JUDGMENT **[2013] JMSC COMM. 21**

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA
IN THE COMMERCIAL DIVISION

CLAIM NO. 2013 CD 00010

IN THE MATTER OF SECTION 212 OF THE COMPANIES ACT
AND
IN THE MATTER OF THE INCOME TAX ACT
AND
IN THE MATTER OF VALLEY SLURRY SEAL CARIBBEAN LIMITED
(a Company)

BETWEEN	**EARLE LEWIS**	**1ST APPLICANT**
AND	**CAROL LEWIS**	**2ND APPLICANT**
AND	**VALLEY SLURRY SEAL COMPANY**	**1ST RESPONDENT**
AND	**JEFFREY REED**	**2ND RESPONDENT**
AND	**VALLEY SLURRY SEAL CARIBBEAN LIMITED**	**3RD RESPONDENT**

IN CHAMBERS

Mr. Ransford Braham Q.C. and Mrs. Yualande Christopher-Walker, instructed by Phillipson Partners, Attorneys-at-Law for the Applicants.

Mr. Harold Brady and Mr. Harold Malcolm, instructed by Brady & Co, Attorneys-at-Law for the Respondents.

Heard : 20, 30 May, 13 June, 18 July, 16 September, and 27 December 2013.

COMPANY LAW - SECTION 212 OF THE COMPANIES ACT - APPLICATION FOR LEAVE TO BRING DERIVATIVE ACTION IN THE NAME AND ON BEHALF OF THE COMPANY- COMPANY AND NOT THE PROPOSED DEFENDANTS THE PROPER PARTY TO THE APPLICATION FOR LEAVE- REQUIRED TO RECEIVE NOTICE OF APPLICATION FOR LEAVE- WHETHER APPLICANTS ARE "COMPLAINANTS"- 3 CONDITIONS PRECEDENT- NOTICE TO DIRECTORS, GOOD FAITH, APPEARS TO BE IN THE INTERESTS OF THE COMPANY THAT ACTION BE BROUGHT- WHETHER FULFILLED

Mangatal J:

[1] This application has had quite a checkered and contentious history, which includes a claim and applications that preceded this claim. When the application, which was filed on January 14 2013, first arose for hearing on the 21st of February 2013, no one appeared for the applicants and thus it had to be adjourned.

[2] On the 4th of April 2013, an ex parte application to do with service arose for hearing, but was withdrawn by learned Queen's Counsel, Mr. Ransford Braham, lead Counsel who appeared for the applicants.

[3] The application first commenced on the 20th May 2013. By this date the applicants had also filed another application on the 13th May 2013 and the Respondents had filed a notice of application, amended on May 15 2013, taking several points, including jurisdictional points. It was agreed with Counsel that logically, aspects of the Respondents' application would have to be dealt with first. I must express my gratitude to the Attorneys-at-Law on both sides. I appreciate the great amount of research that was done and it has certainly provided useful guidance for the Court.

[4] The applicants are both directors of Valley Slurry Seal Caribbean Limited, along with Jeffrey Reed, who is managing director, and Ron Bolles, and Allan Berger. These three Directors reside in the United States. The shares in the Company Valley Slurry Seal Caribbean Limited are held, 60% by Valley Slurry Seal Co. (a California Corporation) and 40% by Earle Lewis.

[5] For ease of understanding, I will first set out what is sought in the applicants' respective Notices of Application for Court Orders. The applicants Earle Lewis and Carol Lewis in the application filed January 14 2013, request the following Order and on the following grounds:

> **"1. The Court's leave to allow the Applicants to bring a derivative action in the name and on behalf of Valley Slurry Seal Caribbean Limited (a company) for the purpose of prosecuting an action on the company's behalf against Valley Slurry Seal Company and Jeffrey Reed pursuant to Section 212 of the Companies Act.**
>
> **The grounds on which the Applicants seek the Order are as follows:**
>
> 1. **The Applicants are qualified complainants to bring this Application under section 212(3) of the Companies Act 2004 as Directors and Shareholder of the company.**
> 2. **The 1st Respondent is the majority shareholder of the company, and the 2nd Respondent, its Managing Director.**
> 3. **That the Court's leave is required under section 212(1) of the Companies Act 2004 for a complainant to bring a derivative action in the name and on behalf of Valley Slurry Seal Caribbean Limited for the purpose of prosecuting an action on the company's behalf.**
> 4. **The Directors received reasonable notice from the complainants of their intention to apply to the court under section 212(1) of the Companies Act 2004.**

5. **The Respondents and Directors of Valley Slurry Seal Caribbean Limited are well aware of the complaint previously brought before this Honourable Court by Claim No. CD 2012 00110, which was struck out on the application of the Respondents for the 1st Applicant's failure to seek the court's leave to file a derivative action.**
6. **The Respondents have wilfully disregarded their fiduciary duty to avoid conflicts of interest when conducting related party transactions with the company.**
7. **The 1st Respondent breached its duty as shareholder in seeking to provide goods and services to the company at inflated mark ups whilst representing those pricings to be within market.**
8. **In committing the company to using the goods and services of the 1st Respondent and his related companies at artificially inflated pricings, the 2nd Respondent breached his fiduciary duty as Managing Director of the company by abusing his authority to misrepresent that the goods and services provided by his related companies were delivered to the company at market prices and *bona fides.***
9. **The issues of the inflated expenses has been brought to the Respondents' attention by the independent auditor they appointed, whilst claiming that the company is indebted to the 1st Respondent for Sixty Four Million, Two Hundred and Seventy Eight Thousand Two Hundred and Ten Dollars and Two Cents ($64,278,210.02) as at August 17, 2012.**
10. **The 1st Respondent is also in breach of a Shareholders' Agreement prohibiting a shareholder of the company from having competing financial interests against it.**
11. **The Respondents' failure to properly allocate costs incurred to the *"management fee"* of United States Twenty Five Thousand**

Dollars (US$25,000.00) deducted monthly from the company's accounts.

12. **The 2nd Respondent's breach of his fiduciary duty as Managing Director of the company to act with transparency or to employ appropriate accounting practices to properly account for the company's revenues.**
13. **The Respondents claim continuing ownership over the company's interest in the "leased" macro pavers in the face of the auditor's findings that the Respondents and their related party companies are not entitled to claim an illicit benefit from a purported "operating lease" where the company was at all material time paying for them on a capital lease basis.**
14. **The 1st Respondent's Claim CD 00108 of 2012 intended to deprive the company of its lawful entitlement to macro pavers bearing Serial numbers 3BPZLOOX68F718449 and 3BPZLOOX48F718448 through similar related party transactions between the 1st Respondent and the company at the instance of the 2nd Respondent.**
15. **The Respondents' breach of their duty of care towards the company by removal of its main asset and primary means of employment.**
16. **Transfer of funds representing profits and tax liabilities from the company's account held at The Bank of Nova Scotia on or about September 6, 2012.**
17. **Deprivation of its lawful entitlement to profits derived from its business of constructing roads and buildings in Jamaica, in or about the sum of Seventy Million Dollars ($70,000,000.00) through related party transactions between the company and the 1st Respondent at the instance of the 2nd Respondent.**

18. The Respondents' wilful disregard of the effect .... of their acts and breaches on the rights and interests of the 1st Applicant as a shareholder of the company."

