[2015] JMCC COMM 23

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

CIVIL DIVISION

CLAIM NO. 2015CD00089

BETWEEN	**DEBBIAN DEWAR**	**CLAIMANT**
AND	**ERVIN MOO YOUNG**	**FIRST DEFENDANT**
AND	**BERES WARREN**	**SECOND DEFENDANT**
AND	**OVERTON MOO YOUNG**	**THIRD DEFENDANT**
AND	**LEROY ELLIOT**	**FOURTH DEFENDANT**
AND	**GROVE BROADCASTING COMPANY LIMITED**	**FIFTH DEFENANT**

Tana'ania Small Davis and Kerri-Ann Allen instructed by Livingston Alexander and Levy for the claimant

Georgia Gibson Henlin and Coleasia Edmonson instructed by Henlin Gibson Henlin for the first, second and fifth defendants

Ransford Braham QC instructed by Brahamlegal for the third and fourth defendants

Sandra Minott Phillips QC and Simone Bowie Jones instructed by Myers Fletcher and Gordon for interested parties (Estate Karl Young and directors Joni Young Torres and Kimberly Murphy)

November 17 and 27, 2015

COMPANY LAW – APPLICATION TO BRING DERIVATIVE ACTION UNDER SECTION 212 OF COMPANIES ACT

SYKES J

[1] Mrs Debbian Dewar, through the skeleton submissions, filed by her attorneys at law makes the submission that this application to bring a derivative action has been brought because it is necessary to settle the proper composition of the board of directors of Grove Broadcasting Company Ltd ('Grove'). Indeed, as was said at paragraph 7 of the skeleton submissions, '[t]he issue in the case is the composition of the Board (sic) of directors.' The context of this application is a significant disagreement between Mrs Debbian Dewar, director, managing director and inheritor of 50,000 shares, and Mr Ervin Moo Young, director and recognised by some directors as chairman of Grove. Her allegation is that Mr Ervin Moo Young sought to remove her from her post of managing director because she refused to sanction the payment of $300,000.00/month towards his expenses. Mr Moo Young's response is that he and other directors had concerns over her stewardship of the company while she was managing director.

[2] In response to this attempt to remove her she filed this claim in her personal capacity as managing director seeking orders that would resolve the composition fo the board. The present application before the court is to permit her to continue or intervene in her own claim and treat it as a derivative action. The court accepts

that the same facts may give rise to a personal action as well as a derivative claim.

[3] The claim as presently pleaded is one under section 213A of the Companies Act. That provision permits persons who fall within the definition of complainant (defined in section 212 (3)) to bring a claim where that person is the victim of oppression or unfair prejudice because of how the company or directors of the company have treated them. More will be said about the distinction between a derivative action and one alleging oppression or unfair prejudice later in these reasons for judgment.

[4] Some names will constantly appear in these reasons and it is proper to speak to them here. Other names will be mentioned where necessary for the narrative. There are at least three Youngs and Moo Youngs in this case. The court will refer to them by first name for convenience. There is Mr Karl Young (now deceased) who will be called Karl. There is Chad Young (now deceased) who will be called Chad. There is Mr Ervin Moo Young who will be called Ervin. These three gentlemen were related. Karl and Ervin are brothers. Chad is Karl's son and necessarily Ervin's nephew.

A warning and a plan

[5] The court is mindful of the fact that in these circumstances each party attempts to wrap themselves in the cloth of righteousness complete with halo. The court will therefore be mindful of the risk that memories may be selective.

[6] The narrative will be broken down into three parts. Part one addresses the founding and the operation of Grove to the deaths of Karl and Chad. Part two addresses the developments since the death of both men. Part three deals with the matters leading up to this litigation.

The shareholdings

[7] Grove is the parent company that operates Irie FM radio station in Jamaica. Grove has two classes of shares. There are 500,000 ordinary class A shares with voting rights and 1.5m ordinary class B shares without voting rights. The relevant shares are the 500,000 shares with voting rights. These were allocated in the following manner: Karl – 350,0000; Chad 100,000 and Mr Ralph Smith 50,000. It is common ground that Karl and Chad are now deceased and their shares are now part of their respective estates. Letters of Administration have now been granted in respect of Estate Karl Young to the administratrix who is Mrs Joni Young Torres. Thus the majority shareholder in Grove is Estate Karl Young. There has been a Grant of Probate in respect of the will left by Chad. Under the terms of the will Ervin and Mrs Dewar are the executors of will. Mrs Dewar was bequeathed 50% of the 100,000 shares held by Chad. Mr Ralph Smith transferred his shares to his granddaughter Miss Thamani Smith.

Part one – inception to February 27, 2014

[8] Ervin is the chief target of Mrs Dewar's indignation. Karl was a visionary as far as broadcasting and the development of Jamaican music was concerned. He took the view that there could be a twenty-four-hour radio station that played, exclusively, reggae music. To give effect to this vision he founded Grove. Grove gave birth to Irie FM, a very popular radio station.

[9] From all the affidavits presented there is abundant evidence that Karl and Chad had a very informal way of operating the company. There is little or no evidence of board meetings, meetings of shareholders and other activities commonly associated with the operation of companies.

