[2020] JMCA App 16

JAMAICA

IN THE COURT OF APPEAL

APPLICATION NO COA2020APP00029

BEFORE: THE HON MR JUSTICE F WILLIAMS JA
THE HON MRS JUSTICE FOSTER-PUSEY JA
THE HON MISS JUSTICE SIMMONS JA (AG)

BETWEEN	**JOHN GLENMORE PLUMMER**	**1ST APPLICANT**
AND	**BRIAN PLUMMER**	**2ND APPLICANT**
AND	**PHENEE ANTHONY PLUMMER**	**1ST RESPONDENT**
AND	**SEAN FRASER**	**2ND RESPONDENT**
AND	**DENBIGH FARMS LIMITED**	**3RD RESPONDENT**

Keith Bishop and Andrew Graham instructed by Bishop and partners for the applicants

Mrs Tamara Francis Riley-Dunn and Miss Karlene McFarlane instructed by Nelson-Brown Guy & Francis for the respondents

17, 18 February and 3 April 2020

F WILLIAMS JA

[1] I have read in draft the judgment of my sister Simmons JA (Ag) and agree with her reasoning and conclusion. I have nothing further to add.

FOSTER-PUSEY JA

[2] I too have read the draft judgment of my sister Simmons JA (Ag). I agree with her reasoning and conclusion.

SIMMONS JA (AG)

[3] This was an application for permission to appeal against the order of Batts J made on 31 January 2020. The applicants also sought a stay of that order until the determination of the appeal. The application was supported by the affidavit of John Glenmore Plummer (the 1st applicant), sworn to on 13 February 2020. Upon hearing the parties' submissions, we refused the application for permission to appeal and ordered costs to the respondents to be taxed or agreed. This is a fulfilment of this court's promise to provide reasons for its decision.

[4] The claim at first instance was concerned with the way in which the 3rd respondent, a private, family owned, limited liability company involved in the business of cattle rearing and sugar cane farming, was managed by the 1st applicant. The claim form was filed on 21 June 2017 by the 1st and 2nd respondents, a shareholder and a director respectively, of the 3rd respondent (the company), against the 1st applicant. Their complaint on the company's behalf was that the 1st applicant, who was the managing director of the company conducted several transactions without the knowledge and approval of the company's Board of Directors, and failed to account for income and expenditure in respect of the farm. The respondents have also taken issue with the lease of certain lands which belonged to the company. The grant of a lease of land owned by the company to the 2nd applicant, who was the son of the 1st applicant, appeared to have been the proverbial straw which broke the camel's back, resulting in this matter being the subject of litigation.

[5] It was alleged that in procuring that lease the 1st applicant acted:

"a. Mala fide and against the interest of [the respondents] and other shareholders of the company.

b. For improper purposes in relation to the affairs of [the company].

c. In breach of trust and/or in breach of his obligations as trustee in respect of the assets of [the company]."

[6] The particulars of the breach are as follows:

"i. Failing to advise the other board of directors of an intention to lease the said land.

ii. Failing to call a meeting to have such a decision passed by way of resolution.

iii. Failing to lease the said lands at fair market value.

iv. Profiting from the quarrying of the subject property directly and/or indirectly through the said Brian Plummer to the exclusion of any of [the respondents]."

[7] The relief claimed was:

"1. Damages.

2. That the lease dated 31st day of December 2015 between [the company] and [the 2nd applicant] be set aside.

3. An account of profit [sic] made by [the 1st applicant] by reason of the said lease dated December 31, 2015.

4. Payment of all sums found due to [the respondents] on taking an account of profits.

5. Interest at such rate for such period as deemed fit by this Honourable Court."

[8] The claim was amended in April 2019 and the following relief was claimed:

"1. Damages

2. An Injunction restraining [the 2nd applicant] from mining the lands comprised in Certificate of Title registered at Volume 1467 Folio 152 of the Register Book of Titles.

