On behalf of the appellant, Mr Hylton QC argued that what the appellant sought in the court below was permission for the company to pursue a derivative action against Mrs Mary Ramson. The appellant, he said, has not brought a "claim" or filed a "statement of case" against Mrs Mary Ramson as no claim exists at the leave stage. Queen's Counsel submitted that the underlying derivative action can come into existence only after an application for leave is successful and that the successful applicant will not be a party to the derivative claim as the claim will take the form of a new set of legal proceedings brought in the name of the company.

[17] In response, Mr Braham QC submitted that, in considering whether to strike out the second leave application, the learned judge was correct to treat the fixed date claim form and the supporting affidavit of the appellant, as the relevant "statement of case" within the meaning of rule 26.3(1). He argued that pursuant to rule 2.4 of the CPR, a statement of case includes a fixed date claim form.

[18] I accept the position of the company as expressed by Mr Braham. Even though in the instant case, the fixed date claim form was not filed to commence a claim, strictly speaking, but rather as an application for leave to bring a claim, nevertheless, the filing of a fixed date claim form is in keeping with the general practice and procedure of the courts as reaffirmed by this court in **Chas E Ramson v Sally Ann Fulton**. At paras. [81] and [82] of that judgment, Brooks JA (as he then was) laid down the procedure to be employed when dealing with applications for leave to bring derivative actions. He stated at para. [81] in so far as is immediately relevant:

> "[81] … 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 [Companies]**

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; ..." (Emphasis added)

[19] According to the CPR, a fixed date claim form is to be construed as a statement of case. Rule 2.4 of the CPR defines a statement of case to mean:

> "(a) a claim form, particulars of claim, defence, counterclaim, ancillary claim form or defence and a reply; and
>
> (b) any further information given in relation to any statement of case under Part 34 either voluntarily or by order of the court"

[20] Rule 2.4 of the CPR further states that "'claim' and 'claim form' are to be construed in accordance with Part 8", and that a "'fixed date claim form' is a claim form in form 2 upon which there is stated a date, time and place for the first hearing of the claim". Rule 8.8(2) of the CPR (as amended in 2011) requires a fixed date claim form to be accompanied by an affidavit. There is no longer an option for use of a particulars of claim as there was before the amendment. It also requires any response to the affidavit in support of the fixed date claim form to be by way of affidavit. Therefore, wherever a fixed date claim form is used, it is evidence in support that is required rather than pleadings of facts as in a particulars of claim.

[21] Indeed, the appellant cannot proceed by way of fixed date claim form supported by an affidavit and then contend that the rules applicable to fixed date claim forms and admissibility of evidence by way of affidavit should not be applied to her case. This position is untenable. With the originating process for leave being by fixed date claim form, the company would have had no recourse but to apply for the court to deal with the originating process that was before it, which was the fixed date claim form supported by affidavit. The process used by the appellant is the accepted procedure in this jurisdiction for commencing an application for leave to bring a derivative action. Therefore, the fixed date claim form and the supporting affidavit stood together for the consideration of the learned judge as the appellant's statement of case, which embodied her application for leave to bring the derivative action.

[22] Consequently, the second leave application, having been commenced by way of fixed date claim form, would have been amenable to a striking out order if any of the conditions under rule 26.3 was established to the satisfaction of the court. The appellant, therefore, cannot succeed on this issue.

(b) Whether the learned judge erred in finding that the second leave application was an abuse of process as the allegations in it ought properly to be ventilated and determined in the oppression action

[23] The learned judge, at paras. [21] to [23] of the judgment, detailed his finding that the second leave application was an abuse of process in these terms:

> "[21] … I find that where the acts complained of by the Claimant, who seeks leave to bring a derivative action, is the same as the acts complained of in previous proceedings for derivation action or any other proceeding against the Defendant, the Claimant should not be granted leave without more.
>
> [22] The Particulars of Claim for the oppression action (the second claim) alleges, among other things, that unlawful payments were made to Mary Ramson for work she did not do for the company…

> [23] The subject matter of the claim before me has therefore been included and can sufficiently be addressed in the oppression action. I therefore see no reason why this court should not strike out this claim. The Claimant will not be prejudiced. On the other hand, the Defendants would be in an unfavourable financial position if they have to defend this claim while defending a claim with similar facts and allegations before another judge of this court. The same issues of fact before different courts runs [sic] the embarrassing risk of different findings. There is also no reason why the company should be put to that expense. The oppression action is very much alive. The main issue in this claim can be dealt with there. I agree with the Defence that the Claimant may receive the relief sought in this action as in the oppression action. This is because the Particulars of Claim (in the oppression action) and affidavit in support of this application allege the same wrong by the intended Defendant. I find that it is not in the interest of the company to be having multiple actions involving the same facts and allegation."

[24] Mr Hylton argued that, in holding that the second leave application could be pursued in the oppression action, the learned judge failed to recognize the distinction between a derivative action pursuant to section 212 of the Companies Act, and an oppression action pursuant to section 213A. He submitted that the cause of action and remedies concerning a derivative action are different from an oppression action. He noted that derivative actions are brought to protect the rights of the company while oppression actions are brought to protect the personal rights of the shareholders. He argued that, in a derivative claim, the applicant has no personal remedy as it is an action for restitution by the company. However, in an oppression action, the applicant may be entitled to a personal remedy, but cannot recover any loss suffered by the company. Queen's Counsel further submitted that claims for restitution by a company in oppression actions are permissible only in limited and exceptional circumstances. Further, as it relates to an oppression action, a complainant must establish conduct by directors or officers of the company that is oppressive and/or unfairly prejudicial to the complainant's interest. In

the instant case, Mrs Mary Ramson is not a director or an officer of the company. In support of these arguments, Queen's Counsel relied on the cases of **Wallensteiner v Moir (No 2)** [1975] All ER 849, **Edwards and another v Halliwell and others** [1950] 2 All ER 1064, and **Re Charnley Davies Ltd (No 2)** [1990] BCLC 760 ('**Re Charnley Davies**').

