IN THE SUPREME COURT OF BELIZE, A.D. 2014

(CIVIL)

CLAIM NO. 566 of 2010

BETWEEN:-

WILFRED P. ELRINGTON CLAIMANT

AND

PROGRESSO HEIGHTS LIMITED DEFENDANT

Before: **Madam Justice Shona Griffith**
Dates of Hearing: **15th October, 2014; 22nd December, 2014**
Appearances: **Mrs. Alifa Elrington-Hyde for the Claimant**
Ms. Pricilla Banner of Courtenay Coye LLP for the Defendant

DECISION

Companies - Appointment of Inspector to investigate affairs of company – section 110(2) Belize Companies Act, Chapter 250 – Good reason – Factors to be considered – Directors – Acting without resolutions – Legality of actions.

Introduction

[1] This is a claim inter alia, for an order for appointment of an Inspector to investigate the affairs of the Defendant Company Progresso Heights Ltd. ('the Defendant' or 'company'), filed at the instance of its minority shareholder, Wilfred Elrington on 10th August, 2010. The order for appointment of an Inspector is sought pursuant to section 110(2) of the Companies Act, Cap. 250 of the Laws of Belize ('the Act') which requires that good reason be demonstrated to the Court for such appointment, as well as the absence of malice. The good reason advanced to the Court by the Claimant is based upon an alleged misuse of funds of the company by its directors and the non-compliance by the Company of its regulatory obligations as prescribed by the Act.

The relief sought by the claim is as follows:-

(1) A declaration that the affairs of the Defendant be investigated;

(2) A declaration that the two directors and majority shareholders are acting illegally and dishonestly in relation to the Defendant;

(3) An order appointing a competent inspector in accordance with section 110(1) of the Companies Act to investigate the affairs of the Defendant including investigations of the financial statements to determine the assets and liabilities of the Company and the legality or otherwise of disbursements of the earnings made by the Defendant;

(4) An order that any and all rights and entitlements of the Claimant since the 21st day of July, 2003 should be accorded and or be paid to the Claimant;

(5) An order that pending the completion of the report of the inspector the Defendant be restrained from dealing with or alienating or disposing of any of its real estate and other assets;

(6) An order that the two directors personally pay the cost of the investigation;

(7) Such further or other relief as the Court may deem just.

[2] The Defendant resists the claim on the broad basis that at all material times the Claimant provided legal services to and acted as the Defendant's legal advisor, thus any non-compliance with its statutory obligations were attributable to the Claimant failing to properly advise the directors as to their duties under the Act. Additionally, that contrary to the Claimant's allegations, the directors had held numerous meetings with the Claimant whereby the Defendant's business was discussed, a firm of chartered accountants had been hired upon the recommendation of the Claimant and had conducted annual audits of the Defendant's accounts to the knowledge of the Claimant and the Claimant received the several payments distributed by the Defendant as dividends without complaint.

The Case for the Claimant

[3] The Defendant Progresso Heights Ltd. is a limited liability company incorporated in Belize on the 21st July, 2003 with its main objective as real estate purchase and development for re-sale to the public. The Memorandum and Articles of Association of the company were subscribed by Lawrence Schneider and Adam Schneider, both citizens of the United States of America, who between them also held eighty percent (80%) of the company's shares. The Claimant, Wilfred Elrington held the remaining twenty percent (20%) of the shares. Lawrence Schneider and Adam Schneider were at all material times the directors of the company.

[4] According to the Claimant, an Attorney-at-law by profession, he made the acquaintance of Lawrence Schneider in the 1990's through business dealings, and sometime in 2002 he introduced Mr. Schneider to a large tract of land located in Corozal, Belize with the view of pursuing its purchase and development. Mr. Schneider agreed to invest in the land in 2003 and the Defendant company was incorporated (July, 2003) for the purpose of carrying out that investment.

[5] Upon incorporation, the registered office of the company was listed as 50 North Front Street, Belize City, Belize – which was the same address as that from which the Claimant carried out his law practice. The company carried out its operations from the time of incorporation and according to the Claimant held over two thousand acres of land in Progresso Village, Corozal, Belize and (at the time of institution of the claim) had grossed over twelve million ($12m) Belize dollars in sales.

[6] Despite its apparent success the Claimant alleged significant and serious failures by the directors in relation to the management of the company, including but not limited to - failures to hold general or any meetings, to appoint an auditor or file accounts, to maintain accounting or any other kinds of records at its registered office in Belize or elsewhere, to declare dividends (albeit sums were paid out to shareholders), or to issue share certificates – all of these failures being breaches of duties statutorily prescribed by the Companies Act of Belize (Cap. 250).

[7] In June, 2010, the Claimant requested from director Lawrence Schneider, and was provided, with financial statements of receipts and expenditure of the Defendant from the date of incorporation to April, 2010. The Claimant was also provided with a listing of cheques received from sales of land and a listing of monies paid out to shareholders as dividends during the same period. The Claimant alleged that these financial records disclosed a misuse of the company's funds to defray personal financial obligations of the two directors and that the records also disclosed that proceeds of land sales were being diverted from the Defendant to other companies, one such being Progresso Heights LLC, a company incorporated in the United States of which the Claimant had no knowledge. The Claimant also expressed grave concern over the apparent failure of the directors to comply with any of the company's duties as prescribed by law. The Claimant sought a meeting with the directors in order for them to substantiate the financial information provided to the Claimant.