[6] The applicants' Notice of Application for Court Orders filed May 13 2013 sets out the following orders sought and grounds:

"1. That personal service of the Notice of Application for Court Orders filed on the 14th of January 2013 and the Affidavit of Earl Lewis sworn to and filed on the 14th day of January 2013, Affidavit of Earl Lewis sworn to on the 3rd of May 2013 and filed on the 3rd of May 2013, be dispensed with;

2. That in the alternative methods employed to effect service of the abovementioned documents on the Respondents are effective and reasonable alternate methods of service and sufficiently gives the Respondents notice of the proceedings herein;

.....

The grounds on which the Applicants seek the Orders are as follows:

1. **Part 6.8(1) of the Civil Procedure Rules (Amended) permit this Honourable Court to dispense with service of a document if it is appropriate to do so;**
2. **That the Applicants have served the documents on the Respondents by means of fax, email and courier and the 2nd Respondent has confirmed receipt of the said documents;**
3. **Part 6.4(1) of the Civil Procedure Rules (Amended) states the rule applicable to the service of documents for a pre-action court proceeding ... ;**
4. **That the 2nd Respondent is evading service of the Court documents and alternate service is appropriate in these circumstances; and;**

5. **The 2nd Respondent has acknowledged in writing, his receipt of these documents sent to the Respondents by courier, fax and also by email."**

[7] The Respondents' Amended Notice of Application for Court Orders filed May 15 2013, sought the following relief and set out the following grounds:

"1. A declaration that the court has no jurisdiction to try the claim;

2. Alternatively, a declaration that the court should not exercise its jurisdiction to try the claim;

3. Alternatively that the matter be struck out and referred to arbitration in accordance with the Shareholders Agreement.

4. An order that the court appoints one of the three suggested arbitrators, Mr. Justice Ian Forte, Ret'd, Mr. Justice Henderson Downer Ret'd, or Mr. Hugh Small Q.C. in the matter;

.....

The grounds on which the Respondents are seeking the orders/reliefs are as follows:

1. **Rule 7.8(1)(a) of the Civil Procedure Rules 2002 ("the CPR") provides that where a claim form is to be served out of the jurisdiction, it may be served by personal service effected by the claimant or his or her agent;**
2. **The Applicants are not in compliance with Section 212 of the Companies Act** (as) **they have not satisfied the requirements of Section 212 (2)(a), 212 (2)(b) and 212(c).**
3. **Section 5 of the Arbitration Act provides that once a claim is filed any party to said proceedings may apply to the court to stay proceedings. The claimants' case is based on Shareholders Agreement executed by the parties on the 8th `of March 2010 which governs their relationship and it contains a mandatory arbitration clause, Clause 14.10.**

4. **Rule 9.6(6)(a) of the CPR provides that any order under this rule may also strike out the particulars of claim;**
5. **The Applicants have not acted in good faith in that their application seeking permission to file a derivative action in the name of Valley Slurry Seal Caribbean is an abuse of process of the court. The matters to which they have pleased (**placed?) **in their application are contained in matters already before the court.**
6. **The Applicants have not paid or offered to pay for costs awarded against them in the previous claims and have never put up security for costs.**
7. **It is just and convenient and in the interest of dealing** (with) **this case justly that all these orders be granted in the circumstances."**

[8] Sections **212** and **213** of the **COMPANIES Act** read as follows:

"**Complainant remedies**

Derivative actions.

212-(1) Subject to subsection (2), a complainant may, for the purpose of prosecuting, defending or discontinuing an action on behalf of a company, apply to the Court for leave to bring a derivative action in the name and on behalf of the company or any of its subsidiaries, or intervene in an action to which any such company or any of its subsidiaries is a party.

(2) No action may be brought, and no intervention in an action may be made under subsection (1) unless the Court is satisfied that-

(a) the complainant has given reasonable notice to the directors of the company or its subsidiary of his intention to apply to the Court under subsection (1) if the directors of the company or its subsidiary do not bring, diligently prosecute or defend, or discontinue, the action;

(b) the complainant is acting in good faith; and

(c) it appears to be in the interests of the company or its subsidiary that the action be brought, prosecuted, defended or discontinued.

(3) In this section and sections 213 and 213 A, "complainant" means-

(a) a shareholder or former shareholder 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.

Court powers

213.-(1) The Court may, in connection with an action brought or intervened in under section 212, make such order as it thinks fit, including an order-

(a) authorising the complainant, the Registrar or any other person to control the conduct of the action;

(b) giving directions for the conduct of the action;

(c) directing that any amount adjudged payable by a defendant in the action be paid, in whole or in part, directly to former or present shareholders or debenture holders of the company or its subsidiary, instead of to the company or its subsidiary; or

(d) requiring the company or its subsidiary to pay reasonable legal fees incurred by the complainant in connection with the action.

(2) An action brought or intervened in under section 212 shall not be stayed or dismissed by reason only that it is shown that an alleged breach of a right or duty owed to the company or its subsidiary has been or may be approved by the shareholders, but evidence of approval by the shareholders may be taken into account by the Court in making an order under that section.

[9] Mr. Brady took a preliminary point that the Court's permission was required in order to serve the Notice of Application out of the Jurisdiction on the Respondents. Also, that the application of January 14 2013 is not before the Court because of the

application of May 13 2013. It was Mr. Braham's position that service had been properly effected. However, in the event that it was not properly done, he would be asking the Court to exercise its discretion in relation to service.

[10] On the 20th of May 2013, in relation to the first series of preliminary points, my ruling was that there was no requirement for the Court's permission to be obtained in order to serve on the Respondents the Notice of Application for Court Orders filed January 14 2013. It seemed to me that the Rules of the CPR about seeking the Court's permission to serve court process out of the jurisdiction as contained in Part 7 of the CPR, do not apply to what is in essence a pre-action application for leave to bring a derivative action under section 212 of the Companies Act. Further, I did not agree with Mr. Brady that the application dated January 14 2013 is in reality not before the court because of the application dated May 13 2013.

