IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN THE COMMERCIAL DIVISION

CLAIM NO. SU2020CD00413

IN THE MATTER OF the Companies Act 2004

AND

IN THE MATTER of s. 213A(2)(a), s. 213A(2)(b) and 213A(2)(c) of the Companies Act.

BETWEEN	**MICHAEL DRAKULICH**	**1ST CLAIMANT**
	MAX PATCHEN	**2ND CLAIMANT**
	MILVERTON REYNOLDS (Notice of Discontinuance filed by 3rd Claimant on 12th February 2021)	**3RD CLAIMANT**
	NORMA CLARKE	**4TH CLAIMANT**
	JOHN DALTON	**5TH CLAIMANT**
AND	**KARIBUKAI LIMITED**	**1ST DEFENDANT**
	RAINFOREST ADVENTURES (HOLDINGS) LIMITED	**2ND DEFENDANT**
	MYSTIC MOUNTAIN LIMITED	**3RD DEFENDANT**

IN CHAMBERS

M. Georgia Gibson Henlin, QC, Stephanie Williams and Peta-Shea Dawkins instructed by Henlin Gibson Henlin for the Claimants

Sandra Minott Phillips, QC, Simone Bowie-Jones Stephanie Ewbank and Shaniel May instructed by Myers Fletcher & Gordon for the 1st and 2nd Defendants

Janet Morrison instructed by Hart Muirhead and Fatta for the 3rd Defendant

22 April, 17th May, 19th July and 9th September 2021,

Judges of Concurrent jurisdiction- Equal power and authority- Power to set aside or review only in exceptional circumstances – Purview of the Court of Appeal- Res judicata

PALMER HAMILTON J

THE APPLICATION

[1] By virtue of their application for summary judgment filed on the 26th day of May, 2021, the 1st and 2nd Defendants, inter alia, raised a point in limine concerning the jurisdiction of this Court to hear and determine the Claimants' application (the content of which will be examined later on in this decision), filed on the 16th March 2021. The 1st and 2nd Defendants objected on the premise that Batts J finding that he is satisfied that the Claimants' claim contains no serious issues for trial and that bare assertions, unsupported by credible evidence and contradicted by undisputed documentation, may not suffice to create a triable factual issue cannot be disturbed by a Court of concurrent jurisdiction. Given the significance and implication of this jurisdictional point, however resolved, this Court thought it prudent to address it before proceeding on the Claimants' application. Accordingly, this judgment is concerned with a careful assessment and determination of this preliminary objection.

BACKGROUND

[2] The parties herein are embroiled in a dispute over the management of the 3rd Defendant, a private company with limited liability and located in Ocho Rios in the parish of St. Ann. The Claimants herein are former directors of the 3rd Defendant. The 1st Claimant is also former Chairman of the Board and former Chief Executive Officer of the 3rd Defendant. The 1st Defendant (domiciled in St. Lucia) is the sole shareholder in the 3rd Defendant. The 1st, 4th and 5th Claimants are minority shareholders in the 1st Defendant and the 2nd Defendant (domiciled in the British Virgin Islands) is the majority shareholder in the 1st Defendant. Josef Preschel, whose witness statement was filed on the 28th day of May 2021, is the President of the 2nd Defendant and Secretary of the 3rd Defendant. He is also a Director of all 3 Defendants.

[3] This matter had its genesis in an Amended Fixed Date Claim Form (hereinafter referred to as AFDCF) and a Further Amended Notice of Application for Court Orders supported by an affidavit, filed on the 7th October, 2020. In their AFDCF, the Claimants sought the following Declarations (inclusive of the injunctive relief listed below), that:

(1) the 1st and 2nd Defendants as affiliates of the 3rd Defendant have acted in a manner that effects or is intended to effect a result that unfairly disregards, is oppressive or unfairly prejudicial to the Claimant as director, officer and/ or creditor of the 3rd Defendant;

(2) the 1st and 2nd Defendants as affiliates of the 3rd Defendant have conducted or carried on or intend to conduct or carry on the business of the 3rd Defendant in a manner that unfairly disregards, is oppressive or unfairly prejudicial to the Claimant as the director, officer and/ or creditor of the 3rd Defendant; and

(3) the powers of the directors or representatives of the 1st and/ or 2nd Defendants as affiliates of the 3rd Defendant have been exercised conducted or carried on or that they intend to conduct or carry on the business of the 3rd Defendant in

a manner that unfairly disregards, is oppressive or unfairly prejudicial to the Claimant as the director, officer and/ or creditor of the 3rd Defendant.

[4] In their further amended application, the Claimants applied for injunctive relief which was earlier sought in their Amended Notice of Application filed on the 24th September, 2020. On the 25th September, 2020, injunctive relief was granted on the Amended Notice of Application for Court Orders by my learned brother Batts J until 9th October, 2020, in the following terms:

(1) The 1st and 2nd Defendants, whether by themselves, their servants, agents or otherwise howsoever, are restrained from interfering in the operations of the 3rd Defendant including but not limited to the restructuring of the Seven Year Global Bond (issued pursuant to the Trust Deed dated the 28th September 2018 between the 3rd Defendant and the JCSD Trustee Services Limited) which shall include finalizing the documents required pursuant to the restructure arrangement agreed on or around May 2020 with the bondholders until the 9th October 2020 or further order of the Court;