[25] Mr Hylton also contended that the other proceedings brought by the appellant did not amount to a multiplicity of actions and that, in any event, the mere existence of multiple actions arising from the same set of facts does not necessarily amount to an abuse of process as the court is empowered to consolidate any or all of the claims, if appropriate. He drew support for this argument from **Leon Forte v Twin Acres Development Ltd** [2015] CD 00004). Queen's Counsel argued that if, in the instant case, there is some overlap of the facts, which speak to a general course of conduct of misappropriation by the directors, whether for their benefit personally or the benefit of others, the proceedings brought by the appellant are claims for separate and different reliefs and should not be treated as an abuse of the process.

[26] Finally, citing the case of **Ricco Gartmann v Peter Hargitay** (unreported), Court of Appeal, Jamaica, Supreme Court Civil Appeal No 116/2005, judgment delivered 15 March 2007 ('**Gartmann v Hargitay**'), Mr Hylton submitted that the learned judge failed to apply the guidance from this court that striking out is a draconian order and that such an order should only be considered when the statement of case can be categorised as entirely hopeless.

[27] In his response on behalf of the company, Mr Braham submitted that the appellant was effectively seeking to bring more than one claim in relation to the same subject matter. He submitted that a party should not be twice vexed in the same matter and it is vexatious to require the court to adjudicate on the same issue twice.

[28] Queen's Counsel also contended that the issue of whether the directors of the company made unlawful payments and/or benefits in kind to Mrs Mary Ramson is a live

issue for the court's consideration in the oppression action. He submitted that this is the only way the court can arrive at a determination as to whether the appellant has established oppression or unfair prejudice. Therefore, there is no need for leave to be granted for a derivative action to be brought in relation to the same issue having regard to the breadth of the court's power under section 213A (especially section 213A(3)(h)) of the Companies Act and that what the appellant really wants is a personal remedy.

[29] Mr Braham maintained that the learned judge correctly found that it was not in the interests of justice for the court to adjudicate on the same issues of fact as this presents a real risk of irreconcilable judgments.

[30] In support of these arguments, Queen's Counsel relied, in particular, on **Johnson v Gore Wood & Co (a firm)** [2002] 2 AC 1 ('**Johnson v Gore Wood**'), **National Commercial Bank Jamaica Limited v Justin O'Gilvie and others** [2015] JMCA Civ 45, **The Royal Bank of Scotland Ltd v Citrusdal Investment Ltd** [1971] 3 All ER 558, and **Malata Group (HK) Ltd v Jung** 89 OR (3d) 36, ('**Malata (HK) v Jung**'), which considered sections 246 and 248 of the Ontario Business Corporations Act, 1990, equivalent provisions to sections 212 and 213A of the Companies Act.

[31] In considering the differing contentions of the parties, I start with the acknowledgment that various circumstances can give rise to a complaint that there has been an abuse of the process of the court. In **Johnson v Gore Wood** Lord Bingham, commenting on the court's power to strike out a claim for abuse of the process of the court, stated at page 22 that:

> "The rule of law depends upon the existence and availability of courts and tribunals to which citizens may resort for the determination of differences between them which they cannot otherwise resolve. Litigants are not to be without scrupulous examination of all the circumstances to be denied the right to bring a genuine subject of litigation before the court... This does not however mean that the court must hear in full and rule on the merits of any claim or defence which a party to litigation may choose to put forward. For there is, as Lord

Diplock said at the outset of his speech in *Hunter v Chief Constable of the West Midlands Police* [1982] AC 529, 536, an

> 'inherent power which any court of justice must possess to prevent misuse of its procedure in a way in which, although not inconsistent with the literal application of its procedural rules, would nevertheless be manifestly unfair to a party to litigation before it, or would otherwise bring the administration of justice into disrepute among right thinking people. The circumstances in which abuse of process can arise are very varied...'"

[32] There are, therefore, two crucial competing principles in determining the question whether to strike out a claim for abuse of process. They are (i) the prevention of the misuse of the court's procedures; and (ii) the right of a litigant to bring a genuine subject of litigation before the court. It is because of the latter competing principle that it is advised that the court's power to strike out a party's statement of case should be used "sparingly" and only in hopeless cases as it is a draconian power that could deprive litigants of access to justice. In **Gartmann v Hargitay** Cooke JA, at para. 10, gave expression to this principle in these terms:

> "10. The striking out (dismissal) of a claimant's statement of case (in this case statement of claim) is a draconian order. Such an order, while compelling in suitable circumstances, should be informed by caution lest litigants are deprived of access to the 'judgment seat'. In my view this drastic step of striking out a statement of case should only be considered when such statement of case can be categorized as entirely hopeless..."

[33] In the instant case, the learned judge at para. [17] of his judgment made it clear that he was aware of this principle when he stated that:

> "[17] … It is well settled law, as it relates to striking out, that it is a draconian step which the court should take reluctantly. This does not mean however that the court should not strike out a claim merely because it is draconian so to do."

[34] In arriving at his decision, the learned judge found that the second leave application should be struck out because the subject matter of that proposed action is included and could sufficiently be addressed in the oppression action so as to avoid prejudice to the company as well as irreconcilable decisions.

[35] I find meritorious, the appellant's contention that the learned judge fell in error in this aspect of his decision. There are, as correctly noted by Mr Hylton, distinctive differences between a derivative action and an oppression action. Derivative actions are brought under section 212 of the Companies Act on behalf of or in the name of a company for wrongs done to it; while oppression actions are brought under section 213A if the action of a company or the manner in which it is being operated "is oppressive or unfairly prejudicial" to the person defined by the Act to be a complainant in such matters. Derivative actions are brought to protect the rights of the company, while oppression actions are brought to protect the personal rights of the complainant.

[36] There are also notable differences between the statutory conditions that must be satisfied for the bringing of a derivative action and those for the bringing of an oppression action. With respect to a derivative action, section 212(2) of the Companies Act provides that no derivative action may be brought, and no intervention in a derivative action may be made 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."