[8] This meeting, which had been scheduled for 12th June, 2010 in Miami never materialized but instead on the 11th June, 2010 director Lawrence Schneider informed the Claimant that he was unable to meet and had retained a law firm in Belize to represent the directors and to handle all further dealings between the Claimant and the directors. The Claimant retained his own lawyers, who wrote to the directors with demands inter alia, for a cessation of the company's business, provision of full accounting for the Defendant and several other businesses, and repayment of unlawful payouts of the company's proceeds. In response, the directors' attorney's provided assurances of their willingness to provide access to and accounting records for the Defendant. The Claimant met with the directors' attorneys, where proposals were made for the audit of the Defendant and the possible sale of the Claimant's interest in the Defendant was introduced.

[9] According to the Claimant, the directors through their attorneys responded only to the question of possible sale of the Claimant's interest but not to the auditing of the Defendant's accounts and as such that exercise was never carried out.

Thereafter communication between the Defendant's directors and the Claimant ceased and against this backdrop of unaudited financials, the alleged failure of the directors' statutory duties and the alleged unlawful spending of the Defendant's funds, the Claimant instituted his claim for the appointment of an Inspector to investigate the company's affairs.

The Case for the Defendant

[10] The Defendant was represented by its director Lawrence Schneider ('the director') and the case advanced by the Defendant admitted the basic facts regarding the establishment of the Defendant and its business operations. Beyond those basic facts however the director advanced an entirely different picture as to the extent of the Claimant's involvement in and knowledge of the company's affairs.

[11] Firstly, the director asserts that the Claimant was the legal advisor and provided legal services to the Defendant from its incorporation. The legal services were agreed by the Claimant, to be provided says the director, free of charge in lieu of financial contribution to the company's operations as the Claimant could not afford to contribute in funds. The Defendant presented to the Court, its certificate of incorporation which had been issued to the Claimant's law firm as Attorneys-at-law for the Defendant along with a prior letter under the hand of the Claimant submitting the Defendant's memorandum and articles of association for issue of the said certificate of incorporation.

[12] More particularly, the director states that the Claimant acted as attorney-at-law in the conduct of land sales by the Defendant, provided legal advice on a regular basis and the director exhibited several pieces of correspondence in the form of letters and emails addressed to or sent by the Claimant which spoke to the company's concerns. Further, in 2008, after providing such services free of cost as indicated above, the Claimant then demanded a two percent 2% processing fee on all closing transactions in the company's land sales and monies were paid to the Claimant in this regard. The Claimant's assertion that he was at no time the attorney-at-law for the Defendant was therefore untrue.

[13] Also untrue says the director, was the Claimant's assertion that no meetings of the company were held and in this respect submitted into evidence emails referencing proposed business to be discussed on visits to Belize by the director. According to the director, regular meetings were held between the directors and the Claimant in Belize and Florida to discuss the company's affairs. Additionally, there were numerous telephone calls by the directors to the Claimant in respect of the company's affairs.

[14] As regards the failure to appoint an auditor and to submit yearly accounts the Defendant again dispels this assertion as wholly untrue. Contrary to what the Claimant alleges, the director states that upon the recommendation of the Claimant, the Defendant hired Ms. Yvette Guild of Chartered Accountants Guild & Guild to prepare annual audited financial statements. The Claimant is said to have been apprised on a yearly basis of the financial statements prepared by Yvette Guild and in particular provided legal opinions or certification on the Defendant's audited accounts, for the purposes of disclosure to the United States Government. Financial statements from Guild & Guild for years 2004 through 2010 were provided by the Defendant in addition to requests made of the Claimant on at least two occasions, by Lawrence Schneider and Yvette Guild for certification of the company's audited accounts.

[15] The director denied that the company's funds were being misused by the directors to defray their personal expenses or otherwise mismanaged and states that the Claimant had ample opportunity to substantiate such claims from the audited statements provided by Guild & Guild and from the documentation provided to him at his request in April, 2010. Additionally, the Claimant was given the opportunity to obtain additional information from Guild & Guild in respect of the documents provided in April, 2010 as the accountants were authorized by the director to provide any information requested by the Claimant. The Claimant took advantage of neither of those opportunities.

[16] In respect of the final series of communication between the parties which essentially led them to the current point, the Defendant's case is that the claim is motivated by malice. In April, 2010, the director states that the Claimant via email (which is produced in evidence) requested that the company provide a letter to a local bank undertaking to pay on his behalf the sum of US$2000 per month, being repayments of a loan of US$75,000 which he and his siblings were about to take out in connection with a business venture. The directors refused and thereafter the Defendant says is when the Claimant started to express concern about the company's financial statements and lack of meetings. The Defendant supports this assertion with email communications between the director and the Claimant in this regard dated May 22nd and 27th, 2010.

