A PORT IN THE STORM:
THE AVAILABILITY OF PROTECTION FOR MINORITY SHAREHOLDERS IN THE COMMONWEALTH CARIBBEAN

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A Port in the Storm: The Availability of Protection for Minority Shareholders in the Commonwealth Caribbean

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The past year has seen renewed interest in banking and corporate practices in the Commonwealth Caribbean. It is likely that there will also be increased attention on corporate governance practices and, in particular, the statutory and common law protection available to shareholders in companies incorporated in the Commonwealth Caribbean. A quick scan of the headlines reveals some of the developments within the region and internationally which are drawing attention to these issues. As the *Foreign Account Tax Compliance Act* ("**FATCA**") comes into effect, non-US financial institutions face onerous information gathering and tax collection requirements imposed by the American legislation. Caribbean financial institutions, many of which are located in jurisdictions subject to strict confidentiality legislation, will now face the challenge of staying onside with both domestic laws and FATCA. Through late 2012 and early 2013, there were also major data leaks which revealed the identities of the individuals behind offshore accounts and corporations across the Caribbean, and governments in the UK, US and Canada have announced crackdowns on citizens using corporate vehicles in offshore financial centres to avoid tax in their home jurisdiction. In Jamaica, the *Jamaica International Financial Services Authority Act, 2011* signals a move towards developing and promoting Jamaica as an international financial services centre, and it will need to address the issues currently faced by established offshore financial centres.

As a result of the economic pressures that many clients continue to face following the 2008 world economic crisis, the legal landscape in which civil litigators

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practice has also changed in recent years. Civil litigators in the Caribbean are now practising in an environment which has been affected by the austerity measures adopted in both the public and private sectors, and cash-strapped clients are looking to counsel to provide cost-effective solutions. Practitioners must understand both the challenges and opportunities they now face when representing clients implicated in cases involving corporate wrongdoing. This paper will explore the remedies available to minority shareholders in the Commonwealth Caribbean and focus on the interaction between unfair prejudice claims and derivative actions, looking at when the latter remedy is available and/or appropriate.

In *Lalla v. Trinidad Cement Limited et al.*, the Honourable Justice Peter Jamadar (as he then was) endorsed the following description of the oppression or unfair prejudice remedy:

> [The] Oppression remedy 'is beyond question the broadest, most comprehensive and most open-ended shareholder remedy in the common law world. It is unprecedented in its scope'.[2]

The oppression remedy does, as described in *Lalla*, offer a vast and flexible remedy to shareholders and other parties whose interests have been unfairly prejudiced by the conduct of the company. However, it is not the only remedy available to minority shareholders and while it can achieve significant results, it may not always be the most appropriate recourse for a client. When approached by a client alleging unfair prejudice, the crucial first step is to determine what the client seeks to achieve as there

[2] TT 1998 HC 172 (30 November 1998, per Jamadar J) at 5-6 [*Lalla*]

are a variety of statutory remedies available. The litigation strategy must be informed – and will be determined, at least initially – by the client's ultimate objective.

When considering the remedies which may be available to clients who are minority shareholders or who have been frozen out of the management of a company, there is the added challenge of funding litigation against the company where the assets are controlled by the majority whose conduct is at issue. A minority shareholder's assets may be entirely tied up in the company or the controlling directors may refuse to declare dividends or pay management salaries, which can compromise a client's ability to finance the litigation contemplated to remedy the wrongdoing. Conversely, the majority may be in a position to use company funds to defend the litigation challenging their conduct, and may use delay tactics or bring unnecessary applications in an attempt to increase costs for the claimant. Again, while there are remedies available to attempt to address these apparent roadblocks to relief, the litigation strategy should be guided by the client's objectives. This paper will consider how litigators can craft creative and cost-effective solutions for their clients.

A Brief Overview of the Origins of Company Law in the Caribbean

Company law in the Commonwealth Caribbean finds its roots in the English *Companies Act 1862*.[3] Jamaica enacted the *Companies Act 1865,* later replaced with the *Companies Act 1965*, which was repealed and replaced with the current *Companies Act 2004*.[4] English company law also heavily influenced other commonwealth

[3] Andrew Burgess, *Commonwealth Caribbean Company Law* (Oxon, UK: Routledge, 2013)

[4] Jamaica's *Companies Act 2004* at s. 160 [*JA Act*]; Burgess, *ibid* at 3-4, 7

jurisdictions such as Canada and the *Canada Business Corporations Act* ("**CBCA**")[5] which has served as a model for the legislation enacted in several Caribbean countries, most notably Barbados[6] and to a lesser extent, Jamaica.[7]

