JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CIVIL APPEAL NO COA2025CV00014

APPLICATION NO COA2025APP00044

BETWEEN	**ADAM STEWART**	**APPLICANT**
AND	**ROBERT STEWART**	**1ST RESPONDENT**
AND	**DMITRI SINGH**	**2ND RESPONDENT**
AND	**ELIZABETH DESNOES**	**3RD RESPONDENT**
AND	**LAURENCE MCDONALD**	**4TH RESPONDENT**
AND	**GORSTEW LIMITED**	**5TH RESPONDENT**

Ian Wilkinson KC, Conrad George, Lenroy Stewart and Ms Gabrielle Chin instructed by Hart Muirhead Fatta for the applicant

Mrs Symone Mayhew KC and Ms Aaliyah Myrie instructed by Mayhew Law for the 1st respondent

Kevin Powell and Ms Timera Mason instructed by Hylton Powell for the 2nd respondent

Mrs Daniella Gentles-Silvera KC, Ms Kathryn Williams and Stephen Nelson instructed by Livingston, Alexander & Levy for the 3rd respondent

Mrs Denise Kitson KC and Darien Streete instructed by Grant, Stewart, Phillips & Co for the 4th respondent

John Graham KC and Ms Peta-Gaye Manderson instructed by John G Graham & Co for the 5th respondent

25 March, 10 April and 5 May 2025

Civil practice and procedure — Injunction pending appeal — Appeal against refusal to grant injunction — Whether judge was palpably wrong to refuse to grant an injunction — Company law — Oppression remedy — Threatened oppressive conduct – Whether serious issues to be considered on appeal -

Standing to bring claim as a future shareholder – Whether additional evidence to be considered on the application — Companies Act, sections 23, 212(3) and 213A

ORAL JUDGMENT

IN CHAMBERS

STRAW JA

Introduction

[1] The applicant, Adam Stewart, seeks an interim injunction to restrain the first four respondents, Robert Stewart, Dmitri Singh, Elizabeth Desnoes, and Laurence McDonald from proceeding with two meetings of the board of directors of the 5th respondent company, Gorstew Limited ('Gorstew' or 'the company'), until the determination of his appeal.

[2] By notice of appeal filed 6 March 2025, and subsequently amended on 17 March 2025, the applicant desires this court to overturn the decision of Batts J ('the learned judge'), by which he, on 3 March 2025, dismissed an application for an injunction, to restrain the 1st to 4th respondents from proceeding with the initial meeting (scheduled for 18 December 2024), until the determination his claim made pursuant to section 213A of the Companies Act. By this claim, the applicant also seeks the appointment of three independent non-executive directors to the board of Gorstew.

[3] The application is supported by two affidavits of Gabrielle Chin both filed and sworn on 6 March 2025 (one being an affidavit of urgency). The court was also provided with the various affidavits that were relied upon by the parties in the court below and which are relied upon before me.

[4] On 7 March 2025, I granted an interim injunction pending the *inter partes* hearing and on 25 March and 10 April 2025, further interim injunctions, pending my full consideration of the matter.

Background

[5] The background and context giving rise to the claim and the initial application for an injunction are set out at paras. [1], [3], [4] and [9] of the decision of the learned judge. Paras. [3] and [4] are here reproduced for ease of reference:

> "[3] The testator, Mr. Gordon 'Butch' Stewart OJ was a very wealthy businessman who had several companies in differing fields of endeavor. He also had several children in the course of different relationships. The [applicant] is a son by the testator's second wife Penelope Jane 'P.J.' Stewart. During the testator's lifetime he was integrally involved in the running of his father's businesses and continues so to be. Given the large number of assets, it is not surprising that the testator took great care, when making his will, to detail the arrangement of his estate. His will dated 15th May 2020 directed the Executor/Trustees exactly how he wished the companies to be organized after his passing. In this regard clauses 12-14 provided…:
>
> '**The ATL Group**
>
> 12. In this my Will '**ATL Group**' shall mean the company, Gorstew Limited ('Gorstew') and its subsidiaries and other companies which own the following businesses, namely:
>
> (a) Appliance Traders Limited and its businesses (otherwise called ATL) including the business operated from 35 Half-Way Tree Road, in Saint Andrew and Bogue in Saint James;
>
> (b) the Jamaica Observer newspaper;
>
> (c) one or more radio station(s) and any other media business including the business known as Buzz;
>
> (d) ATL Motors Limited/ATL Automotive Holdings Limited/ATL Autobahn Limited and all companies and entities involved in the motor vehicle dealership business or having an

interest in the motor vehicle business anywhere in the world ('the ATL Motors Sub-group');

(e) the AC Marriott hotel in Kingston, Jamaica;

(f) the warehouse commonly called Alcrataz owned by Gorstew or by a company or companies owned by Gorstew but which was built and expanded by one or more companies within the Sandals & Beaches Group and which is currently occupied by the Sandals & Beaches Group at a nominal rent, but only if it has not been sold as part of any deal relating to the Sandal & Beaches Group;

(g) any other hotel wherever located which is not operated under the Sandals or Beaches brand, or if the Sandals & Beaches Group is sold, is excluded from such sale;

(h) the property known as 5 Kent Avenue, Montego Bay, in the Parish of Saint James; and

(i) any other business falling outside the Sandals & Beaches Group, the Unique and the HPI Group (not specifically dealt with herein).

For this purpose, the ATL Group shall be deemed **not to include**:

(i) the hotel known as Sandals Negril even though Gorstew may be the registered proprietor thereof at the time of my death;

(ii) any other asset used as part of the Sandals & Beaches hotel business (excluding Alcrataz); and

(iii) any undeveloped land intended for use by, or expansion of, any Sandals or Beaches hotel.

13.1 I GIVE the ATL Group to my following three (3) sons in the following proportion, namely:

(a) Adam Stewart = 52%;

(b) Robert 'Bobby' Stewart = 24%; and

(c) Gordon Jackson Stewart =24%

The allocation of interest in the ATL Group recognizes Adam's important role in expanding and developing the ATL Motor Sub-group.