3. Appointment of Mr. Vince Plummer in the place of John Glen Plummer.

4. That the lease dated December 31, 2015 between [the company] and [the 2nd applicant] be set aside.

5. An account of profit made by [the applicants] by reason of the said lease dated December 31, 2015.

6. Payment of all sums found due to [the respondents] on taking an account of profits.

7. Interest at such rate for such period as deemed fit by this Honourable Court."

[9] The general rule is that where a wrong is done to a company, only that company may file a claim. This is commonly referred to as the rule in **Foss v Harbottle** (1843) 67 ER 189. This rule is a recognition that the directors' duties are owed to the company, and where there is a breach of those duties, it is the company which has suffered. The decision how to proceed lies with the majority of the directors, unless it is a situation where the wrongdoer is in control of the company and the breach is not capable of ratification. Where that is the case, a minority shareholder may sue. The rationale for this exception is that due to the wrongdoer's dominance, the decision making machinery of the company is paralysed. This type of action is known as a "derivative action". In **Burland v Earle** [1902] AC 83, Lord Davey, who delivered the decision of the Board stated:

> "…it is clear law that in order to redress a wrong done to the company or to recover moneys or damages alleged to be due to the company, the action should prima facie be brought by the company

> itself. These cardinal principles are laid down in the well-known cases of ***Foss v. Harbottle*** (1843) 2 Hare 461 and ***Mozley v. Alston*** (1847) 1 Ph 790, and in numerous later cases which it is unnecessary to cite. **But an exception is made to the second rule, where the persons against whom the relief is sought themselves hold and control the majority of the shares in the company, and will not permit an action to be brought in the name of the company. In that case the Courts allow the shareholders complaining to bring an action in their own names. This, however, is mere matter of procedure in order to give a remedy for a wrong which would otherwise escape redress**, and it is obvious that in such an action the plaintiffs cannot have a larger right to relief than the company itself would have if it were plaintiff, and cannot complain of acts which are valid if done with the approval of the majority of the shareholders, or are capable of being confirmed by the majority. The cases in which the minority can maintain such an action are, therefore, confined to those in which the acts complained of are of a fraudulent character or beyond the powers of the company. A familiar example is where the majority are endeavouring directly or indirectly to appropriate to themselves money, property, or advantages which belong to the company, or in which the other shareholders are entitled to participate, as was alleged in the case of ***Menier v. Hooper's Telegraph Works***. (1874) L.R. 9 Ch. 350." [1] (Emphasis supplied)

[10] The claim, having been filed by the 1st and 2nd respondents on the company's behalf, falls within the definition of a derivative action. The particulars of claim, alleged injury to the company by the 1st applicant, who at the time of committing the purported breach, was in a position of dominance.

[11] A defence was filed and at the case management conference, on 7 May 2019, various orders were made. The matter was set down for trial for 17 - 28 February 2020

---

[1] Page 93

and as at the date of the case management conference there was no challenge to the court's jurisdiction to hear the claim.

[12] On 17 December 2019 the respondents filed an application in which they sought the following orders:

> " 1.That, if required, leave be granted retroactively to bring this claim in the name of and on behalf of Denbigh Farms Limited for wrongs done to the company it's [sic] Directors and Shareholders.
>
> 2. That the Amended Claim Form and Amended Particulars of Claim filed on April 29, 2019 be allowed to stand.
>
> 3. An Order declaring that [the respondents] and the Applicant for these orders are "complainants" within the meaning of section 212 of the Companies Act.
>
> 4. A Declaration that this Honourable Court has jurisdiction in this matter.
>
> 5. No order as to Cost [sic]."

[13] The applicants filed an application on 14 January 2020 in which they sought the following orders:

> "1. This claim filed by [the respondent] be struct [sic] out for non-compliance with Section 212 (1) and 213 of the Companies Act, 2004; and
>
> 2. Cost [sic] to the applicants to be agreed or taxed."

[14] Both applications were heard at the pre-trial review on 31 January 2020 and the following orders were made by Batts J in his judgment:

> "a) Application to strike out is refused the claim will stand
>
> b) Application for leave to appeal is refused.

c) Costs to the [respondents] to be taxed or agreed.

d) [Respondents'] attorney to prepare, file and serve formal order."