[17] The Defendant acknowledges that there was the arrangement made to meet on June 12th, 2010 in Miami, as alleged by the Claimant and that the directors declined to meet and informed the Claimant as to this effect on June 11th, 2010. Their reason for so doing however, says the director, is that having refused to underwrite the $75,000 as requested, they apprehended a change in the Claimant's demeanour towards them (the directors); the meeting was to be at the Belizean Consulate in Miami for the second time; the Claimant had also insisted on being made a director to the company; and then there were the recent accusations being made with respect to the director's mismanagement of the company's affairs, which were surprising given that the Claimant was the company's legal counsel in Belize. In the circumstances the director states that they felt it in the company's best interests to retain legal counsel in respect of any further dealings with the Claimant.

[18] Thereafter, the director confirms the exchange of letters between attorneys for both parties and specifically contends that the Defendant was not opposed to any further audit of the company's finances and that the Claimant was advised that he was free to engage someone to carry out an audit at his own expense. The director states that they authorised their accountant Yvette Guild, to cooperate with the Claimant and provide whatever information or documentation was requested and that they advised the Claimant that they had done so.

There was therefore no need in the directors' view to have made any further reference to the question of any additional audit by the Claimant.

[19] In the final analysis, the Defendant's case was to the effect that at all material times the Claimant was aware of the financial operations of the Defendant; provided legal services and advice as part of the Defendant's operations; was at all times apprised through provision of and access to yearly audited reports by Yvette Guild; had been part of many meetings discussing the Defendant's operations; had received dividends along with the other two shareholders of the company from the profits of business; and was aware of the existence of Progresso Heights LLC from which the Claimant received cheques for dividend payments. Additionally, the application to the Court was motivated by malice given the Defendant's refusal to accommodate the Claimant in several financial concessions that he sought from the Defendant.

The Court's consideration

Findings of fact.

[20] The underlying facts of the case as agreed by both sides are acknowledged by the Court – these pertain to the formation of the company, the business operations carried out by the company, the directors and shareholders and their percentage of shareholding. From the evidence as contained in the witness statements of both parties and that elicited under cross examination, the Court makes the following findings of fact which are relevant to its consideration of the claim:

[21] Legal Services

(i) The Claimant provided legal services to the Defendant from the time of its incorporation as evidenced by the Claimant's submission of the company's memorandum and articles of Association to the Registrar of Companies for issue of a certificate of incorporation. This is evidenced by **Tab 2,** witness statement of Lawrence Schneider (hereinafter '**WSLS**') and correspondence from the Attorney General's Ministry and Central Bank both addressed to the Claimant with regard to the incorporation of the company – **Tab 3 WSLS**.

(ii) The legal services provided by the Claimant continued beyond incorporation. Evidence of the Claimant continuing to provide legal services to the Defendant is garnered from various documents submitted by the Defendant. In particular (but not entirely) – communication in October, 2004 and August, 2005 between the director and the Claimant regarding the Defendant's business operations – **Tab 4 WSLS**; email dated April, 2008 from the Claimant to a purchaser of the Defendant's land identifying himself as attorney with full responsibility for the Defendant's affairs up to 7th February, 2008 – **Tab 5 WSLS**; the Claimant acknowledged drawing and preparing a deed of mortgage dated February, 2005 on behalf of the Defendant company and its directors (– **Tab 25 WSLS**), albeit the Claimant disputed having received any payment for so doing. The evidence also showed that the Claimant first provided legal services in processing land transfers by the Defendant in the operation of its business in 2006 and 2007 and the Claimant under cross examination admitted filing annual returns for the Defendant every year from its incorporation to 2010 – **Tabs 18-24 WSLS**.

(iii) The Claimant did receive payment for processing land transfers on behalf of the Defendant. Cheques were exhibited by the Defendant. Particularly, two cheques made out by the Defendant to the Claimant respectively dated 21st and 29th April, 2010 in the sums of $1,362 as 'closing costs for parcels 1165, 1166 and 1167' and $1,110 as 'closing costs parcel 1321' – **Tab 6 WSLS**. Other cheques were exhibited from a Jason Weaver, PA IOTA Trust Account in various sums noted as for 'transfer fees' in respect of numerous lot numbers.

(iv) The Claimant's assertion that at no time was he ever retained by the Defendant to provide legal services and that this was evidenced by the absence of any resolution as to such retainer can be regarded as technically correct on the latter assertion. However, the fact that there was no resolution appointing the Claimant to act as Attorney-at-law (the Court accepts that there was no such resolution) and whether or not the Claimant received payment as such (the Court finds that there some payment evidenced for legal services), are largely irrelevant to the simple question of whether the Claimant provided legal services or not. There is plain documentary evidence in existence with respect to his active provision of legal services in the business affairs of the Defendant.

The absence of a resolution authorizing a retainer might affect a question of the extent of the Claimant's duty or liability as an attorney-at-law towards the Defendant in the event that such a question arose. For the purposes of the Court's consideration of this matter however, that question does not arise and it suffices that the Court finds as a matter of fact that the Claimant provided legal services to the Defendant.

