IN THE COURT OF APPEAL OF BELIZE AD 2020

CIVIL APPEAL NO 6 OF 2015

WILFRED P ELRINGTON Appellant

v

PROGRESSO HEIGHTS LIMITED Respondent

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BEFORE

The Hon Madam Justice Minnet Hafiz-Bertram	Justice of Appeal
The Hon Mr Justice Murrio Ducille	Justice of Appeal
The Hon Mr Justice Lennox Campbell, QC	Justice of Appeal

F Lumor, SC and S Pitts for the Appellant.

P Banner for the Respondent.

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13 June 2019 and 23 December 2020

HAFIZ BERTRAM JA

[1] I had the opportunity of reading the draft judgment of my learned brother, Campbell JA and I agree that the appeal should be dismissed. I concur in the reasons for judgment given and the orders proposed therein.

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HAFIZ BERTRAM JA

DUCILLE JA

[2] I have had the opportunity of reading the draft judgment of my learned Brother, Campbell JA and I agree with the reasoning and disposition. There is nothing that I can add to it.

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DUCILLE JA

CAMPBELL JA

[3] The Appellant, the claimant below, an Attorney-at-law, is a subscriber of the Respondent, having subscribed to not less than twenty per cent of the shares of the Respondent.

[4] The Respondent was incorporated on the 21st day of July 2003 under The Companies Act, Chapter 250 of the Laws of Belize. Mr. Schneider and his son Adam Schneider were appointed as the two directors of the Respondent and were issued 80% of the shares in the Respondent.

The Claims, 566 and 712

[5] The Appellant filed a Claim Form dated 10th August 2010 (Claim 566). In turn, the Respondent commenced a Claim on the 12th October, 2010 against the Appellant and his law firm. The primary relief sought by the Respondent was the delivery of title documents which were in the custody of the Appellant, along with receipts for various properties sold over the period September 2009 to June 2010 (Claim 712). Both claims were consolidated before Legall J on the application of Mr Elrington.

[6] By the way of Claim 566, Mr Elrington sought declarations that the affairs of Progresso Heights Ltd (Progresso) be investigated and that the two directors and majority shareholders are acting illegally and dishonestly in relation to the Company. Mr Elrington also sought Orders appointing an inspector in accordance with section **110 (1)** of the

Companies Act to investigate the affairs of Progresso, its financial statements and the legality of its disbursements. He claimed that all of his entitlements since 21st July 2003 should be paid to him and the company be restrained from dealing with or alienating or disposing of any of its real estate and other assets. He sought an order that the two Directors personally pay for the cost of the investigation.

[7] He claimed that since its incorporation Progresso has never issued any share certificate to the three subscribers and has been engaged in the purchase and sale of real estate. No dividend has been formally declared despite making gross sales exceeding six million dollars of United States currency.

[8] The Statement of Claim alleged inter alia:

(a) Progresso Heights Limited Liability Corporation was incorporated in the USA without the knowledge of the Claimant, and into which the Claimant contends that the proceeds of sale of the Defendant's assets are being illegally diverted.

(b) That there are good reasons for an application pursuant to **Section 110 (1) (b) of the Companies Act.**

[9] The Defendant filed a Defence on the 13th October 2010, contended inter alia:

(4) The Directors… who are also 80% shareholders, in the Defendant, met with the Claimant, who is a 20% shareholder in the Defendant, on numerous occasions since the incorporation of the Defendant to hold meetings in relation to the business of the Defendant, including the statutory meeting. Such meetings were held either in Belize, Miami, Florida or Lantana, Florida to discuss the Defendant's affairs. The Directors also held numerous telephone calls with the Claimant in respect of the Defendant's affairs.

(5) The Defendant says that the Claimant as the Defendant's Attorney - at- law prepared the Articles and Memorandum of Association and

incorporated the Defendant. The Claimant also agreed to provide legal advice and services in relation to Belize law to the Defendant throughout its operations in view of the fact that he allegedly could not contribute financially to the development of the Defendant's property. In pursuance of this arrangement, the Claimant initially processed the Defendant's closing documents for the period 2006 to 2007 without charging the legal processing fee. The Claimant at no time made any financial investment in the Defendant and the Directors of the Defendant made extensive loans to the Defendant after the initial investment for infrastructure, development and marketing of the Defendant's property.