[15] It is that decision which has spawned this application. The grounds of appeal are as follows:

> " a. The learned Judge erred in facts and/or law in permitting the respondents to continue a derivative action that was filed in 2017 without the leave of the court notwithstanding the clear provisions outlined in section 212 of the Companies Act, which forbids the commencement of a derivative action without the leave of the court;
>
> b. The learned Judge erred in law and/or fact in holding that the majority shareholders of a company can continue a claim against a minority shareholder who is not even a director of the company which is contrary to the clear and unambiguous provisions outlined in section 212 of the Companies Act, the principles in **Foss v Harbottle, Rea v Wilderboer** and the many other related cases;
>
> c. The learned Judge erred in law in holding that despite the defects in the notice that has [sic] been admitted by the respondents, the notice was a proper notice and was also a reasonable notice to the directors despite the fact that the said notice made no reference to the directors of the company bringing an action, diligently prosecute, defend or continue an action;
>
> d. The learned Judge erred in law and/or fact in permitting the majority shareholders to bring a derivative action against a minority shareholder who is not a director although the Board of Directors has options to pass a resolution to commence proceedings in court against the minority shareholder."

[16] Rule 1.8(7)[2] of the Court of Appeal Rules sets out the considerations for the court in determining whether it should grant an application for permission to appeal. It states:

---

[2] Formerly rule 1.8(9)

> "[t]he general rule is that permission to appeal in civil cases will only be given if the court or the court below considers that an appeal will have a real chance of success."

[17] In assessing whether there is a real chance or prospect of success the court is mindful of the guidance from the case of **Duke St John-Paul Foote v University of Technology Jamaica (UTECH) and Elaine Wallace** [2015] JMCA App 27A, where Morrison JA (as he then was), referring to the dictum of Lord Woolf from **Swain v Hillman and another** [2001] 1 All ER 91, observed as follows:

> "[21] This court has on more than one occasion accepted that the words "a real chance of success" in rule 1.8(9) of the CAR are to be interpreted to mean that the applicant for leave must show that, in the language of Lord Woolf MR in **Swain v Hillman and another** [2001] 1 All ER 91, at page 92, "there is a 'realistic' as opposed to a 'fanciful' prospect of success"… So, for the applicant to succeed on this application, it is necessary for him to show that, should leave be granted, he will have a realistic chance of success in his substantive appeal."

[18] I will now proceed to consider each ground in order to assess whether it has a realistic prospect of success.

a. The learned Judge erred in facts and/or law in permitting the respondents to continue a derivative action that was filed in 2017 without the leave of the court notwithstanding the clear provisions outlined in section 212 of the Companies Act, which forbids the commencement of a derivative action without the leave of the court.

[19] Mr Bishop, on behalf of the applicants, submitted that under section 212 of the Companies Act 2004, a shareholder, former shareholder, debenture holder, former debenture holder, director, officer or former director of a company can apply to the court to bring a derivative action. He stated that among the conditions to be satisfied are, that

reasonable notice should be given to the directors, the complainant must be acting in good faith and the action must be in the interest of the company.

[20] Counsel stated that, in the case at bar, the respondents did not satisfy those conditions. Specifically, no notice was given to the directors or former directors including the 1st applicant. He further stated that the respondents should have demonstrated that the notice was given and exhibited evidence of same. Reference was made to **Earl Lewis et al v Valley Slurry Seal Company** [2013] JMSC Comm 21, in which Mangatal J set out at paragraphs [22] to [35], the requirements for bringing a derivative action. Paragraph [24] states:

