[2018] JMCC. Comm. 4

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

COMMERCIAL DIVISION

CLAIM NO. 2016CD00153

BETWEEN	COMMUNITY MEDICAL SERVICES LIMITED	CLAIMANT
AND	THE MEDICAL ASSOCIATES HOSPITAL	FIRST DEFENDANT
AND	CONRAD GEORGE	SECOND DEFENDANT

IN CHAMBERS

Donovan Malcolm instructed by Clough Long and Co for the Claimant

Michael Hylton QC, Shanice Scott instructed by Anna Gracie of Rattray Patterson Rattray for the First Defendant

Jacqueline Samuels Brown QC, Marcia Grace Samuels instructed by Anna Grace of Rattray Patterson Rattray for the Second Defendant

December 19, 20 and 28, 2017 and January 8, 2018

COMPANY LAW – CIVIL PROCEDURE – SUMMARY JUDGMENT APPLICATION – WHETHER CLAIMANT HAS REAL PROSPECT OF SUCCESS

SYKES J

Transferred shares

[1] Community Medical Services Ltd ('CMS') wants to recover shares transferred to Medical Associates Limited ('MAL'). CMS says that the person who transferred the share did not have authority to do what he did. CMS also says that the preconditions for the transfer were not met. This mean, it is said, that the transfer was invalid and CMS is still the legal and beneficial owner of the shares.

[2] The wonderful thing about this case is that all three remaining litigants (for there were as many as two claimants and eleven defendants) are of the view that the matter can be resolved by way of summary judgment applications because all the documents needed to resolve the applications are before the court and all that is going to be said has been in the supporting affidavits. The result of this perspective is that all three litigants are seeking summary judgment in their favour. The two defendants have succeeded and the claimant has failed. These are the reasons explaining the success and failure of the applications.

The investor

[3] Hospitals are expensive to build, expensive maintain and expensive to refurbish. The Medical Associates Hospital ('MAH') is a well-known private hospital in Jamaica that provides good quality health care for those who can afford to pay. MAL is the company that operates MAH. CMS is described as the 'regulatory authority' for MAL. CMS had 404,164 shares in MAL.

[4] CMS was formed in December 1975 for the purpose of acquiring 'the whole or part of the shares of [MAL]' and to 'manage and operate the medical facility known as [MAL].' That was the context in which it came to own the shares.

[5] Overtime it became apparent to those operating MAL that new capital was needed to upgrade the plant if the hospital was to continue offering high quality

medical care. With that in mind the board of MAL set about seeking investors. One was found in the form of AIC (Barbados) Limited ('AIC').

[6] AIC and MAL executed a Heads of Agreement ('HOA') in 2006 and Share Subscription Agreement ('SSA') in 2007. Summarily stated, the HOA provided for the following:

(a) two loans to MAL totalling (JA$65,000,000.00) secured by two promissory notes 'which shall be convertible' into '1,050,000 fully paid up ordinary shares of $61.88 each of MAL and issued to AIC or its Nominee representing' 67% of the issues and fully paid up share capital;

(b) JA$25,000,000.00 was to paid to MAL and JA440,000,000.00 was to paid to the Commissioner of Inland Revenue;

(c) AIC was to get 404,000 shares in exchange for the JA$25,000,000.00 and a further 646,000 for the additional JA$40,000,000.00;

(d) an additional JA$110,000,000.00 was to be provided to finance further developments at MAH.

[7] The agreement was signed by Dr Grace Haynes and Mr Conrad George for MAL and by Mr Wayne Chen for AIC.

[8] The SSA has these features:

(a) AIC was to make two loans totalling JA$65,000,000.00 to MAL secured by promissory notes which were convertible 'at the right of [AIC] into ordinary shares in [MAL]';

(b) a further loan of JA$110,000,000.00;

(c) AIC to receive 404,000 shares in exchange for JA$25,000,000.00 and 646 shares for JA$40,000,000.00;

(d) in respect of the 404,000 MAL was to have a special resolution to amend its articles in order to buy back its shares held by CMS or in the alternative to CMS was to donate its share to MAL.