[37] With respect to an oppression action, the conditions to be satisfied are expressed in section 213A(2), as follows:

> "(2) If upon an application [to bring an oppression action] under subsection (1), the Court is satisfied that in respect of a company or of any of its affiliates-
>
> (a) any act or omission of the company or any of its affiliates effects a result;
>
> (b) the business or affairs of the company or any of its affiliates are or have been carried on or conducted in a manner; or
>
> (c) the powers of the directors of the company or any of its affiliates are or have been exercised in a manner,
>
> that is oppressive or unfairly prejudicial to, or unfairly disregards the interests of, any shareholder or debenture holder, creditor, director or officer of the company, the court may make an order to rectify the matters complained of."

[38] In keeping with the differences in the statutory regimes governing the two types of actions, the relevant authorities have correspondingly established the crucial differences between them. In terms of remedies: in an oppression action, the applicant may be entitled to a personal remedy, but cannot recover any loss suffered by the company. In order to recover losses suffered by the company, the derivative action will generally have to be pursued because a company may only be allowed to recover losses in an oppression action under exceptional circumstances. Furthermore, there is strong authority that has established that there can be parallel or concurrent derivative and oppressive actions arising from the same set of facts. In this regard, in **Chas E Ramson v Sally Ann Fulton**, Brooks JA recognized the distinctions between the two actions and the possibility of there being parallel or concurrent actions. He noted at para. [81] j. of the judgment:

> "[81] …
>
> 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)." (Emphasis added)

[39] Borrowing the expression of Millett J in **Re Charnley Davies** at page 784, it may succinctly be said that "[t]he very same facts may well found either a derivative action or [an oppression action under the Companies Act]. But that should not disguise the fact that the nature of the complaint and the appropriate relief [are] different in the two cases".

[40] Furthermore, it is a recognized feature of our jurisprudence that there can be concurrent or parallel proceedings arising from the same facts, triable in different forums, and which could lead to inconsistent decisions. The mere fact there is a risk or the possibility of inconsistent decisions is not a complete bar to the conduct of parallel proceedings. In other words, this risk or possibility is not determinative of the matter. This is an established principle in relation to concurrent criminal and civil proceedings arising from the same facts. See, for instance, **Donald Panton and others v Financial Institutions Services Limited** [2003] UKPC 86. This principle should be no less applicable to concurrent oppression and derivative actions under the Companies Act given the fundamental distinctions between them.

[41] It should also be noted that an alternative to striking out on the basis that there are multiple proceedings, would have been to order a stay of one of the proceedings until the other was determined. This was a point argued by Mr Hylton. Striking out a party's case must be a matter of last resort and, therefore, should only be done in plain and obvious cases as established by the authorities. To strike out a party's statement of case as abuse of process, simply on the basis that there are multiple proceedings arising from the same facts, may not be in keeping with the overriding objective. The learned judge ought to have considered whether, in the interests of justice, one or other of the

proceedings should be stayed to await the outcome of others. I accept that the learned judge did not conduct his analysis in that way. However, I must hasten to note that based on the learned judge's later finding regarding the affidavit evidence (which will be considered below), even if he had considered the option of ordering a stay, his decision to strike out the second leave application would have been the same as he found no evidential basis to support the proposed derivation action. That, however, would have been an entirely different basis for striking out the claim.

[42] Accordingly, at this juncture in my analysis, I accept that the existence of the oppression action did not necessarily exclude the simultaneous pursuit of a derivative action arising from the same facts. Much would have turned on the remedy being sought in both actions, against whom the remedy was being sought, and in whose interest each action was being pursued. To make this determination, there must be a close analysis of the statements of case in both actions against the background of the applicable statutory provisions governing each of them.

[43] Counsel for the company contended that section 213A(3)(h) of the Companies Act provides for a remedy in the oppression action that could benefit the company if the court is satisfied that unlawful payments and or benefits were made to Mrs Mary Ramson as alleged in the oppression action. They rely heavily on the decision of the Ontario Court of Appeal in **Malata (HK) v Jung** for this proposition. Section 213A(3)(h) provides that the court may, make any interim or final order it thinks fit, including an order "varying or setting aside a transaction or contract to which a company is a party, and compensating the company or any other party to the transaction or contract". In my view, neither section 213A(3)(h) nor **Malata (HK) v Jung** assists the company's case on appeal.

[44] In **Malata (HK) v Jung**, the plaintiff (Malata HK) was one of three shareholders and a creditor of the corporation (Malata Canada). The plaintiff brought oppression claims alleging that Jung (the defendant), another shareholder in the company who was also a director and officer of the company, had misappropriated corporate funds. The plaintiff sought, among other things, an order requiring the defendant to return unlawfully

diverted funds to the company. The defendant brought a motion for aspects of the claim to be dismissed on the ground that those aspects were derivative in nature and required leave of the court for them to be brought. The motion did not succeed. The court noted that the remedy for the company could be pursued in the oppression claim by virtue of, among other things, section 248(3) of the Ontario Business Corporations Act, the oppression action provision in the Act, which is an identically worded provision to section 213A(3)(h) of our Companies Act.

[45] Apart from noting the overlap between the statutory provisions relating to oppression and derivative actions, the court noted that section 248(3) is drawn in broad language, and includes the provision for relief to the company. The court opined that section 248(3) contemplates a remedy that benefits the company itself even though the claim made by the plaintiff could also have been pursued by way of a derivative action pursuant to section 246 of the Act. The court noted that allowing an oppression action to proceed, while there is harm to a corporation, would not nullify a derivative action, because the two actions involve different threshold tests. A derivative action simply requires a violation of the company's legal rights; while an oppression action requires, even in the case of harm to the company, a violation of corporate legal rights that is oppressive, unfairly prejudicial or unfairly disregards the complainant's interests. The court concluded that the plaintiff could have proceeded by way of a derivative action, but given the overlap between the statutory provisions governing the two actions and the particular circumstances of the case, the plaintiff was not required to obtain leave to bring a derivative action.