> "[24] In ' Fraser & Stewart COMPANY LAW OF CANADA', 6th Edition, 1993, by Harry Sutherland, Q,C, cited by Counsel for the 1st and 2nd Respondents, at page 717, under the heading 'Commencing a Derivative action', it is stated: 'Commencing a derivative action' The codification of the representative action embraces all causes of actions that a shareholder may sue for on behalf of a corporation and thus there no longer exists a common law representative action. The statute must be complied with and leave must be obtained from the court. ..... First, the applicant must prove that reasonable notice has been given to the directors of the corporation... This section is not construed in a technical or restricted manner and thus 'notice' has been held to include the request to bring the action together with details of the nature of the claim: see **Re Daon Development Corp** (1984), 54 B.C.L.R. 235 (S.C.); **Re Bellman and Western Approaches Ltd.** (1981), 17 B.L.R. 117 (B.C.C.A.); and **Armstrong v. Gardner** (1978), 20 O.R.(2d) 648 (H.C.) (A letter to the board of directors constitutes notice); but see **Re Daon Development Corp**., supra, where a letter written to the board by the complainant's solicitor after the motion had been filed was not considered to constitute notice. It is not necessary to include a draft statement of claim: **Loeb v. Provigo Inc**. (1978), 88 D.L.R. (3d) 139 (Ont. H.C.) The notice must be directed to the directors and not simply to the corporation itself: **Johnson v. Meyer** (1987), 57 Sask. R 161 (Q.B.) Sufficient notice is established even though each and

> every cause of action is not specified in the notice: **Re Bellman and Western Approaches Ltd.**, supra. 'Notice' is no more than the knowledge which would be disclosed in a generally endorsed writ of summons: **Re Northwest Forest Products Ltd**., [1975] 4 W.W.R. 724 (B.C.S.C.) The technicalities as to notice may be satisfied by serving a notice of motion: **Baniuk v. Carpenter (No. 2)** (1987), 217 A.P.R. 394 (N.B.Q.B.)."

It was submitted that the respondents, therefore, failed to satisfy the requirements as set out in the Act.

[21] Mr Bishop also relied on the case of **Joseph Cyril Edward Bamford v John Henry Harvey** [2012] EWHC 2858, which stated that in a derivative action "normally the company should be the only party to enforce a cause of action belonging to it". It was therefore submitted that the respondents having failed to satisfy the conditions, and having filed a claim without the leave of the court, the claim should not be allowed to stand as it was.

[22] Mr Bishop also submitted that there was no evidence before the learned judge from which he could properly have concluded that the present directors had elected to adopt and continue the claim. He also noted that there was no evidence of any resolution having been passed at a shareholders' meeting.

[23] Mr Bishop took issue with Batts J's finding that this was a good case "to bring and continue the action". He submitted that there was no legislative support for a matter being commenced as a derivative action and for the proper plaintiff, the company, to subsequently give permission for it to continue. He contended that based on the common

law provisions, the legislators were "deliberate in ensuring that leave is granted before the company commences action in a derivative action".

[24] Counsel for the respondents, Mrs Riley-Dunn, conceded that the claim was commenced by and on behalf of the company, without leave first being obtained. Leave was however then sought by application dated 17 December 2019, and the learned judge having heard the arguments proffered by both parties, granted leave to allow the claim to continue.

[25] Mrs Riley-Dunn submitted that this ground had no realistic prospect of success, as the order of Batts J that the claim as commenced was to stand, was based on four varying reasons. She submitted that the court had jurisdiction to grant leave under section 212 of the Companies Act and the threshold requirements were met. Additionally, she relied on the finding of fact that the majority of directors ratified and adopted the continuation of the claim in its present form, as they are entitled to so do. Reference was made to the affidavit of Vince Plummer, the Managing Director of the company, who stated at paragraph 15 of his affidavit in support of the application for leave, sworn to on 27 January 2020, that it "is the firm belief of the directorship of the Company that the one way we would seek redress for that which was done is through the intervention of this Honourable Court",

[26] Mrs Riley-Dunn also referred to paragraph 37 of the affidavit of Jenifer Plummer Barrett, the Company Secretary, sworn to on 10 December 2019 in support of the respondents' application for leave in the court below, which stated that the Board of

Directors believed that the application (claim) was "… brought in good faith and for the genuine purpose of pursuing the losses suffered by Denbigh Farms due to the acts and omissions of the Defendants including the misappropriation of corporate opportunities and redirection of profits from Denbigh Farms to others". Mrs Plummer Barrett also stated that the company had "… suffered a grave loss and damage as a result of the negligence and breach of fiduciary duties owed to it by its former managing director and majority shareholder, [the 1st applicant]".