(2) The 1st and 2nd Defendants are restrained whether by themselves, their servants, agents or otherwise however, from interfering in the operations of the 3rd Defendant including but not limited to directing Josef Preschel to vote or causing Josef Preschel to procure the Board of the 3rd Defendant to vote in a manner that favours the directives or interest of the 1st and 2nd Defendants, to the exclusion of the Claimant and/ or the 3rd Defendant's directors or as set out in the proposed resolution no. 1 of the members meeting of the 1st Defendant fixed for 11:00 am St. Lucia time until the 9th October 2020 or further order of the Court;

(3) That 1st and 2nd Defendants by their servants and/ or agents including Josef Preschel are restrained from requesting the 3rd Defendant's information other than through the directors of the 3rd Defendant including the Claimant as

Director and Chief Executive Officer until 9th October 2020 of further order of the Court;

(4) The 1st and 2nd Defendants are restrained from interfering in the operations and Claimant's management of the 3rd Defendant or from implementing or causing to be implemented their resolutions to appoint directors selected by it or with a view to the controlling the 3rd Defendant's Board and/ or to act in a manner that directs the appointment of directors other than in accordance with the 3rd Defendant's Articles until the 9th October 2020 or further order of the Court including:

(a) **Proposed Resolution 6**- the company, as sole shareholder of MML, be able to take all necessary steps/ procedures, including, but not limited to, the passing of any resolutions, to ensure that the Board of MML is comprised of the following directors*:*

(i) Albino Rodriguez Aguilar;

(ii) Alexander Jose Rodriquez Bonilla;

(iii) Teresa Malpassi;

(iv) Nilka Gomez Quiroz;

(v) Rossana del Carmen Alvarado Escala; and

(vi) Josef Preschel.

(5) The 1st and 2nd Defendants are restrained from interfering in the operations and/ or the Claimant's management of the 3rd Defendant or from implementing or causing to be implemented their resolutions to affect the management and operations of the 3rd Defendant or with a view to controlling the 3rd Defendant's Board and/ or to act in a manner that directs the appointment of directors or removal of the Claimant as Chief Executive Officer or the Chairman of the

Board until the 9th October 2020 or further order of the Court including as follows:

(a) **Proposed Resolution 7**- the appropriate shareholder/ or directors of the resolutions be passed at the end and a level to reflect the following:

(i) that the company hereby confirms and approves that the operations of an end and shall be managed in the manner as set out in the document entitled “Who Decides What” (attached to the Notice of Meeting to be held of the 25th September 2020” as Appendix 1);

(ii) that at least two (2) authorized signatories of MML, one of which shall be the General Manager, namely Ryan Peart, be required to sign any cheques drawn from the accounts of MML and the Secretary be and is hereby authorized to indicate on the mandate give to the bank(s) at which MML’s accounts are held, that at least two (2) authorized signatories shall sign any cheque drawn from the accounts, with at least one signatory being Ryan Peart;

(iii) that the accounts of MML shall be managed in the manner as set out in the document entitled “Account Management” [attached to the notice Appendix 2] and the Secretary be and is hereby authorized to send to any such banks such mandate as agreed;

(iv) that the appointment of Josef Preschel as Director of MML be ratified and that he now be named Interim Managing Director and that the Secretary of MML and/ or such other person as is authorized will do all that is required to effect to the terms of his appointment;

(v) that Michael Drakulich be removed as Chairman of the Board of Directors of MML and an interim Chairman be appointed as agreed to by a majority of the Board of Directors of MML and such interim Chairman shall remain Chairman until the conclusion of the buy/ sell negotiation among the

shareholders of Karibukai or unless otherwise agreed by a majority of the board of directors of MML;

(vi) that MML hereby removes the position of Chief Executive Officer, and that the positions of General Manager of MML job description be approved as stated in the document entitled “Job Descriptions” (attached to the notice as appendix 3);

(vii) that Michael Drakulich shall not have the power to solely instruct legal counsel on behalf of the MML and that any instructions to be given to any advisor of MML shall be done by at least two (2) directors one of which should be appointed by the Rainforest Adventures for the Limited;

(viii) that the articles of incorporation of MML be amended in the following manner:

1. Article 66 be amended by deleting and substituting same with the following sentence “in case of an inequality of words, with the actual of hands were unopposed, the Chairman of the meeting at which the show of hands takes place or act with the port is demanded shall not be entitled to a 2nd or casting vote”

2. Article 118(a) be amended in the following manner:

a) By deleting the sentence which states that “in the case of an inequality of votes, the Chairman shall have a 2nd or casting vote” and by replacing it with “in the case of an inequality of force, the Chairman shall not have a 2nd or casting vote”; and

b) By deleting the sentence which states “it shall not be necessary to give notice of a meeting of directors to any director for the time being absent from Jamaica” and by replacing it with “it shall be necessary to give notice of a meeting of directors to or directors, with or located in or outside of Jamaica”

c) Article 109 to be deleted and substituted with the following “the quorum necessary for the transaction of business shall be six (6) directors (whether attending in person or as allowed by section 141 of the Act). For the purposes of this article and alternative appointed by a director shall be counted in the quorum at a meeting at which a director appointing him is not present”,

d) Article 111 to be amended by deleting in the first line the words “who is” and in the second line the words “approved by the majority of directors”;

e) By inserting an Article 112A to read as follows: “if the company engages a person to hold the position of Chief Executive Officer (CEO), the CEO shall be responsible for the day-to-day operations of the Company for so long as he is engaged under a contract of employment and shall report to the Board of Directors as requested by the Board. The CEO, if also a director shall not to be elected as the Chairman of the Board of Directors.”

f) By inserting an article 115A to read as follows:

“SPECIAL MAJORITY RESOLUTIONS”