[9] The articles of MAL were amended to facilitate the buying back of the shares. As we now know there was no buy back but a donation and the donation was not for the purpose of facilitating the transaction but because CMS wanted to get out of the business of managing or regulating MAH.

[10] In August 2008 the board of CMS met and passed a resolution to donate its share to MAL. The reasons given were these:

> *The Chairman reported that it is the desire of the remaining members of the Company to wind up its operations having regard to the fact that due to retirement and death of many of its members it has divested itself of the management of the medical facility at 18 Tangerine Place in the Parish of St Andrew to Medical Associates Limited since September 2001 and that arrangement must now be made to deal with the assets of the Company prior to such winding up*

[11] This preamble states clearly that the reasons for passing the resolution to donate the share was the retirement and death of members of CMS. There is no reference to the HOA or SSA. There is not a single board minute of CMS after 2006/2007 or documentary evidence stating in actual terms that the donation of the shares was contingent upon the arrangement between MAL and AIC being acted upon. Despite the fact that the SSA mentions that the articles of MAL were to be amended to facilitate a buy back or donation the undisputed fact is that in the end CMS decided to get out of regulating MAH because CMS's members had died or retired. There is no document stating the contrary.

[12] In September 2008, after the August 2008 CMS resolution was passed by the board, there was an aborted effort to transfer the shares. In September 2014 the shares were transferred by CMS to MAL. Dr John Hall, a director of CMS, signed on behalf of CMS.

[13] It is vital to note that this share transfer based on the preamble was not to be a sale which would take place by valuation and arriving at the true or a realistic market value. The transfer was being done because CMS wanted out of the business of running MAL which operated the hospital. Also it is to be noted that the preamble expressly stated that since September 2001 CMS was for all practical purposes no longer involved in the management and operation of the hospital.

The relevant legal principles

[14] Rule 15.2 of the Civil Procedure Rules ('CPR') permits a court to make an assessment of the prospects of success and enter judgment without a trial (hence the expression 'summary judgment) if there is no real prospect of success for either the claimant or the defendant.

[15] Lord Hobhouse in **Three Rivers District Council and others v Governor and Company of the Bank of England (No 3)** [2003] 2 AC 1 made these points in relation to summary judgments under the English CPR. His Lordship made these observations which this court adopts and applies to the present case. At paragraph 153 his Lordship said:

> *...under Part 1 of the Civil Procedure Rules now in force it is the overriding objective, and the duty of the courts and the parties, that cases should be dealt with justly and that this includes dealing with cases in a proportionate manner, expeditiously and fairly, without undue expense and by allotting only an appropriate share of the court's resources while taking into account the need to allot resources to other cases. This represents an important shift in judicial philosophy from the traditional philosophy that previously dominated the administration of justice. Unless a party's conduct could be criticised as abusive or vexatious, the party was treated as having a right to his day in court in the sense of proceeding to a full trial after having fully exhausted the interlocutory pretrial procedures.*

[16] At paragraph 158 his Lordship said:

> *...under CPR Part 24, the judge is making an assessment not conducting a trial or fact-finding exercise. Whilst it must be remembered that the wood is composed of trees some of which may need to be looked at individually, it is the assessment of the whole that is called for. A measure of analysis may be necessary but the "bottom line" is what ultimately matters.*
>
> ...
>
> *The criterion which the judge has to apply under Part 24 is not one of probability; it is absence of reality. The majority in the Court of Appeal used the phrases "no realistic possibility" and distinguished between a practical possibility and "what is fanciful or inconceivable" (ante, p 83h). Although used in a slightly different context these phrases appropriately express the same idea. Part 3 of the CPR contains similar provisions in relation to the court's case management powers. These include explicit powers to strike out claims and defences on the ground, among others, that the statement of case discloses no reasonable ground for bringing or defending the claim.*

[17] Further at paragraph 161 Lord Hobhouse noted:

> *The judge's assessment has to start with the relevant party's pleaded case but the enquiry does not end there. The allegations may be legally adequate but may have no realistic chance of being proved.*

[18] It is always useful to pay close attention to documents prepared when litigation was not contemplated. As will be seen when the applications are dealt there is no document exhibited by CMS which supports the proposition that the shares it held in CMS were to be transferred if and only if the deal between MAL and AIC was consummated. The court goes further to say that there is no email or board minutes of CMS showing the understanding now being advanced by Mr Malcolm. It seems to this court that CMS wanted to get out it then position and was waiting on the opportune moment. That moment case when AIC was identified as the investor. It was this that triggered the resolution and the decision to donate (not sell after an evaluation) the shares to MAL.

[19] That which Mr Malcolm has advanced is lawyer's ingenuity being applied retrospectively. It is striking that not a single contemporaneous document has been produced supporting the notion now being advanced. The best explanation for the absence of such documentation is that no one in CMS made the link between the transfer and deal between MAL and CMS in the way now being advanced. This is supported by the preamble to CMS's board minutes which explains why the shares were being transferred to CMS.

[20] The closest one comes to divining a possible argument which can be formulated in the way Mr Malcolm now advances is a letter written by Mr Conrad George in his capacity as MAL's board chairman. He wrote a letter dated August 13, 2013, to MAL's shareholders that AIC did not wish to convert their debt into equity. But that has nothing to do with CMS's decision to part with the shares. This was one year before the transfer of the shares.

[21] There is no evidence that after CMS got notice of this it changed is position regarding the transfer of the shares. There are no minutes or any kind of communication capable of showing that it was not going forward with the August 29, 2008 resolution. As far as the documentation goes, CMS's position as reflected in the resolution was cast in granite.

[22] On CMS's own case the reason for the 2008 transfer not going through was that the stamp duty and transfer tax were thought to be too high and CMS appealed. That was the reason for the delay and not a change of heart about the transfer. Also the 2008 transfer was not signed by David Levy and Dr Grace Haynes as the August 29 resolution stated but by Dr Knox Hagley and Dr Grace Haynes. Yet no objection was raised by CMS that the 2008 transfer was signed by Dr Hagley and not Mr Levy. The point being made that the idea that the wrong person signed the 2014 transfer was an idea that occurred to someone but there was really no concern over who signed as long as the person signing for CMS had the requisite authority to bind CMS. Therefore since August 29, 2008 CMS exhibited a firm and settled intention to transfer the share to MAL. It was of no

moment to CMS when the shares were transferred as long as they were transferred.

The applications

[23] Dr Grace Haynes who provided CMS's affidavit in support of its summary judgment applications makes three core points:

(a) article 20 of CMS's articles requires that the seal shall be affixed to the instrument in the presence of one director and signed by that director as well as the secretary of CMS;

(b) the September 2014 share subscription agreement as not signed in accordance with CMS's article 20 and therefore has no legal effect;

(c) MAL did not buy back the shares in accordance with its articles and therefore the transfer is invalid.

[24] Article 20 does not say what Dr Haynes says it says. What it says is this:

> *The Company's seal shall be procured by the directors who shall provide for the safe custody thereof and the seal shall not be used except by the authority of the directors or the chairman and when to be used shall be affixed to the instrument in the presence of one director and shall be countersigned by the said director and the secretary or the person exercising the functions of the secretary of the company.*

[25] That is the only article dealing with the seal. This article, and there is no other article that says otherwise, does not say that every instrument issued by the company must have the company seal. All the article says is that the directors are to (a) get a seal for the company; (b) provide for its safe keeping and (c) not to use is unless the directors or the chairman gives permission for it to be used and when such permission is given the relevant instrument is to be signed by relevant persons. That, respectfully, does not mean that any instrument issued by the company without the seal is invalid.