Claimant's Submission at trial.

[10] In the Claimant's written submissions, it was contended that, the powers to appoint inspectors are conferred on the Supreme Court, by Section 110(1) (b) of the **Companies Act, Cap 250**, Laws of Belize which provides:

(1) The court may appoint one or more competent inspectors to investigate the affairs of any company and to report thereon in such manner as the court directs.

(a) …

(b) In the case of any other company having a share capital on the application of members holding not less than one tenth of the shares issued.

[11] *Section 110(2) provides*:

"The application shall be supported by such evidence that the court requires for the purpose of showing that the applicants have good reason for and are not actuated by malicious motives in requiring the investigation, and the court may, before appointing an inspector, require the applicants to give security for payment of the cost of the inquiry."

[12] That none of the acts of the Director purported to be performed in the company's name was clothed with legal authority as the company acts through one of two organs the Board of Directors and the Company in general meeting.

[13] The claimant submitted that there were regulatory breaches, as evidenced by the failure to hold a single general meeting. Progresso failed to cause an auditor to make a report to the shareholders on the accounts of the company and to have a balance sheet before the company in general meeting, despite netting six million dollars in United States currency in revenue.

The Defendant's submissions at trial.

[14] The Defence identified two issues for the resolution of the claim.

(i) Whether an Inspector should be appointed in respect of Progresso under s.110 of the Companies Act.

(ii) Whether the Directors of Progresso should personally pay for the investigation.

[15] It was submitted that based on s.110 in order for the Court to appoint an Inspector the Claimant must establish the following:

(i) Application to appoint is made by a member holding not less than one-tenth of the shares issued;

(ii) The application must be supported by such evidence which demonstrate that the applicant is not actuated by malicious motives in requiring the investigation. See **Lopez Equipment Co. Ltd. v Pasa Belize Ltd**, **Claim No.383 of 2013**, delivered 17th June 2014.

[16] Learned senior counsel submitted that In **Lopez Equipment Co.** this Court provided guidance in the approach to be taken by the courts in determining whether an Inspector should be appointed. The Court considered the foundations of such an

appointment in UK and Canadian law and accepted that the remedy of appointing an inspector into the affairs of a company is not one to be lightly entered into. Learned senior counsel further submitted that the Court also accepted that a difference of opinion as to how a company is to be managed does not provide good reason for the exercise of the court's discretion. [para. 60 of the judgment].

[17] Mr. Courtenay argued that the Claimant had failed to satisfy the preconditions of s.110 and the relevant guidelines espoused by this court in **Lopez Equipment Co.**, that it must reach a "standard of serious mismanagement or bad faith according to the peculiar facts." The question of good reason must supersede the difference of opinion on the management of the company.

[18] It was contended on behalf of the Respondent, that the evidence adduced at trial demonstrated (para. 14 of judgment) that the Claimant was not only a member of the Defendant, but was its attorney-at-law. This position is not affected by the issue of non-payment for some of the services he provided. Based on his acknowledgment that he was the Defendant's attorney, any question regarding the legality of the affairs of the Defendant must be laid at the feet of the Claimant.

[19] According to Mr. Courtenay, at no time has the Claimant advised or in any way informed that the Defendant was not being managed properly. The Claimant admitted in his viva voce evidence that, "he never requested a meeting of the company up to the day of filing of the claim and that he, imagined that he may requisition a meeting and that, " I never queried any matter not once as there was no need to query."

[20] Mr. Courtenay submitted that the instant case is distinguishable from **Lopez Equipment Co.**, in that, although there were requests made of the defendant for funds through shareholders contributions, there was no reason given as to how they were to be expended. There was no satisfactory explanations as to why the funds were needed. The explanations provided were proved to be inadequate and irregular when reviewed by qualified accountants. According to the Defendant's submission, the mismanagement in

Lopez Equipment Co. was patent and undeniable. Mr. Courtenay submitted that should the Court find that there was non-compliance with certain regulations, the court was asked to find that the Defendant was misguided by the Claimant.