115A. The Company shall not conduct the following without the passing of first an ordinary resolution of the Board of Directors and then a special resolution of the shareholders:

a) alter the share capital or in attached rights;

b) issue, a lot, redeem, purchase or grant options over any shares or other securities or reorganize its share capital in any way, including creating any new class or reclassification of securities;

c) change the company’s name or trademarks;

d) merge with any other company or business;

e) borrow money in excess of US$50,000;

f) do or permit or suffer to be done in the act or thing as a result of which the Company may be wound up, with a voluntarily or compulsorily, unless it is insolvent within the meaning of the Insolvency Act;

g) apply for proposal or any other arrangement with creditors generally;

h) vary certain material contracts valued more than US$50,000 including but not limited to tour contracts, ticketing contracts, relationships with cruise lines;

i) any change in the substantial nature or scope of the business as carried on from time to time;

j) commence any new business not being ancillary of incidental to such business;

k) incur capital expenditure in excess of US$50,000;

l) sell, transfer, lease, sublease, assign or otherwise dispose of any or all of the Company property or assets, whether or not for valuable consideration;

m) enter into or conduct litigation or arbitration;

n) mortgage or charge in a company accident or issue a debenture;

o) giving any loan or line of credit in the amount greater than US$50,000;

p) remove or appoint auditors;

q) pay or make any dividend or other distribution;

r) give any guarantee or indemnity are standard surety for the obligations of any 3rd party;

s) acquire or make any investments in another company or business or incorporated in a subsidiary;

t) permit any power or authority of its directors to be delegated to any Executive Director or committee of directors or to any other person whatsoever;

u) enter into any transactions or series of connected transactions involving expenditure in aggregate of more than US$100,000;

v) Make any agreement to do any of the foregoing.

3. **Proposed Resolution 8-** the Company, as social award of MML, be able to take any and all legal action necessary in Jamaica, if necessary, to ensure the resolutions as past are effected at the MML level and to restrain the directors of MML from doing any such act or omitting to do such act which is not in the best interest of MML.

[5] On said date, the 2nd-5th Claimants filed their Consent to be added as Claimants in the matter and the 2nd-4th Claimants also filed affidavits in agreement with the content of the 1st Claimant's affidavits filed on 25th September and 7th October, 2020. The 1st and 2nd Defendants filed their submission opposing the application for the interim injunction on the 8th of October, 2021. On the 9th October, 2020, the matter was part heard and adjourned to the 15th October, 2020. The injunction was extended to the 6th November, 2020. On the 29th October, 2020, the AFDCF was heard. There were a number of Orders made including:

(1) Claimants to file and serve Particulars of Claim on or before the 25th November, 2020;

(2) Defendants are to file Defence and Counterclaim if so advised on or before the 20th January, 2021;

(3) Claimant's to file and serve Reply and Defence to counterclaim if necessary on or before February 19, 2021;

(4) Parties are to proceed to mediation which is to be completed on or before the 19th February, 2021;

(5) Witness statements are to be filed and exchanged on or before the 30th April, 2021;

(6) Pre-Trial Review fixed for the 17th May, 2021 at 3 p.m. for 1 hour; and

(7) Trial fixed for the 19th July, 2021 for five (5) days.

[6] On the 6th day of November, 2020, Batts J delivered a written judgment refusing the interlocutory injunction and awarded costs to the Defendants. On the 21st December, 2020, the Claimants filed their Amended Particulars of Claim. On the 20th January, 2021, the Defendants filed their Defence and the Counterclaim of the 3rd Defendant. The Claimants then filed a Reply to the Defence of the 1st and 2nd Defendants on the 04th of February, 2021.

[7] On the 16th of March, 2021, the Claimants (as remained) filed an Amended Notice of Application with the affidavit of the 1st Claimant (filed on the 18th February, 2021) in support seeking to strike out the 3rd Defendant's counterclaim as well as to disqualify Myers, Fletcher and Gordon (who had filed a Notice of Change of Attorney on the 17th December, 2020) from acting as Attorneys-at-law for the 3rd Defendant. There was also an Affidavit of Urgency by the 1st Claimant in support. Additionally, another affidavit was filed on the 21st of April, 2021, urging the Court to abridge the time for service of the application for interim declarations, summary judgment and disqualification of Myers, Fletcher and Gordon.

[8] They also sought summary judgment on the following issues in the claim:

(1) An order that the directors' meeting of the 3rd Defendant of the 25th September 2020 and the 1st December 2020 and the resolutions passed thereat are invalid as being in breach of the 3rd Defendant's Articles;

(2) An order that the appointment of Omar Lagraba as an alternate is invalid; and

(3) An order that Annual General Meeting (AGM) of the 3rd Defendant on the 2nd December 2020 and the resolutions passed thereat are invalid.

Alternatively, interim declarations in the following form:

(1) A Declaration that the directors' meeting of the 3rd Defendant of the 25th September 2020 and the 1st December 2020 and the resolutions passed thereat are invalid as being in breach of the 3rd Defendant's Articles;

(2) An order that the appointment of Omar Lagraba as an alternate is invalid; and

(3) A Declaration that Annual General Meeting (AGM) of the 3rd Defendant and the resolutions passed thereat on the 2nd December, 2020 are invalid.

[9] The Claimants also sought an Order to rectify the register of Directors of the 3rd Defendant by directing the Registrar of Companies to register the Notice dated 18th February, 2021 and permission to file a Defence to the 3rd Defendant's Counterclaim.