[10] What is about to be stated comes from the affidavit of Ervin. According to Ervin he is a director of Grove. He became a director in February 1999. When the company was formed Karl was the majority holder of the voting shares and this

was the case right up to the time of his death on June 10, 2010. During this period Karl was also the managing director.

[11] Ervin says that since February 1999 when he became a director there were no directors' meetings. Karl, says Ervin, ran the company 'in a very informal and unconventional manner.' By this he meant that Karl 'literally did things his way.' Karl ran the company 'on his terms and his "rules".' Ervin also says that the evidence of this is found in 'the lack of directors' meetings and the number of directors with whom it can be said that he consulted for any significant decisions.' Ervin further states that he 'was not consulted for meetings or financial decisions.' Ervin indicates that the 'informality also extended to shareholder's meetings.'

[12] The allegation of the informal nature of the operation of the company does not come only from Ervin. There are other deponents to the same effect. Miss Thamani Smith, for example, said in her affidavit that she became a shareholder in December 2012. She says that she has never received a notice of any shareholder's meeting. She has never attended a shareholder's meeting. She says that she contacted the company as well as the company secretary and no one was able to tell her when the next meeting for shareholders would be held. She also says that she has never received any copies of any financial statements.

[13] Mr Warren states that he was been a director since February 1999. He says that Karl never had board meetings or any other kind of meetings. He swears that after Chad took over it was more of the same. According to Mr Warren the only person he knew Chad discussed things with were Mrs Dewar. He also states that he began attending board meetings in December 2014 when Ervin began having meetings in an effort to regularize the board of directors and the affairs of the company. He testifies that the meeting on May 27, 2014 was a board meeting held at the chambers of the firm of Nunes Scholefield Deleon and Co ('the law

firm') and the matters discussed related to accountability, board meetings and there being only one signatory on the account.

[14] Mr Overtan Young indicates that he was appointed director in December 2014. He states that since December 2014 monthly circulars were sent to call board meetings.

[15] Mr Ralph Smith states that he was shareholder in Grove and was an initial shareholder. He said that he transferred his shareholding to his granddaughter Miss Thamani Smith. He says that during the time he was a shareholder the company never had any shareholders' meetings whether formal or informal. He states that he was never been asked to participate in any decision making concerning the appointment of Mrs Dewar as a director or the removal of Mr Elliot or Mr Chang. Mrs Dewar has not stated that these assertions of lack of meeting under the reigns of Karl and Chad were untrue. She was an officer of the company and became a director in 2011. The point is not whether these persons or Mrs Dewar were properly appointed but rather how is it that her concerns about the management of the company has assumed such significant proportions since Ervin and others have become more involved when worse was in existence before their involvement? Chad, as already noted, was Karl's son and he grew up with Ervin's family in the United States of America. When Karl became ill, Chad became more involved in the company. Ervin says that during this illness he (Ervin) took more frequent trips to Jamaica to assist his brother. As stated above, Karl died on June 10, 2010. Regrettably, Chad also became ill and died on February 27, 2014. After Chad became ill, Ervin, not unexpectedly became more involved in the company.

[16] Ervin says that although there were no directors' meetings, Chad was appointed managing director. He also states that Mrs Dewar was not appointed managing director during the life time of Karl. He adds that despite the articles of the association not making provision and despite the absence of board meetings, Mrs Dewar was appointed as joint managing director which meant that the

company had two managing directors after Karl became ill, namely, Chad and Mrs Dewar. The court notes that a cursory reading of the articles reveal that it is permissible to have joint managing directors. Articles 81 – 93 suggest this possibility.

[17] The assertion by Ervin that Mrs Dewar was not properly appointed as a director is not correct because there is evidence that she was appointed to the board at a meeting at which Chad, Ervin and Mr Warren were the directors present (see sixth affidavit of Mrs Dewar, exhibit numbered 220). For completion, there is evidence that she was appointed joint managing director (see sixth affidavit of Mrs Dewar, exhibit numbered 221). He claims that Mr Cheddesingh was not properly appointed director because there were no board meetings. It is against this background that Ervin stresses that, for him, the lawfully appointed directors were original directors until their directorships ended in accordance with article 94.

[18] Chad ran the company with the same level of informality as his father but, says Ervin, in fairness to Chad, he had very little time to turn to the governance issues and by the time Chad took over the company he too became ill and never quite recovered. There is a letter from a doctor indicating that he was the treating physician for Chad between January 2012 and February 27, 2014.

[19] Ervin says that it was in sorting out the estates of his brother and nephew he sought to get more information about the company and its operations. He was sufficiently aware that the estates of both men were connected to Grove. He and Mrs Dewar are the joint executors of Chad's will. Quite sensibly, he sought legal advice. He attended upon the law firm to discuss matters related to Chad's estate and to examine governance issues relating to Grove as well as ZIP 103 Ltd another radio station that was the child of Karl's music acumen.

[20] Ervin has been careful to make the point that the law firm is not his personal attorneys but were the attorneys at law for Grove for several years. To this court, it makes perfect sense to contact them.

[21] The court now turns to Mrs Dewar's narrative. Mrs Dewar's first affidavit is completely silent on the matters deponed to by Ervin regarding the founding and manner of operating the company. Mrs Dewar says that she became a director of Grove on December 16, 2011 and was appointed, as she put it, 'joint managing director on June 12, 2013.' She describes Chad as 'the principal managing director.' There is other evidence from her indicating that she was the financial controller for nearly 13 years before she was appointed director. This would mean that she would have had the opportunity to observe the manner in which Karl and Chad managed the company.