[26] There is no evidence concerning the directors' position regarding the use of the seal in this transaction meaning there is no evidence that the use of the seal was mandatory because of a decision to that effect by CMS. CMS's resolution of August 2008 does not say that the seal must be used in the donation of the shares to MAL. This means that there is no factual or legal foundation for the idea that the share transfer required CMS's seal. There is therefore not identifiable breach of CMS's article 20 in this case.

[27] When one looks at even the September 2008 aborted transfer one sees in the preamble that the transfer was described as 'a gift as determined by a resolution of the Board of the Transferor.' The September 2014 transfer states that the consideration for the transfer of the 404,164 shares was JA$1.00. This was for all practical purposes a gift to MAL.

[28] In any event section 6 of the Companies Act 2004 states:

> *For the avoidance of doubt, it is hereby declared that, unless otherwise specifically provided in this Act or any other enactment, an act of a company that is contrary to its articles (including any transfer of property to or by a company) shall not be invalid by reason only that the act is contrary to its articles.*

[29] This provisions means that it says. Breach of a company's articles in and of itself does not invalidate an act done by it even if that act, including any transfer of property, is contrary to its articles.

[30] Sections 4 and 5 of the Companies Act are also of relevance here. Section 4 (1) states that subject to the Act a company has all 'the rights, powers and privileges of an individual.' Without more this means that the company acting through its officers can contract with third parties. Section 4 (2) indicated that the company has the capacity to carryon on its business in any jurisdiction outside of Jamaica to the fullest extent of Jamaican law and the law of the foreign state. Section 4 (3) provides that ait is not necessary to pass any bylaw in order to confer any particular power on a company or its directors. This follows naturally from section

4 (1). Section 4 (4) is reminder that section 4 does not authorise the company to do anything in breach of any law proscribing its business activities or in breach of any licence or permit required.

[31] Section 5 states that the company shall not carry on any business or exercise any power that it is restricted from doing by its articles and neither shall it exercise its powers in a manner contrary to its articles.

[32] The combined effect of these provisions is that a substantial portion of the intricate case law built on the foundation the ultra vires principle laid down in in **Ashbury Railway Carriage and Iron Co Ltd v Riche** (1875) LR 7 HL 653 and the various devices designed to circumvent the worst effects of the rule are now ancient history. At its core the ultra vires doctrine rendered void actions by the company because they were illegal or even immoral but because they were not permitted by the articles of association. To put it another way, the ultra vires doctrine was directed more the concept of legal capacity. Section 4 (1) which expressly states that companies now have the same capacity as individuals means that third parties, for the most part, dealing with companies need not worry about an **Ashbury** situation lurking in the shadows. In that case a company was created under the Companies Act of 1862. The directors agreed to purchase a concession for making a railway in Belgium. It turned out that the shareholders did not share the directors' optimism about the venture. The company told the other contracting party that the contract was ultra vires the company. The contracting party went to court to enforce his contract. The litigant was told by a unanimous decision of the House of Lords that the contract was outside the powers of the company and not just outside the powers of the directors. The second thing he was told was that once the contract was outside the powers of the directors and company, there was no legal possibility of the contract being ratified. The company lacked the capacity to do what it purported to do even though the acts done were not criminal.

[33] Lord Cairns LC at pages 672 - 673 summed up the position in this way:

In a case such as that which your Lordships have now to deal with, it is not a question whether the contract sued upon involves that which is malum prohibitum or malum in se, or is a contract contrary to public policy, and illegal in itself. I assume the contract in itself to be perfectly legal, to have nothing in it obnoxious to the doctrine involved in the expressions which I have used. The question is not as to the legality of the contract; the question is as to the competency and power of the company to make the contract. Now, I am clearly of opinion that this contract was entirely, as I have said, beyond the objects in the memorandum of association. If so, it was thereby placed beyond the powers of the company to make the contract. If so, my Lords, it is not a question whether the contract ever was ratified or was not ratified. If it was a contract void at its beginning, it was void because the company could not make the contract. If every shareholder of the company had been in the room, and every shareholder of the company had said, "That is a contract which we desire to make, which we authorize the directors to make, to which we sanction the placing the seal of the company," the case would not have stood in any different position from that in which it stands now. The shareholders would thereby, by unanimous consent, have been attempting to do the very thing which, by the Act of Parliament, they were prohibited from doing.