The shareholder relief available in the Caribbean also developed from the English legislation. The unfair prejudice remedy incorporated into the UK *Companies Act 1948* was imported into both Canadian and Caribbean company law, and while these various statutes share the same origins, important regional differences have developed over the years. The oppression remedy introduced into the UK *Companies Act 1948* was intended to provide an alternative to winding up, and gave the court the power to "make such order as it thinks fit".[8] The provision has since evolved but pursuant to Part 30 of the UK *Companies Act 2006*, the court retains the power to "make such order as it thinks fit for giving relief in respect of the matters complained of".[9] The unfair prejudice provisions in the companies acts in Jamaica and across the Caribbean grant a similarly broad discretion to the courts. It is crucial to note that the court's discretion may only be used to *rectify* the wrongs committed. As held by the Ontario Court of Appeal in *Naneff v. Con-Crete Holdings Ltd.*, "in seeking to redress equity between private parties the provision does not seek to punish but to apply a measure of corrective justice".[10] The Canadian courts have also held that the

[5] RSC 1985, c C-44

[6] See *Canwest International Inc. et al. v. Atlantic TV Ltd. et al.*, (1994) 30 Barb LR 276 [*Canwest*]

[7] Burgess, *supra* note 3 at 13

[8] UK *Companies Act 1948*, c. 38, s. 210

[9] UK *Companies Act 2006*, c. 46 [*UK Act*] at s. 996

[10] (1995), 23 OR (3d) 48 (CA) at 11 [Emphasis added] [*Naneff*]

discretionary nature of the orders which may be granted in oppression actions acts as a safeguard to prevent vexatious or frivolous proceedings from going forward.[11]

Who is the Complainant?

As a starting point, it is necessary to consider which parties may apply for relief against suspected wrongdoing within a company, as the complainant is the catalyst for the proceedings. While the derivative action and oppression remedy are most often referred to as "shareholder remedies", they are actually available to a broader scope of interested parties. It is useful to conceive of the complainant as a stakeholder, rather than a shareholder. The provisions in Jamaica's *Companies Act* which deal with the relief available to shareholders and others actually fall under the heading of "Complainant Remedies",[12] which captures the broader category of persons to whom these remedies may be available.

The companies acts in many Caribbean jurisdictions provide remedies to the "complainant", which may include shareholders, directors or officers, certain public authorities or members of the general public (with leave of the Court).[13] As an example, s. 239 of Trinidad's *Companies Act* defines "complainant" as:

> (a) a shareholder or debenture holder, or a former holder of a share or debenture of a company or any of its affiliates;
>
> (b) a director or an officer or former director or officer of a company or any of its affiliates;
>
> (c) the Registrar; or

[11] Dennis H. Peterson, *Shareholder Remedies in Canada*, 2d ed, loose leaf (Markham, ON: Butterworths, 2009) at 17.163

[12] *JA Act*, ss. 212-213A

[13] Burgess, *supra* note 3 at 315

> (d) any other person who, in the discretion of the Court, is a proper person to make an application under this Part.[14]

Across the Commonwealth Caribbean, there are several similarities between the definition of "complainant" in each jurisdiction's legislation but the acts vary with respect to two classes of specified persons: the Registrar and the "proper person".

It should be noted that in St. Kitts and Nevis, Part XX of the *Companies Act*, which deals with unfair prejudice, does not refer to "complainant"; rather, the act limits the availability of the remedy to members of a company, "a person who is not a member of a company but to whom shares in the company have been transferred or transmitted by operation of law" or, in limited circumstances, the Minister.[15]

The Shareholder

While the Court retains wide discretion to determine whether a party may have standing to seek relief pursuant to the oppression remedy, that discretion is not unlimited. In *Canwest International Inc. et al. v. Atlantic TV Ltd. et al.*, the Court of Appeal for Barbados found that although the plaintiffs had been promised an interest in the defendant company and had relied on that promise to their detriment, they did not qualify as shareholders for the purposes of the statutory definition of complainant. However, the plaintiffs were deemed to have standing pursuant to the "proper person" category.[16] The Honourable Chief Justice Denys Williams held:

> In my opinion, the very wide powers of the court hearing an application under section 228 provide a clue as to how the issue is

[14] Trinidad's *Companies Act 1995*, Ch 81:01 at s. 239 [*TT Act*]

[15] St. Christopher and Nevis *Companies Act 1996*, Ch 21.03 at s. 142 [*SKN Act*]