[22] Mrs Dewar while not saying so explicitly clearly was of the same view concerning the manner in which the company was operated. Mrs Dewar, in one of her many missives and emails, states in a document headed 'Management Report' and dated October 6, 2014 that she was the financial controller of Grove for almost 13 years before taking over as managing director in March 2014 following Chad's death. If this is so, this means that she would have been in the company since at least 2001. The very report is consistent with Ervin's assertion about the informal manner Karl operated the company. For example, Mrs Dewar writes in the report that 'the Young's controlled the running of almost all the departments' and that the 'norm was for line staff to deal directly with the CEO thus bypassing the HOD's.' She reports that meetings were 'rarely held [and] as a result there was no cohesiveness between the departments which resulted lack (sic) of communication being a major problem' (Volume 1 page 261). All this took place under what Mrs Dewar calls 'the old management system' (Volume 1 page 261).

[23] She has not stated anything to suggest that Ervin's description of Karl's and Chad's style of management of the company and other deponents who have said the same thing is inaccurate. It is therefore safe to say that the company under Karl's and Chad's reign was indeed operated in an informal manner.

[24] She is very clear that when she joined the board Chad was the chairman, Ervin and Mr Beres Warren were directors. She states that Mr Marshanee

Cheddesingh was appointed a director on October 10 2013. The court has not seen any documentation supporting this but both sides appear to agree that he is a properly appointed director. From Mrs Dewar's perspective, the de jure board members (meaning those appointed in accordance with the articles of association and the Companies Act) are Ervin, Mr Warren, Mr Cheddesingh and her.

[25] From what has been said so far Mrs Dewar and Mr Cheddesingh became directors after Karl's death and before Chad died. It should be noted at this stage that there is an original director in respect of whom there is no evidence that his directorship was properly terminated in accordance with article 94 of the Companies Act. This is Mr Leroy Elliot. The same applies to two other directors – Messieurs Cecil Chang and Gobind Chatani – prior to Mr Chang's death and Mr Chatani's resignation.

Part two – events from February 2014 to December 2014

[26] When Chad died in February 2014 a vacuum now existed. Ervin took a more active role. He consulted the law firm in March 2014. The principal attorneys from the firm who were involved in this matter between March 2014 and September 2014 were Mr Donovan Jackson and Mr Paul Tai.

[27] At this early stage the court wishes to address the allegation made by Mrs Dewar against the law firm that they were favouring Ervin's personal interest over that of the company. From this court's reading of all the email and letters written by the law firm and also reading the email and letters from Mrs Dewar and others there is not one jot or tittle of evidence that the law firm acted as the personal attorneys for Ervin and the other directors who consulted the law firm. There is absolutely no basis for the rather serious allegation made against the law firm by Mrs Dewar that the lawyers there were part of a greater conspiracy to install Ervin as chairman and assist him in his nefarious plot to wrest control of Grove from her and the other directors who sided with her and to place it in the hands of Ervin and his fellow plotters. All the communication that this court has seen without

exception shows that the attorneys, at all material times, were addressing matters related to the operations of the company. More details from the letters written are given below.

[28] What is it that may have caused Mrs Dewar to lay such serious charges against the lawyers? A bit of history is important.

[29] According to article 82 of the articles of association the first directors were Messieurs Karl Young, Gobind Chatani, Cecil Chang, Leroy Elliot, Lloyd Stanbury, Patrick Yap Shing and J 'Saucer' Williams. Of this number, four are now deceased – Messieurs Yap Shing, J 'Saucer' Williams, Cecil Chang and Karl. Mr Stanbury resigned effective December 1, 1994. There is now testimony from Ervin that Mr Chatani resigned in December 2014. This has not been challenged and the court is prepared to act on it. It appears that Mr Chang died sometime in either late December 2014 or early 2015. This means that, at present, of this original group of directors only Mr Elliot is still on the board since there is no evidence that he was removed in accordance with article 94. Mr Chang before his death attended a meeting on December 9, 2014.

[30] As noted earlier, from Mrs Dewar's perspective the legitimate directors of Grove as of February 27, 2014 were Ervin, Mr Beres Warren, Mr Marchanee Cheddesigh and her.

[31] After Chad's death, Ervin consulted the law firm. This led to a meeting, in March 2014, with the law firm. The persons present at this meeting were Ervin, Mr Warren, Mr Cheddesingh, Mrs Dewar and Ms Prudence Townsend who was representing the company secretary. Mrs Dewar says that it was not a board meeting despite all the board members being present along with the company secretary. According to Mrs Dewar the meeting was a set-piece, that is to say, it was pre-arranged to discuss the financial hardships of Ervin and not to discuss the affairs of the company despite the fact that the lawyers had stated that the purpose of the meeting was (a) to help the board function and (b) guide the

directors to ensure that the rights of the beneficiaries of the estates of Karl and Chad were respected.

[32] Mrs Dewar states that her understanding of the purpose of the meeting was to receive advice on how the board should carry out its fiduciary duties in light of the passing of Karl and Chad.