[21] It was submitted that, the Claimant has failed to discharge the burden of proving he was not actuated by malice because, (a) if any breach is found, the Claimant is the direct cause of such breach and the Claimant choose to raise the issue for the first time, after his request for a loan guarantee by the Defendant was denied. The Claimant had requested on numerous occasions that he wanted more dividends paid to him.

[22] The Claimant had recommended to the Directors that the Defendant should borrow money from the Bank in order to pay unearned dividend to the Claimant. The Directories did not accede to that request from him.

Griffith J ruling

[23] Griffith, J. in an oral decision delivered on the 22nd December 2014, said at paragraph 1, inter alia:

> "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."

[24] On the 13th January 2015, Griffith J. delivered a written judgment, stating at paragraph 2 inter alia:

> *(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 Claimants 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.

[25] Griffith J found that, the Defendant's case is that the claim was motivated by malice. That the malice was revealed when the company refused the Claimant's request that the company repay the sum of $2000 per month for a loan of $75,000.00 which he and his siblings were about to take out. Thereafter the Claimant started to express concern about the company's financial statement and lack of meetings. (See paragraph 16).

[26] The Court found that the claimant processed land transactions on behalf of the Defendant in 2006 and 2007, and filed annual returns on behalf of the Defendant every year from its incorporation to 2010. Griffith J opined that the claimant was not a mere shareholder but had access to information and significant knowledge of the company's business operations. The claimant received monies out of the profits of the company's business. There was evidence adduced of deposits in the claimant's accounts and cheques made payable to him. (See para. 23) The "claimant's hands are in the same position as those by whose hands the payments were made." (para. 28). There was no allegation of specific impropriety, other than the absence of resolution in respect of the financial transactions of the company.

[27] The court also found that the breach complained of was to the company and redressable at the instance of the company. Therefore under the first application of the rule in **Foss v Harbottle** the Court found "that the Claimant had no right to bring a claim seeking relief for his assertion of the director's wrongs to the company." (para. 32). 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 of the directors' actions. See **Bumford Anor. v Bumford et al** [1970] Ch 212 per Harman LJ at P237-238.

[28] The court rejected the relevance of the application of the exception to the rule in **Foss v Harbottle** because the court found that there was no evidence, other than the absence of resolutions of the directors' management of the company. There was no issue of a fraudulent or improper transaction. The Court held that the Claimant was not a mere shareholder but an attorney-at-law, who was aware of the company's failures to comply with its statutory duties and would have been aware of the statutory remedies at his disposal. The Court cited with approval the oft- quoted comments of Lord Denning, MR from **Re Pergamon's Press,** 1970 3 All E.R 535.

[29] Griffith J considered two authorities on the nature of the proceedings to be examined. Firstly, **Victor Riviere v National Bank of Dominica Ltd. DOMHCV2004/454**, in which the High Court of Dominica held, that the investigation to be undertaken would reveal nothing, as there was already information in the hands of the shareholders upon which they may choose to act, the appointment of an inspector in that case would be pointless.

[30] Secondly, In **Rosemount Enterprises v Mercury Industrial et al**, **2005 BCSC1339**, the applicants were majority shareholders, but were still the minority for voting purposes. The application to appoint an Inspector, was premised upon conduct oppressive to the shareholders. Both applicants and respondent were family owned and related in business. The court found that the applicants had failed to establish, that the affairs of the company were being conducted in a manner oppressive to and prejudicial to the shareholders. The Court found that despite the fact that the company had failed to comply with the statutory requirements to hold annual general meetings or to appoint an auditor in general meeting for twenty years that it was clear that the shareholders had been kept informed as to the operations of the company. There were viable remedies available to the shareholder which he never pursued.

[31] The Court was of the view there were similarities between the instant case and **Rosemount Enterprises.** In both cases the defendants were non-compliant with the statutory requirements and the claimants were involved and informed of the operations of the company. Both claimants had viable remedies at their disposal which were not pursued.

[32] On the 15th April 2019, the Appellant filed an Amended Notice of Appeal, containing some six grounds, summarized as follows:

(i) The Judge lacked jurisdiction to take over and continue the hearing, the parties having settled the claim on the 3rd November, 2011 before Legall J.

(ii) The parties are estopped by the Record from any assertion other than Claim 566 of 2010 has been settled.

(iii) The Judge failed to exercise her discretion properly by misconstruing the meaning of the term, "the affairs of the company", not to include the business of the company which includes goodwill, profit, loss, contracts and investment.