[10] This application was heard by this Court on the 22nd April 2021 and adjourned to the 17th May, 2021. I made several Orders including the filing of submissions and list of authorities on the issue of Myers, Fletcher and Gordon's representation of the 3rd Defendant. On the 7th of May, 2021, Josef Preschel filed his 2nd affidavit. On the 17th May, 2021, the matter was adjourned to the 19th July, 2021 and the trial of the claim stayed pending the determination of the Claimants' Amended Notice of Application.

[11] On the 26th May, the 1st and 2nd Defendants filed a Notice of Application for summary judgment on the Claimant's claim. The 3rd Defendant also sought

summary judgment against the Claimants on its counterclaim. Two days later, Josef Preschel filed his witness statement.

[12] The Claimants then filed a Notice of Application supported by an affidavit on the 7th of July, 2021, seeking to amend an Order this Court made on the 17th May, 2021. They also filed a Notice of Preliminary Objection contesting the hearing of the 3rd Defendant's application for summary judgment on the premise that their application to disqualify Myers, Fletcher and Gordon from acting for the 3rd Defendant was pending.

GROUNDS OF THE 1ST AND 2ND DEFENDANTS' APPLICATION FOR SUMMARY JUDGMENT

[13] In addition to the ground stated at para. 1 of the judgment herein, the 1st and 2nd Defendants also posited that:

(1) The Claimants have no real prospect of succeeding on their claim against the 1st and 2nd Defendants in these circumstances where:

(i) this Court has found the Claimants' claim to be devoid of a triable issue against the 1st and 2nd Defendants;

(ii) there is no material difference between the injunction sought by the Claimants on an interlocutory basis and the permanent injunctions they seek in their claim; and

(iii) both the interlocutory and permanent injunctions sought by the Claimants against the 1st and 2nd Defendants are reliefs ancillary to the issues in respect of which they seek three declarations itemized as reliefs 1,2 & 3 of their claim.

(2) The Court of Appeal (Brooks P, Sinclair-Haynes & Edwards, JJA) in its decision handed down on the 16th April, 2021 has provisionally (pending its hearing of, and decision on, the Claimants' substantive appeal that is before

them) held that this Court cannot be said to have been plainly wrong in its approach or conclusions including those set out above;

(3) The Court of Appeal has also provisionally (pending its hearing of, and decision on, the Claimants' substantive appeal that is before them) held that developments occurring since the Order of this Court made on 6 November 2020 are not sufficient to affect that decision; such development being consistent with the proposed steps that the RAL-appointed director had previously indicated that they wished to take, this Court being cognizant of those intentions;

(4) The Court of Appeal declared the 1st and 2nd Defendants to be the successful parties before it on the Claimants' application to vary or discharge the Order made on the 26th day of November 2020 by a single Judge of Appeal (Simmons, JA) and awarded them the costs of the Claimants' application to that Court; and

(5) The 1st, 4th and 5th Claimants having been found guilty of material non-disclosure by the High Court of Justice in St. Lucia on matters that are the subject of this claim by them against the 1st and 2nd Defendants, are barred by that misconduct from obtaining the permanent equitable injunctive relief they seek in their claim against those defendants.

[14] It is this Notice of Application that gives rise to the preliminary objection with which this Court is now concerned. On the 19th July, I reserved judgment on the Defendants' preliminary point; I now deliver same.

SUBMISSIONS:

[15] In their submissions filed on 02 July, 2021, the Defendants contended that:

(1) the change is not in accordance with the rules;

(2) it is unfair to the Court as presently constituted;

(3) it is unfair to the court as previously constituted; and

(4) it is unfair to them.

[16] They added further that:

(1) Given the provisions of CPR 27.10 (5) and Batts J having conducted the first CMC conference on 29 October 2020 and heard all interim applications made to date, this application of the Claimants' dated 18th February 2021 (now amended in the version filed on 16th March 2021) was properly placed before him for hearing when first it was listed before the court on 22nd April 2021;

(2) The hearing by a differently constituted Court of this application by the Claimants puts this Court in a jurisdictional conundrum, in that:

(i) To hear and grant summary judgment in favour of the Claimants on any issue in their claim must involve a review and the overturning of Batts J's prior conclusion that the Claimant's claim is devoid of a triable issue;

(ii) A judge of concurrent jurisdiction with Batts J, cannot overturn his prior decision or depart from his findings and conclusions;

(iii) The application is contemptuous of, and inconsistent with, the conclusion of this Court (repeatedly expressed in its written reasons delivered by Batts J) that there is no triable issue in the Claimant's claim.

(3) The application is unreasonable, frivolous and vexatious in the context of the Court's prior conclusions, and because it would be a legal absurdity for summary judgment, being a trial on the merits, to proceed on a claim that is devoid of a triable issue;

(4) In proceeding to hear this application this Court would be exceeding its jurisdiction by pre-empting the Court of Appeal's adjudication on the issue it is seized of in the appeal before it of this Court's order made by Batts J. The

central issue in that appeal is whether Batts J was correct in his conclusion that the Claimant's claim contains no serious issue to be tried;

(5) If it is that this Court (through Batts J) has taken a position consistent with the above points, then the movement of this application to another judge of concurrent jurisdiction is irregular and unjustified. It is the duty of the Claimants/ Applicants to have brought this to the attention of this Court as presently constituted. Their failure to do puts the differently constituted Court at risk of:

(i) Assuming a jurisdiction, he/ she does not have to review the decision and conclusions of a judge of concurrent jurisdiction;

(ii) Pre-empting the consideration of, and determination by, the Court of Appeal of the correctness of the conclusions of this court upon which it's prior decisions have been based; and

(iii) Inadvertently doing either one of those things.