[33] Now come the crux of Mrs Dewar's allegations. She states that at the meeting Mr Jackson explained that the directors were entitled to minimal expenses. He also suggested, she says, that Ervin be appointed chairman so he could get some income from the company. Mr Jackson also suggested that Ervin's appointment as chairman may result in some of his trips abroad being covered by the company. From the minutes of this meeting, there was disagreement between Ervin and Mrs Dewar. She eventually concedes, in her affidavit, that matters relating to the company's financial statements were discussed as well as the addition of signatories to the bank account.

[34] Even on her own affidavit it is difficult to see how it could be said that the meeting was a set-piece designed to secure for Ervin payment of his expenses in light of the matters discussed. Mrs Dewar states that she needed advice on the role of chairman before agreeing to appoint someone in that capacity. There is nothing wrong with seeking advice but this is quite a remarkable position coming from someone who by then had been a director for over three years and a prior thirteen years' experience as senior officer of the company. If Mrs Dewar was still in the dark about the role of the chairman of a company this would be, in this context, the final confirmation of how informal the operations were under the chairmanship of Karl and Chad.

[35] Mrs Dewar then goes on the offensive and attacks the law firm and accuses them of taking sides with Ervin. As proof of this this she cites, among many things, the communication from the lawyers indicating that Ervin was now the chairman (when according to her he was not so appointed) and the lawyers' reference to Mr Leroy Elliot as a director when to her knowledge he was never

involved in the running of the company and he had ceased being a director since 1999.

[36] The minutes of the May 27, 2014 meeting show that the matters discussed related to the financial statements, the structure of the company, and the chairmanship of the board and Ervin's concern about the payment of $300,000/month for maintenance. Mrs Dewar indicated that she wished to be chairman but the attorney Mr Tai pointed out that it would not be appropriate for her to be both managing director and chairman concurrently. No clear decision was taken regarding who should be chairman.

[37] There is a letter dated June 24, 2014 from Mr Donovan Jackson to Grove's bankers letting them know of the meeting of May 27 and the plans going forward.

[38] There is a June 5, 2014 letter from the firm addressed to Grove attention Ervin. The letter begins with a reference to the meeting with the board on May 27, 2014 at which various issues were discussed. The letter spoke to the need for the board to make all critical decisions including significant appointments, expenditures outside the norm, salary increases, decisions on strategic matters; the need to have proper systems of requisition and payment; the company's financial statements and accounts; that Ervin was appointed board chairman; the company's tax liability; repair and renovation of the company's premises; the estates of Karl and Chad. The letter exhorts the board by saying, 'The Board of the Company has a fiduciary duty to the company to operate in a manner which is in the best interest of the company and its owners and for this reason it is important that transparency be brought to all matters concerning the company's operations.'

[39] The letter was copied to Mrs Dewar. She responds by email (dated June 6) and her point of contention was that Ervin was not appointed chairman. Interestingly, she did not take issue with any of the other matters in the June 5 letter.

[40] There is a second letter from the firm dated September 9, 2014 to Grove marked attention Ervin. The letter stated that since the meeting on May 27, 2014 a number of issues have arisen which the board needs to address. The letter refers to those issues: the public share offer requirement of the broadcasting licence; claims against the company by two persons; the bank mandate; the company's financial statements and account; the management report; the company's tax liability; repair and renovation of the company's premises; ZIP (103) FM's share allotment; lawfully appointed directors. The letter has the exhortation to the board to act in accordance with its fiduciary duty to the company. The firm, wisely, pointed out that at some point the personal representatives of the estates of Karl and Chad will require some accountability and therefore every effort should be made to enable proper responses. Mr Jackson advised that should the directors be unable to meet and make appropriate decisions then the only course of action would be an action by a disgruntled director seeking declaratory relief in relation to critical matters. The letter suggested an urgent meeting to discuss important matters. This letter was copied to Mrs Dewar.

[41] On September 18, 2014 Mr Jackson sent an email to Mrs Dewar urging a response to the September 9 letter because there were many issues to address. Mrs Dewar responded by saying that she has made efforts to organize the meeting but Ervin and Mr Warren were not responding favourably.

[42] In an email dated September 2014 Mrs Dewar writes to Ervin and copies it to Mr Jackson. There she makes the rather serious allegation that Mr Jackson was clearly trying to help Ervin take control of the board. She took issue with Mr Elliot being regarded as a member of the board and decried the fact that she was not consulted on such an important issue. From this it became very clear that Mrs Dewar was not going to be persuaded that neither Mr Elliot nor indeed any other director who was not properly removed from the board was still a director of Grove.

[43] Ervin, by letter dated, November 24, 2014 to Mrs Dewar took the view that Grove was not operating in accordance with good governance principles. To that end a board meeting would be called to address (a) appointment of signing officers on the company's accounts; (b) Mrs Dewar's presentation to the board regarding the financial position of the company; (c) regularise the position of directors who were not removed though notice of removal was filed at the Registrar of Companies and (d) regularise and discuss 'the similarly arbitrary appointment of Directors to the Board of the Company (sic). The letter proposed the date of December 9, 2014.

[44] As can be seen there is nothing in the emails and letters capable of suggesting that the law firm was advancing the personal interest of Ervin other than that of the company.