13.2 Notwithstanding anything above if during my lifetime I shall give any of my three (3) sons any interest in any of the companies or assets comprised in the ATL Group then such *inter vivos* gift shall go in reduction of the percentage ownership in the ATL Group or relevant company, as the case may be but not so as to diminish any *inter vivos* gift made by me. For instance, I have in mind to give my son, Adam a 40% interest in the ATL Motors Sub-group during my lifetime and if I should do so, Adam's bequest under sub-clause 13.1 in respect of the ATL Motors Sub-group would be a further 12% to arrive at 52%. But if I were to give Adam an *inter vivos* gift of say 60% interest in the ATL Motors Sub-group then under subclause 13.1 he would receive zero interest in the ATL Motors Subgroup under this my Will and the remaining 40% would be divided equally between my other two sons referred to in sub-clause 13.1 namely; Robert 'Bobby' Stewart (20%) and Gordon Jackson Stewart (20%).

14. With respect to the ATL Group, I wish the following to be done and I charge my Trustees with the duty of reorganizing the ATL Group to ensure that these objectives are met; namely:

(a) that the ATL Group be reorganized under a single parent company in

which shares can be allocated to my three (3) sons as stated in paragraph 13 above;

(b) that the ATL Group be managed and operated along strict business lines with a strong professional board of directors to generate income for the named beneficiaries;

(c) that my thee (sic) (3) sons named above shall, if they so desire, have seats on the board of directors of the parent company and other principal companies within the ATL Group and, in the case of Gordon Jackson Stewart, who is an infant at the date of this Will, upon his reaching the age of majority in Jamaica.

(d) that Adam Stewart be the chairman of the ATL Group so long as he is willing and able to hold that office,

(e) that Adam may establish a management company or team to manage the businesses comprised in the ATL Group on terms that such company or team be paid management fees on strict arm's length basis as determined and approved by my Trustees during the initial set-up period with the assistance of professional management consultants as determined by my Trustees;

(f) that Jamaica Observer, although a loss-making venture at the moment, not be sold or disposed of or be closed down so long as the beneficiaries can, within reason, sustain this company by providing

financial assistance from other companies within the ATL Group.

Nothing in this clause 14 shall be construed to mean that the beneficiaries of the ATL Group may not wind-up, sell or dispose of any business or asset in the ATL Group subject to requisite board or other approval PROVIDED that any such sale or disposal shall be on an arm's length basis. This clause shall also apply to Jamaica Observer if my three sons referred to in clause 13 above shall unanimously agree that it should be closed, sold or otherwise disposed of because it is a financial burden on the ATL Group.'

[4] In effect certain of his companies were to come under a new umbrella company, not yet in existence. The [applicant] is to receive 52% of the shares in that new company. [Gorstew] is one of those companies and was, at the date of the testator's death, wholly owned by the testator …. The Executor/Trustees have a responsibility to implement the wishes of the testator. In that regard they must identify and call in the assets, ensure they are duly protected and undertake the process of distribution in accordance with the testator's instructions." (Emphasis as in the original)

[6] A grant of probate in respect of the Will of Mr Gordon 'Butch' Stewart ('the Will') was given on 31 October 2023. Against this backdrop, on 12 December 2024, the 1st respondent, Robert Stewart (the applicant's brother and a director of Gorstew) summoned a meeting of the board of directors of Gorstew that was to take place on 18 December 2024, in the following terms:

"**GORSTEW LIMITED**

NOTICE OF BOARD OF DIRECTORS MEETING

I, **ROBERT STEWART**, director of GORSTEW Limited, acting pursuant to Article 103 of the Company's Articles of Incorporation **DO HEREBY SUMMON** a meeting of the Board of Directors to be held on: -

DAY: Wednesday
DATE: December 18, 2024

TIME: 9:00 a.m. - Jamaica Time (US Central)
VENUE: The Hibiscus Meeting Room
Courtyard By Marriott
1 Park Close, Kingston 5

- As well as remotely by a Zoom meeting link

Robert Stewart -Director
Dated the 12th day of December, 2024

GORSTEW LIMITED

AGENDA

1. Meeting Called to Order
2. Apologies for Absence
3. Notice of Meeting
4. **Matters to be discussed**

a. That [the applicant], having appropriated unto himself the title of '**Executive Chairman**', without being appointed by the Directors or other lawful means, be and is hereby directed to cease to describe himself as such and to cease to exercise or purport to exercise any executive functions in relation to the Company.

b. **To duly appoint a Chairman** of the board of the Company pursuant to Article 106 of the Article of Association of the Company.

c. **Appointment of Additional Director**

That, Paul Soutter, a former Finance Director of the Company, be and is hereby appointed as an additional Director of the Company.

d. **Action with respect to Jamaican Observer Limited.**

That the Company, as principal shareholder in Jamaican Observer Limited, be and is hereby authorized to take the requisite legal steps to reorganize the board of directors of that

subsidiary to protect that subsidiary and prevent its newspaper from being used as an instrument to attack and besmirch the character of persons on behalf of [the applicant], Jaime Stewart and Brian Stewart.

e. **Appointment of Audit committee**

That an Audit Committee consisting of at least two Directors of the Company, [sic] least one of which or, if more than two, the majority of which must be a director or directors which has/have not being [sic] involved in the day to day management of the Company over the last three (3) years and that the duties and functions of the Audit Committee be as set out in the **Appendix** attached hereto.

f. **Management of the Company**

That the management arrangements with respect to the Company be reviewed to determine whether it is compliant with Mr. Gordon Stewart's mandate as set out in his Will— in particular clause 14 (e) of the Will and if not to determine whether the Board should approve the arrangement and appeal to the Executors to accept and ratify the arrangement if it were not preapproved by the Executors as required or alternatively whether any other action should be taken in respect thereof." (Emphasis as in the original)

[7] It was in respect of this meeting ('the December meeting') that the learned judge refused injunctive relief on 3 March 2025. On that same day, Robert Stewart wrote to the board of directors to convene a meeting on 10 March 2025, with an agenda identical to that of the December meeting. The applicant therefore wishes this court to grant an injunction to prevent these meetings, pending the determination of his appeal.

[8] The initial injunction was sought pending the determination of the applicant's claim for, among other things, a declaration that any attempt to pass a resolution removing him as executive chairman of Gorstew or other entities within the Gorstew/ATL Group,

amounts to conduct that is oppressive, unfairly prejudicial or amounts to an unfair disregard of the applicant's rights as director, officer and majority beneficial shareholder of those companies, within the meaning of section 213A of the Companies Act. This claim is yet to be heard.

Findings of the learned judge

[9] In refusing the injunction, the learned judge found that there was no serious issue to be tried. He found in particular that the applicant did not have the standing to bring a claim under section 213A of the Companies Act in the capacity of a shareholder as he is not a shareholder in Gorstew and he is not yet the registered holder of 52% of the shares in the ATL Group, which company does not yet exist.