(6) Absent a triable issue, there is nothing warranting a trial, whether summarily or otherwise. The conclusion of this Court is that the Claimant's claim contains no triable issue. This Court has no remaining jurisdiction to conclude otherwise. Only the Court of Appeal can disturb that conclusion by this Court; and to date, it has not done so;

(7) This Court has no power to overturn the findings and conclusion of Batts J that there is no serious issue for trial; and

(8) Batt's J's finding that the Claimants' claim contains no serious issues for trial and that bare assertions, unsupported by credible evidence and contradicted by undisputed documentation, may not suffice to create a triable factual issue, cannot be disturbed by court of concurrent jurisdiction.

[17] The Claimants responded by contending that:

(1) The preliminary objections are unreasonable, frivolous and vexatious in the context of the Court's prior conclusion and because it would be a legal absurdity to treat an interlocutory matter as a decision on the merits capable of giving rise in effect to an issue of res judicata;

(2) The application for summary judgment was filed on the basis of Batts J converting the matter to a claim form. The Notice of Application for summary judgment was filed on 16th March 2021;

(3) In relation to setting aside an interlocutory order, it can be placed before a different Judge;

(4) Judge exercised CMC powers but it was not a CMC. The CMC rule 27.10(5) says " so far as practicable ....", it cannot be taken any higher. All the parties were equally affected by the change in the matter when the parties came on 22nd April 2021 and 17th May 2021;

(5) Even if there is a jurisdictional issue it would be procedural, not substantive. The Court has jurisdiction over the matter and the point was not raised at the first moment. Since submissions have already been made then it is too late to have the matter go back before Batts J;

(6) The application before this court does not require the Court to renew or overturn any conclusion of Batts J; and

(7) Batts J decision at the interlocutory stage does not equate to findings of facts because as a matter of law those are issues for trial. Batts J maintained that he cannot make a determination as to findings of fact and expressed that he made no findings one way or the other.

ISSUE:

[18] The following issue arises for determination:

(1) Whether this Court has the jurisdiction to hear and determine the Claimant's application filed on the 16th March, 2021?

LAW AND ANALYSIS

[19] The Claimants have approached the Court as complainants under the **Companies Act.** S. 212(3) of the **Companies Act and The Companies (Amendment) Act**, 2017 provides that:

> In this section and sections 213 and 213A "complainant" means-
>
> a. A member of former member of a company or an affiliated company;
>
> b. A debenture holder or former debenture holder of a company or an affiliated company;
>
> c. A director or officer or former director or officer of a company or an affiliated company

[20] S. 213A provides:

> (1)- A complainant may apply to the Court for an order under this section.
>
> (2)- If upon an application under subsection (1), the Court is satisfied that in respect of a company or of any of its affiliates-
>
> a. Any act or omission of the company or any of its affiliates effects a result;
>
> b. The business or affairs of the company or any of its affiliates are or have been carried on or conducted in a manner; or
>
> c. The powers of the directors of the company or any of its affiliates are or have been exercised in a manner,
>
> that is oppressive or unfairly prejudicial to or unfairly disregards the interest of any shareholder or debenture holder, creditor, director or officer of the company, the Court may make an order to rectify the matters complained of.
>
> (3) The Court may, in connection with an application under this section make any interim or final order it thinks fit, including an order-
>
> a. Restraining the conduct complained of;

b. Appointing a receiver or receiver- manager;

c. To regulate a company's affairs by amending its articles or creating or amending a unanimous shareholder agreement;

d. Directing an issue or exchange of shares or debentures;

e. Appointing directors in place of, or in addition to, all or any of the directors then in office;

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

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

h. Varying or setting aside a transaction or contract to which a company is a party, and compensating the company or any other party to the transaction or contract;

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

j. Compensating an aggrieved person;

k. Directing rectification of the registers or other records of the company;

l. Liquidating and dissolving the company;

m. Directing an investigation to be made; or

n. Requiring the trial of any issue

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

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

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

[21] S. 6(1) of the **Judicature (Supreme Court) Act** provides that:

Judges of the Supreme Court shall have in all respects, save as in this Act otherwise provided, equal power, authority and jurisdiction.

Therefore, it appears to this Court that the general rule is that all Judges of the Supreme Court are equally empowered.

[22] In **Leymon Strachan v The Gleaner Company Ltd. & Another** [2005] 1 WLR 3204, the plaintiff sued the defendants for libel and, in default of defence, obtained a judgment in the Supreme Court of Jamaica for damages to be assessed. Following a contested hearing before Bingham J and jury, damages were assessed and judgment entered for that sum. The defendants subsequently applied to the Supreme Court to set aside the default judgment and to have leave to defend the action on the grounds that fresh evidence enabled them to plead justification. The application came before Walker J, who, having overruled the plaintiff's preliminary objection that he had no jurisdiction to do so, set aside the original default judgment and gave the defendants leave to file and serve a defence on terms as to costs.