Status of the board

[45] According to Mrs Dewar, Mr Elliot, Mr Chang and Mr Chatani resigned as directors effective December 18, 1999. On the other hand Ervin states that Messieurs Elliot, Chang and Chatani told him that they had not resigned from the board in accordance with the articles. From the documents presented to the court there is no evidence that the directorships of Messieurs Elliot, Chang and Chatani were terminated in accordance with article 94 before December 2014. Since the conversations with directors just mentioned, Ervin said that Mr Chatani resigned in December 2014. There is no challenge to that. Mr Chang is also now deceased. These assertions have not been disputed by Mrs Dewar and so the court will not discuss them any further. Mr Chang died shortly after the December 9, 2014 meeting. This leaves Mr Elliot.

[46] Mrs Dewar attempted to suggest that Mr Leroy Elliot was not a director of the company. For this she relied on documents submitted to the Registrar of Companies and documents in the handwriting of Karl that Mr Elliot was no longer a director. However, since article 94 makes clear and explicit provision for how directors leave office there must be evidence that Mr Elliot's directorship was

terminated in accordance with the article. No such evidence was presented to this court. Mrs Small Davis, in light of this irresistible fact, fell back to this argument: the documents show what Karl would have decided and therefore since we know what his desires were then it should be treated as if the proper method of demitting office had been effected. This court cannot accept such a proposition. The company has set up its own rules about how directors demit office. There is no evidence that the rules were complied with and on the face of it Mr Elliot is still a director of Grove. Also Mrs Dewar cannot have it both ways. If she accepts Ervin as a director despite his clear admission that until his brother's illness and death he was not involved with the company then clearly she cannot have any good faith objection to Mr Leroy Elliot being a director despite his many years of inactivity. If this is correct then on the face of it Mr Leroy Elliot is still a member of the board because there is no credible evidence that his directorship was terminated in accordance with the article 94. The handwritten documents of Karl and the documents presented to the Registrar of Companies are, at best, the belief that Mr Elliot had ceased to be a director but it is article 94 that is important and decisive and not the notification to the Registrar of Companies.

[47] It would appear that the law firm's initial conclusion that Mr Elliot was not lawfully terminated as a director is not 'curious' as suggested by Mrs Dewar but consistent with the evidence at this stage. Not even her counsel, Mrs Small Davis, was able to demonstrate to this court that there was compliance with article 94 on the question of the ending Mr Elliot's directorship.

[48] There was a meeting on December 9, 2014. Some parts of hte minutes are very terse and the thoughts are not fully developed but what seems clear enough is that the meeting began with Mr Chang and Mr Chatani and at some point during the meeting Ervin, Messieurs Elliot and Warren arrived and joined the meeting. So too did Mr Overton Young. This meeting made a number of decisions. The meeting appointed Ervin as chairman, removed the names of deceased directors and those who resigned and added other persons to the board. From the record the only two directors who voted on the adding members to the board were

Messieurs Elliot and Chang. The person added to the board at this meeting were Mr Troy Moo Young, Mr Overton Young, Mrs Joni Kamille Young Torres and Miss Kimberly Ann Murphy.

[49] Mrs Dewar sought legal advice. This legal advice produced a letter from her lawyers to Ervin dated December 22, 2014.

[50] It is the decision of this December 9 meeting regarding the additional directors that has, in part, provoked this legal dispute. The attempt to remove Mrs Dewar was perhaps the last straw.

Part three – January 2015 to the present

[51] The internecine quarrels between Mrs Dewar and Ervin were not dampened by the intervention of the holiday commemorating the birth of the prince of peace. A number of board meetings were held between January 2015 and March 2015. On March 29, 2015 Ervin acted. Ervin signed a letter suspending Mrs Dewar from her post as managing director with immediate effect. It was this letter that led ultimately to this claim being filed. The letter indicated that she was being suspended while investigations were conducted into the management and financial affairs of the company. She claims that there is no credible basis for these investigations.

[52] Eventually, Mrs Dewar filed this claim and sought interim relief. The defendants appeared and orders were made reinstating Mrs Dewar as managing director and establishing an interim board which included the persons who were alleged to have been unlawfully appointed. The board also included Ervin, Mr Warren, Mrs Dewar and Mr Cheddesingh.

The application

[53] This is an application to continue and/or intervene in this present claim in the name of Grove. This present claim was commenced as a personal action by Mrs Dewar against the five defendants. The remedies sought are (a) an injunction

preventing the first four defendants from holding out that Mr Overton Moo Young, Mr Troy Moo Young, Mr Leroy Elliot, Mrs Joni Young Torres and Miss Kimberly Murphy were properly appointed as directors or from acting together as a board to effect business on behalf of Grove; (b) a declaration that the only properly appointed board members are Ervin, Messieurs Warren and Cheddesingh and Mrs Dewar; (c) a declaration that her suspension had no legal effect; (d) an order striking out certain records that were filed at the Registrar of Companies; (e) rectification of the register of directors; (f) general damages against the first four defendants.

[54] According to her affidavit filed in support of the claim she began this claim under section 213A of the Companies Act. That section permits redress for oppression and unfair prejudice.

[55] She now wants to be permitted to bring this claim in the name of Grove since according to her the proper constitution of the board is an intractable issue and it is necessary to review the defendants' actions.