[10] The learned judge found that there was only one item on the meeting agenda that could affect the applicant his capacity as a director; that being the proposal to appoint an additional director. This, the learned judge stated, could affect the balance of voting rights on the board. The learned judge concluded, however, that in the absence of evidence to show that the additional director would adopt positions that were hostile to the applicant, this was speculative.

[11] The learned judge found that the applicant's case was anticipatory and that section 213A speaks to actual conduct, not anticipated future conduct. He noted that "[t]here is no remedy where proposed conduct is 'likely to have an effect'".

[12] He also found that damages would not be an adequate remedy for either party in the event of the grant or failure to grant an injunction. He considered the balance of convenience and found that the justice of the case dictated that the directors and/or executors/trustees should be permitted to call the meeting, consider the agenda items, and carry out their fiduciary and statutory responsibilities.

[13] The learned judge postulated that the applicant's expected 52% shareholding in the future entity was not endangered by any of the agenda items proposed and that

remedies are available to the applicant if the respondents fail to act lawfully and cause the applicant or the companies to suffer loss.

Submissions

For the applicant

[14] Learned King's Counsel, Mr Wilkinson, for the applicant, contended that if injunctive relief is not continued, the applicant's appeal will be rendered nugatory. He argued that the applicant has a good arguable appeal, noting that the appeal concerns the exercise of the learned judge's discretion. He asserted that the learned judge made serious errors in arriving at his decision, and explored seven of the learned judge's findings.

[15] First, as to the finding that the ATL Group "does not yet exist", Mr Wilkinson stated that this was demonstrably wrong, as the ATL Group was clearly defined in the Will to be Gorstew and its subsidiaries, with certain specified exceptions. These companies are already in existence.

[16] Second, relating to the learned judge's finding that section 213A of the Companies Act does not speak to future conduct. Reliance was placed on the cases of **101114752 Saskatchewan Ltd v Devonian Potash Inc and another** 2012 SKCA 64 ('**Saskatchewan Ltd**') and **Re Posgate & Denby (Agencies) Ltd** [1987] BCLC 8, in positing that section 213A protects against future or threatened oppressive conduct.

[17] Third, as to the applicant's standing, Mr Wilkinson contended that the learned judge was wrong to find that the applicant's only standing to bring a claim under section 213A of the Companies Act was in his capacity as a director. Mr Wilkinson asserted, as a well-established principle, that a specifically enforceable contract for the sale of shares constituted the recipient as beneficial owner under a constructive trust (citing the cases of **Neville and another v Wilson and others** [1997] Ch 144 and **LA Micro Group (UK) Ltd and another v Frenkel and others** [2025] 2 WLR 1 ('**LA Micro Group**')). On the basis of these authorities, King's Counsel submitted that "shareholder", under the

Companies Act includes the beneficial shareholder as well as the legal shareholder. Reliance was also placed on the case of **Northover v Northover and others** [2014] JMCC Comm 15 ('**Northover**') in emphasising that the oppression remedy is an equitable remedy that is broad and flexible to protect the interest of stakeholders in a variety of circumstances. As such, the learned judge ought to have considered the applicant's standing to bring the claim in the capacity of a shareholder.

[18] Fourth, concerning the learned judge's finding that any relief sought by the applicant should concern disadvantages to him in his capacity as a director, King's Counsel contended that this was contrary to the findings of the learned judge in a previous case (**Ivan Smith (Administrator of the Estate of Kathleen Elfreda Chambers Smith) v CDF Scaffolding & Building Equipment Ltd and others** [2016] JMCC Comm 23) and also at variance with sentiments concerning the flexibility of the oppression remedy to prevent unjust outcomes. Mr Wilkinson maintained that the applicant's interests as "putative majority shareholder" remained a relevant consideration.

[19] Fifth, relating to the finding of the learned judge that the agenda item which would most affect the applicant in his capacity of director, was the proposal to appoint Mr Soutter as a director. This finding, it was asserted, failed to take account of agenda item 4(a), which proposed to direct the applicant to cease to exercise executive functions, which would result in the applicant suffering irreparable harm in his capacity as a director and would likewise cause significant damage to Gorstew and its subsidiaries.

[20] The two remaining findings of which Mr Wilkinson complained related to the adequacy of damages as a remedy and that the applicant would have remedies available to him if the respondents fail to carry out their fiduciary and statutory responsibilities. It was submitted that both findings were demonstrably wrong.

[21] Based on the foregoing, King's Counsel submitted that the applicant has an appeal with good prospects for success and has satisfied the threshold test for injunctive relief,

that there is a serious issue to be tried. Further that damages would not be an adequate remedy and that the balance of convenience weighs in favour of granting the injunction.

On behalf of the respondents

[22] Submissions were made on behalf of the 1st, 2nd, 3rd and 4th respondents by Mrs Mayhew KC, Mr Powell, Mrs Gentles-Silvera KC and Mrs Kitson KC, respectively. These submissions overlap in several respects and these respondents have adopted each other's submissions. As such, in order to properly capture the submissions, they will be summarized jointly. No submissions were made on behalf of the 5th respondent.

[23] The respondents submitted that the applicant has no real prospect of success on appeal, as the learned judge exercised his discretion correctly in refusing to grant an injunction (**Michael Drakulich and others v Karibukai and others** [2021] JMCA App 4 ('**Drakulich**')). To begin, the learned judge was correct to find that the applicant's only standing to bring a claim under section 213A of the Companies Act is in the capacity of a director and not as a shareholder. Reference was made to the definition of "complainant" (under section 212(3) of the Companies Act), the classification of members (under section 23 of the Companies Act) and to article 32 of Gorstew's Articles of Association ('the articles' or 'Gorstew's articles'), which sets out what happens on the death of a member of the company. It was posited that the Companies Act and the articles would prevail above the Will and that in any event, based on the Will, neither the applicant nor his brothers were ever intended to be shareholders in Gorstew. Rather, their bequest is in shares in the new parent company. The applicant therefore not being a shareholder in Gorstew is not entitled to bring a claim in that capacity. Reliance was placed on the case of **Joni Kamille Young-Torres (as administrator of the estate of Karl Augustus Young) v Ervin Moo-Young and others** [2019] JMCA Civ 23 ('**Young-Torres**').