[27] At paragraph 38, Mrs Plummer Barrett stated that she believes in the "…merits of the claim, and [that] it appears to be in the best interests of Denbigh Farms that the claim be continued as filed". Mrs Plummer Barrett was one of the five directors of the company at the time of the application, and she swore to this affidavit for and on behalf of the remaining directors of the company.

[28] In the circumstances, it was submitted that evidence was presented to the learned judge which indicated that the board of directors, at the time of the application, ratified and adopted the continuation of the claim.

Discussion

[29] Article 93 of the company's Articles of Association states that "[t]he business of the Company shall be managed by the Directors, who …may exercise all such powers of the Company as are not by the Act or by these Articles required to be exercised by the Company in General meeting…". Decisions of the Board and/or shareholders are usually written and are also subject to certain procedural requirements. Where the company is a

small one, the reality is that the decision making process may not always follow the technical requirements of meetings and resolutions.

[30] It has also been recognized at common law that in the absence of a written resolution, where it is shown that all the members knew of, and agreed, or acquiesced in a decision, they and the company will be bound. In **Parker & Cooper Ltd v Reading** [1926] Ch 975, Astbury J stated the principle in the following terms:

> "… where the transaction is intra vires and honest, and especially if it is for the benefit of the company, it cannot be upset if the assent of all the corporators is given to it. I do not think it matters in the least whether that assent is given at different times or simultaneously."[3]

[31] In the case at bar, Mrs Plummer Barrett, in her affidavit, stated that she was duly authorized to depose to the affidavit in support of the application for leave to bring the claim and for the claim to be allowed to stand. She also deposed that all the directors and shareholders of the company, except the 1st applicant were given notice from 2015, of the 1st and 2nd respondents' intention to commence a claim on the company's behalf. Additionally, she stated that it appeared to be in the best interests of the company for the action to proceed to trial. A list of the directors and shareholders was exhibited to her affidavit. The directors were Vince Plummer, Sean Conway Fraser, Sandrea Barnett, Jacqueline Plummer-Reid and Jenifer Plummer Barrett. All five directors were present at the hearing of this matter.

---

[3] Page 984

[32] The learned judge stated, at paragraph [26] of his judgment, that "the present directors have clearly elected to adopt and continue the claim". Mr Bishop argued that this finding was without foundation. The fact that the present directors elected to continue the action, in my view, appears to be a sufficient basis on which such a finding could be made. In addition, based on **Parker & Cooper Ltd v Reading,** the agreement of those directors, even if not in writing, is sufficient to bind the company.

[33] The amendment of the claim by the present Board signifies their decision to so adopt and continue the claim in the name of the company. The claim would then proceed as the company's claim against the 1st applicant, the former director and majority shareholder, and the 2nd applicant, a third party, as opposed to a derivative action. In the circumstances, the requirement for leave to file the claim would therefore be negatived. In the circumstances, I am of the view that this ground has no realistic prospect of success.

b. The learned Judge erred in law and/or fact in holding that the majority shareholders of a company can continue a claim against a minority shareholder who is not even a director of the company which is contrary to the clear and unambiguous provisions outlined in section 212 of the Companies Act, the principles in Foss v Harbottle, Rea v Wilderboer and the many other related cases.

[34] Mr Bishop submitted that the 1st and 2nd respondents did not have any right to bring a claim against the 2nd applicant, who was neither a director nor shareholder. Counsel submitted that an ordinary claim for breach of contract should be brought against the 2nd applicant, rather than a derivative action.

[35] It was also submitted that there is no legislative support for the finding of the learned judge that this was a very good case "to bring and continue the action" as section 212 of the Act provides that a complainant may "prosecute, defend, discontinue or intervene" an action on behalf of a company. He stated that no mention was made of permission being given to continue, as the legislature did not contemplate a claim being filed without leave. As stated above, he contended that Parliament was deliberate in stipulating that leave be granted before a derivative action is commenced.

[36] Mrs Riley-Dunn submitted that the learned judge did not make the decision complained of in this ground. She stated that what the learned judge found at paragraph [24] of his judgment was that where the majority of the directors are of the view that it is in the company's interest to commence, or by extension, adopt a claim that had already commenced, they did not need the permission of the court to do so. In other words, the company would not require the leave of the court to commence a claim or adopt a claim that has already commenced.