(iv) Having found that there was breach of statutory governance, the judge misdirected herself by failing to grant the order for the inspection of the Respondent.

(v) The learned Judge erred and misdirected herself, by taking into consideration extraneous matters.

(vi) The Judge erred in the following respects, by finding that the appellant provided legal services notwithstanding the absolute failure of legal governance, that financial statements were prepared by the Gill and Gill although there was no appointment of an auditor in general meeting of the Respondent.

[33] The Appellants relied on written submissions filed in Supplemental Skeleton Arguments of the Appellant, which is cited as addressing "to a large extent the Amended grounds of Appeal contained in the Amended Notice." Both Counsel exhausted the time scheduled for presentation on the issue introduced in Ground One

of the Amended notice. The Appellant contended in his written submissions that there are two conflicting final decisions made in the Supreme Court in respect of Claim 566 of 2010: –

(a) *Final Consent Order made before Legall J on the 3rd November , 2011;*

(b) *The decision of Madam Justice Shona Griffith delivered on the 13th January 2015 which refused the order for the investigation of the affairs of Progresso Heights Ltd.*

[34] Learned Senior Counsel, Mr Lumor on behalf of the Appellant attacked the order made by Griffith J whilst admitting that the learned judge had not been made aware of the status of the consent order by either party in **Claim No. 566.** That consent order, according to the Appellant, caused Griffith J to lack jurisdiction to hear the matter.

[35] Mr. Lumor, SC submitted that there was no dispute between the parties therefore the court lacked jurisdiction to reopen and hear that matter. Mr Lumor's submission hinged on the highly contentious issue of whether the parties had agreed a consent order for the appointment of an Inspector to investigate the affairs of the Respondent, pursuant to s. 110 of the **Companies Act**.

[36] Ms. Banner contended, that there was insufficient evidence adduced from the Record from which the court could determine whether a contract has been agreed. According to Ms. Banner, what the extracts from the judgments show is "there was an agreement to try to agree. An agreement was never reached." Ms. Banner further submitted that "no order was ever prepared and the parties smoothly and fluidly went through the process and went to trial because all the parties are aware they never agreed a consent order."

[37] Senior Counsel brought an additional issue of Estoppel by the record of the court. He explained that, if a claim has explicitly determined in previous concluded proceedings between the same parties the claim cannot be raised again other than on appeal unless there is fraud or collusion. He relied on **Halsbury's Volume 4**, Para 16(2) p.421. Mr. Lumor argued that, Estoppel by the Record arises when a judgment has been given which

is a matter of record. The principle rests on two limbs; firstly, litigation should come to an end; and secondly, no one should be proceeded against twice for the same matter. Therefore a party relying on estoppel by the Record should be able to show that the matter has been determined by a court of competent jurisdiction in a judgment which is final.

[38] Mr. Lumor sought to make a distinction between consent orders that represent the "agreement of the parties" and consent orders which obtained the approval of the Court in accordance with the relevant legislation." Lord Denning explained the ambiguity within the profession as to the meaning of a consent order. It is necessary to discover which meaning is used. In **Siebe Gorman v Pnuepac Ltd.** [1982] 1All ER 377, he says at 380; *There are two meanings to the word consent; firstly, it may evidence a real contract between the parties. In such a case the court will only interfere with such an order on the same grounds as it would with any other contract. The other meaning is this: the words by consent may mean the parties hereto not objecting. In such a case there is no real contract between the parties. The order can be altered or varied by the court in the same circumstances as any other order that is made by the court without the consent of the parties.*

[39] The Appellant had alleged that the reliefs he claimed *was agreed or consented to by the Defendant Company.* [See para. 7(b) of the Supplemental Skeleton Arguments]. It was also alleged at paragraph 15, "*despite the final consent order agreed to be entered*." It is therefore clear that the meaning that is being asserted by Mr. Lumor falls within the first meaning as defined by Lord Denning, which evidence a real contract between the parties. Neither party has submitted to the contrary.

[40] Learned Senior Counsel, to prove his contention of consent agreement between the parties, relied on the Record as noted in the judgment of the Caribbean Court of Justice, in **Claim 712** which was commenced by the Respondent, the Supreme Court judgment of Legall J, and a letter of appointment addressed to one Mr. Cedric Flowers, CPA.