[24] In addition, the respondents submitted that the issues complained of by the applicant were rightly considered by the learned judge to be anticipatory in nature, with the result that the applicant's claim was premature. The cases of **Re Ringtower Holdings plc (Re a Company No 005685 of 1988 (No 2))** (1989) 5 BCC 82, **Bank**

of Montreal v Dome Petroleum Ltd 1987 CanLII 3177 (AB KB), **Northover** and **Marcia Bellegarde (Executrix, Estate Lloyd Winston Wilson deceased) v Donovan Lewis and another** [2024] JMCC Comm 35 ('**Marcia Bellegarde**') were relied upon to make the point that the applicant needed to show actionable conduct giving rise to oppression or unfair prejudice, instead of conduct that was anticipatory.

[25] Reliance was placed on the cases of **BCE Inc and Bell Canada v A Group of 1976 Debentureholders and others** [2008] 3 SCR 560 ('**BCE**'), **Ervin Moo Young v Debbian Dewar and others** [2016] JMSC Comm 16 ('**Moo Young**') and several other cases, in defining oppression, unfair prejudice and unfair disregard. On the basis of these authorities and the affidavit evidence, it was submitted that the applicant did not satisfy the elements to mount a successful claim. Consideration was given to each of the items on the agenda and it was submitted that discussion of those items could not breach any of the applicant's expectations as a director of Gorstew Limited, such as to constitute oppression, unfair prejudice or unfair disregard. It was further asserted that the various disputes in the different claims involving executors and beneficiaries under the Will are irrelevant to the present case.

[26] The respondents underscored the importance of the board of directors being enabled to carry out the business of Gorstew and that the court should not lightly interfere with the management of the company. They asked that the application be refused.

Additional evidence that was not before the learned judge

[27] By her affidavit sworn on 6 March 2025, Ms Chin addressed several events that took place after the learned judge had reserved his decision.

[28] Concerning Gorstew's legal representation, she stated that DunnCox, by letter dated 28 February 2025, withdrew their representation from the company, having only been engaged earlier that month. She asserted that this withdrawal, as well as the circumstances leading to it, are relevant to this application.

[29] She referenced the evidence of the applicant as to his continuing desire for Gorstew and the board of directors to receive proper independent legal advice, specifically in relation to various disputes affecting the company. She spoke of two claims; the "red flag audit claim" and the "shareholder registration claim". Both claims are issued by the executors under the Will. By the former claim, the executors seek an order authorising them to carry out an audit of Gorstew, Appliance Traders Limited ('ATL') and its subsidiaries. The latter is one by which they seek to be entered as members on the register of Gorstew, ATL and Hillman Holdings Limited. Ms Chin deposed that DunnCox was engaged to advise and act for the company in those proceedings. Notwithstanding this, the board of directors adopted resolutions in respect of those proceedings without first seeking advice from DunnCox, despite the applicant's entreaties for such advice to be sought.

[30] These resolutions were passed at meetings held on 19 and 27 February 2025. The meeting of 19 February 2025 was convened by the 2nd respondent, Dmitri Singh to consider whether the respondents should be indemnified by Gorstew in the instant proceedings and to discuss the issue of instructions to DunnCox. It was Mr Singh's position that the directors are entitled to indemnification based on article 146 of Gorstew's articles. The applicant disagreed with this position and his attorneys wrote to DunnCox expressing his concerns. Without obtaining legal advice, the board, by majority, voted that the directors should be indemnified. They also voted not to oppose the red flag audit proceedings. At the meeting held on 27 February 2025, it was voted to consent to the shareholder registration claim.

[31] The applicant questioned the validity of the decisions taken and characterised the conduct of the board in the circumstances as being derelict in their duties, and stated that the retention of counsel was merely a conduit to make decisions that were detrimental to the applicant, rather than to take independent legal advice. The court was asked to have regard to these circumstances as illustrative of the board's dysfunction and the need for injunctive relief to protect the company and the applicant's interest as a majority beneficial shareholder.

[32] With respect to this additional evidence from Ms Gabrielle Chin, the respondents oppose the use of this evidence before me. They asked that it be disregarded, asserting that it does not satisfy the requirements to adduce fresh evidence.

[33] Mr Wilkinson, on the other hand, submitted that this court could take cognisance of the evidence, even without an application for fresh evidence.

Discussion

[34] The power of a single judge of this court to hear and determine interlocutory applications was ventilated in the matter of **West Indies Petroleum Limited v Scanbox Limited and others** [2022] JMCA App 28. F Williams JA noted that a single judge has the power to hear and determine procedural applications (see paras. [63], [64] and [65]). He cited the case of **Cable & Wireless Jamaica Limited v Eric Jason Abrahams** [2021] JMCA App 19, in which McDonald-Bishop JA (as she then was) reiterated that procedural applications are the same as interlocutory applications, that is, applications for the purpose of preserving the status quo. The current application is procedural in nature and made in a bid to preserve the status quo between the parties, pending the hearing of the appeal.

[35] In **Drakulich**, Brooks P summarised the principles relating to the grant of an interim injunction pending appeal as follows:

> "[25] It is now well-established that this court will not lightly disturb the exercise of a discretion exercised by either a single judge of this court or a judge of the court below (see **The Attorney General of Jamaica v MacKay** [2012] JMCA App 1). The court is also guided by the principles concerning the grant of injunctions pending appeal, as set out in **Novartis AG v Hospira UK Ltd – Practice Note** [2014] 1 WLR 1264. Floyd LJ, at paragraph 41, summarised the principles relating to the grant of an interim injunction, pending appeal, where a claimant was unsuccessful at first instance, as follows:
>
> > '… (1) The court must be satisfied that the appeal has a real prospect of success. (2) If the court is satisfied that there is a real prospect of success on

> appeal, it will not usually be useful to attempt to form a view as to how much stronger the prospects of appeal are, or to attempt to give weight to that view in assessing the balance of convenience. (3) It does not follow automatically from the fact that an interim injunction has or would have been granted pre-trial that an injunction pending appeal should be granted. The court must assess all the relevant circumstances following judgment, including the period of time before any appeal is likely to be heard and the balance of hardship to each party if an injunction is refused or granted. (4) The grant of an injunction is not limited to the case where its refusal would render an appeal nugatory. Such a case merely represents the extreme end of a spectrum of possible factual situations in which the injustice to one side is balanced against the injustice to the other. (5) As in the case of the stay of a permanent injunction which would otherwise be granted to a successful claimant, the court should endeavour to arrange matters so that the Court of Appeal is best able to do justice between the parties once the appeal has been heard.'"