[22] Accounting and Financials

(i) The Court finds that the Claimant was aware of the Defendant's use of accounting services provided by Yvette Guild and that financial statements were produced by Ms. Guild. The Court has regard to the letter dated 9th July, 2005 from Lawrence Schneider to the Claimant requesting a legal opinion regarding disclosure duties and the company's accounts – **Tab 6 WSLS**. Another such request dated January 21st, 2007 was also exhibited under cover letter from Yvette Guild of even date – **Tab 16 WSLS**. In the email correspondence (May, 2010) leading up to final communication between the parties (June, 2010), the Claimant appears aware of Yvette Guild in the context of provision of accounting services to the company – **Tab 18 WSLS**. The Claimant acknowledged under cross examination that he gave the name of Yvette Guild to the Defendant's directors as a person who could possibly be employed by the Defendant but denied thereafter knowledge of whether she was so employed or not.

(ii) With respect to the financial statements submitted by the Defendant – (**Tabs 9-15 WSLS)**, the Court accepts that such statements exist from 2003 through 2010 and that the Claimant was notified of the existence of a financial statement for the year ending December 31st, 2004 and for the year ending December 31st, 2006. The opinions on disclosure requested by Lawrence Schneider then by Yvette Guild are evidence of this fact and the Claimant under cross examination equivocally answered that 'he may have' seen these emails. The Court is prepared to and does accept on a balance of probabilities that financial statements for the years 2004 through 2010 were prepared prior to the institution of this claim and were available to the Claimant and that the existence of these financial statements came to his attention at least in respect of the years ending 2004 and 2006.

[23] Dividends/Payments

(i) The Claimant at no time disputed receiving payments of money from the company. In fact, the Claimant admitted having received approximately $200,000 as payments from the Defendant. The receipt of these sums is therefore not in dispute however the Claimant denies ever receiving 'dividends'. Insofar as dividends would be the legal designation of the company's profits, declared at an annual general meeting - in the absence of such a declaration or of any such meeting, the Claimant cannot be said to have received 'dividends'. However, whether or not the payments received are to be called dividends is in the Court's view irrelevant for the purposes of concluding that the Claimant received monies out of the profits of the company's business operations. The Court's finding therefore is that the Claimant received a share of the company's profits and did not dispute receiving those sums which were paid to him via deposit to his account by the director and through cheques bearing the Defendant's name and that of Progresso Heights LLC as the account holders, on numerous occasions – **Tab 8 WSLS**.

(ii) With respect to payments requested from the Defendant, contrary to what was pleaded in his statement of case the Claimant admitted in cross examination writing an email to the director requesting $35,000 (**Tab 8 WSLS**) which was requested in plain words after a statement that Mr. Schneider had been promising for some time to make a return on investment. Additionally, the Claimant accepted in cross examination that in his email of 22 April, 2010 (**Tab 17 WSLS**) to the director the reference made by him being pleased to hear that 'more of the proceeds of sale will now be available for disbursement between us and that disbursement can start within the next 30-45 days…' - that this reference to 'disbursements meant 'the distribution or dividends'. The Claimant's response in answer to that suggestion put was 'yes, that is so'.

[24] Alleged Unlawful Use of Monies of the Defendant

(i) Progresso Heights LLC – the Claimant alleged that monies were unlawfully diverted from the Defendant by its directors to a company Progresso Heights LLC, of which he had no knowledge prior to receiving financial documentation from the Claimant after he requested same in June, 2010. The Court finds that this allegation is not supported by the evidence before the Court.

The Claimant did in fact receive monies paid out by Progresso Heights LLC prior to June, 2010. Even if it may be the case that the Claimant was unaware of the use of Progresso Heights LLC by the Defendant, as a shareholder, the directors were not obliged to notify or have the approval of the Claimant in order to manage its financial affairs thus the fact that the Claimant was according to him not aware of the source of the payments he received does not give rise to a finding that the use of Progresso Heights LLC was unlawful. The question of the effect of the absence of a resolution authorizing dealings with Progresso Heights LLC is a consideration to be addressed as a matter of law.

(ii) Misuse of company funds by the directors – In cross examination the Claimant was asked to specifically point out what payments as detailed in the list of expenditure were unlawful. The Claimant generally answered that all payments made to Jason Weaver, an attorney purportedly hired by the company but with no resolution of this fact – were unlawful. Also unlawful, were all payments made to Progresso Heights LLC, for as stated above, there was no resolution made to authorise payments to this company. No resolution was in fact in evidence nor was the Court of the opinion that any such resolution existed. Again, the question of the absence of resolutions authorizing the directors' actions are to be discussed as a matter of law. At this juncture therefore, it is the finding of the Court that aside from the issue of the resolutions, there has been no allegation of any specific impropriety in respect of the financial transactions of the company.

[25] <u>Statutory Governance</u>

(i) There was unquestionably a failure of the directors to abide by their statutory duties of managing and keeping records of the company. The Court finds the following facts relating to the directors' governance of the company:-

- There were meetings of the directors and the shareholder and other modes of communication whereby the company's business was discussed. The email correspondence – **Tab 4WSLS**. There were however no minutes of those meetings to whatever extent they were held. There is no indication of the frequency or nature of business conducted at any such meeting.

There are no minutes of any first general meeting if one was so held. The Court therefore finds a failure on the part of directors as it relates to holding and recording annual general meetings of the company.