[41] The judgment of the CCJ in **Claim 712 [2017] CCJ12**, delivered by Mr. Justice Hayton on the 4th August 2017 identifies two instances of orders being made on the 3rd November before Legall J in **Claim 566**; the first being the parties agreement to an overseas based witness, Mr. Schneider, giving evidence via video link. The application was grounded on an allegation that the witness was fearful of travelling to Belize because he believed his liberty and physical safety would be imperiled. When these allegations were first presented in the applicant's affidavit dated 29th September 2011, Mr. Elrington objected. However, by the 3rd November, the parties were in agreement that the witness could give evidence by way of video link.

[42] The CCJ felt it advisable to encourage the parties towards mediation of their grievances. The CCJ noted that there was a need to resolve the "bitter dispute" underlying the claim and that the "emotional feelings of the parties seem to be running high."

[43] There is merit to Ms. Banner's complaint that there is an insufficiency of evidence to say whether this order, which is a case management order, emanated from the Court or from the parties. In any event, this consent order did not raise any issue of being in conflict with Griffith J judgment.

[44] The second Order mentioned in the extract of the judgment of the CCJ, was that:

> *"Senior counsel for Progresso in both claims informed the court that he was advising his client to agree to an order for an inspector to investigate the affairs of Progresso in claim 566 and that a draft consent order should be forthcoming once an appropriate inspector had been agreed upon. Counsel for both sides and the court agreed to proceed with the current Claim No. 712."*

[45] The CCJ pointed out in paragraph 7 [last 5 lines] that Legall J didn't deal with the issues raised. The CCJ noted that the matters raised in Claim 566 were also raised in paras. 11-27 of the defence to **Claim 712**, which alleged wholesale non-compliance and requested the court to appoint an Inspector to investigate Progresso. Legall J judgment

did not consider those issues. The consent order was never raised before Griffith J. The file passed to her contained no consent order.

[46] Ms. Banner had argued forcefully that at best the evidence adduced to prove the formation of "a real contract between the parties" at its highest has only evidenced an agreement to agree. The events before Legall J on 3rd November 2011 were noted in the Court's judgment in **Claim 566** dated 28th February 2012 at paragraphs **[6 –8]**. This constitutes the Record in the Supreme Court on which the Appellant's submission is grounded and gives rise to the main issue in the Amended Appeal, as to whether a consent order was agreed between the parties. Legall J said at paragraph **[8]**. *At the said hearing on the 3rd November, 2011 the learned senior counsel for the defendant in Claim No. 566 of 2010 informed the court that he was prepared to advise his client to agree to the inspection - reliefs claimed in the said action -and try to agree on an order for the appointment of an inspector. Learned counsel on the other side had no objection to that proposal. It was agreed by the parties that a draft order be prepared. As a result of that position, the court fixed 8th November 2011 to lay over the draft consent order and fixed the trial of the other claim, this matter of 712 of 2010 for the 9th December, 2011. Up to now the draft order has not been submitted to the court.*

[47] The language of Legall J is clear and lacking in ambiguity. The extract of paragraph 8 provides the trial judge's summary of his reasons for embarking on a trial of **Claim 712** alone, although it had been consolidated with **Claim 566**. Legall J notes that Senior Counsel who appeared in both matters, gave the court an undertaking that, "he is prepared to advise his client to agree to inspection." The learned judge expressly states, "which was the relief sought." There is no indication who initiated the discussion, if there was one, that led to the undertaking given by Mr. Courtenay. Not surprisingly, counsel for the Claimant is reported as having no objections to Mr. Courtenay's undertaking. The learned judge noted that the undertaking given, was the relief sought in the Action. I venture to say, that in the emotionally charged circumstances of this case, such an undertaking would be a strong course to advise on. Their Lordships in the CCJ, appear to be of the view, that the "bitter dispute" in **Claim 566** was still unresolved, thus they encouraged the parties to

pursue mediation to achieve dispute resolution. Their Lordships would not have found it necessary to encourage mediation, if the record in either claim had indicated that the matter had been determined by the Supreme Court as the Appellant has urged before this court.