[36] Similarly, in the case of **Rona Thompson v City of Kingston Sodality Co-Operative Credit Union Limited** [2015] JMCA App 12 Brooks JA (as he then was) noted:

> "[14] A single judge of appeal is permitted, by rule 2.11(c) of the Court of Appeal Rules (CAR), to consider and grant applications for injunctions pending the determination of an appeal. In determining whether an injunction ought to be granted pending appeal, the single judge must find that the applicant has a good arguable appeal (see **Olint Corp Ltd v National Commercial Bank Jamaica** Ltd SCCA No 40/2008 Application No 58/2008 (delivered 30 April 2008)). As a part of that analysis, the single judge must bear in mind the fact that this court, when considering the appeal, will only disturb the decision of the learned judge below, if it finds that the judge exercised his or her discretion on an incorrect basis (see **The Attorney General v John Mackay** [2012] JMCA App 1).

> [15] The guiding principle is whether, at this stage, the single judge finds that it is arguable that the learned judge in the court below was in error in a significant way in the decision handed down at first instance. … The broad questions raised by those guidelines in this context are, is there a serious issue to be raised on appeal, are damages an adequate remedy and the requirements of the balance of convenience or, in other words, the interest of justice."

[37] In the circumstances, my duty is to first assess whether the applicant has shown that he has a serious issue to be considered on appeal. If he demonstrates that there is a serious issue, he will be entitled to an injunction so as not to render the appeal nugatory, provided that he also shows that damages would not be an adequate remedy and that the balance of convenience lies in favour of the grant of an injunction. All the submissions of counsel have been considered, even if not reproduced entirely in this judgment.

[38] I will be considering the affidavit of Gabriel Chin filed on 6 March 2025. It contains material that was not before the learned judge for his deliberation. It was served on the respondents before I heard of the application on 25 March 2025. Although the respondents have submitted that it should not be considered, the applicant has expressed that it will be the subject of an application for fresh evidence at the hearing of the appeal. The authorities indicate that the principles in **Ladd v Marshall** [1954] 1 WLR 1489 are not strictly applied in relation to interlocutory applications (see **Russell Holdings Limited v L&W Enterprises Inc and ADS Global Limited** [2016] JMCA Civ 39 at paras. [42] to [45]). As such, the proper course is to give consideration to the affidavit.

Is there a serious issue to be considered on appeal?

[39] There have been several affidavits filed by the parties. I have read them but will not make reference to all the allegations and counter-allegations made. Essentially, these affidavits reveal conflicting issues between the applicant and some of the respondents, as well, as between the applicant and the executors under the Will. Serious allegations have been made by the applicant and about the applicant. It is not my duty to decide

between the parties on these factual assertions, the determination of which will await trial of the fixed date claim form.

[40] As stated previously, the claim is based on section 213A of the Companies Act which provides that:

> "213A-(1) A complainant may apply to the Court for an order under this section.
>
> (2) If upon an application under subsection (1), the Court is satisfied that in respect of a company or of any of its affiliates—
>
> (a) any act or omission of the company or any of its affiliates effects a result;
>
> (b) the business or affairs of the company or any of its affiliates are or have been carried on or conducted in a manner; or
>
> (c) the powers of the directors of the company or any of its affiliates are or have been exercised in a manner,
>
> that is oppressive or unfairly prejudicial to, or unfairly disregards the interest of any shareholder or debenture holder, creditor, director or officer of the company, the Court may make an order to rectify the matters complained of.
>
> (3) The Court may, in connection with an application under this section make any interim or final order it thinks fit, including an order—
>
> (a) restraining the conduct complained of;
>
> (b) appointing a receiver or receiver-manager;
>
> (c) to regulate a company's affairs by amending its articles or by-laws, or creating or amending a unanimous shareholder agreement;
>
> (d) directing an issue or exchange of shares or debentures;
>
> (e) appointing directors in place of, or in addition to, all or any of the directors then in office;

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

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

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

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

(j) compensating an aggrieved person;

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

(l) liquidating and dissolving the company;

(m) directing an investigation to be made; or

(n) requiring the trial of any issue.

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

(a) the company is unable or would, after that payment, be unable to pay its liabilities as they become due; or

(b) the realizable value of the company's assets would thereby be less than the aggregate of its liabilities."

[41] It is noted that at para. [6] of his judgment, the learned judge sets out the provisions of section 213A of the Companies Act prior to its amendment in 2017 and therefore did not include the third category relating to unfair disregard of interests. It is

not clear, therefore, whether this category would have formed part of the learned judge's consideration.

[42] The agenda items to be injuncted are set out above at para. [6], as well as the relevant sections of the Will (clauses 12 to 14) at para. [5] above.

[43] The learned judge correctly summarised his duty in relation to the application for an interim injunction at para. [11] of his judgment. It is my view that the learned judge did not err in his findings as to the applicant's lack of standing to bring the claim as a beneficial shareholder (see section 23 of the Companies Act and paras. [44], [48] and [55] of the **Young-Torres** case). Further, concerning clauses 12 to 14 of the Will, the learned judge's interpretation, that it is a single parent company which is to be formed (under which Gorstew will fall) to which the applicant is entitled to majority shares, could not be considered demonstrably wrong. In any event, even if the Will could be interpreted to conclude that the applicant is to be given majority shares in Gorstew as a single entity, and its subsidiaries, he would still be in the position of a beneficial shareholder. Mr Wilkinson's reliance on **Neville v Wilson** and **LA Micro Group** does not assist (see also articles 32 to 35 of Gorstew's articles which address transmission of shares in the event of the death of a member). Therefore, as a beneficial shareholder, the applicant does not satisfy the criteria as a complainant under section 212(3) of the Companies Act.

[44] What is consequential for the purposes of this application, is whether, as director of Gorstew, the applicant has satisfied the criteria of a serious issue to be tried. That is, the applicant must show that he is being disadvantaged in his capacity as director under any of the three categories set out in section 213A. These categories are oppression, unfair prejudice or unfair disregard of his interest.