[11] After I had heard several other preliminary points on the 20th and 30th May 2013, Mr. Braham made an oral application to add Valley Slurry Seal Caribbean Limited. Mr. Brady's position was that Valley Slurry Seal Caribbean Limited would only need to be added at the stage if and when leave was granted.

[12] My decision was that, no matter how I ruled upon the several other preliminary points, no harm can be done, whether to the present respondents, the 1st and 2nd Respondents, or to Valley Slurry Seal Caribbean Limited, if Valley Slurry Seal Caribbean Limited were to be added. In the event that I rule a particular way, i.e.in favour of Mr. Braham Q.C.'s most recent submission that the proposed Defendants to the derivative action need not have been served, and indeed, that it is the company that should be served with notice of the application for leave pursuant to section 212 of the Companies Act, then we would have saved time and costs in adding the company. In my judgment, this was in keeping with the overriding objective of dealing with cases justly. That would therefore mean that the relevant party with whom matters in dispute would need to be resolved would now be before the court. As a result, I ordered the addition of Valley Slurry Seal Caribbean Limited as a 3rd Respondent. The Applicants by

way of an Amended Notice of Application for Court orders filed June 4 2013, sought to incorporate the 3rd Respondent in the wording of the application.

[13] On the 13th of June 2013, after further reflecting on the matter, my ruling on the preliminary points to do with service and notice and the Court's jurisdiction as it relates to those issues was as follows:

> (a) There is no requirement that the proposed Defendants to a derivative action, who were named as the 1st and 2nd Respondents in this application, receive notice or be served with the application for leave made pursuant to section 212(1) of the Companies Act. Indeed, it would appear that they need not even have been named as Respondents. I rely upon the Canadian cases of **Lederer v. 372116 Ontario Ltd.** (2001), 530 R. (3d) 303 (C.A.), **Samuel Manutech Inc. v. Redipac Recycling Corp** [1980] O.J. 4766, the informative article " Derivative Actions-How They Work and How They Don't" by Gordon Phillips, Phillips & Company, Vancouver, B.C., and the excerpt at pages 450-467 from the text **Oppression and Related Remedies**, by Mark Koehnen, of the Ontario Bar, all cited by learned Queen's Counsel, Mr. Braham. Indeed, in my view it is the company Valley Slurry Seal Caribbean Ltd. that should properly be a respondent to the application and which entity is entitled to notice.
>
> (b) In the alternative, the 1st and 2nd Respondents have received adequate and reasonable notice of this application, in the event that I am wrong.

[14] However, whilst the 1st and 2nd Respondents may have no standing on the leave application, I think it is permissible for them to be allowed to make submissions, particularly as they have been notified about it and their legal representatives were in fact present at this hearing. In light of the decision that I reached, it was therefore not necessary or appropriate to examine the very interesting and novel arguments as to the Rules of the CPR relating to service and service out of the jurisdiction. I am therefore of the view that this Court does have jurisdiction to entertain the application by the applicants. The case of **Elmes v. Hygrade** [2001] EWCA 121, cited by Mr. Brady, whilst relevant to issues of the court's power to remedy errors regarding service, is not

relevant in the present circumstances. What was important was that the Court should be satisfied that Valley Slurry Seal Caribbean Limited had received proper notice of the application, and that was easily satisfied without contest. It should be noted that this question of notice of the application being made under sub-section 212(1) of the Companies Act is a different and separate question from the notice requirement under sub-section 212(2)(a).Under sub-section 212(2)(a), the applicant has to fulfil, (for want of a better term), a substantive requirement that the complainant has given reasonable notice to the directors of the company of his intention to apply to the Court under sub-section (1) if the directors do not bring the action.

[15] As I indicated to Mr. Braham whilst hearing this matter, it seems to me that this application should perhaps have been brought by way of an originating proceeding, in particular a Fixed Date Claim Form, supported by an Affidavit and the only Respondent to the application would be the company Valley Slurry Seal Caribbean Limited. The Canadian authorities cited suggest that if leave is granted, a new and separate action has to be filed, against the relevant parties, in this case the 1st and 2nd Respondents. However, the point is far from clear, and our Companies Act does not specify the procedure to be adopted, unlike certain other legislation in other countries. In **Fraser & Stewart, Company Law of Canada**, Sixth Edition, 1993, by Harry Sutherland Q.C., at page 717, it is stated: "The application for leave is brought by way of motion or application." In Malaysia, the application is made by originating summons. In the article "Derivative Actions-How They Work and How They Don't", at page 7, it is stated:

> **"Procedurally, you seek leave by filing a petition, not a writ. Any party may apply under Rule 52(11)(d) to have them converted into an action, with rights of discovery, but it seems unlikely that such an application would be well received:**
>
> **....**
>
> **(b) it seems counter intuitive to have a lengthy trial merely to decide if someone has the right to launch an action-in *Discovery Enterprises Ltd. v. Ebco Industries* (1997), 34 B.C.L.R. (3d) 168 K. Smith J. noted that "the procedure... is intended to be a summary procedure to permit a chambers**

judge to quickly determine whether a complainant may institute a derivative suit".

[16] In our jurisdiction, petitions have been reserved mainly, when dealing with company matters, for winding up proceedings. Other applications to do with companies which require a summary proceeding, used to be made by originating summons, and under the CPR 2002, by way of Fixed Date Claim Form. I do not think this is a point that creates a great difficulty, and the Court has power, in particular under Rule 26. 9 (3) of the CPR, where there has been a procedural error, to make an order to put things right. This application can therefore be ordered to proceed as if begun by Fixed Date Claim Form. I so order.

The Applicants' Substantive Submissions

[17] It was submitted, and I accept, that both applicants fall within the definition of "complainant" given in section 212(3) of the Companies Act, as, in the case of Mr. Lewis, the 1st Applicant, he is both a shareholder and a director, and in the case of Mrs. Lewis, the 2nd Applicant, she is a director.

[18] It was submitted that the conditions precedent in section 212(2) of the Act, may be summarised as follows:

a. That the complainant gave the Directors of the company reasonable notice of the complainant's intention to apply under section 212(1) of the Act, if the Directors do not with diligence bring the action and diligently prosecute the action that the complainant is proposing to bring.

b. That the complainant in bringing the action is acting in good faith.

c. That the proposed action appears to be in the interest of the company.

[19] In very detailed and comprehensive submissions, Counsel for the applicants referred to the Affidavit evidence and to the law, including many Canadian cases, and submitted that the applicants have satisfied all of the conditions precedent and it was submitted that the Court ought to grant the leave sought as prayed.