[23] Following further interlocutory proceedings, the plaintiff applied to the Supreme Court to set aside Walker J's order. That application came before Smith J, who upheld a preliminary objection by the defendants that he had no jurisdiction to set aside Walker J's order. The Court of Appeal dismissed the plaintiff's appeal from that decision and the plaintiff appealed to the Privy Council. His appeal was dismissed. Their lordships concluded that:

> [32] The Supreme Court of Jamaica is a superior court or court of unlimited jurisdiction, that is to say it has jurisdiction to determine the limits of its own jurisdiction. From time to time a judge of the Supreme Court will make an error as to the extent of his jurisdiction. Occasionally, his jurisdiction will have been challenged and he will have decided (after argument) that he has jurisdiction; more often, he will have exceeded his jurisdiction inadvertently, its absence having passed unnoticed. But whenever a judge makes an order he must be taken implicitly to have decided that he has jurisdiction to make it. If he is wrong, he makes an error whether of law or fact which can be corrected by the Court of Appeal. But he does not exceed his jurisdiction by making the error; nor does a judge of co-ordinate jurisdiction have power to correct it. As between the parties, and unless and until reversed by the Court of Appeal, his decision is res judicata. [33] In the present case Walker J held that he had jurisdiction to make the order he did. If wrong, his decision could be reversed by the Court of Appeal which would be bound without going into the merits to set aside his

> substantive order as a nullity. As between the parties, however, and unless and until reversed by the Court of Appeal, his decision (both as to jurisdiction and on the merits) was res judicata. As a judge of co-ordinate jurisdiction Smith J had no power to set it aside.

[24] In **Ranique Patterson v Sharon Allen** [2017] JMCA Civ 7, the COA had this to say:

> [26] On the issue of jurisdiction, it must also be said that **Mason v Desnoes** and **Geddes Limited and Leymon Strachan v The Gleaner Company Limited and Another** [2005] UKPC 33 demonstrate that a judge may, in certain circumstances, set aside an order made by a judge of concurrent jurisdiction. Examples of such circumstances are, firstly, if the application before the first judge was made, in the absence of a party, or, secondly, where the merits of the case were not decided at that first hearing. It is usual that the application to set aside is placed before the same judge who made the order, which is sought to be impugned. Where, however, as in this case, that judge is not available, another judge may hear and decide the application to set aside the first order.

[25] In **Kenneth Leighton Peart v Nadine Carlene Peart and Anor** [2021] JMSC Civ 58, an application was made before A. Pettigrew-Collins J to set aside some aspects of Orders made by A. Thomas (Ag) and A. Lindo JJ. It was argued, inter alia, that the Claimant was over the age of 21 years and was not shown to have been suffering from any mental or physical disability to warrant being provided for out of the estate under Section 6 of **the Inheritance (Provisions for Family and Dependants) Act** and furthermore, at the time of making the Order, the learned Judge had no jurisdiction to do so. Counsel for the 1st Defendant pointed out that this was not an application to correct a clerical error but an application to set aside orders made outside the statutory powers of the learned judges.

[26] The Learned Judge after referring to their lordships' decision in **Leymon Strachan**, expressed that

> **[39]** The Board gave as an example of an order that may be set aside ex debito justitiae, an order made in breach of the rules of natural justice. It was also pointed out that courts have stayed clear of laying down a comprehensive definition of defects that would bring an order within the ambit of those which may be set aside ex debito justitiae. As was stated in paragraph 12 of the said **Isaac v Robertson**, an order is either regular or irregular; **"if it is irregular, it can be set aside by the court that made it**

> **upon application to that court; if it is regular it can only be set aside by an appellate court upon appeal."** [Emphasis is added]

[27] The Learned Judge concluded that:

> **[46]** The instant case does not fall within the category of cases which may be set aside ex debito justitiae. The impugned orders are regular orders. There is no question of any defects in the procedure adopted when the orders were applied for and made. It was a question of whether the court could properly have made those orders, an issue of jurisdiction. The court having made the order, must be taken to have been satisfied that it had jurisdiction. It is a determination superior courts of record are entitled to make. Therefore, any challenge on the basis that such a determination was erroneous should be by way of an appeal.
>
> **[47]** Queen's Counsel Mr. Piper's contention is that the learned judges could not properly have made the orders they did because the enabling legislation did not allow for these orders to be made having regard to the applicant's age at the time of the application. Those circumstances give rise to a challenge to the judges' jurisdiction to make the orders. The learned judges at the time of making the orders would have assumed that they had jurisdiction so to do. There would be no question of the orders being irregular in the sense in which that term has been used in the authorities cited. The orders were made inter partes and were not obtained upon fraudulent information. Even if the orders were made in circumstances where the learned judges were in error as to the law, and consequently, had no jurisdiction or even if the orders were nullities, or vulnerable to be so declared, a judge of concurrent jurisdiction has no power to set aside those orders. Such an order by a court of record is valid and binding and any challenge must be by way of appeal. The first defendant's recourse was to have appealed those orders.

[28] In **Celia Diane Pershadsingh v Dr. Jepthah Ford**, [2015] JMSC Civ. 123, Batts J declined the invitation of the Defendant to review the decision of McDonald-Bishop J. the Defendant was seeking to set aside a default judgment entered against him. At para. 8 and 13, Batts J said respectively:

> It is clear to me that my sister judge heard the Defendant and the Claimant prior to making her decision to enter judgment. It is therefore not a decision made ex-parte or in the absence of the Defendant. In consequence this application should either be brought before her if, she is available or, if there is disagreement with the order it should be the subject of an appeal. If I am wrong and if I do have jurisdiction to consider this matter, it seems to me that the Defendant must fail.
>
> .... However, judges differ on matters of discretion. I am not here sitting as a judge of appeal. It is not for a judge of coordinate jurisdiction to say

> whether another was right or wrong. It is not appropriate to substitute my discretion for hers.