- There is no evidence of any resolution appointing an auditor, albeit the Court has already found that Yvette Guild, of Guild & Guild Chartered Accountants did conduct annual audits of the Defendant's finances – (**Tabs 9-15 WSLS**). There was statutory non-compliance with respect to the appointment of an auditor at a general meeting of the company, but the Court finds that there were audits of the company's finances every year from 2004 up to 2010 when the claim was filed.
- Given that there have been no annual general meetings there have been no formal declarations of dividends nor records filed in respect of dividends declared or paid as required by the Act and Articles of Association of the company. The Court does find however that there were monies consistently paid out to the shareholders out of monies earned by the company in carrying out its business.
- There is no evidence of distribution of the company's capital assets.
- No share certificates were issued – albeit shareholding is accurately reflected in the annual returns filed with the Companies Registry.
- No minute books or other records were kept (required by regulation 48 of company's articles) at the registered office of the company nor as it appears anywhere else.

(ii) The statutory breaches identified above must have a legal consequence either in relation to the validity of the actions of the company or the liability of the directors. These consequences however would not necessarily immediately oblige the Court to grant the relief sought in the form of appointing an inspector to investigate the affairs of the company or invalidating the actions of the company. The Court must therefore examine the consequences of its findings made above and thereafter determine, having regard to the nature of the relief sought, whether its discretion is to be exercised in favour of granting such relief.

The consequences of the Court's findings

[26] With respect to the Court's finding that the Claimant did provide legal services to the company and was at the least paid fees upon transfers of land, the Court determines that the Claimant was not in the position of a mere shareholder with no access to information or knowledge of the conduct of the company's business operations. From the processing of transfer documents (cheques made out to the Claimant from Defendant indicate provision of such services), interfacings with purchasers, providing standard legal advice, filing annual returns and engaging with the directors regarding initiatives and performance of the company (all provided by the documentary evidence produced in the witness statement of Lawrence Schneider), the Claimant had in the Court's view, significant knowledge of and involvement in the company's business operations.

[27] In relation to the accounting services provided by Guild & Guild, as stated before the Court finds that the Claimant was aware of such services. The Court is not able to say whether actual financial statements were brought to the attention of the Claimant prior to the events leading up to the institution of the claim, commencing June, 2010, but the Court for reasons given at paragraph 22 above, finds that financial statements were prepared and available to the Claimant. The effect of the failure to appoint the auditor in general meeting as required by statute will be addressed below with reference to the effect of the statutory breaches of the company.

[28] In respect of 'dividends' (so called for failure to have been declared in annual general meeting), there were numerous payments indisputably accepted by the Claimant from the company's business operations. If as the Claimant alleges, these payments are unlawful for want of having been properly declared as dividends, and the Claimant acknowledges having received these unlawful payments with full knowledge of this fact - (the Claimant knows of no meeting where dividends were declared nor of any resolution which declared dividends) - it must simply mean that with respect to any attempt to impugn these payments, the Claimant's hands are in the same position as those by whose hands the payments were made.

[29] The alleged misuse of the company's monies - (namely the use of Progresso Heights LLC, payments to Jason Weaver and whatever other payments were broadly impugned) - was advanced on the basis of absence of resolutions authorizing such actions. The Court firstly states its understanding that the actions were not being advanced as being ultra vires the company, for the Company certainly has the power to deal with Progresso Heights LLC or any other person or individual in defraying its expenses or otherwise structuring its affairs. Additionally, the directors are authorized by article 70 to manage the company and carry out any action that the company can carry out, save for any action specifically required by the articles or by statute to be carried out by the company in general meeting.

[30] It is nonetheless expected that decisions of directors would be evidenced by resolution. If as appears to be the case there was no resolution authorizing these actions, there is an irregularity underlying the company's actions. With respect to such irregularity the Court considers the application of the rule in **Foss v Harbottle [1843] 2 Hare 416**. Very simply stated, this well-known rule provides that given the separate legal personality of a company, a wrong done to a company cannot be redressed by a minority shareholder unless the circumstances of the wrong come within certain exceptions. Further application of this rule has the effect that where the actions complained of could be rectified by a simple majority vote of the company in general meeting, the Court would not entertain an action in relation to the actions complained of as they can in any event be ratified by those in control of the company. Relief sought at the hands of a minority shareholder would therefore be refused as amounting to a waste of the Court's time. This position as to ratification is illustrated in **Bamford et anor v Bamford et al [1970] Ch 212 per Harman LJ @ pp 237-238**:-

> *"It is trite law, I had thought, that if directors do acts, as they do every day, especially in private companies, which, perhaps because there is no quorum, or because their appointment was defective, or because sometimes there are no directors properly appointed at all, or because they are actuated by improper motives, they go on doing for years, carrying on the business of the company in the way in which, if properly constituted, they should carry it on, and then they find that everything has been so to speak wrongly done because it was not done by a proper board, such directors can, by making a full and frank disclosure and calling together the general body of the shareholders, obtain*

absolution and forgiveness of their sins; and provided the acts are not ultra vires the company as a whole everything will go on as if it had been done all right from the beginning. I cannot believe that that is not a commonplace of company law. It is done every day. Of course, if the majority of the general meeting will not forgive and approve, the directors must pay for it."