[56] Claims for derivative actions are still new to Jamaica and there are not many case whether at first instance or from the Court of Appeal. Such claims are now governed by section 212 of the Companies Act. It would be helpful to give some background to this statutory intervention.

The origin of the derivative action

[57] Professors Len Sealy and Sarah Worthington in **Cases and Materials in Company Law** (8th) indicate that a derivative action is a method of dealing with maladministration of a company. Andrew Burgess JA, writing extra judicially, in his text **Commonwealth Caribbean Company Law** (2013) defined the derivative action as 'an action brought by a shareholder or other complainant in respect of wrong done to the company where the wrongdoers are in control of the company and refuse to bring an action in the name of the company' (page 323). His Lordship was careful to point out at page 327:

> *It is clear from the language of the provisions of the Acts [referring to the new statutory provisions in the Commonwealth Caribbean including section 212 of the Jamaican statute] that the derivative action is available only for the remedying of wrongs done to the company. It is not available for the enforcement of rights of individual shareholders or class of shareholders and is therefore to be distinguished from personal and representative actions. The action is 'derivative' because it 'derives' from the [complainant] being a member [of the class of persons defined as complainant in the statute and therefore entitled to bring a derivative action] ... the company which is wronged and not because of any wrong done to the shareholder per se.*

[58] Although his Lordship referred to shareholders the statutory provision in Jamaica uses the expression complainant and gives it a wide definition (section 212 (3)). It includes directors and officers of the company.

[59] The statute was introduced to remedy perceived defects in the common law's remedies for maladministration of a company. The nature of the problem, as could be expected, was accurately summarized by Lord Denning MR in **Wallersteiner v Moir (No 2)** [1975] QB 373. The facts are irrelevant for present purposes. At page 390 the Master of the Rolls said:

> *It is a fundamental principle of our law that a company is a legal person, with its own corporate identity, separate and distinct from the directors or shareholders, and with its own property rights and interests to which alone it is entitled. If it is defrauded by a wrongdoer, the company itself is the one person to sue for the damage. Such is the rule in Foss v. Harbottle (1843) 2 Hare 461. The rule is easy enough to apply when the company is defrauded by outsiders. The company itself is the only person who can sue. Likewise, when it is defrauded by insiders of a minor kind, once again the company is the only person who can sue. But suppose it is defrauded by insiders who control its affairs - by directors who hold a majority of the shares - who then can sue for damages? Those directors are themselves the wrongdoers. If a board meeting is held, they will not authorise the proceedings to be taken by the company against themselves. If a general meeting is called, they will vote down any suggestion that the company should sue them themselves. Yet the company is the one person who is damnified. It is the one person who should sue. In one way or another some means must be found for the company to sue. Otherwise the law would fail in its purpose. Injustice would be done without redress.*

[60] The courts recognise that within a company there may be severe disagreements over the direction a company should take. There may be strong views held by directors and shareholders about how to handle a particular crisis or opportunity but that does not translate into a derivative action at the behest of the party who came out on the losing end of that internal debate. Any lawyer worth his or her salt can always find that the decision made may have a negative effect on the company and build on that to say that company's affairs are being mismanaged in some way. This court is not aware of any company where some defect in its operations cannot be found.

[61] Nonetheless, the courts recognised that sometimes the company is hijacked by unscrupulous persons or perhaps, equally distressing, persons so inept that they are really incapable of conducting the operations in the best interest of the company. The common law responded by developing exceptions to the general

rule that the courts do not interfere with the lawful decisions made by the company.

[62] There are good reasons for requiring the permission of the court before a derivative action can be brought. At the very least there needs to be some scrutiny to make sure that the litigant is not seeking to dress up a personal claim as a claim for and on behalf of the company.

[63] The case of **Foss v Harbottle** 67 ER 189 is the usual starting point of this discussion. Three significant points emerged from the case. First, the case held that only the company could sue for wrongs done to it. Second, it also held that if the acts complained of could still be ratified by the shareholders then the claim could not be pursued. Third, acts which were voidable and not void could be ratified. The underlying theme of the judgment was the principle of majority rule. It may be that only persons who disapproved of the act in question are those suing and if the majority approved all that majority need to do is call a meeting and ratify the impugned act. This is how Vice Chancellor Wigram put the matter at pages 203 - 204:

> *Now, that my opinion upon this case may be clearly understood, I will consider separately the two principal grounds of complaint to which I have adverted, with reference to a very marked distinction between them. The first ground of complaint is one which, though it might primâ facie entitle the corporation to rescind the transactions complained of, does not absolutely and of necessity fall under the description of a void transaction. The corporation might elect to adopt those transactions, and hold the directors bound by them. In other words, the transactions admit of confirmation at the option of the corporation.…*
>
> *The complaint is that those trustees have sold lands to themselves, ostensibly for the benefit of the cestui que trusts. The proposition I have advanced is that, although the Act should prove to be voidable, the cestui que trusts may elect to confirm it. Now, who are the cestui que trusts in this case? The corporation, in a sense, is undoubtedly the cestui que*