[46] The principles enunciated in **Malata (HK) v Jung** are quite uncontroversial but as the court concluded, the particular circumstances of that case also led to the decision that the oppression claim alone could stand without the need for the plaintiff to obtain leave to pursue a derivative claim. The circumstances of that case are obviously and readily distinguishable from the instant case on the simple basis of who the parties were in those proceedings as distinct from who they are in the case at hand. In that case, both the plaintiff and defendant were directly connected as shareholders of the company in

question and were parties to the oppression action. The defendant in the oppression case was the same person against whom the derivative action would have been brought. Therefore, relief for violation of the company's legal rights could be obtained against that defendant in favour of the company in the oppression claim. In such a case, the application of the equivalent provision to section 213A(3)(h) of our Companies Act would be understandable and acceptable.

[47] In this case, however, the circumstances are completely different for section 213A(3)(h) to be invoked in support of the company's contention. The appellant is seeking to bring the derivative action directly against Mrs Mary Ramson for losses she claims were sustained by the company as a result of unlawful payments and benefits received by Mrs Ramson. No one has contended either in this court or in the court below that such an action cannot be pursued. Therefore, in the case presented by the appellant, she would have no personal cause of action in the oppression action against Mrs Mary Ramson who is not a member, director or officer of the company. Furthermore, Mrs Mary Ramson is not a party to the oppression action and so any orders that could be made therein in favour of the company, could not be made against her and, so would not bind her as a third party. In other words, as Mr Hylton rightly submitted, the company could not receive restitution from Mrs Mary Ramson in the oppression action given her status as a non-party to that action. The oppression action would, therefore, not have nullified the provision of the Companies Act for the bringing of a derivative action in the name of the company against her as a third party.

[48] It seems, therefore, that provided the statutory conditions were met for leave to be granted with respect to the second leave application, there would have been nothing to preclude the bringing of a derivative action on behalf of the company to recoup the alleged losses from Mrs Mary Ramson even though there is a subsisting oppression action brought by the appellant on her own behalf for personal reliefs.

[49] In striking out the second leave application on the ground that the relief being sought could be obtained in the oppression claim, the learned judge failed to consider

the critical differences between the reliefs available in the two actions, Mrs Mary Ramson's status *vis-à-vis* the company and the appellant, and the fact that Mrs Mary Ramson was not a party to the oppression action for any relief to have been obtained against her personally in favour of the company. It does appear that the learned judge failed to take into account some relevant considerations that would have been material to his decision as to whether the second leave application was an abuse of process on the basis of multiple proceedings arising from the same facts involving the company. This failure would have led him into error.

[50] I am inclined to conclude that there is merit in the appellant's contention that the learned judge erred when he struck out the second leave application because, in his view, the subject matter to which it related was included and could have been sufficiently addressed in the oppression action so as to avoid financial prejudice to the company and the risk of irreconcilable decisions in the court.

[51] Accordingly, this ground of appeal succeeds.

(c) Whether the learned judge erred in his finding that there was insufficient evidence for the appellant to proceed with the second leave application and, thus no reasonable grounds for bringing the claim (ground (ii))

[52] As already established, the allegations of unlawful payments to Mrs Mary Ramson formed the basis for the second leave application. At paras. 8 and 24 of her supporting affidavit, the appellant deposed that:

> "8. The claim for which I am seeking the Court's permission to institute on behalf of the Company is for recovery of losses suffered by the Company as a consequence of the directors funnelling payments and benefits to the wife of the Chairman, Mrs. Mary Ramson, when she was not working for the Company or providing any service or value.
>
> …
>
> 24. **In or around April 2017, I learned that Mrs. Mary Ramson had been on the payroll of the Company**

> **for many years, although she did not work for or provide any services or value to the Company. This information was shared with me by someone with intimate knowledge of the financial affairs of the Company (who has requested that his/her identity be kept confidential).** The information was given in the context of my investigating whether the directors and shareholders had been operating the Company so as to misappropriate shareholder benefits without affording me the *pro rated* benefits to which I am entitled as a shareholder." (Emphasis added)

[53] Then at para. 40, she deposed:

> "I do not believe a genuine employment arrangement ever existed between the Company and Mrs Mary Ramson. I believe she was paid a salary but did not work for or provide any 'employment services' to the Company."

[54] The remainder of the appellant's affidavit contained information regarding her other actions before the Supreme Court; her family background; background to the formation of the company and ownership of shares in the company; and her unsuccessful efforts to obtain further information to support her allegations. No evidence was provided substantiating or verifying the hearsay assertion that unlawful payments were made to Mrs Mary Ramson, and up to the time of the hearing of the application to strike out, she did not disclose the source of the information she was relying on. According to her, the informant does not wish for his or her identity to be disclosed.

[55] In analysing the appellant's affidavit, the learned judge stated at paras. [24] to [26] of the judgment:

> "[24] In ***Canadian Business Corporation Law***, McGuiness, Volume 3 page 686 and paragraph 22.125, the authors state:
>
> > 'As a general rule, an application for leave to commence a derivative action will rise or fall on the affidavit evidence adduced in support of and in response to the application. Leave should not be

> given when there is only a theoretical possibility that a cause of action may exist, or that are purely conjectural in nature.'
>
> In the case before me the Claimant is relying on information that she received from an individual within the company who wishes to remain anonymous. The Claimant has no evidence to show that what was said to her is true. In this regard see paragraph 24 of her affidavit dated 27th of September, 2018 and filed 10th of October, 2018…
>
> I agree with Defence counsel that the Claimant cannot be allowed to rely on hearsay evidence in order to prove her claim.
>
> [25] I find that this application, not being interlocutory in character or falling within the ambit of the exceptions, the evidence being relied on by the Claimant is inadmissible hearsay evidence. The Claimant is not allowed to rely on facts, the proof of which, she has no admissible evidence. In this case the claimant has in any event failed to state the source of her information and belief. It is manifest that the evidence is based largely on conjecture...
>
> The Claimant has, due to lack of evidence, failed to show any reasonable ground for the grant of leave to bring a derivative action.
>
> [26] In summary, the Claimant's use of hearsay evidence to support her claim, as well as the absence of evidence in proof of her assertions, preclude an order giving leave to bring a derivative action…"

[56] In criticising this aspect of the learned judge's decision, Mr Hylton submitted that there is clear and substantial authority that the court will only strike out a claim pursuant to rule 26.3(1) of the CPR where, on its face, the claim is not sustainable in law. He submitted that the court does not consider evidence on such an application. In making this argument, he relied on paras. 13 and 14 of the case of **Gordon Stewart v John Issa** (unreported), Court of Appeal, Jamaica, Supreme Court Civil Appeal No 16/2009,

judgment delivered 25 September 2009), and paras. [9] to [12] of **City Properties Limited v New Era Finance Limited** [2013] JMSC Civ 23.