[48] The extract notes that it was agreed by the parties that a draft order be prepared. That order would be to formalize the appointment of an inspector in the event senior counsel succeeded in advising his client to appoint an inspector. There has been no evidence that learned counsel's advice was met with any favour by his client. It's worthy of note that Counsel's undertaking was given on the 3rd November 2011, the parties came before Legall J on four subsequent occasions without there being any mention of either the appointment of an Inspector or the completion of a draft order.

[49] The letter of the 9th January 2012 to Mr. Cedric Flowers doesn't take the Appellant's case any further than the expressed wish of the parties to retain the services of Mr. Flowers. There may be many reasons why the appointment of Mr. Cedric Flowers was not finalized. I accept the submission of Ms. Banner that at its highest the evidence adduced indicates an agreement by both counsel to agree to the appointment of an inspector. There is not a tittle of evidence adduced to show that has been done. I reject the submission of Mr. Lumor that the judgments of Legall J, the CCJ's judgment in **Claim 712** or the decision of this court provides an estoppel by RECORD. I cannot accept the submission of learned senior counsel that the records indicate that there was an agreement between the parties for the appointment of an inspector to investigate the affairs of the Respondent, which agreement constitutes a final order which estops any further determination of the issues contained therein.

[50] The principle of res judicata is outlined in **Elroy Garraway v Ronald Williams [2011] CCJ 12**, paragraph 14:

[14] As is well known, the principle of res judicata is intended to give finality to judicial decisions. Literally, the term means that a matter has already been finally settled by judicial decision and is not subject to further appeal. In order for the doctrine to be

applicable three essential conditions must be satisfied: there must be an earlier decision covering the issue; there must be a final decision on the merits of that issue; and the earlier suit must involve the same parties or parties in privity with the original parties. Once satisfied the principle bars the same parties from litigating on the same claim or any other claim arising from the same transaction or subject matter that was or could have been raised in the first suit. Thus is precluded continued litigation between the same parties in respect of essentially the same cause of action. The concomitant waste of judicial resources is avoided.

This principle was applied by this court in the matter of **Caribbean Consultants & Management Limited v Attorney General & Ors. Civil Appeal No. 46 of 2011**. The Appellant has failed to satisfy this Court that the first of the three essential condition has been satisfied. I reject the Appellant's submission that the Appellant and Respondent are estopped by the records of the Supreme Court, the Court of Appeal, and the Caribbean Court of Justice in this matter from asserting otherwise than that the matter has been settled. I reject the submission that there was any earlier decision by Legall J on the appointment of an inspector to investigate Progresso. The conduct of the Appellant is inconsistent with the principle on which he relies for the prosecution of his case. The Appellant would have been barred from litigating on the same issue against the same party. The conduct of the Appellant is inconsistent with the principle on which he relies for the prosecution of his case. The Appellant would have been barred from litigating on the same issue against the same party. On the Appellant's case as argued, he caused a waste of judicial time and exposed the administration of justice to the danger of conflicting decisions. To my mind, even if he had succeeded in proving a final decision before Legall J, this ground would have failed.

Resolution of Remaining Grounds.

[51] I cannot accept as Mr. Lumor submits that the Judge failed to exercise her discretion properly; firstly, by misconstruing the meaning of the term "the affairs of the company;" secondly, in finding that the financial statements were prepared by Guild and Guild Consulting, although they had never been in compliance with the relevant rules for

the appointment of an auditor and the presentation of reports to the general meeting. There is no misdirection by the learned judge, having found that there was breach of statutory governance nonetheless refusing to grant the order for the inspection of the Respondent.

[52] Griffith J made relevant finding of facts in respect of the financial statements. The learned judge found that the Appellant was aware of the Respondent's use of the accounting firm Guild and Guild Consulting, whom the Appellant admitted in cross-examination to have recommended. The Appellant was in fact notified of the financial statements for the year 2004 and 2006. The court accepted that financial statements for the years 2004 through 2010 were prepared prior to the institution of claim and were available to the Appellant.