[37] Counsel, Mrs Riley-Dunn stated that Batts J found as a matter of fact that the shareholders and directors of the company changed during the life of the claim and that as of July 2019, the board of directors constituted Vince Plummer, Sean Fraser, Sandra Barnett, Jacqueline Plummer-Reid and Jenifer Plummer-Barrett. She directed the court's attention to paragraph [26] of the judgment where the learned judge also found, as a matter of fact, that the present directors of the company had elected to adopt and continue the claim, thereby making the grant of leave irrelevant.

[38] Mrs Riley-Dunn also pointed out that it is factually inaccurate to state that the 1st and 2nd respondents hold the majority of the shares in the company, as even with their interests combined, their shareholding is less than that of the 1st applicant.

Discussion

[39] Paragraph [24] of the judgment states:

> "Since directors can cause the company to act it follows that applications, pursuant to Sections 212 and 213, will more often than not be by either minority shareholders or directors or by former shareholders or directors. Directors in the majority, who see it in the company's interest to commence a claim, do not need the permission of the court so to do. Majority shareholders, similarly, do not need the courts intervention to attain their objectives. In the ordinary course of events they will be able to appoint a board of directors which will abide by their wishes."

[40] That passage reflects the law as it now stands. The majority directors or shareholders do not need the court's permission to bring any action. Once the wrong complained of is ratifiable, the majority have the option to do so.

[41] In this case, although the 1st applicant is no longer a director, he is a majority shareholder, and as such the company can take action against him or continue a claim against him for his purported breach of duty while he was the managing director of the company.

[42] I agree with Mrs Riley-Dunn that this ground has no realistic prospect of success.

c. The learned Judge erred in law in holding that despite the defects in the notice that has [sic] been admitted by the respondents, the notice was a proper notice and was also a reasonable notice to the directors despite the fact

that the said notice made no reference to the directors of the company bringing an action, diligently prosecute, defend or continue an action.

[43] Mr Bishop argued that based on the decision in **Earl Lewis et al v Valley Slurry Seal Company,** the requirement for notice not having been met, the learned judge was wrong in permitting the claim to stand. Counsel stated that the basis on which the learned judge found that the three statutory pre-requisites had been satisfied is unclear, as the learned judge did not state when the applicants received the notice and whether it was reasonable notice.

[44] He also argued that the learned judge failed to acknowledge the weaknesses in what he identified as the "Notice", in that the words "intention to apply to the court" were absent. The absence of those words, he argued, should have been dealt with by the court below. The "Notice" that the court relied on, was therefore defective. The learned judge also failed to identify when the applicants received the said "Notice" and to state whether he considered it to be reasonable notice.

[45] It should be noted that Mr Bishop also submitted that there was no proof that the above mentioned email communication came to the attention of the 1st applicant.

[46] Mrs Riley-Dunn submitted that it has long been accepted in this jurisdiction that there is no strict formality or technicality for the notice that is to be given to the directors. She stated that the notice does not even have to specify every possible cause of action that is to be brought against the directors, and there is no requirement for the directors to be specifically named. Reference was made to **In re Bellman et al and Western Approaches Limited** (1981) 130 DLR (3d) 193 (**Re Bellman**) cited by Sykes J (as he

then was) in **Sally Ann Fulton v Chas E Ramson Limited**, [2016] JMSC COMM 14, where Nemetz CJ remarked that "a failure to specify each and every cause of action, claim or head of relief in a notice does not…invalidate the notice as a whole".

[47] Sykes J in **Sally Ann Fulton v Chas E Ramson Limited** explained the requirement to give notice and what is considered to be reasonable notice at paragraph [16] of his judgment; he stated "…it has been said that the purpose of giving notice to the directors is to enable them to examine all the facts and circumstances and make an informed decision". At paragraph [19], Sykes J continued "…it may well be that once the directors receive notice and have had sufficient time to conduct the necessary assessment, they may decide that the company should take remedial measures to address the complaints raised. It may also be the case that the directors may give an explanation that may satisfy the applicant who then takes no further action".