[57] Queen's Counsel took issue with the learned judge's acceptance of the company's submission that an application for leave to bring a derivative action is not an interlocutory or procedural matter. He argued that this analysis was flawed because what was before the learned judge was not the application for leave to bring a derivative action but an application to strike out pursuant to rule 26.3(1) of the CPR, which is an interlocutory application. He contended that at the interlocutory stage, the appellant does not have to prove anything. She only needs to say these are the facts being relied on.

[58] Mr Hylton submitted further that instead of analysing the statement of case, the learned judge proceeded as if he was hearing the substantive claim and analysed the evidence which was then before the court. The learned judge ought not to have investigated the adequacy of the evidence. He contended that to the extent that the learned judge's decision was based on the evidence or lack thereof, the learned judge erred because the application for leave to bring a derivative action had not yet reached the case management stage where the court would give directions relating to disclosure, evidence and further affidavits.

[59] Queen's Counsel further argued that in analysing the evidence, the learned judge only made mention of para. 24 of the appellant's affidavit and ignored the evidence contained in subsequent paragraphs. He contended that the appellant's application addressed all the requirements of section 212 of the Companies Act relating to an application for leave to bring a derivative action. According to Queen's Counsel, the application to strike out based on lack of evidence is particularly egregious because the company has possession and control of the evidence and has deliberately withheld it.

[60] Mr Hylton also contended that the learned judge failed to appreciate that the appellant was seeking to satisfy the preliminary hurdle of the leave test in the proceedings

and, thus, was wrong to strike out the appellant's application for permission to bring a derivative action.

[61] In responding on behalf of the company, Mr Braham maintained that all three requirements under section 212(2) of the Companies Act must be satisfied in order to obtain leave to bring a derivative action. Therefore, to establish that the proposed derivative action is in the interests of the company and is brought in good faith, the appellant, at the very least, is required to show on the application for leave, that there is an arguable case. The claim should not be based on mere conjecture or speculation, nor should the evidence in support of the cause of action be tenuous. In support of this submission, Queen's Counsel relied on the learning of the authors of Canadian Business Corporation Law: Third Edition, Volume 3, para. 22.125 at page 686 and the judgment of the Court of Appeal for British Columbia in **Robert L Gartenberg v Charles Raymond and others** 2005 BCCA 462 ('**Gartenberg v Raymond**') at paras. 31 and 32.

[62] Queen's Counsel also relied on the decision of the New South Wales Supreme Court in **Swansson v Pratt** [2002] NSWSC 583, in submitting that an application for leave to bring a derivative action is not an interlocutory or procedural matter and that the statements of case in such actions are subject to the same strictures as any other statement of case. He argued that the evidence filed in the affidavit is integrated in the fixed date claim form and is, therefore, effectively part of the claim. The judge, he submitted, was thus entitled to look at the evidence and quite properly had regard to the character of the claim before him.

[63] Mr Braham further contended that para. 24 of the appellant's affidavit, sworn to on 27 September 2018, is the crux of the cause of action for the proposed derivative claim. However, in that paragraph, the appellant has failed to state the identity of the informant and the source of the information on which she is relying. It does not meet the requirements of the common law, the Evidence Act or rule 30.3(2) of the CPR. Accordingly, the learned judge was correct to find that the evidence set out in para. 24

of the appellant's affidavit is hearsay which contravenes rule 30.3(1) of the CPR and there is no evidence to support the proposed cause of action. This interpretation of rule 30.3 of the CPR, he argued, is consistent with the decision of this court in **Al-Tec Inc Limited v James Hogan and another** [2019] JMCA Civ 9 ('**Al-Tec**').

[64] Mr Braham also noted that based on the appellant's affidavit, it is clear, that she had no further information to support the allegations made as she is seeking a disclosure order from the court to compel the company to provide information to support her claim for permission to bring a derivative action. This, Queen's Counsel submitted, was a "fishing expedition". He argued that the appellant cannot rely on discovery hoping that something will turn up in support of the claim. There must be some evidence in support of the cause of action and the possibility of recovery at the end of the day. It was not sufficient for the appellant to merely state a cause of action with no facts to support it. For these reasons, he contended, the learned judge's decision should not be disturbed as it cannot be said to have been demonstrably wrong or so aberrant.

[65] For reasons I will now attempt to outline, I am more attracted to the arguments of Mr Braham than those of Mr Hylton regarding the learned judge's treatment of the appellant's evidence in support of the fixed date claim form.

[66] Before the learned judge was the company's application to strike out or stay the second leave application brought by the appellant. This, the learned judge recognized when he stated at para. [7] of the judgment:

> "[7] Before me is an Amended Notice of Application, filed by the Defendant on the 24th January, 2019, to have the fourth claim struck out and/or in the alternative to have the claim stayed pending the outcome of the appeal in ***Sally Fulton v Chas E Ramson Limited SCCA No 67 of 2016*** (the first claim). I am therefore asked to determine whether this application, for leave to bring a derivative action, is to proceed, be struck out or stayed."

Therefore, I must disagree with Mr Hylton that the learned judge overlooked the fact that he was not hearing the derivative claim itself.