But, my Lords, if the shareholders of this company could not ab ante have authorized a contract of this kind to be made, how could they subsequently sanction the contract after it had, in point of fact, been made. I endeavoured to follow as accurately as I could the very able argument of Mr. Benjamin at your Lordships' Bar on this point; but it appeared to me that this was a difficulty with which he was entirely unable to grapple. He endeavoured to contend that when the shareholders had found that something had been done by the directors which ought not to have been done, they might be authorized to make the best they could of a difficulty into which they had thus been thrown, and therefrom might be deemed to possess power to sanction the contract being proceeded with. My Lords, I am unable to adopt that suggestion.

[34] Lord Chelmsford spoke to the same effect at page 679:

The real description of the contract entered into by the company is, an engagement to supply the contractors for the construction of a

foreign railway with the funds necessary to enable them to execute their contract. This is clearly not within any of the objects described in the memorandum of association, and the contract was ultra vires, and therefore not voidable merely, but absolutely void. The learned counsel for the Defendant in Error, after arguing against the conclusion that the contract was ultra vires, contended that the contract having been in part performed, and the money of the company having been paid in respect of it, the shareholders, in order to have the benefit of their money, so misapplied, had a right to abstain from objecting to the contract, which might then be enforced against the directors. Because, he said, the Companies Act, though it prohibits the contract being entered into, does not say, if the directors have made such a prohibited contract, what the shareholders may do with it. And he enforced his argument by urging the distinction between an illegal act and an act which it is beyond the power of the directors to do, a distinction which may be exemplified by the difference between the objects for which the company is established, contained in the memorandum of association, and the regulations for the management of the company in the articles of association.

This argument is really directed to the question whether the contract was capable of being ratified by the shareholders, the consideration of which will introduce another question, whether it was in point of fact ratified.

I have already observed that the contract entered into by the company with Messrs. Riche was not a voidable contract merely, but being in violation of the prohibition contained in the Companies Act, was absolutely void.

It is exactly in the same condition as if no contract at all had been made, and therefore a ratification of it is not possible. If there had been an actual ratification, it could not have given life to a contract which had no existence in itself; but at the utmost it would have amounted to a sanction by the shareholders to the act of the directors, which, if given before the contract was entered into, would not have made it valid, as it does not relate to an object within the scope of the memorandum of association.

[35] These passages were the foundation of that body of law that came to be known as the ultra vires doctrine. As can be seen once the action was not in the articles the act was not voidable but void. This meant that third parties dealt with companies at their own risk. It was prudent to know the content of the memorandum of association and even then, as the **Ashbury** case showed, judges may take a different view from the directors and shareholders.

[36] Section 4 curtails significantly this kind of reasoning. While section 5 says that the company should not act outside its articles section 6 has circumscribed the ultra vires doctrine considerably by stating that a breach of the company's articles without more shall not invalidate things done by the company.

[37] This point has become important because Mr Malcolm has rested his case substantially on a breach of the articles of association of both CMS and MAL. In light of the reasoning so far and against the background of the sections 4 to 6 of the Companies Act the court is saying something more is needed other than a naked statement of breach of articles of association to invalidate the share transfer transaction. That type of reasoning died in 2004. Mr Malcolm's submissions are over a decade late.