[48] Counsel, Mrs Riley-Dunn, referred to the affidavit of Vince Plummer in support of the application for leave in the court below, to which copies of three email messages which were sent to all of the then directors of the company, including the 1st applicant, were exhibited. The first email, which was sent on 21 February 2017, referred to, *inter alia*, the sand mining project and demands made by the Board that the mining project be carried out in the name of the company instead of the 2nd applicant, as well as the need for the 1st applicant to attend an urgent meeting to discuss the lease and find solutions.

[49] A second email, which was copied along with the first email, although not specifically referred to in the affidavit, was sent on 23 February 2017. It indicated that

there had been no resolution of the issues raised in the first email. It also outlined the 1st applicant's absence from a meeting, which was called to discuss those issues and an invitation being extended to him, once again, to attend a rescheduled meeting to discuss the issues surrounding the lease agreement. The first and second emails were sent by Mrs Plummer Barrett.

[50] The third email which was exhibited to the affidavit was dictated by the 1st respondent and sent by "Jennie Powell" to the company's shareholders, including the 1st applicant, on 9 March 2017. It was titled "The Lion is now AWAKE", and it was submitted that it demonstrated by its tone and tenor that the respondents, in particular the 1st respondent, were frustrated with the lack of action being taken in respect of the said lease agreement. He outlined the issues that he has with the lease agreement and expressed the view that there was a clear conflict of interest, given that it was entered into between father and son. He also raised concern that the decision was taken to mine the land in this way and to enter into a lease agreement without the knowledge or permission of the shareholders. There is also a deadline given of 31 March 2017 for action to be taken to rectify what has been described as a wrong against the company and its shareholders, specifically, for the licence to be amended to show the company as the owner thereof.

[51] Mrs Riley-Dunn submitted that those email messages make it clear that at all times the 1st applicant was being asked to join in the discussions, with a view to the issues being fully ventilated, so that he could participate in the process of finding a solution that

was in the best interests of the company. Counsel stated that based on Vince Plummer's affidavit, it was apparent that the 1st applicant failed and/or refused to attend any of the scheduled meetings. This has not been refuted.

[52] It was submitted that these emails show that the directors were aware of the problem and received sufficient notice, in order to make an assessment of the issues raised, and take the necessary actions to remedy same. Mrs Riley-Dunn noted that the learned judge accepted these communications along with the assertions made by Mrs Plummer Barrett in her affidavit, that the 1st applicant, as Managing Director was notified of the allegations and the desire to file a claim against him for his alleged misconduct.

[53] It was also submitted that the affidavits filed in support of this claim showed that all of the directors were aware of the issues and that their failure to resolve the issues internally would have led to the matter being referred externally. It was, however, conceded that the notice did not speak specifically to any request that the 1st applicant commence a claim against himself or the 2nd applicant. Counsel stated that this was not an issue in the court below, as the respondents accepted that the wording of section 212 (2)(a) of the Companies Act, arguably, presupposed that the complainant required action from the offending director. In this instance, that action would be for the 1st applicant to commence a claim against himself and his son (the 2nd applicant). Counsel also highlighted that locally and internationally the approach of the courts in determining compliance with a notice has been purposive; not literal.

[54] Reference was made to **Winfield v Daniel** 2004 ABQB 40 in which the Alberta Court of Queen's Bench considered the effect of section 240 of the Alberta Business Corporation Act, which mirrors section 212 of our Companies Act. Gallant J considered various factors including the rationale behind the notice requirement, the common law rule in cases of futility, and the improbability that the relevant director would have commenced proceedings against himself and another party on behalf of the company. It was held that the failure to provide notice of the intention to the 1st applicant to commence a claim against himself should not be fatal to the application for leave on the facts of the case, as it was unlikely that the parties would have been able to resolve their dispute outside of the courts. Literal compliance with the notice requirement would have been futile based on the purpose for giving notice.

Discussion

[55] The learned judge's finding that the "Notice" was sufficient for the purposes of section 212 of the Companies Act, cannot be faulted as the respondents presented the court with evidence of the shareholders' grievances being laid before the Board including the 1st applicant, in numerous emails. As noted 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.