[67] The appellant's statement of case was the subject of the striking out application. To determine whether the claim should be struck out, the learned judge, of necessity, had to consider the contents of the fixed date claim form and affidavit filed in support of it. There was evidence before the court and not pleadings as is the case when particulars of claim are filed. Indeed, evidence is what was required and not mere assertions of facts that were subject to proof later in the proceedings. As Brooks JA directed in **Chas E Ramson v Sally Ann Fulton** at para. [81]c., "the claim should be supported by affidavit evidence which addresses all elements of section 212". Within this context, section 212 requires, inferentially, that there be sufficient evidence to establish, among other things, that the complainant is acting in good faith and that the bringing of the derivative action is in the interests of the company. The satisfaction of these conditions requires proof of the existence of facts that, on the face of them, would lead a court to the conclusion that leave should be granted.

[68] Similar views were expressed in the Canadian case of **Gartenberg v Raymond**, in which the Court of Appeal for British Columbia stated that:

> "[31] **To show that it is in the interests of the company for the legal proceeding to be prosecuted, an arguable case must be shown to exist. In my view, there was no evidence before the chambers judge upon which an arguable case could be shown to exist.** The only evidence upon which Mr. Gartenberg relies for the existence of a conspiracy between Mr. Gibson and Mr. Raymond is the timing of Mr. Raymond's departure as a director of Consolidated and his subsequent acquisition of Architectural in a public auction. Further, there was evidence that Mr. Gartenberg's proposed loan would not have been approved by the CDNX. There was only a suggestion in some correspondence that the CDNX be prepared to waive its requirements. There was also nothing before the chambers judge to demonstrate that Consolidated could have repaid Mr. Gartenberg's proposed loan any better than it could have repaid Collingwood's. There was no evidence that the price paid by Collingwood for Architectural was less than market value. There was therefore no evidence that the actions of Mr. Gibson and Mr. Raymond caused Consolidated any loss.

> [32] **Counsel for Mr. Gartenberg submitted that if the company records were subject to the discovery process, something might turn up that would assist Mr. Gartenberg's action. In my view, that contention is tenuous. In the end, the basis for Mr. Gartenberg's action remains only a theory. There are no articulable grounds to support it. In my view, the chambers judge erred in finding that there was any evidence on which it could be said that an arguable case existed**." (Emphasis added)

[69] Following on these persuasive dicta, Mr Hylton's argument that the learned judge ought to have had regard to the fact that the claim had not reached the stage for disclosure and case management conference cannot be accepted. There is a threshold requirement to be satisfied for leave to be granted (albeit low) and the court requires evidence for the satisfaction of that test. At a minimum, there must be shown that *prima facie* there is an arguable case. Essentially then, there must be a substratum of facts to establish that the appellant has a legitimate claim to be pursued. The statement of case advanced for leave to bring the derivative action must be shown, on evidence, to be real and substantial not fanciful and tenuous. Therefore, neither the application for leave nor the proposed derivative claim should be based on conjecture or speculation as correctly pointed out by Mr Braham.

[70] There would, therefore, have been no legal basis for the learned judge to allow the proposed derivative claim to be brought if, on the face of the application for leave, there was insufficient evidence to support the action or to show that an arguable case exists. The crucial question for the learned judge was whether the affidavit evidence being relied on for permission to bring the derivative action disclosed an arguable case for leave to be granted.

[71] The learned judge rightly focused on para. 24 of the appellant's affidavit because that is where she spoke to the issue surrounding payments to Mrs Mary Ramson and the reason she wanted to bring the derivative action. The learned judge's conclusion that para. 24 contained inadmissible hearsay evidence on which the appellant sought to rely

is unimpeachable and the appellant, to her credit, has not challenged the accuracy or reasonableness of that finding. However, Mr Hylton, on her behalf, contended that the application for leave was interlocutory and so the hearsay evidence was permissible and admissible. I cannot agree with that argument. In this regard, rule 30.3 of the CPR now assumes relevance to our consideration of this ground of appeal and the appellant's arguments in support of it. The rule provides:

> "30.3 (1) The general rule is that an affidavit may contain only such facts as the deponent is able to prove from his or her own knowledge.
>
> (2) However an affidavit may contain statements of information and belief –
>
> (a) where any of these Rules so allows; and
>
> (b) where the affidavit is for use in an application for summary judgment under Part 15 or any procedural or interlocutory application, provided that the affidavit indicates –
>
> (i) which of the statements in it are made from the deponent's own knowledge and which are matters of information or belief; and
>
> (ii) the source for any matters of information and belief."

[72] As is seen rule 30.3(2) allows for hearsay statements to be adduced in certain situations. However, for hearsay to be admissible, the affiant is obliged to state in his affidavit the source of any such information or belief (rule 30.3(2)(b).

[73] Furthermore, in **Cable and Wireless Jamaica Limited v Eric Jason Abrahams** [2020] JMCA Civ 45, Brooks JA (as he then was) cited the dictum of Peter Ng J of the Hong Kong Court of Appeal in the case of **Wong Ming Bun v Wang Ming Fan** [2014] 1 HKLRD 1108, where Peter Ng J stated at para. 36 of his judgment, in part, that:

> "36. This Court is bound by the Court of Appeal decision in *East Asia Satellite Television (Holdings) Ltd v New Cotai LLC*. The legal position is clear – whether a shareholder can commence a derivative action in the name and on behalf of the company **is a matter of substantive law**, and is governed by the law of the place of incorporation ie *lex incorporationis*…." (Emphasis added)

[74] So, the question of whether the appellant could commence a derivative action in the name of the company, for which leave was being sought, was a matter of substantive rather than procedural law. In such circumstances, reliance on hearsay information would not be permissible.

[75] Additionally, the application for leave was not interlocutory as there was no subsisting claim, action or matter to which it related. In **Swansson v Pratt**, relied on by the company, Palmer J opined that an order on an application for leave to bring a derivative action is not interlocutory in character but final and the applicant bears the onus of establishing the requirements of the subsection to the court's satisfaction.