The Respondents' Substantive Submissions

[20] In the Respondents' submissions, it was pointed out that section 212 of the Jamaican Companies Act is a replica of the Canadian legislation. Mr. Brady also commended to the Court the approach taken by the Malaysian Courts as he submitted that Malaysia has similar legislation.

[21] Comprehensive submissions were also made by the Respondents, which were usefully summarized in paragraphs 52 -54 of the written submissions as follows:

> **"52. The Canadian courts approach to the grant of leave to bring a derivative action is persuasive. Accordingly the court should be satisfied that:**
>
> **a. The applicants have made efforts to cause the directors to prosecute the proceeding.**
>
> **b. They have met the threshold of what the Canadian court would regard as reasonable notice to the company of their intention to apply for leave.**
>
> **c. The applicants have or are acting in good faith.**
>
> **d. It is in the best interest of the company for the claim to be brought.**
>
> **53. It is submitted that-**
>
> **1. On the evidence before the court the applicants have failed on all four limbs of the test. See *Primex Investments Ltd. v. Northwest Sports Enterprise Ltd. 1995 Can Lll717 (BC.S.C.) (Supreme Court of British Columbia)***
>
> **2. The applicants have failed to discharge the burden of establishing that they are acting in good faith. See *Tremblett v. SCB Fisheries Ltd.* (1993) 116 Nfld. & PEIR 139 (Tremblett) at [84]**
>
> **3. Furthermore by signing the lease for the pavers the Lewises acquiesced in the matter complained of. See paragraph 949 Canadian Encyclopaedic Digest-Derivative Action.**

4. In light of the shareholders agreement which governs the company and the shareholders and which provide an arbitration clause by which all matters arising can be resolved, a claim on a matter which falls within the perview within the arbitration clause cannot be said to be in the interest of the company. See *Primex Investments Ltd. v. Nortwest Sports Enterprise Ltd. ....*

5. In any event the arbitration is an effective alternat(ive) **remedy to deal with the matter complained of. On the authority of *Barret v. Dunkett & Others* (1995) 1 BCLC 243 an alternative remedy is a bar to grant of leave to file a derivative action.**

54. On the foregoing basis the application for leave ought to be refused by the court. It is further submitted that the court has jurisdiction to appoint an arbitrator pursuant to the shareholders agreement."

THE LAW AND AUTHORITIES

a. NOTICE

[22] I have looked at the numerous authorities cited to me. In my judgment, the wording of the Canadian legislation, specifically the Canada Business Corporations Act, Clause 239 is more similar to the Jamaican Companies Act, section 212, than is the corresponding section of the Malaysian Act. When a company is federally incorporated in Canada, it will usually be the **Canada Business Corporations Act** that will be applicable- see the article **Derivative Actions-How they Work and How They Don't** , page 3 . For example, the **Companies** (**Amendment**) **Act 2007** of Malaysia speaks to the Court not granting leave unless "it appears *prima facie* to be in the best interest of the company that the application for leave be granted." These words are also present in the B.C. Act, Canada. However, the Jamaican Act has no such prima facie requirement and in addition, only speaks about the action being in the interests, as opposed to best interests of the company. I have therefore found the Canadian authorities, especially those considering the Canadian Business Corporations Act most helpful.

[23] In the useful excerpt from Marcus Koehnen, **"OPPRESSION, and related remedies"**, cited by Counsel for the Applicants, at page 456, paragraph 3 headed " Notice to Directors", it is stated:

> **"3. Notice to Directors**
>
> **Canadian corporate statutes require applicants to give notice to the board of directors before seeking leave to commence a derivative action. The proposed defendant is not entitled to notice of the claim and has no standing to make submissions on the leave application.**
>
> **.....**
>
> **The notice requirement should not be construed in an "unduly technical manner." The notice should give the directors enough detail to let them identify the transaction or conduct at issue, but need not be framed with great particularity. The notice need not take any particular form. A solicitor's letter is sufficient."**

[24] In **" Fraser & Stewart COMPANY LAW OF CANADA"**, 6th Edition, 1993, by Harry Sutherland, Q,C, cited by Counsel for the 1st and 2nd Respondents, at page 717, under the heading " Commencing a Derivative action", it is stated:

> **"Commencing a derivative action"**
>
> **The codification of the representative action embraces all causes of actions that a shareholder may sue for on behalf of a corporation and thus there no longer exists a common law representative action. The statute must be complied with and leave must be obtained from the court.**
>
> .....
>
> **First, the applicant must prove that reasonable notice has been given to the directors of the corporation... This section is not construed in a technical or restricted manner and thus "notice" has been held to include the request to bring the action together with details of the nature of the claim: see *Re Daon Development Corp* (1984), 54 B.C.L.R. 235 (S.C.); *Re Bellman and Western Approaches Ltd.* (1981),**

17 B.L.R. 117 (B.C.C.A.); and *Armstrong v. Gardner* (1978), 20 O.R.(2d) 648 (H.C.) (A letter to the board of directors constitutes notice); but see *Re Daon Development Corp., supra*, where a letter written to the board by the complainant's solicitor after the motion had been filed was not considered to constitute notice. It is not necessary to include a draft statement of claim: *Loeb v. Provigo Inc.* (1978), 88 D.L.R. (3d) 139 (Ont. H.C.) The notice must be directed to the directors and not simply to the corporation itself: *Johnson v. Meyer* (1987), 57 Sask. R 161 (Q.B.) Sufficient notice is established even though each and every cause of action is not specified in the notice: *Re Bellman and Western Approaches Ltd., supra.* "Notice" is no more than the knowledge which would be disclosed in a generally endorsed writ of summons: *Re Northwest Forest Products Ltd.*, [1975] 4 W.W.R. 724 (B.C.S.C.) The technicalities as to notice may be satisfied by serving a notice of motion: *Baniuk v. Carpenter (No. 2)* (1987), 217 A.P.R. 394 (N.B.Q.B.).