[29] Further, in **Sharlton Gilroy v Fernando Hudson,** [2020] JMSC Civ. 214, the question was whether a court of co-ordinate jurisdiction was the proper forum for an application to set aside in a case where the suggestion is that a Judge did not have the jurisdiction to do so? Carr J after referring to the decision in **Leymon Strachan**, supra, found that it was not.

[30] On a considered review of the authorities, it becomes evident that there are certain instances in which a Judge may set aside an Order of another judge of concurrent jurisdiction. Examples of these were given in **Leymon Strachan, supra** and by our Court of Appeal in **Ranique Patterson v Sharon Allen, supra.** Statutory provisions and/ or rules of the Court may also make provisions for exceptions. However, it does seem clear that the general position is that an error made by a Judge of the Supreme Court in law or fact is to be corrected by the Court of appeal. This is applicable even in instances where a Judge was not empowered to make a particular Order and/ or the Order was irregular. **See: Kenneth Leighton Peart v Nadine Carlene Peart and Anor**, supra.

[31] In fact, where the Order is irregular, the best practice is for that matter to be placed back before the Court that made it. Moreover, it seems to me that this is the default position where the Order is irregularly made and there are no exceptional circumstances. Otherwise, it is the Court of Appeal, that has jurisdiction to review or set aside an irregular Order. Where the Order is regularly made and there are no exceptional circumstances, the challenge must be made in the Court of Appeal

[32] As I resolve this matter, I bear in mind that each case turns on its own facts. I am also fully aware that there has been no argument made and correctly so, impugning Batts J jurisdiction to have heard and determined the matter in the way he did. Neither has anyone said his Order were irregular. In fact, I take it for granted that this was a regularly made Order. Unlike in **Kenneth Leighton Peart v Nadine Carlene Peart and Anor, supra,** where Counsel challenged the power

of the Learned Judges to make the decisions they did, on the premise that they acted outside of their statutory powers, Batts J was well within the ambit of his powers to refuse the injunction. His was the jurisdiction to grant the injunction and then to discharge it. This means that this was a regular Order. Further, there are no exceptional circumstances highlighted herein. In the final analysis then, such an Order may only be challenged before the Court of Appeal. The question of how the discretion was exercised is a matter for an appellate court and not for another judge of the same jurisdiction. It is this current state of affairs that has led me to the decision given below.

[33] However, as aforementioned, the Claimants have not, at least 'in form', questioned the discretion of the learned Judge before this Court. Neither have they asked this Court to set aside or review it. They have however asked for several Orders, including summary judgment and interim declarations, which Counsel for the 1st and 2nd Defendants submit is tantamount to a request to overturn Batts J prior decision. It thus behoves this Court to consider closely the Claimants' application to determine the issue of jurisdiction. If it is a fresh application based on new material, then this Court may have jurisdiction to do so. Otherwise, the Claimants would be in the wrong forum. As I resolve this issue, I am also cognizant that there is a substantive appeal arising from Batts J's finding which is pending before the Court of Appeal.

[34] In his judgment, Batts J found that there was no real issue pertaining to the injunctive relief sought, which requires trial and gave his reasons. He nevertheless further considered whether there was a triable issue, the adequacy of damages and the overall justice of the case. On both examinations, he ruled in favour of the 1st and 2nd Defendants. On one hand there was insufficient evidence and conversely, it was neither just nor convenient for the Defendants to be restrained. At paras. 18-25 of **Michael Drakulich and Ors v Karibukai Ltd and Ors** [2020] JMCC Comm 31, the learned Judge considered in detail the evidence and facts which would be available at trial. Accordingly, I am not in agreement with Counsel for the Claimant's submission that it would be a legal absurdity to treat an

interlocutory matter as a decision on the merits capable of giving rise in effect to an issue of res judicata. It seems to me that the learned Judge sufficiently reviewed the parameters of the case in making his determination.

[35] Our Court of Appeal reviewed the doctrine of res judicata in **Bartholomew Brown and Anor v Jamaica National Building Society** [2016] JMCA App 7. The Court said:

> [42] The respondent has urged this court to dismiss these applications based on the principles of res judicata and re-litigation as an abuse of the process of the court. The principle of res judicata describes a number of different legal principles that bar parties from re-opening matters that were already determined by a competent court save on appeal. The learned authors of Halsbury's Laws of England, 2015, Volume 12A, paragraph 1603 have said that the purpose of this principle is to:
>
> "...support the good administration of justice in the interests of the public and the parties by preventing abusive and duplicative litigation, and its twin principles are often expressed as being the public interest that the courts should not be clogged by re-determinations of the same disputes; and the private interest that it is unjust for a man to be vexed twice with litigation on the same subject matter..."
>
> Three of the main legal principles embraced by this doctrine are: (i) cause of action estoppel which prevents a cause of action from being raised on the basis that the legal rights and obligations of the parties were already concluded by an earlier judgment; (ii) issue estoppel which prevents a party from contending the contrary to any precise point which having been put in issue, had been determined against him; and (iii) the rule in **Henderson v Henderson** (1843) 3 Hare 100 which prevents a party from raising in subsequent proceedings matters which were not, but could and should have been raised in earlier proceedings. The doctrine of res judicata is applicable to issues, defences, applications and/or causes of actions which have been heard and determined on the merits....

[36] In **Sephlene Anne Johnson v Clarence George Johnson**, [2019] JMSC Civ 41 K. Anderson J posited at para. 9, that:

> The doctrine of res judicata, (from the latin term, 'res judicata pro veritate accipitur,' meaning, 'a thing adjudicated is received as the truth'), holds that where a judicial decision is made by a Court of competent jurisdiction, said decision is conclusive between the parties, and the same matter cannot be re-opened by the parties save on appeal.