[45] This court considered the descriptions of the terms oppressive conduct and unfair prejudice in **Drakulich**. Also, in the first instance decisions of **Northover** and **Moo Young**, Edwards J and Sykes J (as they then were), respectively defined these concepts. At para. [92] of **Northover**, Edwards J stated that oppressive conduct is defined as

conduct that is "burdensome, harsh and wrongful". She stated further that "[i]t may arise on an illegal action, appropriation of corporate property, breach of equitable rights, mismanagement and squeeze outs". At para. [93] she noted that "[o]ppressive conduct is usually the exercise of dominant power against the will of the weaker corporate stakeholder by some breach of legal or equitable rights". It can cover actions of a director.

[46] Concerning unfair prejudice, Edwards J cited the Jenkins Committee in the Report of the Company Law Committee Cmnd 1749 in England dated 30 May 1962. In that report, unfair prejudice was defined as a "visible departure from the standards of fair dealings and a violation of the conditions of fair play on which every shareholder who entrust [sic] his money to a company is entitled to rely". It was noted further that "[i]t may arise from acts in the past, acts being currently committed or acts which are anticipated. It must relate to conduct of the company's affairs, acts or omissions of the company or acts or omissions on the company's behalf" (see paras. [101] to [117] of **Northover**). Paras. [111] and [112] of **Northover** offer further insight. Edwards J referred to **Re a company** [1986] BCLC 376. She stated:

> "[112] In **Re A Company** … Lord Hoffman considered that the language of the English section 459 did not limit the interest of the member to strict legal rights. It could encompass the legitimate expectation that he would continue to participate in management as a director and his dismissal and exclusion from the company's management may be unfairly prejudicial to his interest as a member."

[47] Sykes J addressed the third category; unfair disregard. At the time of that judgment, this category only applied to the Canadian law and not to our Companies Act. However, as already indicated, our Companies Act was subsequently amended (in 2017), to incorporate this third category. Sykes J's assessment of this third category is useful. At para. [33] he stated "[t]he importance of this third category … is that complainants who fall short of either of the first two may be able to scrape over the finish line under the unfairly disregard". Mrs Gentles-Silvera, in her submissions, stated that the term has been interpreted to mean "unfairly or without cause, pays no attention to, ignore or treat

as of no importance the interests of the [complainant]". The definition is taken from **Sharma Persad Lalla v Trinidad Cement Holdings Limited and others** (unreported decision), HCA No Cv S-852/98, judgment delivered 30 November 1998, which is quoted at para. [210] of **Marcia Bellgarde**.

[48] Sykes J at para. [30] examined the concept of the oppression remedy as expressed in the Canadian case of **BCE**. Section 241 of the Canadian statute, the Canada Business Corporations Act is essentially reproduced in section 213A of the Companies Act, albeit there are some minor distinctions in phraseology. The distinctions are inconsequential to my deliberations of the three categories. At para. [94] of **BCE**, it was stated "'[u]nfair disregard' is viewed as the least serious of the three injuries, or wrongs, mentioned in s. 241. Examples include favouring a director by failing to properly prosecute claims, improperly reducing a shareholder's dividend, or failing to deliver property belonging to the claimant: see Koehnen, at pp. 83-84".

[49] At para. [56] of **BCE** the court stated:

> "In our view, the best approach to the interpretation of s. 241(2) is one that combines the two approaches developed in the cases. One should look first to the principles underlying the oppression remedy, and in particular the concept of reasonable expectations. If a breach of a reasonable expectation is established, one must go on to consider whether the conduct complained of amounts to 'oppression', 'unfair prejudice' or 'unfair disregard' as set out in s. 241(2) of the CBCA."

[50] Further, at para. [58], the court reiterated that "oppression is an equitable remedy. It seeks to ensure fairness — what is 'just and equitable'. It gives a court broad, equitable jurisdiction to enforce not just what is legal but what is fair". The point is also made that courts considering claims for oppression should look at business realities, not merely narrow legalities. Oppression is fact-specific and what is just and equitable is judged by the reasonable expectations of the stakeholders in the context and in regard to the relationships at play (see para. [59]).

[51] Of some importance too, is para. [60] of **BCE**, where the court quoted Lord Wilberforce in **Ebrahimi v Westbourne Galleries Ltd** [1973] AC 360 as follows:

> "Against this background, we turn to the first prong of the inquiry, the principles underlying the remedy of oppression. In *Ebrahimi v. Westbourne Galleries Ltd.*, [1973] A.C. 360 (H.L.), at p. 379, Lord Wilberforce, interpreting s. 222 of the U.K. *Companies Act, 1948*, described the remedy of oppression in the following seminal terms:
>
> > The words ['just and equitable'] are a recognition of the fact that a limited company is more than a mere legal entity, with a personality in law of its own: that **there is room in company law for recognition of the fact that behind it, or amongst it, there are individuals, with rights, expectations and obligations inter se which are not necessarily submerged in the company structure.**" (Italics as in the original) (Emphasis added)

[52] The court then went on to say at paras. [61] and [62]:

> "[61] Lord Wilberforce spoke of the equitable remedy in terms of the 'rights, expectations and obligations' of individuals. 'Rights' and 'obligations' connote interests enforceable at law without recourse to special remedies, for example, through a contractual suit or a derivative action under s. 239 of the CBCA. It is left for the oppression remedy to deal with the 'expectations' of affected stakeholders. The reasonable expectations of these stakeholders is the cornerstone of the oppression remedy.
>
> [62] As denoted by 'reasonable', the concept of reasonable expectations is objective and contextual. The actual expectation of a particular stakeholder is not conclusive. In the context of whether it would be 'just and equitable' to grant a remedy, the question is whether the expectation is reasonable having regard to the facts of the specific case, the relationships at issue, and the entire context, including the fact that there may be conflicting claims and expectations."

[53] It is within the context of this understanding of the oppression remedy that the applicant is submitting that the learned judge has made significant errors in his assessment of whether there is a serious issue to be tried. On the other hand, Mrs Gentles-Silvera for the 3rd respondent, has emphasised the provisions of the Companies Act and Gorstew's articles. Reference was made to (1) the case of **Re Saul D Harrison & Sons plc** [1995] 1 BCLC 14 ('**Re Saul D Harrison**'), where the court had to assess what amounts to unfair prejudice; (2) sections 174 and 179 of the Companies Act which codifies a director's fiduciary duty and provides for the removal of directors upon the passing of an ordinary resolution by the company; and (3) this court's statements in **Young-Torres** at paras. [126] and [127]. The point was also made that Gorstew's articles "contemplate directors not holding office in perpetuity" (see para. 46 of those submissions and article 82 of Gorstew's articles) and that article 99 gives the directors the power to appoint any person to be a director to fill a vacancy or as an addition.