[25] As stated in **Intercontinental Precious Metals Ltd. v. Cooke** (1994), 88 B.C.L.R.(2d) 101, quoted at page 37 of the article "Derivative Actions-How They Work, and How They Don't", the purpose of the notice requirement is " to afford the directors a reasonable opportunity to consider their position before the application is heard by the Court".

b. GOOD FAITH

[26] Whether an applicant is acting in good faith is a question of fact to be determined in each case.In **Tremblett v. S.C.B. Fisheries Ltd.** (1993), 116 Nfld & P.E.I.R. 139 (Nfld. S.C.), at paragraphs 58 and 84, Puddester J. made the following statements as to good faith and the onus of proof, which were quoted with approval in **Primex Investments Ltd. v. Northwest Sports Enterproses Ltd. and 453333 B.C. Ltd.** (1995) ,[1996] 4 W.W.R. 54,(paragraph 30):

> **"58.it is necessary that an applicant bring cogent evidence establishing clearly on a preponderance of evidence that the application is in fact brought in good faith....**
>
> ...
>
> **84. ...in an application such as this there is a substantial onus on the applicant-complainant himself to positively establish "good faith". ..it seems to me that this is a logical and appropriate requirement where the remedy sought is to place in the control of an applicant who is potentially, and indeed perhaps usually, a minority shareholder or single director, the authority to cause the resources of the corporation to be directed towards pursuing a court proceeding which is not willingly pursued by the majority of shareholders or the board. Even though this matter is assessed on an application, as opposed to a trial, in my view there is a substantial onus to be met by any applicant, including the applicant here, with respect to the establishment of good faith."**

[27] On this issue of good faith, I found the Australian case of **Swain v. Pratt** [2002] NSWSC, quite instructive. Though the words of the **New South Wales Corporations Act**, are not exactly the same as our legislation, they are similar to the Malaysian and B.C. Act and indeed, Palmer J. stated at paragraph 20, "Its inspiration was s.165 of the *New Zealand Companies Act, 1993,* a section derived in turn from the *Canada Business Corporations Act 1985.*" At paragraphs 35-37, his Lordship, sitting in the Equity Division of the New South Wales Supreme Court stated:

> **"35.At this early stage of the development of the law on statutory derivative action created by Pt 2F. 1A it would be unwise to endeavour to state compendiously the considerations to which the Courts will have regard in determining whether applicants in all categories defined by s. 236(1) are acting in good faith. The law will develop incrementally as different factual circumstances come before the Courts.**

36. Nevertheless, in my opinion, there are at least two interrelated factors to which the Courts will always have regard in determining whether the good faith requirement of section 237(2)(b) is satisfied. The first is whether the applicant honestly believes that a good cause of action exists and has a reasonable prospect of success. Clearly, whether the applicant honestly holds such a belief would not simply be a matter of bald assertion: the applicant may be disbelieved if no reasonable person in the circumstances could hold that belief. The second factor is whether the applicant is seeking to bring the derivative suit for such a collateral purpose as would amount to an abuse of process.

37. These two factors will, in most but not all, cases entirely overlap: if the Court is not satisfied that the applicant actually holds the requisite belief, that fact alone would be sufficient to lead to the conclusion that the application must be made for a collateral purpose, so as to be an abuse of process. The applicant may, however, believe that the company has a good cause of action with a reasonable prospect of success but nevertheless may be intent on bringing the derivative action, not to prosecute it to a conclusion, but to use it as a means for obtaining some advantage for which the action is not designed or for some collateral advantage beyond what the law offers. If that is shown, the application and the derivative suit itself would be an abuse of the Court's process: *Williams v. Spautz* [1992] HCA 34; (1992) 174 CLR 509, at 526. The applicant would fail the requirement of s.237(2)(b)."

[28] Palmer J. at paragraph 38 of the **Swansson** judgment points out that a current shareholder with more than a token shareholding seeking to recover property so that the value of shares will be increased, or a current director, may satisfy the good faith criteria with relative ease. His Lordship stated:

"38. Where the application is made by a current shareholder of a company who has more than a token shareholding and the derivative action seeks to recovery of property so that the value of the applicant's shares would be

increased, good faith will be relatively easy for the applicant to demonstrate to the court's satisfaction. So also where the applicant is a current director or officer: it will generally be easy to show that such an applicant has a legitimate interest in the welfare and good management of the company itself, warranting action to recover property or to ensure that the majority of the shareholders or of the board do not act unlawfully to the detriment of the company as a whole."

[29] At paragraph 41, it was pointed out that if it is the intention of the applicant to restore value to the company, the fact that the applicant also has personal animosity to the directors or other shareholders will not amount to bad faith.

[30] Further, at paragraph 43 Palmer J. expressed the view that the application would not be made in good faith if the applicant seeks to receive a benefit, which in good conscience, he should not receive, for example if he had knowingly participated in the wrong complained of along with the proposed defendant. This is so even though the company itself stands to benefit from the derivative action.

[31] In the **Canadian Encyclopedic Digest, Business Corporations(Ontario) X-Shareholders 8-Derivative Actions**, cited by Mr. Brady, at paragraphs 949, 956 and 957, it is stated as follows-

"949. The granting of leave is not automatic, but requires the court to exercise a judicial discretion. In deciding whether to grant leave, the court must balance the clear policy of the section to protect the legitimate interests of persons who fit within the definition of "complainant" and the at least equal interest in avoiding undue interference with corporate management that is being conducted in good faith, as well as the need to avoid a multiplicity of actions. A shareholder may not bring a derivative action where he or she has acquiesced in the conduct complained of. In deciding whether to grant leave, the court may take into account the apparent merit of the claim, and it would not seem appropriate for the court

to grant leave where the management of the corporation have made a judgment in good faith that it is not in the best interests of the corporation to pursue a particular claim, particularly where that judgment has been made by an independent committee of the directors who have conscientiously reviewed the merits of the proposed claim. However, the court must not decide the merit of the claim before deciding whether to grant leave. The court should grant leave where the proposed action is in the shareholder's interest, unless the action appears likely to be dismissed or is frivolous, scandalous or vexatious.

...

956. By extension, it is necessary to distinguish between shareholder oppression, dissent and derivative action rights. The oppression and dissent remedies provided for in Ontario's Business Corporations Act and the Canada Business Corporations Act create personal rights in favour of the shareholder. The mere fact that a shareholder has such a right (for instance, the right of dissent upon an amalgamation) is not sufficient in itself to justify a derivative action (for, in the case of an amalgamation, there is no wrong to the corporation).

957. The fact that the oppression remedy is also available to an aggrieved shareholder (even if such proceedings have been instituted) is not relevant to the question of whether leave should be granted to bring a derivative action. The shareholder is not forced to choose between personal and derivative relief. Thus the commencement of separate personal and derivative claims is not necessarily abusive. A derivative action is one for the redress of a wrong to the corporation itself. A personal action by the shareholder (whether brought solely on his or her own behalf or as a class action on behalf of the other shareholders) is to redress the wrong done to the shareholder or shareholders, as distinct from the corporation. Thus there is no duplication in the proceedings."