[37] His lordship went on further at paras. 12-13:

The Jamaican Court of Appeal decision of **The Assets Recovery Agency v Hamilton, Andrew and Hamilton, Dorothy et al** [2017] JMCA Civ 46 is instructive regarding the doctrine of res judicata, whereby it was stated at paragraph 75 that:

'The phrase res judicata is apt to denote three distinct, though related, ideas. In its first, narrower, sense, it describes the species of estoppel ("cause of action estoppel") which prevents a party to an action from asserting or denying, as against the other party, the existence of a particular cause of action, the non-existence or existence of which has been determined by a court of competent jurisdiction in previous litigation between the same parties. So, if the cause of action was determined by a judgment of the court to exist, or not to exist, the matter is res judicata and no action can subsequently be brought by the losing party to assert the opposite.'

[13] Further at paragraph 75 and 76 it was averred that:

[75] 'In its second, perhaps looser, sense, it speaks to a situation in which a particular issue forming a necessary ingredient in a cause of action has been litigated and decided; but, in subsequent proceedings between the same parties, involving a different cause of action to which the same issue is relevant, one of the parties seeks to re-open that issue. In such circumstances, the doctrine of issue estoppel is said to apply to prevent the reopening of the particular issue. However, the principle of issue estoppel is subject to an exception in special circumstances where further material becomes available, whether factual or arising from a subsequent change in the law, which could not by reasonable diligence have been deployed in the previous litigation.'

[76] Then thirdly, as Lord Kilbrandon pointed out in the judgment of the Privy Council in **Yat Tung Investment Co Ltd v Dao Heng Bank Ltd and Another**, '... there is a wider sense in which the doctrine may be appealed to, so that it becomes an abuse of process to raise in subsequent proceedings matters which could and therefore should have been litigated in earlier proceedings". This is what is sometimes described as **Henderson v Henderson** abuse of process, deriving as it does from the classic statement of Wigram VC in the nineteenth century case of **Henderson v Henderson** "… where a given matter becomes the subject of litigation in, and of adjudication by, a Court of competent jurisdiction, the Court requires the parties to that litigation to bring forward their whole case, and will not (except under special circumstances) permit the same parties to open the same subject of litigation in respect of matter which might have been brought forward as part of the subject in contest, but which was not brought forward, only because they have, from negligence, inadvertence, or even accident, omitted part of their case. The plea of res judicata applies, except in special cases, not only to points upon which the Court was actually required by the parties to form an opinion and pronounce a judgment, but to every point which properly belonged to the subject of litigation, and which

> the parties, exercising reasonable diligence, might have brought forward at the time.'

[38] The application brought now by the Claimants does make reference to issues which could have been dealt with before Batts J. From a review of the evidence in this matter on 29th August 2019, it was resolved that the 2nd Defendant would nominate 6 directors and by the 14th September, 2020, Mr. Preschel appointment to the 3rd Defendant's Board was confirmed as the 6th RFA director. In the letter dated 28th August, 2020, the 1st Claimant issued an ultimatum. He indicated that he invested U S$1M and demands a proportionate cash investment from the 2nd Defendant of US$2.566M or that the 2nd Defendant transfers or cancels its shares in the 1st Defendant. This is ultimatum Batts J referred to at para. 23 of his decision.

[39] In the letter dated 31st August 2020, Josef Preschel requests a shareholders meeting on 7th September, 2020 to, amongst other things, appoint him as a Corporate Representative, request information relating to the 1st Defendant's financials, acquire the 1st Claimant's shares in the 1st Defendant and treat with the management of MML. This meeting was eventually held on the 25th September, whereat the 1st Claimant was removed as Chairman.

[40] Given the history of the relationship amongst the parties and that Omar Lagraba, based on the evidence, was actively involved in the affairs of the 2nd Defendant, I am of the view that matters pertaining to him, as well as earlier directors' meetings and register of directors have been existing issues and factors that could have and ought to have been addressed earlier. In any event, if I assumed jurisdiction, any ruling in this matter in favour of the Claimants, would automatically reverse the effect of the decision of Batts J. I would therefore have implicitly overturned his decision. This, I will reiterate, is solely within the purview of the Court of Appeal. In these circumstances, I do not agree with Counsel for the Claimants that even if there is a jurisdictional issue, it is only procedural.

DISPOSITION

In the circumstances, I find that I do not have the jurisdiction to hear the Claimants' application and any other applications herein, and I uphold the 1st and 2nd Defendants' preliminary objection.

ORDER:

[41] I now make the following Orders:

(1) The objection raised in limine by Counsel for the 1st and 2nd Defendants is hereby upheld;

(2) The Notices of Application for Court Order listed as follows:

i. The Claimants' Amended Notice of Application for Court Orders dated 18th February, 2021 and filed on the 16th March, 2021, and

ii. The 1st and 2nd Defendants 'Notice of Application for Court Orders dated and filed the 26th May, 2021;

are stayed pending the determination of the substantive issues by the Court of Appeal.

(3) The Claim and Counterclaim are also stayed pending the determination of the substantive issues by the Court of Appeal;

(4) The Claimant's Application for leave to appeal is adjourned to a date to be fixed by the Registrar;

(5) Costs are awarded to the 1st and 2nd Defendants to be taxed, if not agreed; and

(6) 1st and 2nd Defendants' Attorneys-at-Law to prepare, file and serve Orders made herein.