[56] In any event, in the case of **Winfield v Daniel**, Gallant J found that the failure to provide notice was not fatal as, bearing in mind the history between the parties, it was unlikely that the dispute could have been resolved out of court. The learned judge said:

"In this case, it is obvious that strict compliance with the statutory requirement of giving notice would be futile".[4] The purpose of the notice as stated in **Intercontinental Precious Metals Ltd v Cooke** (1994), 88 BCLR(2d) 101, referred to by Mangatal J in **Earle Lewis and another v Valley Slurry Seal Company and others** is " to afford the directors a reasonable opportunity to consider their position before the application is heard by the Court".

[57] In this matter there is evidence of numerous emails being sent to the 1st applicant, in an effort to resolve the dispute. From all indications, he did not appear to be interested in discussing the matter. What then would have been the purpose of informing him of the proposed action? It is likely that a court may find that there would be none.

[58] Accordingly, it is my view that this ground is unlikely to succeed.

d. The learned Judge erred in law and/or fact in permitting the majority shareholders to bring a derivative action against a minority shareholder who is not a director although the Board of Directors has options to pass a resolution to commence proceedings in court against the minority shareholder.

[59] Mr Bishop, in reference to the learned judge's findings that "[t]he present directors of the company have clearly elected to adopt and continue the claim", submitted that there was no evidence before him in support of this. He further submitted that the

[4] Paragraph 15

respondents did not present the court with a Board resolution or resolution passed at a shareholders' meeting.

[60] As stated prior, counsel contended that the 1st and 2nd respondents did not have a right to bring a derivative action against the applicants, in particular the 2nd applicant who was neither a director nor shareholder of the company. This issue, counsel stated, was not addressed by the learned judge. Mr Bishop stated that the respondents should have brought a claim for breach of contract against the 2nd applicant, as he was not a member of the company.

[61] Mrs Riley-Dunn submitted that permission was not granted by the court for the respondents to bring a derivative action against a minority shareholder. It was granted retroactively to bring a derivative action against a managing director and majority shareholder, who allegedly used his position to enter into a lease agreement on behalf of the company.

[62] Counsel reminded the court that the 1st and 2nd respondents were not majority shareholders, as the largest block of shares in the company was held by the 1st applicant, with the only other shareholder holding the same amount being Eadis Plummer, that being 5000 shares. The remaining shareholders each held shares totalling between 1250 to 3750 shares. Mrs Riley-Dunn pointed out that the 1st and 2nd respondents only hold 2500 shares, each.

[63] In concluding, Mrs Riley-Dunn urged the court to find that the applicants failed to demonstrate that the proposed appeal has a realistic prospect of success and to refuse

the application for leave to appeal. With respect to the issue of whether a stay of the proceedings would be appropriate if the application is granted, counsel indicated that she would not have any basis on which to object.

Discussion

[64] The issue of whether or not the company was required to pass a resolution to commence proceedings against a minority shareholder, was ventilated above. As noted at paragraph [29], often times small companies do not follow the technical requirement for a written resolution, however, where it is shown that the members knew or agreed or acquiesced in the decision, then the company will be bound. Furthermore, evidence has been presented, which indicates that the 1st applicant is not a minority shareholder, but rather a majority shareholder, with 5,000 shares allotted to him. The company can commence or continue an action against a majority shareholder and former director. The 2nd applicant, who is neither a director nor a shareholder, can also be sued on the basis that he has benefitted from the 1st applicant's alleged breach of duty.

[65] At the time of the filing of the claim, the alleged wrongdoer, that is the 1st applicant, was in control of the company as its managing director and majority shareholder. Upon the 1st applicant ceasing to be a director and new directors being appointed to the Board, the company was then in a position to adopt and continue the claim. The claim would therefore, no longer be a derivative action on behalf of the company which requires leave of the court, but instead a claim by the company against a former director and majority shareholder, and a third party who is alleged to have benefitted from that former director's purported breach. The latter claim would not

require leave of the court. It is my view that this ground does not have a realistic prospect of success.

[66] It is for the above reasons that we made the order set out in paragraph [3] of this judgment.