> *trust; but the majority of the proprietors at a special general meeting assembled, independently of any general rules of law upon the subject, by the very terms of the incorporation in the present case, has power to bind the whole body, and every individual corporator must be taken to have come into the corporation upon the terms of being liable to be so bound. How then can this Court act in a suit constituted as this is, if it is to be assumed, for the purposes of the argument, that the powers of the body of the proprietors are still in existence, and may lawfully be exercised for a purpose like that I have suggested? Whilst the Court may be declaring the acts complained of to be void at the suit of the present Plaintiffs, who in fact may be the only proprietors who disapprove of them, the governing body of proprietors may defeat the decree by lawfully resolving upon the confirmation of the very acts which are the subject of the suit. The very fact that the governing body of proprietors assembled at the special general meeting may so bind even a reluctant minority is decisive to shew that the frame of this suit cannot be sustained whilst that body retains its functions. In order then that this suit may be sustained it must be shewn either that there is no such power as I have supposed remaining in the proprietors, or, at least, that all means have been resorted to and found ineffectual to set that body in motion: this latter point is nowhere suggested in the bill: there is no suggestion that an attempt has been made by any proprietor to set the body of proprietors in motion, or to procure a meeting to be convened for the purpose of revoking the acts complained of.*

[64] What the Vice Chancellor was cautioning against was permitting a claim to go forward against a company for an alleged wrong done to it in circumstances where the acts complained of were voidable and not void ab initio. From this early start it is not hard to see why the common law, overtime, insisted that the bringing of a derivative action required (a) control of the company by the wrong doers; (b) the act complained was void and not voidable at the option of the company and (c) fraud, oppression and the like.

[65] The Vice Chancellor's position is nothing more than a reflection of the 'the elementary principle that A cannot, as a general rule, bring an action against B to recover damages or secure other relief on behalf of C for an injury done by B to C. C is the proper plaintiff because C is the party injured, and, therefore, the person in whom the cause of action is vested' (**Prudential Assurance Co Ltd v Newman Industries Ltd** joint judgment of Cumming-Bruce, Templeman and Brightman LJJ [1982] Ch 204, 210). This is nothing more than the inevitable conclusion that arises from the concept of separate legal personality of the company and the consequential right to sue and the burden of being sued in its own name. This elementary conclusion was confirmed by the House of Lords in **Salomon v Salomon** [1897] AC 22. This basic principle still holds true. Allowing another to bring a claim on behalf of the injured party is always unusual and that is why justification will always be needed by those seeking to bring the claim.

[66] Jenkins LJ summed up the position in **Edwards v Halliwell** [1950] 2 ALL ER 1064, 1066:

> *The rule in Foss v Harbottle, as I understand it, comes to no more than this. First, the proper plaintiff in an action in respect of a wrong alleged to be done to the company or association of persons is prima facie the company or the association of persons itself. Secondly, where the alleged wrong is a transaction which might be made binding on the company or association and on all its members by a simple majority of the members, no individual member of the company is allowed to maintain an action in respect of that matter for the simple reason that, if a mere majority of the members of the company or association is in favour of what has been done, then cadit quaestio.*

[67] The common law exceptions developed by the courts have been the subject of sustained criticism for a number of years. It is said that their boundaries are uncertain. Some have said that the only true exception is the fourth one – fraud on the minority. The conventional exceptions prior to the Act were:

(a) the action by the company or directors was ultra vires the constitution of the company or just plain illegal. The idea here is that an ultra vires act or plainly illegal act could not ever be made good by a majority vote of the relevant decision making organ of the company; the act or conduct requires a special majority;

(b) a shareholder's personal rights were infringed; and

(c) a fraud on the minority

The new statutory regime

[68] The legitimate concerns of the Vice Chancellor have been neutered by section 213 (2) of the Act. Section 213 (2) states that an action brought or intervened in under section 212 should not be stayed or dismissed by reason only that it is shown that the alleged breach of a right or duty owed to company has been or may be approved by the shareholders. The provision goes on to say that evidence of approval by the shareholders may be taken into account by the court in making an order under section 212. This means that the fact that the conduct complained of may be ratified or approved by the shareholders is no longer by itself a reason to deny a complainant the opportunity to bring a derivative action.

[69] Burgess JA, in examining the statutory derivative action, has taken the view that the 'breadth of the statutory language also means that the common law derivative action is subsumed within the statutory derivative action and no longer exists as such' (page 327). This was noted after it was said that the 'statutory language is very broad and is said to embrace not only all causes of action under any statute, but also all causes of action in law or in equity that a shareholder may sue for on behalf of the company' (page 327).

[70] From this conclusion by his Lordship this court concludes that new sections 212 and 213 of the Companies Act have been introduced to sweep away the entire edifice built through the common law. However, this does not mean that some of the common sense concerns of the judges of the past cannot be of assistance today.

[71] Despite the criticisms of the derivative action by many, the legislature has still retained the idea that leave is needed to pursue such a claim. The question that arises is, why have the legislators retained the required of judicial permission for this type of claim before it can be brought? The answer seems to be that the legislature recognises that it is open to abuse and there is the risk that the company's assets may be frittered away in pointless litigation; frittered away because in many instances these cases are funded out the company's resources at very significant costs to the company. Already in this case there is documentation suggesting that legal fees are already in excess of JA$2m and the matter is still in the early stages.