[32] In **Barrett v. Duckett** [1995] 1 BCLC 243, it was held that a shareholder would be allowed to bring a derivative action on behalf of a company where the action was brought bona fide for the benefit of the company for wrongs to the company for which no other remedy is available and not for an ulterior purpose. Conversely, if the action was brought for an ulterior purpose or if another adequate remedy was available, the court would not allow the derivative action to proceed. On the facts, the opportunity to put the company into liquidation provided an alternative remedy to the derivative action. In addition, B was not pursuing the action bona fide in the interests of the company but was pursuing it for personal reasons associated with the divorce of her daughter from D. Accordingly, the appeal would be allowed and the action struck out.

c. APPEARS TO BE IN THE INTERESTS OF THE COMPANY

[33] In **Bellman v. Western Approaches Ltd.** (1981) 130 D.L.R. (3d) 193, Nemetz C.J.B.C., sitting in the British Colombia Court of Appeal, at page 201, stated:

> **"(c) *Interests of the corporation***
>
> **In my view this is the key section for consideration in this case. The section does not say that the Court must be satisfied that it is in the interests of the corporation. It says that no action may be brought unless the Court is satisfied that it *appears* to be in the interests of the corporation to bring the suit. I take that to mean that what is sufficient at this stage is that an arguable case be shown to subsist."**

[34] In **Primex**, Tysoe J. expressed the view that an arguable case and a case with reasonable prospects of success amount to the same standard. At paragraph 39, his Lordship stated:

> **" 39. The Respondents asked me to apply this 'reasonable prospect test rather than the "arguable" test from the *Bellman* case. In my view, there is no difference between these two tests. Any position can be argued by competent counsel but, in using the word "arguable", I believe Nemetz C.J.B.C. was referring to a reasonable argument which would not be dismissed out of hand. An argument which is not dismissed out of hand is**

one which has a reasonable prospect of succeeding. In *Re Marc-Jay Investments Inc. and Levy* O'Leary said this:

***It is obvious that a Judge hearing an application for leave to commence an action, cannot try the action. I believe it is my function to deny the application if it appears that the intended action is frivolous or vexatious or is bound to be unsuccessful. Where the applicant is acting in good faith and otherwise has the status to commence the action, and where the intended action does not appear frivolous or vexatious and could reasonably succeed; and where such action is in the interest of the shareholders, then leave to bring the action should be given.*"**

[35] At pages 203 and 204 of **Swansson**, the judge stated:

"How is a Court to exercise its discretion in coming to a determination that it is satisfied that "it appears to be in the interests of the corporation" to allow the derivative action to be brought? The discretion is a wide one. However, despite its breadth, nowhere does Parliament say, nor, in my opinion, was it intended, that the logic of the common law in cases of this kind be disregarded. One must first look to the decision of the directors who, having been given reasonable notice by a complainant in good faith, decide *not* to assert a corporate right of action. In this case they refused. Can it be said that this refusal was given impartially?

.....

Considering the whole of the evidence before the Chambers Judge, she could have come to the conclusion that at the time when they came to the decision not to sue, the directors did stand in a dual relation which prevented them from exercising an unprejudiced judgment. While it is true that a quantifiable loss was not proven, nevertheless, it was sufficient to have adumbrated a potential loss resulting from the covenant in the guarantor's agreement requiring the borrowers to pay a fee to the guarantor in the event that they were not able to cause the company to go public. Since the fee was based on gross revenue, it might place the

directors in a position of conflict in deciding whether it is in their interest to keep revenues down in order to reduce the potential fee or to maximize revenues in the interest of all of the shareholders. However, this would be a matter for the trial Court to consider. It is sufficient that it appears to be in the interest of the company that the action be brought."

RESOLUTION OF THE ISSUES AND FINDINGS OF FACT

Whether applicants are complainants

[36] The Court can only give leave to the applicants if they qualify as being complainants. In my view, both applicants fall within the definition of "complainant" given in sub-section 212(3). The 1st Applicant Earle Lewis is both a shareholder and a director of Valley Slurry Seal Caribbean Limited and thus he fulfils the definition given in both sub-section 212(3)(a) and (c). The 2nd Applicant Carol Lewis falls within the definition given in sub-section 212(3)(c) as she is a director of the Company.

a. Notice

[37] At paragraphs 7-11 of the Second Affidavit of Earle Lewis filed on the 19th of March 2013 in support of the application for leave, Mr. Lewis states:

"7. That pursuant to Section 212 of the Companies Act, the Respondents were given notice on December 18, 2012 of an intention to bring a derivative action to which the Respondents responded to my letter of intention on December 21, 2012.

8.That the facsimile contacts for both Respondents appear on exhibits to Claim No. 2012 CD 00108 being Fax# (916) 373-1438 and Fax # (209) 554-0302 for Valley Slurry Seal Company and Jeffrey Reed respectively.

9. That as a Director of Valley Slurry Seal Caribbean Limited, I have contacted the 1st Respondent and my fellow Directors via Fax # (916) 373-1438 on several occasions over the past 2 years, and from which all have responded.

10. That the Respondents are also well aware of my prior attempt to pursue an Application for derivative action, have received the following notices, and said:

a. Service of Claim Form and Particulars of Claim in *Claim No. CD 110 of 2012,* an Acknowledgement of which was filed in this Honourable Court by the 1st Respondent.

b. Letter dated December 18, 2012 by Earle Lewis to the Directors of VSS CL giving notice of my intention to seek the Court's leave to file an action on behalf of the company. A copy of the said letter is exhibited and marked "EL-1"

c. A copy of the said letter giving notice was faxed to the remaining Directors of VSS CL-Jeffrey Reed using his personal fax number (209) 544-0302, Alan Berger and Ron Bolles at Valley Slurry Seal Co. at fax number (916) 373-1438 and hand delivered to Carol Lewis.

d. Letter dated December 21, 2012 from the 2nd Respondent sent via email to me and Carol Lewis (Director) acknowledging receipt of my December 18, 2012 Notice and copying Alan Berger and Ron Bolles. A copy of the said response is exhibited and marked "EL-2".

11. I am therefore satisfied that the Defendants have been notified of my intention to file this Application for derivative action."

[38] It is useful to examine the contents of the two letters referred to. In a further Affidavit filed May 3rd 2013, Mr. Lewis also exhibited copies of the Claim Form and Particulars of Claim in Claim No. CD 110 of 2012. The letter from Earle Lewis states as follows:

" **BY EMAIL &FAX**

December 18, 2012

The Directors
Valley Slurry Seal Caribbean Limited
Suite 52 Winchester Business Centre

15 Hope Road
Kingston 10

Dear Sirs,

Re: NOTICE OF MINORITY SHAREHOLDER'S INTENTION TO APPLY FOR DERIVATIVE ACTION UNDER SECTION 212(1) OF COMPNAIES ACT OF JAMAICA

Please be advised that I, Earle Lewis, who holds 40% shares in Valley Slurry Seal Caribbean Limited hereby give notice of my intention to apply to the Supreme Court of Jamaica for leave to intervene in Claim CD 00108 *Valley Slurry Seal et al v. Earle Lewis et al* and to file a derivative action on behalf of Valley Slurry Seal Caribbean Limited for the matters complained in the Claim Form and Particulars of Claim in CD 110 of 2012 *Valley Slurry Seal Caribbean et al v. Valley Slurry Seal et al*, no longer before the Court.