[76] I accept that position as a correct statement of the law since all the issues arising between the parties with respect to that application would be finally and conclusively determined at the end of those proceedings whether or not leave was granted. If leave had been granted, that proceeding would have ended because the fixed date claim form initiating the derivative action would have been a separate and new proceeding involving different parties with different legal and factual issues to be resolved by the court. It cannot be said then that the learned judge was wrong to find that the appellant was required to speak from personal knowledge given the nature of the proceeding, in that, it did not fall within any recognized exception under rule 30.3(2) of the CPR.

[77] In any event, even if the application were procedural or interlocutory, the learned judge would have acted properly in rejecting para. 24 of the affidavit on the ground that it was inadmissible hearsay. This is simply because it failed to comply with rule 30.3(2) of the CPR. In contravention of the rule, the appellant failed to state the source of the information or belief she was relying on to establish that Mrs Mary Ramson was unlawfully

paid a salary and granted benefits at the expense of the company. Even worse, she expressly indicated that the informant on whose words she sought to rely wishes not to be identified. The appellant clearly intended to maintain the confidence of her purported informant even in the face of a challenge to her application. So, at the end of the day, the question of whether the claim was procedural or interlocutory would have been rendered immaterial because the appellant would have failed to comply with the rule for the admissibility of hearsay evidence in such proceedings.

[78] Accordingly, the evidence on which the appellant sought to rely to ground the proposed derivative action was inadmissible and properly rejected by the learned judge as conjecture. Furthermore, as the learned judge also observed, she failed to provide any other evidence in proof of her assertions regarding payments to Mrs Mary Ramson. He cannot be faulted for treating with the evidence in the manner he did.

[79] The hopelessness of the second leave application had clearly become evident before the learned judge as it failed on the affidavit evidence proffered in support of it. The appellant was duty-bound to present an arguable case for leave to be granted, and she failed. Accordingly, the learned judge would have been correct to find that her statement of case for leave to bring the derivative action disclosed no reasonable ground for bringing the claim. Consequently, even though the learned judge would have erred in striking out the second leave application on the ground that it could have been dealt with in the oppression action, there were sufficient reasons, in law and fact, for it to be struck out on the alternate ground that it had disclosed no reasonable ground for bringing the claim.

[80] On this ground of appeal that challenges the learned judge's treatment of the appellant's affidavit evidence, the appeal must fail.

Issue (2) – whether the learned judge erred in not granting an order staying the second leave application pending the outcome of the oppression action (ground (iii))

[81] Mr Hylton submitted that the appellant's application for leave to bring a derivative action should not have been struck out as this could preclude restitution for the company

from Mrs Mary Ramson. He outlined that the first leave application that was on appeal was for leave to bring a derivative action against the company's directors for breach of fiduciary duty in relation to the misuse of two corporate properties. He argued that, at the very least, the appellant's application should have been stayed pending the outcome of the lawsuits.

[82] Having found that the learned judge was correct to strike out the claim for the reasons discussed above, I do not consider it necessary to go into any detail as to whether a stay should have been granted pending the outcome of the oppression action or any other proceeding. It suffices to say that the weak evidential base that resulted in the striking out order would also have adversely affected an application for a stay since, for both orders to be made, there must be, at least, an arguable case that reveals the basis of a legitimate claim. Consequently, I agree with Mr Braham that there is no compelling basis on which it could properly be argued that the learned judge should have granted an order for stay of the second leave application instead of striking it out.

[83] The appeal also fails on this ground of appeal.

Issue (3) – whether the learned erred in ordering costs to the company and in granting special costs certificate for two counsel (grounds (v) and (vi))

[84] The learned judge provided no reason for his award of costs to the company with special costs certificate for two counsel. It, therefore, falls on this court to determine whether the costs orders were unreasonable or aberrant and should be disturbed.

[85] The parties did not advance oral arguments on these grounds but, given that there was no formal withdrawal or abandonment of them by the appellant, the grounds have been considered by reference to the parties' written submissions.

[86] Counsel for the appellant maintained that costs ought not to have been awarded to the company in the light of how the matter had been conducted. They contended that the company intentionally withheld evidence and information which would have significantly reduced the size and complexity of the litigation, or avoided it completely.

They further argued that she should not be penalised for making an application to bring a derivative claim as it was not an abuse of process.

[87] It was also contended that the learned judge awarded costs to the company and for two counsel without providing any reason for these orders. Counsel for the appellant submitted that this court will, therefore, have to assess the circumstances to determine if the orders as to costs were appropriate.

[88] Counsel for the company, on the other hand, argued that it was appropriate for costs to be awarded in the company's favour in circumstances where the appellant's case was struck out on the basis of being an abuse of the process of the court and disclosing no reasonable grounds for bringing the claim. They submitted that there was nothing to justify a deviation from the general rule that costs should be awarded to the successful party.

[89] Counsel also submitted that the order for a special costs certificate for two counsel to account for instructing counsel was justified as the issue regarding derivative and oppression actions is sufficiently novel and complex to justify the instructing of Queen's Counsel to argue the application.

(a) Award of costs to the company (ground (v))

[90] Rule 64.6(1) of the CPR states that "[i]f the court decides to make an order about the costs of any proceedings, the general rule is that it must order the unsuccessful party to pay the costs of the successful party". In **Branch Developments Limited t/a Iberostar v Industrial Tribunal and another** [2016] JMCA Civ 26, Morrison JA (as he then was) applying the general rule stated as follows:

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

shown, along the lines indicated in rule 64.6(4), to displace the general rule."

[91] In this case, the learned judge, in deciding to award costs, followed the general rule based on his findings that the company was the successful party. Given the circumstances and the underlying basis for his decision, he cannot be faulted for so doing. There is nothing in the company's conduct of the proceedings that would have warranted a deviation from the general rule. The appellant had made allegations; the onus was on her to prove them in keeping with the ordinary incidence of the burden of proof in civil cases. Simply put, "he who asserts must prove". The company was under no legal duty in providing evidence to her to assist her application for leave. Accordingly, there is no basis upon which this court could justifiably interfere with the exercise of the learned judge's decision in awarding costs to the company as the successful party.

[92] Ground (v), therefore, fails.