[31] Clearly, where the directors are shareholders with the majority control of the company, a minority shareholder may never have redress in respect of wrongs done to a company. This brings to fore then the exception to the rule in **Foss v Harbottle** as alluded to above - which is that where what is complained of amounts to fraud (in the equitable sense) the minority shareholder is permitted to bring an action on behalf of the company. This action being derived from the right of the company itself is referred to as a 'derivative action'.

[32] The question may arise as to the relevance of this rule in the instant case which does not purport to be a derivative action on behalf of the company. In examining the claim, aside from seeking an order appointing an inspector to investigate the affairs of the company, the Claimant alleges a misuse of the company's property at the hands of the directors and seeks relief in that regard as well. With respect to this relief claimed on the basis of the directors' misuse of the company's property, the wrong asserted is to the company. In the second place, the right to seek redress for that wrong is that of the company. Upon first application of the rule in **Foss v Harbottle** therefore, the Claimant has no right to bring a claim seeking relief for his assertion of the directors' wrongs to the company. Upon further application of the rule, the Court would be entertaining a futile claim as the directors' actions can be ratified either by a majority vote of the company in respect of actions requiring such; or upon ratification by the directors of actions they were empowered to take of their own accord.

[33] Notwithstanding the above, the Court considers whether the exception to the rule in **Foss v Harbottle** can be applied having regard to the circumstances of this case. In the instant case, beyond the absence of the resolutions evidencing the directors' decisions in managing the company as they are entitled to do, there was no fact raised by the Claimant which on the evidence, pointed the Court to any question of a fraudulent or improper transaction.

Records were presented in terms of listings of receipts and expenses of the company and yearly audited financial statements prepared by Yvette Guild. Thus despite having the opportunity to do so, nothing was done with these records by the Claimant in terms of at the least, impugning any specific transaction or pointing out irregularities in the face of basic accounting or at the most, subjecting the records to an independent audit.

[34] It is certainly not for the Court to embark upon an accounting exercise with respect to the records presented for itself, therefore the Court can only consider what appears at face value and what appears at face value are financial dealings by the directors carried out without resolutions of the company or the directors themselves. The conclusion therefore in respect of the alleged misuse of the company's property by the directors, is that with respect to the absence of resolutions authorizing the directors' actions, this is an irregularity which can be cured by ratification by a simple majority of the company's members - which the two directors as majority shareholders possess. Additionally, despite having ample opportunity to have done so within the context of having access to the company's financial records, the Claimant has failed to identify even one instance of an improper use of the company's property by the directors.

[35] As pertains to the failure to hold any annual general meetings, this is a statutory duty required by section 66(1) of the Companies Act, Cap. 250. Failure to hold such meeting renders every director, secretary, manager or other officer who is knowingly a party to the failure liable to a summary conviction offence and to a fine not exceeding two hundred and fifty dollars ($250). Section 66(2) entitles a member to apply to the Court to make an order directing an annual general meeting to be held where there has been default under subsection 1. This remedy was therefore available to the Claimant from as early as the complaint arose of there not having been any statutory or general meeting of the company.

[36] The business to be conducted at a general meeting includes inter alia, laying of directors' and auditors' reports and accounts; consideration by members of accounts; appointment of auditors and officers of the company and declaration of dividends to be paid to members.

The Claimant decries the failure to have held any meetings which had the result that no business as listed above could have been conducted. Like the requirement to hold a general meeting, the statutory requirement for appointment of an auditor in general meeting as provided by section 113(1) of the Act could be enforced by way of application to the Court by a shareholder for the Court to direct such appointment - 113(2).

[37] Given that the Court has found that the Claimant was not a mere shareholder uninvolved and ignorant of the company's business, and given that the Claimant is an attorney-at-law, the Court finds that the Claimant would have been aware of the company's failures in complying with its statutory duties and how they impacted him as a shareholder. Additionally as an attorney-at-law, the Claimant could properly be attributed as having knowledge of the remedies at his disposal under sections 66(2) and 113(2) as described above.

[38] It is the Court's view, in the absence of any accounting evidence to the contrary, the accounting services provided by Guild & Guild (provided with the knowledge of the Claimant) were provided in discharge of the statutory requirement for audit of the company's finances. Additionally, given that monies were paid out regularly and accepted without complaint, the same approach in respect of actions capable of ratification by a simple majority of members – as per the rule in **Foss v Harbottle** - is to be applied in respect of these failings. The Court takes this position particularly because in the six years prior to the breakdown of the parties' relations and subsequent institution of the claim, there was never any complaint by the Claimant in respect of the company's statutory non-compliance to hold annual general meetings and the resultant failings to appoint auditors or declare dividends according to the Act. Additionally, there was never any attempt by the Claimant to avail himself of his statutory rights under sections 66 or 113 of the Act.

[39] In respect of the other statutory breaches such as the failure to keep registers and records, given that no meetings were being formally held it follows that there are no formal records.

These are more administrative aspects of compliance which either are to be enforced by the Registrar of Companies if not sooner remedied by the Company. Overall however, there has not yet been identified a breach of the company which is not capable of being remedied by a resolution passed by a simple majority, nor has there been identified on the face of any of the documentation admitted into evidence any particular allegation that raises fraud or misuse of funds. The Claimant additionally is attributed a certain level of knowledge of and dealings with the conduct of the company's business and had available to him but did not pursue, statutory remedies to enforce compliance of the company's duties. With this position outlined, the Court now addresses its mind to the relief sought, most particularly the application for appointment of an inspector to investigate the company's affairs.