[38] The submissions of Mr Malcolm have not taken on board completely the meaning and effect of section 4 (1). The wording is simple but far reaching. When that provision stated that a company has the rights, powers and privileges of an individual subject only to the provisions of the Companies Act, Parliament was saying that anything an individual not under any legal incapacity such as infancy can do a company is able to do. Thus one is to treat a company so far as is possible as a live flesh and blood human being with no legal disability and whatever that individual can do regarding his/her rights, powers and privileges, so too can the company. The ultra vires doctrine is dead. As Professor Andrew Burgess (now Justice of Appeal in the Court of Appeal of Barbados) noted the provision or its equivalent 'renders otiose drafting shenanigans to amplify capacity of a company and the employment by the courts of interpretative

techniques to avoid the strictures of the ultra vires doctrine.' [1] This is reinforced by section 4 (2) of the Companies Act which does away with any necessity to give the company or its directors any power by any bylaw. The effect of sections 5 and 6 is that even if a company acts in breach of its articles that fact in and of itself is no longer legally sufficient to invalidate an act done by the company even if the act involved transfer of property to or from the company. This is a true revolution in company law.

[39] As Professor Burgess has observed the Companies Act in terms similar to Jamaica's has returned power to the shareholders. Any malfeasance on the part of directors or officers of the company are to be dealt with under section 213A. This provision has eliminated the worst features of the **Foss v Harbottle** majority rule principle and has made it easier to challenge those who are running the affairs of the company. In Jamaica, the class of challengers has moved beyond shareholders and includes creditors (secured and unsecured), debenture holders, directors and officers.

[40] It is therefore no longer a viable option to simply turn up in court to say there has been a breach of the company's articles as a basis to invalidate an act. Something more is needed. That something more is not present in this case which means that CMS has no real prospect of succeeding in the claim.

[41] In addition to what has been said there is the case of **The Royal British Bank v Turquand** [1843-60] ALL ER Rep 435. In that case the deed of settlement of a joint stock company registered under the relevant statute indicated that the company may borrow once there was a resolution authorising the borrowing. The claimant in that case sought to enforce a bond against the company. A Mr Phipson sought to argue on behalf of the company that the bond was not made

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[1] Burgess, Andrew, Commonwealth Caribbean Company Law, (2013) (Routlege) p 116.

issued in accordance with the deed of settlement. The court would have none of it. This is how Jervis CJ put the matter:

> *I am of opinion that the judgment of the Court of Queen's Bench ought to be affirmed. I incline to think that the question which has been principally argued both here and in that court does not necessarily arise, and need not be determined. My impression is (though I will not state it as a fixed opinion) that the resolution set forth in the replication goes far enough to satisfy the requisites of the deed of settlement. The deed allows the directors to borrow on bond such sum or sums of money as shall from time to time, by a resolution passed at a general meeting of the company, be authorised to be borrowed: and the replication shows a resolution, passed at a general meeting, authorising the directors to borrow on bond such sums for such periods and at such rates of interest as they might deem expedient, in accordance with the deed of settlement and the Act of Parliament; but the resolution does not otherwise define the amount to be borrowed. That seems to me enough. If that be so, the other question does not arise. But whether it be so or not we need not decide; for it seems to us that the plea, whether we consider it as a confession and avoidance or a special non eat factum, does not raise any objection to this advance as against the company. We may now take for granted that the dealings with these companies are not like dealings with other partnerships, and that the parties dealing with them are bound to read the statute and the deed of settlement. But they are not bound to do more.* ***The party here, on reading the deed of settlement, would find, not a prohibition from borrowing, but a permission to do so on certain conditions. Finding that the authority might be made complete by a resolution, he would have a right to infer the fact of a resolution authorising that which on the face of the document appeared to be legitimately done.*** (emphasis added)

[42] Jervis CJ stated that parties dealing with the company are bound to read the statute and deed of settlement governing the particular company. In the particular case anyone reading the same two documents would have seen that the company had authority to borrow on certain conditions and would have rightly inferred that the requisite resolution was passed authorising the company to do

what appeared on the face of the document to have been legitimately done. What this meant is that persons who read the appropriate documents would not have formed the view that anything amiss had occurred which would or could invalidate the transaction. This mean that persons who dealt with the company were entitled to assume that the internal standards of the company that led up the transaction were met and if there was in fact some defect then that defect would not affect the third party.