This Notice is made pursuant to section 212(2)(a) of the Companies Act of Jamaica. The period of this notice is to be taken together with the notice already provided by the service of the above Claim.

Yours faithfully,

MR. EARLE LEWIS
(Shareholder and Director of Valley Slurry Seal Caribbean Limited)"

[39] The letter from Jeffrey Reed is written on the letterhead of Valley Slurry Seal Caribbean Ltd. and states as follows:

"December 21st 2012

Earle Lewis and Carol Lewis
c/o Embassy Apartments
17 Kings Way
Kingston 10, Jamaica

Please be advised that while we have received your notice of intent to apply for derivative action, as shareholders all of your actions are governed by the shareholder's Agreement which both of you signed. This Agreement takes precedence. We suggest that you re-read it thoroughly and follow its terms and conditions relating to disputes as the Courts will most assuredly defer its provision which you have not followed. We will request sanctions and restitution of any and all costs from you to defend ourselves individually and for the Company.
Sincerely,

Jeffrey Reed
Managing Director
Valley Slurry Seal Caribbean Limited

C.c. Alan Berger, Ron Bolles; Kerrian Mitchell "

[40] It is true that as argued by Mr. Brady, the applicants were relying on the contents of a Claim Form and Particulars of Claim that had been struck out. However, I do not agree that because the Suit was struck out the applicants were not entitled to rely upon the contents. As stated in numerous authorities, the notice requirements are not to be regarded in an unduly technical manner. The main reason that the Suit was struck out was that leave to bring a derivative action on behalf of Valley Slurry Seal Caribbean Limited was not/had not been obtained before the filing of the Suit. It is also true that in Claim CD 00110 of 2012 sections 160-165 and 213 of the Companies Act, as well as the Income Tax Act were also referred to, which have to do with the ordering of an investigation by the appropriate Minister, and that there are no particulars in relation to the averment about the Income Tax Act. However, as the authorities make clear, not all the causes of action have to be referred to and the Notice does not need to be framed with any great particularity or be in any particular form. I agree with Mr. Braham Q.C's submission that the nature of the claim which the applicants now seek to obtain leave in

respect of in the present application is fairly clearly referred to in the Claim Form and Amended Particulars of Claim in Claim No. CD 00110 of 2012. In the Amended Claim Form it is in essence alleged that the Second Respondent Jeffrey Reed, is in breach of his fiduciary duties and in addition the contention was that Valley Slurry Seal Caribbean Limited had also been abused by the First and Second Respondents. Further, that Valley Slurry Seal Co. has been the beneficiary of all that Valley Slurry Seal Caribbean Limited has lost. The abuse alleged included permitting Valley Slurry Seal Caribbean Limited to lease equipment whereby the lease was disadvantageous to the Company. It is alleged that Valley Slurry Seal Caribbean Limited had paid the lease in its entirety and had an interest in the Macro Pavers in essence because the lease payments exceeded the value of the equipment many times over. There were claims made on behalf of Valley Slurry Seal Caribbean Limited for damages for conversion, claims for unjust enrichment and for a number of declarations, including those seeking proper accounting of amounts due to Valley Slurry Seal Caribbean Limited, in particular the declarations sought at sub-paragraphs 31iv, vi and vii of the Amended Particulars of Claim. In addition, the 1st and 2nd Respondents, and the Directors upon whose behalf Mr. Jeffrey Reed wrote, did not ignore the letter dated 18th December 2012; they responded by letter dated 21st December 2012. I agree with Counsel for the Applicants that all the letter purports to do is simply to remind the Applicants of the Shareholders' Agreement and to indicate that that Agreement should take precedence to the proposed derivative claim. In all the circumstances, I am of the view that reasonable notice has been given by the applicants to the directors as required under sub-section 212(2)(a) of the Companies Act and that the Applicants have met the first condition precedent.

b. GOOD FAITH

[41] I recognize that it is for the Applicants to satisfy me that they are acting in good faith and they must do so by cogent evidence. In his Affidavit filed on the 2nd of May 2013, Mr. Lewis at paragraphs 4 and 7 states as follows:

> **"4. That the applicants herein have a legitimate interest in the welfare of the company, and our application for leave to file derivative action is being**

brought in good faith and is grounded in the sincere belief that this action is necessary to protect the interest of the company.

.....

7. That the substance of the exhibited documents show that should the court grant its leave to file a derivative action, that the documents disclose that VSSCL is prima facie entitled to the reliefs sought against the Respondents and that there is a real prospect that a proposed claim will succeed at trial."

[42] Mr. Brady had submitted that the Applicants must satisfy this burden in light of the Shareholders' Agreement and the Arbitration clause therein contained. It is also alleged that by signing the lease for the Pavers the Lewises acquiesced in the matters complained of. I will deal with the issue of the Shareholders' Agreement and the Arbitration Clause first, since this is one of the aspects of Mr. Brady's application that still remains for adjudication, and on the basis of which the application filed on May 15 2013 on behalf of the Respondents sought that this matter be struck out and referred to arbitration in accordance with the Arbitration Clause in the Shareholders' Agreement. In this regard, the Affidavit of Kerriann Mitchell, Attorney-at-Law, employed to Brady & Co, filed May 3rd 2013 proves useful. In that Affidavit, Ms. Mitchell opines that the dispute raised in the claim is one which falls within the terms of the arbitration clause, and the Shareholders' Agreement is exhibited. I should state from the outset that the Shareholders' Agreement is very confusing. It appears to be an agreement between Valley Slurry Seal Caribbean Limited and its shareholders. The definition section defines Shareholders as meaning Valley Slurry Seal Co. (a California Corporation) and Earle Lewis, an individual. Mrs. Carol Lewis does not appear to be a true shareholder, but yet she is treated as one under the Shareholders' Agreement for some purposes. It is also confusing as to whether Jeffrey Reed is a party to the Agreement in his personal capacity, or whether it is Valley Slurry Seal Co. The relevant Arbitration clause reads as follows:

"14.10. Arbitration. Any claim or controversy arising out of or relating to this Agreement, or arising out of or relating to the Company, or the rights

or obligations of the Shareholders as shareholders, directors, officers or employees of the Company will be determined and settled by Arbitration in accordance with the Arbitration Act of Jamaica. Each party involved in an arbitration proceeding in accordance with this section will pay its own expenses. The cost of conducting the arbitration proceeding itself will be borne by each party to it in proportion to the number of shares of the Company owned prior to the commencement of the proceeding. The Shareholders intend that any court of competent jurisdiction in which an action for involuntary dissolution is filed will consider the extent to which the party filing the action reasonably and in good faith attempted to negotiate or arbitrate, prior to filing."