Appointment of an Inspector

[40] The Claimant's entitlement to seek the relief claimed (appointment of an inspector to investigate the company's affairs pursuant to section 110 of the Act) is not in dispute. The Claimant owns twenty percent (20%) of the company's shares and thus satisfies the statutory minimum of ten percent (10%) shareholding. The Court is thus now required to be satisfied that the Claimant has established good reason for the appointment of the inspector and if so satisfied, that the Claimant is not actuated by malice in seeking the relief. The first question that arises is the meaning of good reason.

[41] The Court has in an earlier decision **Lopez Equipment Co. Ltd v Pasa Belize Ltd. Claim no. 383 of 2013** extensively examined the question of what amounts to good reason when considering appointment of an inspector under s.110(2) of the Act. The result of the Court's examination (as helpfully extracted by Counsel for the Defendant) is that good reason must firstly be interpreted against the context of its legislative origins. The Belize section 110 has its origins in pre 1948 United Kingdom Companies Acts where the latter and its successors expanded and further defined the court's powers as it pertained to the circumstances in which the court would exercise its discretion to appoint an inspector to investigate the affairs of a company.

These expanded grounds not being contained in the Belize legislation require caution to be exercised in trying to fit the exercise of the Court's discretion to the contours of what these later Companies Acts provide. What was settled upon however was that an applicant has to meet a standard of serious mismanagement of the company or bad faith however found according to the peculiar facts of any case, as opposed to a mere disagreement as to how the affairs of the company are being managed. Notwithstanding a difference in legislative bases, the Court would still consider the approach of the exercise of the discretion utilized by Courts otherwise of authority, in guiding the exercise of its powers under section 110(2).

[42] Before turning its attention to whether the facts of the present case meet the standard of good reason, the Court firstly finds it useful to examine the nature of the inspector's investigation. As stated in **Re Pergamon's Press, 1970 3 All E. R. 535**, per Lord Denning MR – "*the proceedings are not judicial*"; they are not even "*quasi judicial, for they decide nothing; they determine nothing*." The proceedings are simply investigatory where the inspectors may make damaging findings of fact – accuse some persons, condemn others. The report may lead to judicial proceedings.

[43] With the nature of these proceedings in mind, the Court examines two authorities where the application of the Court's discretion illustrates the manner in which the nature of the proceedings must be considered relative to the particular circumstances of each case. Firstly, the Court considers **Victor Riviere v National Bank of Dominica Ltd DOMHCV 2004/454** per Belle J, OECS High Court, Dominica. The application before the Court in this case was to appoint an inspector to investigate the affairs of the National Bank of Dominica Ltd., pursuant to section 518 of the Companies Act, 1994 of Dominica. The grounds of the section under consideration were based upon Canadian legislation, itself fashioned upon the post 1948 UK legislation, but the nature and purpose of the proceeding nonetheless remain the same as would be considered in relation to the Belize Act. The order for appointment of an inspector in this case was refused on the basis that it would serve no useful purpose.

There had been financial irregularities and failings occasioned by the Board of Directors at the Bank but at the time of the hearing of the matter remedial steps had already been taken and a report of a systemic audit containing recommendations to address the irregularities and failings, had been laid before shareholders. The sufficiency of that report in answering the shareholders' concerns was not an issue for the Court. The approach of the Court, was that given that the nature of the relief was as such that the investigation would decide nothing and there was already information in the hands of the shareholders in respect of which they could elect or not elect to act, the appointment of an inspector in those circumstances, found Belle J., would be pointless.

[44] The second authority the Court makes reference to is a decision of the Supreme Court of Canada - **Rosemont Enterprises v Mercury Industrial et al, 2005 BCSC 1339**. Again, the Court acknowledges the difference in the legislative provisions under consideration, but likewise, the purpose of the remedy and the Court's approach in the application of its discretion remain the same. The application to appoint an inspector to investigate the affairs of the company was in this case based upon the ground that there was conduct oppressive to the shareholders. The applicants held a majority of 86% of the shares but were still the minority for voting purposes. The companies – both applicant and respondent were family owned and related in business. A rift had developed between factions over how the respondent company was being run. It was part of the circumstances (at paragraph 43 of the Judgment) that there had never been annual general meetings held nor resolutions of the shareholders dispensing with them; no auditors had been appointed nor auditors' report laid before the shareholders. The shareholders claimed to have been shut out from the company's operations despite owning 86% of the company.

[45] Additionally, it was also the evidence before the Court (paragraph 48 of the Judgment) that prior to the involvement of lawyers in 2005, there had been no complaints by the shareholders, nor requests to have compliance with those matters not done by the company since its incorporation in 1986.

At paragraphs 52-53 of the judgment it was also found by the Court that there had recently been information provided to the shareholders at an 'informal meeting', whereby written material regarding the performance and operations of the company was provided to the shareholders. There also had been in train by the time the petition was heard, a meeting scheduled to deal with the differences which had developed between the companies.