[16] *Canwest, supra* note 6

> to be resolved. Subsection (3) enacts that, in connection with an application under the section, the court may make any interim or final order it thinks fit and specifies a variety of orders that the court can make, including an order requiring the trial of any issue or an order directing rectification of the registers and other records of the company under section 231.
>
> An application under section 231 can be made by any aggrieved person who alleges that his name has been wrongly omitted from the registers or other records of a company and subsection (3) enacts that in connection with an application under that section the court may make any order it thinks fit (…)
>
> It seems clear from a reading of section 231 that a party to a pre-incorporation agreement can apply under that section as an aggrieved person to have the terms of the agreement for the issue of shares to him enforced against the other parties to the agreement. If an order under section 231 can be made on an application under section 228, why should the category of persons whom the court can in its discretion permit to be complainants for the purpose of section 228, necessarily exclude a party to a pre-incorporation agreement who is alleging oppressive conduct by the other parties to the agreement and who would therefore fall within the category of aggrieved persons?[17]

Can Williams CJ's decision in *Canwest* be applied in the context of Jamaica's *Companies Act*? Does the Jamaican court enjoy a similar discretion in determining who may qualify as a complainant? Given the absence of a "proper person" category in the Act, it is unlikely that the court can read in such a category. Trinidad's High Court rejected such an approach in *Lopez v. Telecommunications Services of Trinidad and Tobago*. This "reading in" approach had been used in the Canadian case of *PCL Industrial Constructors Inc. v. CLR Construction Labour Relations Association of Saskatchewan Inc.*, and the Trinidad Court held in *Lopez*:

> Having come to the conclusion that the omission of a "proper person" from the specified category of persons who can be oppressed was an "obvious oversight by the legislature," the judge then proceeded "to fill in the obvious legislative gap" (paragraphs 68 and 69).

[17] *Ibid*

> The difficulty this Court has had with the PCL decision (including the very succinct approval by the Court of Appeal – and its material but unclear clarification), is that no detailed reasons are given as to why the legislature "undoubtedly intended" to grant oppression relief to all 'complainants' (paragraph 67), except the inference that a person who was given a right to be a complainant must have been intended to benefit from the substantive remedies available in oppression proceedings.[18]

In cases where a client does not obviously fit within the enumerated categories and, as in the case of the Jamaican legislation, the "proper person" provision is not available, counsel may need to consider whether he or she might qualify under an alternative category. In *Re Caribbean Paper Recycling Company Limited*,[19] Brooks J of Jamaica's Supreme Court held that the plaintiff could not seek relief pursuant to s. 213A *qua* shareholder because he had not paid for his shares but he did have standing as a director of the defendant company. However, in *Wong Ken v. Fullwood et al.*,[20] the Jamaican Supreme Court found that the applicant who sought a declaration of his interest in the respondent company as well as interim relief pursuant to s. 213A of the *Companies Act* had no standing. The applicant entered into a relationship with the defendants with the intention of establishing the defendant company, in which the applicant would be a director and hold a 33.3 percent interest. Each party was expected to inject US$150,000 into the company; the applicant paid US$60,000 after the company had been registered and the respondents had been listed as directors and shareholders.[21] The applicant was never issued shares or appointed as a director. The

[18] TT 2004 HC 84 (13 October 2004, per Jamadar J) [*Lopez*]

[19] JM 2006 SC 83 (7 September 2006, per Brooks J) [*Re Caribbean Paper*]

[20] JM 2011 SC 43 (6 April 2011, per Straw J) [*Wong Ken*]

[21] *Ibid* at paras. 5-7

Court found that he did not fall within the Act's definition of complainant and had no standing.[22]

The Registrar

The legislation in several Eastern Caribbean jurisdictions, as well as Guyana and Trinidad, define "complainant" to include the Registrar although there is no indication as to when the Registrar may or should avail itself of the remedies. In *Lopez*, the Court considered the availability of the oppression remedy to the Registrar under Trinidad's *Companies Act*. Jamadar J held:

> For example, the Registrar is one of the definitively described persons who can be a complainant. Yet the Registrar is not one of the members in the section 242(2) specified category. Was this an obvious legislative oversight? That is, if a Registrar [who has complainant rights under sections 239 and 242(1)] alleges oppression with respect to himself or herself as Registrar, would such an action be sustainable under section 242(2) given the omission of Registrar from the specified category in that section?
>
> In my opinion, unless one is prepared to read in Registrar into the specified category in section 242(2), the question must be answered in the negative. Section 242 clearly limits actionable oppression to oppression that affects the interests of any one of the members of the specified category in section 242(2) as such. **The right conferred on the Registrar is the procedural right to invoke the jurisdiction under section 242(2). The purpose is to protect the rights of persons within the specified category in section 242 (2) or their interests as such.** Given the policy and scheme of the legislation there is absolutely nothing absurd, obscure or ambiguous about this.[23] [Emphasis added]

In *Amersey et al. v. Attorney General et al.*,[24] the Court of Appeal of Barbados considered whether the Attorney General was a complainant within the meaning of

[22] *Ibid* at paras. 12-13

[23] *Lopez, supra* note 18 at 6

[24] BB 1992 CA 7 (5 March 1992, per Williams CJ) [*Amersey*]

s. 225 of the *Companies Act.* The claim arose out of a joint venture to develop a sea-island cotton industry, and the Government was supposed to own shares in the company. Following the incorporation of the company, there was a failure to regularize the company's affairs. The Court held that as the interests of the shareholders had been affected and there was a nexus between the Government and the harm, the Attorney General qualified as a "proper person".