[54] In **Re Saul D Harrison** it was noted that in determining the legal rights of a claimant, one has to consider the memorandum and articles of the company. However, while the articles grant powers to the directors to govern the company, section 213A of the Companies Act brings into play "equitable considerations". Brooks P, at para. [20] of **Drakulich** quoted Andrew Burgess to the effect that the purpose of the oppression remedy is to give relief to the reasonable expectations of persons in the protected category. Further, that "[i]n most cases ... the expectation is based on the Company's [sic] Act, the company's constituent documents, and, occasionally, agreements, whether in writing or made orally, which give rise to equitable considerations".

[55] Mr Wilkinson has complained that the learned judge did not properly assess the applicant's role as a director. Specifically, he contends that agenda item 4a, where it is proposed that the applicant cease to exercise executive functions, would result in the applicant suffering irreparable harm in his capacity as a director and would cause significant damage to Gorstew and its subsidiaries.

[56] The learned judge concluded that, based on what was before him, what was being complained of (the agenda items) was future conduct. He emphasised that section 213A of the Companies Act did not speak to future conduct but rather, to acts that had been done or were being done. The conduct as set out in the agenda did not meet those qualifications. He stated that there is no remedy where proposed conduct is "likely to have an effect".

[57] However, Mr Wilkinson has attacked these findings and has submitted that the considerations of section 213A can include threatened oppressive conduct. He referred to the Canadian authorities of **Saskatchewan Ltd** and **BCE** in support of this contention.

[58] In **Saskatchewan Ltd**, the court was called upon to consider the applicability of the oppression remedy in the provincial Business Corporations Act. Section 234(1) of the Business Corporations Act does not refer specifically to relieving against threats of oppressive conduct, which is similar to our Companies Act. The court had to consider whether it had jurisdiction to grant an injunction for relief against threats of oppressive conduct. At paras. [32] to [35] Jackson JA said:

> "[32] While s. 234 does not speak in terms of 'threats of oppression,' this is not determinative of the extent of the court's jurisdiction to prevent anticipated harm. Section 234 of the Saskatchewan Act follows the federal legislation, which refers to actions that 'effect a result.' This language is sufficiently general to include acts that threaten oppressive conduct. As has been often stated, s. 234 is remedial legislation enacted for the relief of minority shareholders and is to be given a broad interpretation to carry out its purpose (see: *Wind Ridge Farms Ltd., supra*).
>
> [33] I note as well that *Air Canada Pilots Association* refers to the *Dome* decision, but also cites Koehnen, *Oppression and Related Remedies, supra*. Professor Koehnen reasons that the federal legislation can provide a remedy to prevent threatened harm (at p. 51):
>
> > All of that said, nothing in s. 241 precludes a remedy for threatened conduct. One can quite easily envisage situations in which the CBCA

> [Canada Business Corporations Act] might apply to threatened oppression. For example, a state of affairs which threatens to harm a complainant may *be* unfairly prejudicial to his interests. In addition, nothing in the CBCA limits the court's jurisdiction to grant injunctive relief. However, the test for granting such relief tends to be relatively high, requiring the applicant to establish that he has a strong *prima facie* case (or a serious issue to be tried), that he will suffer irreparable harm in the absence of an injunction and that the balance of convenience favours the applicant. [Italics in original; underlining mine.]
>
> [34] As support for the proposition that the federal legislation extends to preventing impending harm, Professor Koehnen cites, *inter alia, Krynen v. Bugg* (2003), 2003 CanLII 20428 (ON SC), 32 B.L.R. (3d) 61 (Ont. S.C.J.) at 77. While *Krynen* is based on the Ontario legislation, which does refer to 'threatened' acts of oppression, the Court relied on *quia timet* principles, which are encompassed by the broad remedial provisions of s. 234 or continue to exist as part of general injunctive relief as a companion to the remedies provided for in the various Business Corporation Acts. The historical purposes for interlocutory injunctions include the preservation of property that is the very subject matter of the litigation and the prevention of a real or impending threat to remove contested assets from the jurisdiction: *Aetna, supra*. Injunctive relief has been granted to prevent the disposal of assets in such circumstances: *First Choice Capital Fund Ltd. et al. v. First Canadian Capital Corporation Ltd.*, 1997 CanLII 11040 (SK KB), [1997] 9 W.W.R. 177 (Sask. Q.B.).
>
> [35] For these reasons, I conclude that the Court has the entire jurisdiction it needs to act in the face of the type of threatened oppressive conduct that is in issue in the within appeal pursuant to s. 234 of *The Business Corporations Act*."

[59] If threatened "oppressive" conduct is a viable exploration of the court and at this stage, I am making no pronouncement that it would be, does the agenda items reach that standard? It does not appear that this issue was argued before the learned judge. Certainly he made no reference to this concept in his judgment. What has to be considered, therefore, is whether those items considered within the expanded evidence

(provided in the affidavit of Gabrielle Chin) can impact the assessment as to whether there is a serious issue to be tried.

[60] In examining the agenda items, I look back to the contextual circumstances. The ATL Group, as a single parent company, is to be formed by the executors of the Will. It is to include Gorstew, a privately owned company and several other companies, under its umbrella. The applicant is the beneficial shareholder of majority shares in the ATL Group. The testator expressed at clause 13.1 that the allocation of the majority interest in the ATL Group "recognizes Adam's important role in expanding and developing the ATL Motor Sub-group" and further at clause 14(d) "that Adam Stewart be the chairman of the ATL Group so long as he is willing and able to hold that office".

[61] As such, with specific reference to agenda items 4a and b, it would appear that the reasonable expectation to be held by the applicant is that he should be chairman of the new parent company and not that he should be chairman of Gorstew and its subsidiaries. While the expectation of the chairmanship would not include Gorstew, he is a director. There is no act done or being done, or threatened to be done at this time that would remove him as a director. It would also appear that Gordon Stewart wished for the applicant to have a controlling/leading interest within the group and in particular the ATL Motor Sub-group. There is no evidentiary indication that the proposed agenda items (4a and b) are intended to affect the applicant in respect of his role within the ATL Motor Sub-group or even other subsidiaries in which he may have a management/directorship role prior to Gordon Stewart's death. Neither can it be gleaned that the proposed agenda items are intended to or will prevent the applicant from assuming the role of Chairman within the new parent company once it is formed. With respect to the position of Executive Chairman of Gorstew, the applicant stated that he was CEO and Deputy Chairman "until [his father's] passing" and that he is "now CEO and Executive Chairman" (see affidavit filed 16 December 2024 at para. 9). It is this assumption into the Executive Chairmanship that is relevant to agenda items 4a and b. In this regard, while the tone of these agenda items could be considered to be threatening (bearing in mind the contents of the Will), the articles would also have to be considered. At this time, the applicant is

not yet a member of Gorstew as he still holds the position of a beneficial shareholder. The learned judge's conclusion that agenda items 4a and 4b do not directly impact the applicant in his capacity as a director cannot be said to be palpably wrong.