[46] The Court found that the shareholders had failed to discharge their low burden of establishing even an appearance of the conduct complained of – that is, that the affairs of the company were being conducted in a manner oppressive to and prejudicial to the shareholders. Additionally, in spite of the statutory failings to hold annual general meetings or to appoint an auditor in general meeting, there had been 20 years of non-complaining about these failings in circumstances where it was clear that the shareholders had been kept informed as to the operations of the company. Also, there were viable remedies available to the shareholders which they never pursued. The petition to appoint an inspector to investigate the affairs of the company in those circumstances was not granted.

The case at bar

[47] In the instant case, there is a parallel between the Defendant's lack of compliance with the Act and the state of statutory non-compliance of the company in Rosemont. Likewise, in accordance with the Court's findings that the Claimant was to some degree involved in and aware of the operations of the company – there is yet another parallel which can be drawn in terms of the Court in Rosemont finding that the shareholders seeking the order for appointment of an inspector had been kept informed as to the company's operations. Also of similarity, is the existence of statutory remedies which were available to the Claimant (applications to the Court under sections 66(2) and 113(2) but not pursued.

[48] Given the Claimant's lack of complaint in relation to the non-compliance by the defendant in holding general meetings or appointment of auditor and laying of financial statements for the 6 years of the company's operations prior to the parties' cessation of communication in June, 2010, the Court finds that the statutory non-compliance of the company per se, was not the Claimant's primary concern. The tenor of the Claimant's communications and demands prior to institution of the claim, as well as the relief sought in the claim, indicates that the primary concern of the Claimant is the bona fides of the directors' handling of the financial affairs of the company.

[49] In this respect, the Court's finding is that there had already been provided to the Claimant – before the institution of the claim, financial statements and instructions given to the accountant Yvette Guild to co-operate and provide the Claimant with whatever information was sought. The stance adopted by the directors of the company, with which the Court agrees – is that the opportunity existed for the Claimant to undertake an audit of the company's financials at his own expense. To refer to the Judgment of Rosemont once more (paragraph 64), wherein it was observed with reference to the Canadian Supreme Court in ***Baker v. Paddock Inn Peterborough Ltd***. (1977), 2 B.L.R. 101 which stated:-

> *"It does not seem to me that a Court should appoint someone to inspect and audit the books of a private corporation if the shareholders who wish that relief do not establish that they cannot get it privately."*

Conclusion

[50] The Court finds the overall circumstances of the case to be as follows:-

(i) In the first instance the Claimant would have been aware of the company's failings in its statutory requirements to hold annual general meetings and thereby properly conduct business required such as the appointment of auditors and declaration of dividends;

(ii) In spite of such knowledge the Claimant made no attempt to compel the directors to comply with the company's duties and accepted the payments which he complains were not properly declared as dividends – for the entire period prior to the institution of the claim;

(iii) The Claimant had available to him the financial statements provided to him in June, 2010 and access to the audited financial statements prepared by accountant Yvette Guild;

(iv) The Claimant did not make use of this information or in any event did not present to the Court even a cursory analysis of the financial statements provided to support his claims of a misuse of the company's funds by the company's directors;

(v) Alternative remedies were available to the Claimant via sections 66(2) and 113(2) of the Companies Act to apply to the Court as a shareholder for orders that the company be directed by the Court to hold its annual general meeting or appoint an auditor. The Claimant did not avail himself of these alternative remedies.

[51] Additionally, the Court's finding in relation to the legal effect of the company's failings is that the Claimant not having raised any appearance of a misuse of funds in respect of the financials before the Court, the absence of resolutions evidencing the decisions of the directors in discharging the company's affairs could be remedied by a simple majority vote of the members. The directors whose actions have been challenged own the majority of the shares and would upon a vote secure a simple majority. In the circumstances the Court finds that there is no good reason established for the exercise of its discretion to appoint an inspector to investigate the company's affairs. Having so concluded, there is no need to go on to consider the question of whether the Claimant was actuated by malice in bringing the claim.

[52] With respect to the claim on the basis of the misuse of the company's property by the directors, in the first instance this claim was not properly brought as any such wrong would be a claim for the company to enforce. In this regard as there was no evidence provided by the Claimant of the alleged misuse of funds, the right of the Claimant as minority shareholder to bring an action on behalf of the company was not established and in any event the directors against whom the allegation was leveled, were not parties to the action.

The declaration sought as to the illegality and dishonesty of the two directors in relation to the use of the Defendant's property is therefore refused. In light of the Court declining to grant the declarations sought, the remaining orders sought which all flow from those declarations, are similarly refused.

[53] The Defendants are awarded costs to be assessed, however in light of the fact that the company is not without fault as pertains to its failure to comply with its statutory obligations, costs are awarded in the proportion of 75%.

[54] **The final disposition of the Court is as follows**:

(i) The declaration sought that an inspector be appointed to investigate the affairs of the company is refused.

(ii) The declaration sought that the two directors and majority shareholders are acting illegally and dishonestly in relation to the Defendant is refused.

(iii) All orders requested at paragraphs 3-7 of the Claim are refused.

(iv) The Defendant is awarded costs to be assessed if not agreed in a proportion of 75%.

Dated the day of January, 2015.

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Shona O. Griffith
Justice of the Supreme Court.