[43] In my judgment, the claims against Jeffrey Reed would not plainly be caught by the Arbitration Clause. In order to avoid multiplicity of actions, with one claim being at arbitration, and one in court, in those circumstances a party would not be compelled to go to arbitration-see **Tauton Collins v. Cromie** [1964] 1 WLR 683, cited by Mr. Braham Q.C. More importantly, sections 212 and 213 of the Companies Act confer jurisdiction which can only be exercised by a Court and not an Arbitrator. In those circumstances the Court will not stay or strike out the application without more. At paragraph 566 of the Halsbury's Laws of England, 4th Edition, it is stated:

" A stay may also be refused where a question can only be decided effectively in the first instance by the court as where a plaintiff's claim is based upon statute which gives a particular discretion to the Court and only to the Court or where the arbitrator cannot give the claimed relief."

[44] As regards the question of costs, it seems to me that although an order for costs was made when Claim No. CD 000110 of 2012 was struck out, and these costs have not yet been paid, taxation is still pending. In my judgment, in the circumstances of this case, this does not present a sufficient reason to drive the Applicants from the face of the Court. These matters do not therefore affect the Applicants duty to satisfy the Court that they are acting in good faith, in an adverse way.

[45] In my judgment, the Applicants have demonstrated that they have an honest and genuine belief that they have good causes of action with reasonable prospects of success. Whilst, the issue of whether the Applicants may have acquiesced, or may have knowingly participated in the alleged wrongs, at first gave me pause, I think that this issue and this case is far more complicated than that and will involve mixed questions of fact and law that will have to be resolved at trial. There are issues raised of whether the transactions were at arms' length, transfer pricing accounting principles, and at paragraph 26 of his Affidavit filed January 14 2013, and at paragraph 22 of the Amended Particulars of Claim Mr. Lewis makes the allegation that although at all material times the 1st and 2nd Respondents were sellers of macro paver equipment, they however represented to the Company that lease arrangements were required, only to meet certain paper work needs and was at no time intended to be inimical to the interest of the Company. I cannot say that the Applicants' claim on the issue of the interest claimed in the Macro-Pavers or in relation to accounting and unjust enrichment are frivolous or vexatious or have no reasonable prospect of success. As stated in **Oppression and Related Remedies, at page 459,** novel causes of action do not constitute bad faith. Further, the Court is not meant to resolve difficult points of law on the hearing of an application for leave. This point finds support in what was said by the judge at paragraph 74 of **Primex Investments** , His Lordship stated:

> **"74. ... While it is open to a judge hearing an application for leave to commence a derivative action to make determinations of law, it is not essential for me to make the determination in this case because I have already decided that leave should be granted to commence a derivative action in respect of the transfer of the Arena Shares on the basis that the directors may not have been acting in the best interests of Northwest. As it is not essential for me to make the determination, I decline to make it. It is the evidence. In addition, one of the principal issues regarding the applicability of s.127 to the transaction will relate to the purpose or purposes for the transfer of the Arena Shares and this is a factual determination which can only be made following a trial."**

[46] In the instant case, it seems plain from the response by Jeffrey Reed, who was the Managing Director, in his letter dated 21st December 2012 that the controlling Directors were not minded to bring any suit on behalf of the Company and such Directors would have had conflicts of interest and could not in any manner be described as independent.

[47] In my judgment also the Shareholders' Agreement and the Arbitration clause are not relevant to the claim in respect of which leave is being sought. A claim in relation to the Shareholders' Agreement is not a claim on behalf of the Company but would be a claim on Mr. Lewis' personal behalf as a Shareholder. That situation is to be distinguished from the instant proposed claim. Indeed, a claim qua Shareholder may fall to be considered under the sections of the Companies Act dealing with Oppression Remedies, notably section 213 A. However, that is a separate type of action and in my view does not affect this application which in my view is being made in relation to a wrong allegedly done to the Company Valley Slurry Seal Caribbean Limited.

[48] In addition, the fact that Mr. Lewis the 1st Applicant is a current Shareholder with more than a token holding, and seeks to recover property so that the value of his shares would be increased, allows him to easily cross the threshold and to demonstrate good faith. In relation to Carol Lewis, the 2nd Applicant, in my judgment she, along with Mr. Lewis in their capacity as current Directors, readily show that they have a legitimate interest in the welfare and good management of the company itself, warranting action to recover property or to ensure that the majority of the shareholders or of the board do not act unlawfully to the detriment of the company as a whole.

[49] In addition, the concerns of the auditors as expressed in the Minutes of the meeting of the board of Valley Slurry Seal Caribbean Ltd. held on the 7th May 2012, as well as the whole tone and nature of the discussions held at the meeting, taken with the other evidence discussed above in my judgment support a finding that the Applicants are acting in good faith.

c. APPEARS TO BE IN THE INTEREST OF THE COMPANY FOR THE ACTION TO BE BROUGHT

[50] I agree with Counsel for the Applicants' submissions that the requirement of section 212(2)(c) does create a lower threshold than the formulations "in the best interest of the company" or "prima facie in the best interest of the company." The judge hearing the application for leave is not intended to try the action. In my judgment, this claim is neither frivolous nor vexatious, and has reasonable prospects of succeeding.

DISPOSITION

[51] In my judgment, my discretion ought to be exercised to grant leave to the Applicants as prayed in the Amended Notice of Application for Court Orders filed June 4 2013. I therefore make the following orders:

A. The 1st and 2nd Respondents' Application filed May 15 2013 is dismissed, with costs reserved until the conclusion of the derivative action.

B. The Applicants' Amended Notice of Application seeking leave is to continue as if begun by Fixed Date Claim Form. Leave is granted to the Applicants to bring a derivative action in the name and on behalf of the 3rd Respondent Valley Slurry Seal Caribbean Limited for the purpose of prosecuting an action on the company's behalf against Valley Slurry Seal Company and Jeffrey Reed pursuant to Section 212 of the Companies Act.

C. The derivative action is to be filed by the 31st of January 2014.

D. Costs of the application are reserved until the conclusion of the derivative action.