Application to case

[72] Section 212 (2) has established three threshold requirements before the court permits a derivative action to be brought. They are (a) notice; (b) acting in good faith and (c) appear to be in the best interest of the company. In respect of the second requirement the court has no evidence that Mrs Dewar is not acting in good faith.

[73] Regarding the first requirement reliance was placed on the judgment of Mangatal J in **Earle Lewis v Valley Slurry Seal Company** [2013] JMSC Comm 21. Her Ladyship accepted the proposition that notice under section 212 should not be given an unduly technical meaning. This court agrees.

[74] On the question of notice Mrs Dewar relies on a letter written to Mrs Gibson Henlin by Mrs Small Davis as sufficient notice. The letter is dated July 8, 2015. It states that notice is given to 'your clients Ervin Moo Young and Beres Warren formal notice of our client's intention to make an application under section 212 of the Companies Act for leave to bring a derivative action in the name of and on behalf of the Grove Broadcasting Company Limited and or to intervene in the action …'

[75] It was also that Ervin in his letter dated December 23, 2014 to Mrs Small Davis stated that he did not intend to take the matter to court. However, Mrs Small Davis' December 22 letter to Ervin did not say that she was taking the matter to court.

[76] Mrs Gibson Henlin took the point that she does not represent all the directors and even if she did service on her is not service on the directors because she has no authority to accept service of notice of a derivative action. Mr Ransford Braham QC adopted this point. Mrs Sandra Minott Phillips QC indicated that her clients were not served with notice.

[77] It is this court's view that the notice threshold has not been crossed. The learning cited by Mangatal J indicated that even a letter to the board of directors would suffice. That was not done here. Mrs Small Davis attempted to salvage this by submitting that from all the activity in the matter to date from the filing of the application and the various court appearances notice has been given. The court cannot accept this because it would mean that a litigant who needs leave for filing this type of claim could simply (a) fail to notify directors; (b) file the claim in some other capacity (as has happened here); (c) serve the documents on the directors and (d) say that since the directors have been served with documents then the application can now be made because the present claim was not brought under sections 212 (which would be served on the directors and therefore notice was given) and so leave can be given to either continue the claim as if it were brought under those provisions or leave be given to intervene since the applicant began the claim in another capacity. The court cannot countenance the undermining of the purpose of notice. The authorities say that it is to bring the alleged wrong to the attention of the directors so that they can decide whether they will pursue the matters complained of.

[78] It was said in this case that Ervin had written to Mrs Small Davis in his December 23, 2014 letter to say that the matter would not be going to court. It is not immediately clear what he was responding to because Mrs Small Davis' letter to

him of December 22, 2014 did not mention taking the matter to court. There was some suggestion that Mrs Dewar had mentioned to Ervin that the court should sort out the matter. In the view of this court these additional factors do not alter the conclusion already stated. This court takes the view that such an important matter should not be bedevilled by an intense examination of facts to determine whether the circumstances of any particular case amount to notice to the director. The court has looked at the Canadian cases cited by Mangatal J in her judgment and it strikes this court that the Canadian decisions are just too flexible and have set the bar too low. While it is true to say that the notice requirement should not be elevated to saying that only personal service will do but there ought to be some formality to it. Although the statute does not require that the notice be in writing it would be good practice to have written notice. The Canadian cases say that the notice does not need to detail every possible cause of action. This court does not disagree but there should still be some indication to the directors of what action it is being said that they ought to take so that they can have an informed discussion about the matter.

[79] Mr Ransford Braham QC relying on paragraph 32 of Mangatal J's judgment submitted that where another adequate remedy is available then the action ought not to be allowed. Mr Braham submitted that if the real complaint was that the directors or some of them were not properly appointed the cheaper and more effective remedy would be to summon a shareholders' meeting and put the matter aright. Therefore there is no need for a derivative action.

[80] There is another point that needs to be considered. The written submissions on behalf of the claimant speak to remedies of oppression and unfair prejudice under section 213A. The section 213A remedies are for wrongs done to a certain class of persons or an individual who is a member of that specified class. These remedies are not for wrongs done to the company. Mrs Dewar as managing director is within the statutory definition of complainant. She is within the class of persons (called complainants by the statute) who can sue on the ground of oppression and unfair prejudice.

[81] The ultimate remedy being sought is essentially a decision on who the de jure directors of Grove are and that the relevant records be rectified. It appears that that remedy can be granted in the claim as filed by Mrs Dewar. It is not immediately obvious why a derivative action is necessary or desirable when such a claim adds nothing to the present claim other than costs. The only benefit that strikes the court that Mrs Dewar may secure is that the company may be required to pay the costs of the claim if successful at the end and for the company to fund the litigation in the interim until final judgment.

[82] The court has examined the claim form and the particulars of claim and despite serious allegations of spending significant sums of money without proper authorization the remedies are not seeking to recover any money from the allegedly miscreant directors. The court cannot therefore see how it is in the best interest to permit a derivative action when the final remedy sought although beneficial to the company can be granted without the derivative action.

[83] On two of the three pre-conditions (notice and best interests of the company) Mrs Dewar has failed to show that this derivative claim should go forward.

Conclusion and disposition

[84] The application to bring a derivative claim is dismissed. Costs reserved. Leave to appeal refused.