[62] In relation to agenda item 4(c), which proposes the appointment of Paul Soutter as an additional director, the learned judge stated that this was the only agenda item that may be against the interests of the applicant as it could impact the balance of voting rights on the board. He found, however, that the court was being asked to speculate about positions the new director would adopt. He stated that unless there was evidence that the new director would adopt positions that were hostile to the applicant, there could be no assumption that he would not act in accordance with his fiduciary and other duties as a director. However, it is my view that the expanded evidence of Gabrielle Chin may have made a difference to his assessment. By her evidence, she recited acts done by the board of directors, in particular, failing to seek legal advice where it may be necessary. It would appear to me to be arguable, that in respect of indemnification in these proceedings, it may have been wise for the directors to seek legal advice prior to taking a vote. Further, a director could have a reasonable expectation that the board of directors would seek legal advice in appropriate circumstances especially as such a decision would have an impact on Gorstew's finances. It is arguable that, at the least, it could be raised that this could be an unfair disregard of the applicant's interest as a director. Failure to seek legal advice could give rise to a claim under section 213A of the Companies Act. At this stage, an arguable route to success in the appeal, in my view, is made out. As a result, the circumstances may indicate a need for independent directors, such that no additional directors should be appointed to the board pending the determination of the appeal. Article 104 of Gorstew's articles require a minimum quorum of two directors to transact the business of the company and there are five directors at this time.

[63] With respect to agenda item 4d (concerning the Jamaica Observer), the learned judge could not be said to be palpably wrong in finding that that agenda item does not affect the applicant in his capacity as a director of Gorstew.

[64] Regarding agenda item 4e (concerning the audit committee), the learned judge's decision has not been shown to be wrong. At this juncture, there is no basis to prevent the board of directors from considering the establishment of an audit committee. It has not been demonstrated that it has or is having a negative impact on the applicant in his role as a director.

[65] Item 4f of the agenda is somewhat curious. It provides:

> "f. Management of the Company
>
> That the management arrangements with respect to the Company be reviewed to determine whether it is compliant with Mr. Gordon Stewart's mandate as set out in his Will— in particular clause 14 (e) of the Will and if not to determine whether the Board should approve the arrangement and appeal to the Executors to accept and ratify the arrangement if it were not preapproved by the Executors as required or alternatively whether any other action should be taken in respect thereof."

[66] In considering this agenda item, I also have regard to clauses 14 (b) and (e) of the Will, which provide:

> "(b) that the ATL Group be managed and operated along strict business lines with a strong professional board of directors to generate income for the named beneficiaries;
>
> …
>
> (e) that Adam may establish a management company or team to manage the businesses comprised in the ATL Group on terms that such company or team be paid management fees on strict arm's length basis as determined and approved by my Trustees during the initial set-up period with the assistance of professional management consultants as determined by my Trustees;"

[67] The trustees are charged with ensuring that these objectives, among others, are met. Clause 14(e) of the Will relates to the new parent company and places a responsibility on the applicant to set up the management company or team, together

with some assistance from the trustees. Such arrangements, on the face, do not involve Gorstew. Further, consideration of this agenda item, whilst ignoring the other provisions of clause 14 of the Will, suggests that the board of directors may be picking and choosing to address those aspects of the Will that suit them. Notwithstanding this, it is difficult to conclude, at this time, that this agenda item could be said to be oppressive, unfairly prejudicial to or unfairly disregarding the interests of the applicant in his capacity as a director of Gorstew.

[68] In the round, I am not of the view that the learned judge erred in concluding that there is no serious issue to be tried, based on the evidence that was before him. However, having considered the expanded evidence contained in the affidavit of Gabrielle Chin, I am of the view that there may be merit to the applicant's case in relation to agenda item 4c in demonstrating that there is a serious issue to be tried.

[69] Concerning the issue of damages, I agree with the assessment of the learned judge that damages would not be an adequate remedy for either the applicant or the respondents, bearing in mind the conflicting affidavit evidence and the issues raised therein.

[70] This only leaves the issue of the balance of convenience. I agree with the learned judge that the court must look to the justice of the case. As the learned judge indicated at para. [14], the applicant's case is anticipatory and the board has statutory and fiduciary responsibilities. I wish to reiterate what the learned judge stated at para. [16] in relation to agenda items 4a, b, d, e and f:

> "… If the injunction is refused, but after a trial the court is satisfied that the agenda items ought not to have been implemented, the court can grant a declaration and make such orders … as will put matters right. …"

[71] However, as it relates to agenda item 4c, there is some demonstration that the applicant has an arguable case that his rights under section 213A of the Act may have been breached. Although, as the learned judge indicated, no findings of facts can be

made at this stage, the trajectory of circumstances can be described as a moving target with various possible outcomes. The justice of the case dictates that the status quo in relation to the board of directors of Gorstew be preserved. This preservation will not prevent the directors and or executors/trustees from carrying out their fiduciary and statutory responsibilities while providing some measure of protection for the interests of the applicant.

[72] In the round, based on the evidence before me, the balance of convenience would lie in favour of allowing the board of directors to proceed with the agenda items save for the appointment of an additional director pending the determination of the appeal or further order of the court.

[73] Mr Wilkinson had indicated, in his submissions before me on 25 March 2025, that the learned judge made an order for costs to the respondents on 18 March 2025, but that the order was stayed pending the determination of this application. Bearing in mind all the circumstances, that order for costs is further stayed until the determination of the appeal.

[74] It is hereby ordered:

1. The 1st to 4th respondents are hereby restrained, whether by themselves or otherwise howsoever, from proceeding with a meeting of the board of directors of the 5th respondent, to pass a resolution for the appointment of an additional director to the board of directors of the 5th respondent, until the determination of the appeal herein, or further order of the court.

2. The costs order made below is stayed pending the determination of the appeal.

3. Costs of this application to be costs in the appeal.