[43] But even this rule has come under attack and has been modified significantly by section 7 of the Companies Act. It says that the no person shall be affected or presumed to have notice or knowledge of the contents of a document concerning a company by reason only of the fact that the document has been filed with the Registrar of Companies or is available for inspection at any office of the company. This section as altered the Turquand rule by relieving the parties of reading the documents filed at the Registrar of Companies and it goes further to say that the fact of the documents being available at the Registrar or even for inspect at the company's office without more does not fix the person with knowledge or notice of its contents. The practical effect of this statutory provision is that much of Jervis CJ's reasoning is no longer applicable to Jamaica.

[44] The point is that in this share transaction, MAL need not have concerned itself with the internal workings of CMS in order to find out whether Dr John Hall had the requisite authority from the company. On the face of it he did. There is nothing in CMS's articles that show that Dr John Hall or indeed a single director lacked authority to sign the share transfer. The indoor management rule would operate to protect MAL and that position has been strengthened by section 7.

[45] The effort of Mr Malcolm to point to an alleged breach of MAL's own articles cannot avail CMS since sections 4 to 7 would apply to MAL as well. The reasons given already would apply with full force to MAL.

[46] There evidence is that CMS donated the shares to MAL. Article 3B (a) and (b) MAL's articles permitted it to acquire its own shares by purchase 'or otherwise.'

Sections 58 and 59 permits a company to purchase or otherwise acquire its own shares in certain circumstances. These provisions have modified the rigours of **Trevor v Whitworth** (1867) 12 App Cas 409. The prohibition of a company buying back its own shares was designed to protect creditors who needed to be assured that the pool of funds raised from the allotment, issuing and payment of shares was available unless the money was used for lawful purposes of the company. Lord Herschell LC explained at page 415:

> *What is the meaning of the distinction thus drawn between a company without limit on the liability of its members and a company where the liability is limited, but, in the latter case, to assure to those dealing with the company that the whole of the subscribed capital, unless diminished by expenditure upon the objects defined by the memorandum, shall remain available for the discharge of its liabilities? The capital may, no doubt, be diminished by expenditure upon and reasonably incidental to all the objects specified. A part of it may be lost in carrying on the business operations authorized. Of this all persons trusting the company are aware, and take the risk. But I think they have a right to rely, and were intended by the Legislature to have a right to rely, on the capital remaining undiminished by any expenditure outside these limits, or by the return of any part of it to the shareholders.*

[47] Lord Watson said much the same thing at pages 423 – 424:

> *One of the main objects contemplated by the legislature, in restricting the power of limited companies to reduce the amount of their capital as set forth in the memorandum, is to protect the interests of the outside public who may become their creditors. In my opinion the effect of these statutory restrictions is to prohibit every transaction between a company and a shareholder, by means of which the money already paid to the company in respect of his shares is returned to him, unless the Court has sanctioned the transaction. Paid-up capital may be diminished or lost in the course of the company's trading; that is a result which no legislation can prevent; but persons who deal with, and give credit to a limited company, naturally rely upon the fact that the company is trading with a certain amount of capital already paid, as well as upon the responsibility of its members for the capital remaining at call; and*

they are entitled to assume that no part of the capital which has been paid into the coffers of the company has been subsequently paid out, except in the legitimate course of its business.

[48] In the present case there is no evidence that purpose of the rule has been compromised or undermined in anyway. The court should also point out that contrary to Mr Malcolm's implied argument, the Companies Act does not require the company to have any provision in its article expressly permitting it to buy back its own shares. The statute permits the company to do so in prescribed circumstances and if it chooses to do so then a solvency statement is required from the directors.

[49] From what has been said it is obvious that CMS cannot succeed in securing judgment against MAL. MAL's submissions were the reverse of CMS's. The court accepts and agrees with MAL's submissions and summary judgment is granted to MAL.

[50] Regarding Mr Conrad George, the second defendant, the pleadings of CMS do not disclose any wrong doing. Even if they did, no remedy is being sought against him. This means that it is not necessary for him to be party to the case. Summary judgment is granted in his favour.