[53] The Appellant was not a mere shareholder, but had significant knowledge of and involvement in the Respondent's business operations. The Appellant has himself admitted in previous proceedings where the issue was in dispute that he was Attorney-at-Law for Progresso Heights Limited. At paragraph [28] of **Progresso Heights Ltd**. the Caribbean Court of Justice found that:

> ***[28]*** *If indeed, there was no contractual retainer by Progresso of Mr. Elrington or his law firm before February 2008 it is clear that Mr. Elrington accepted that he had assumed the role of Progresso's attorney and so was under the usual fiduciary duties of an attorney to his client.*

There is no evidence of any breach by the Respondent which cannot be remedied by a resolution passed by a simple majority. The breaches identified can be ratified by the Schneiders who held 80% of the shares in the Respondent. See **Foss v Harbottle.**

[54] Apart from the issue of a lack of resolution, there was no challenge raised of any fraudulent or improper transaction on the part of the Respondent. There was no evidence to support the contention that the Respondent was being seriously mismanaged. Non-compliance of the statutory requirements were properly assessed against the background

of a finding that there were annual audits of the Respondent's finance from 2004 to 2010. I accept that the Court had ample evidence to support its finding that there was no good reason made as required by law to grant the order for appointment of an inspector to investigate the affairs of the Respondent.

[55] The Appellant's submission that the learned trial judge failed to exercise her discretion in accordance with law fails. There was evidence adduced from which the learned trial judge could find that the Claimant was actuated by malice. I accept that in the exercise of its discretion, the court correctly took into its consideration as relevant, the statutory remedy given in Section 113(1) of the Act. That remedy by way of an application to the Court by a shareholder for the Court to direct such an appointment was not enforced for the entire period 2004 to 2010. This statutory remedy attaches to the statutory requirement to hold a general meeting as well as the appointment of an auditor in general meeting. The failure of the Appellant to use and exhaust the statutory remedies is a relevant consideration of the Court in the exercise of its discretion.

[56] Reliance was placed by the Appellant on the authorities of **Jeffery Sersland et al v St. Matthews University School of Medicine Limited Civil Appeal No. 20 of 2008** which was concerned with the institution of proceedings by shareholders of a company for wrongs done by the company. It is well established that the company itself must bring such an Action except in circumstances where the court approves a derivative action. In the absence of resolutions, no act done by a director purportedly done in the name of or on behalf of the Respondent is an act of the Respondent. In **Breckland Group Holding Ltd v. Suffolk Properties Ltd and others [1989] BCLC100 p.106** Harman J. said:

> *"Further in my judgment, a party should not obtain an advantage out of an action which is by definition, wrongly constituted at present over other parties by wrongfully, at present, taking the name of the company into his own hands and using it without authority.*

[57] **John Shaw and Sons Limited and Shaw** provides no authority for the issue before Griffith J, that the failure of a company to formally appoint an auditor does not automatically mean that an inspector should be appointed to investigate the company. That there are other relevant considerations, such as the ability of the company to ratify and approve Guild and Guild as auditors for the period 2004 to 2010, since the act was *intra vires* the powers of the Respondent.

Ground two

[58] The Appellant at no time disputed receiving payments of money from the Respondent and admitted receiving $200,000. The classification of the funds is irrelevant as the Appellant received monies out of the profits of the business of the Respondent. There was evidence that the Appellant, contrary to his pleaded case, admitted in cross-examination that he did in fact request distribution of profits by a return on investment and he did accept in cross-examination that he was "pleased to know the proceeds of sale will be available for disbursement between us."

Ground Three

[59] Counsel on behalf of the appellant in the written submissions dated 31st March, 2016 did not challenge the conclusion of Griffith J, after she had "extensively examined" the question of what amounts to "good reason", for appointing an inspector under section 110(2) of the Act. Griffith J correctly concluded that the legislative background and origins of s. 110 of the Belize Act predated the 1948 Act, which has expanded the courts power. Griffith J was correct in holding that these expansions have not been incorporated into the Belize Act and the local courts should therefore exercise caution in the exercise of the discretion in the determination of the conduct which these later Acts provide.

[60] For the above reasons, I would propose the following orders:

(1) The appeal is dismissed.

(2) Costs is awarded to the respondent. The costs order is provisional, to be made final after seven days. In the event either party should apply for a contrary order within the period of seven days from the delivery of this judgment, the matter of costs shall be determined on written submissions to be filed by the parties in ten days from the date of the application.

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CAMPBELL JA