(b) Special costs certificates for two counsel (ground vi)

[93] Rule 64.12 of the CPR empowers the court to grant a special costs certificate and directs that costs of the attendance of more than one attorney-at-law on the hearing of an application be allowed. Rule 64.12 states:

"64.12 (1) When making an order as to the costs of an application in chambers the court may grant a 'special costs certificate'.

(2) In considering whether to grant a special costs certificate the court must take into account -

(a) whether the application was or was reasonably expected to be contested;

(b) the complexity of the legal issues involved in the application; and

(c) whether the application reasonably required the citation of authorities and skeleton arguments.

(3) The court, having regard to the matters set out in rule 65.17(3), may direct that the costs of the attendance of more than -

(a) one attorney-at-law on the hearing of an application; or

(b) two attorneys-at-law at the trial,

be allowed."

[94] In deciding whether it would be reasonable to direct costs for the attendance of more than one attorney-at-law on the hearing of an application, rule 65.17(3) states that:

"(3) In deciding what would be reasonable the court must take into account all the circumstances, including –

(a) any orders that have already been made;

(b) the conduct of the parties before as well as during the proceedings;

(c) the importance of the matter to the parties;

(d) the time reasonably spent on the matter;

(e) whether the cause or matter or the particular item is appropriate for a senior attorney-at-law or an attorney-at-law of specialised knowledge;

(f) the degree of responsibility accepted by the attorney-at-law;

(g) the care, speed and economy with which the matter was prepared;

(h) the novelty, weight and complexity of the matter; and

(i) in the case of costs charged by an attorney-at-law to his or her client -

(i) subject to section 21 of the Legal Profession Act, any agreement

that may have been made as to the basis of charging;

(ii) any agreement about the seniority of attorney-at-law who should carry out the work;

(iii) whether the attorney-at-law advised the client and took the client's instructions before taking any unusual step or one which was unusually expensive having regard to the nature of the matter."

[95] It is noted that three counsel were on the record for the company – two Queen's Counsel and a junior counsel. The learned judge made an order for a special costs certificate for two counsel without indicating to whom it applied. It seems from counsel for the company's submissions that it would have been for Queen's Counsel, who was instructed to argue the case, and instructing counsel. I am prepared to accept and to hold that the special costs certificate is in relation to Queen's Counsel who argued the case and junior instructing counsel. It cannot be said that the application reasonably required two Queen's Counsel in the absence of any evidence pointing to such a special need.

[96] Having regard to the factors outlined in rules 64.12 and 65.17(3) of the CPR, I do not find that the learned judge's order of costs for two counsel (provided that is for one senior and one instructing counsel as I believe it ought to be) could be said to be unreasonable or so aberrant that no judge mindful of his duty to act judicially would have made it. The legal issues involved in the striking out application touched and concerned derivative and oppression actions which are sufficiently complex and would reasonably have required skeleton arguments and the citation of authorities. Due to the complexity of the issues, the importance of the matter to the parties, the history of litigation between the parties and their conduct in those proceedings, the matter was, in my view, one that required a senior attorney-at-law or an attorney-at-law of specialised knowledge. The

appellant had the services of three counsel, at least one of whom may reasonably be regarded as senior counsel. It was not unreasonable for a Queen's Counsel to appear with instructing junior counsel in the matter.

[97] Accordingly, in the light of the standard of review by which this court is guided, I find no justifiable basis in law to disturb the exercise of the learned judge's discretion in awarding costs to the company and in granting special costs certificate for two counsel. I would only say for the avoidance of doubt that the special costs certificate must be in relation to one Queen's Counsel and instructing junior counsel.

[98] Consequently, the appeal also fails on grounds (vi).

Conclusion

[99] For reasons indicated above, I am not convinced that the learned judge was demonstrably wrong in striking out the second leave application and not granting a stay of the application. Even though he erred in holding that the claim would have been an abuse of process as, in his view, it could have been dealt with in the oppression action, he was otherwise correct in his decision that it was an appropriate claim to be struck out. The evidence relied on by the appellant to ground her application for leave contained inadmissible hearsay which fell within no known exception for it to properly stand. As a consequence, the remaining evidence in the affidavit that would be admissible disclosed no articulable and reasonable ground for bringing either the application for leave or the proposed derivative action. The appellant's statement of case disclosed no arguable case in satisfaction of the leave test.

[100] Additionally, the learned judge's award of costs to the company and grant of a special costs certificate for two counsel, in the circumstances of the case, cannot be said to be unreasonable, injudicious or aberrant to warrant the intervention of this court with the exercise of his discretion. Accordingly, the appeal fails.

Disposal of the appeal

[101] The company has succeeded on all but one ground of appeal. The single issue on which the appellant succeeds is not weighty enough to affect the overall outcome of the appeal as, ultimately, the appellant's claim will stand struck out as ordered by the learned judge. In effect, the decision would stand unchanged and for that reason, the appeal would be dismissed in its entirety. The company may, therefore, be properly viewed as the successful party for the purposes of the award of costs of the appeal.

[102] Accordingly, I would dismiss the appeal; affirm orders 1), 2), and 3) of the learned judge's decision from which the appeal has been brought with costs to the company to be agreed or taxed.

EDWARDS JA

[103] I have read, in draft, the judgment of McDonald-Bishop JA. I agree with her reasoning and conclusion and there is nothing I could usefully add.

DUNBAR-GREEN JA (AG)

[104] I, too, have read, in draft, the judgment of McDonald-Bishop JA and agree with her reasoning and conclusion. I have nothing useful to add.

MCDONALD-BISHOP JA

ORDER

1. The appeal from the decision of Batts J, made on 15 July 2019, is dismissed.

2. Orders 1), 2) and 3) (the subject matter of the appeal) are affirmed. For the avoidance of doubt, the special costs certificate issued to the respondent, Chas E Ramson, in the Supreme Court is for one Queen's Counsel and instructing junior counsel.

3. Costs of the appeal to the respondent, Chas E. Ramson Limited, to be agreed or taxed.