A "Proper Person"

The acts in several Caribbean jurisdictions, other than Jamaica, grant discretion to the court to extend protection to any other person deemed to be a "proper person". This discretion has been characterized as a "grant to the court of a broad power to do justice and equity in the circumstances of a particular case where a person who otherwise would not be a 'complainant' ought to be permitted to bring a derivative action or an oppression action".[25]

Trinidad's High Court considered the "proper person" category in *Lopez* in which the plaintiff alleged that the business of the defendant Textel Pension Plan was being conducted in a manner that was oppressive to his interests as a pensioner, a beneficiary and a "proper person" pursuant to s. 239 of the *Companies Act*. It was the defendants' position that the plaintiff did not fall within the specified category of person to whom the remedy was available.

Relying on a line of authorities from Canadian case law, Jamadar J held:

[25] Burgess, *supra* note 3 at 332

> The essential point that all of these cases make, that is relevant to the issue under consideration by this Court, is that the new and very broad discretion [evidenced by the seemingly unlimited discretionary powers contained in section 242(3)] conferred by section 242(2) of the Companies Act is intended only to rectify oppression. And further, that where an applicant is a member of the specified category in section 242(2), if the discretion of the Court to grant relief is to be exercised, an applicant must establish that his or her interest as a member of the specified category (i.e. "as such") has been affected.[26]

The Court highlighted that a person whose interests have not been affected may be deemed to be a complainant where there is a nexus between the complainant and the harm. However, in *Lopez*, Jamadar J held that the plaintiff sought to expand the category of persons specified in s. 242(2) in a manner which would exceed the Court's jurisdiction:

> In my opinion the intention of section 242 of the 'new' Companies Act is clear. The intention is to give the Courts broad discretionary powers as to the categories of persons who could initiate oppression actions [section 239 and 242(1)], yet not unlimited power; and to specify the definition of oppression by precisely delineating the boundaries within which such actions fall [section 242(2)].[27]

In determining who may be considered a complainant, the court must look at the interaction between the status of the proposed complainant and the intent and purpose of the available remedies. The derivative action and oppression remedies are intended to ensure that disputes within a company are resolved on equitable rather than strictly legal principles.[28] The potential breadth of the definition of complainant suggests that corruption or wrongdoing within a company may be challenged by persons such as

[26] *Lopez, supra* note 18 at 8

[27] *Ibid* at 14

[28] Burgess, *supra* note 3 at 316

creditors who have a vested interest but who are not necessarily implicated in the management or operations of the company.

The test for determining whether an individual or entity is a "proper person" within the meaning of the legislation will depend on the nature of the underlying action. A person deemed to be a "proper person" for the purposes of a derivative action may not meet the test for an oppression action; this will often be the case when a creditor seeks to commence either a derivative action or oppression action. In the case of the latter, the creditor must show evidence of the oppression of a person or party named in the relevant provision and further, that it would be just and equitable to try the case.[29]

Investigating Possible Wrongdoing: The First Steps Towards Litigation

While the oppression remedy[30] is the most obvious or common relief available to a minority shareholder, it may not be the most appropriate starting point. The companies legislation in many jurisdictions provides for investigations by a court-appointed investigator, the Registrar or even the Minister. The CBCA, which has served as a model for current company law statutes in several Caribbean jurisdictions, was extensively reformed in the mid-1970s in response to the *Dickerson Report*, which set out the recommendations of a task force struck by the federal government to consider reforms to Canada's company law.[31] The *Dickerson Report* explained the purpose of the statutory provision for investigations as follows:

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[29] Burgess, *supra* note 3 at 321

[30] Black's Law Dictionary (9th ed) defines oppression as follows: "Unfair treatment of minority shareholders (esp. in close corporation) by the directors or those in control of the corporation."

[31] R.W.V. Dickerson *et al.*, *Proposals for a New Business Corporations Law for Canada* (Ottawa: Information Canada, 1971).

> The system of inspection is designed to serve two purposes. First, it is a valuable weapon in the armoury available to shareholders as a protection against mismanagement. Although Part 19.00 of the Draft Act [Remedies, Offences and Penalties] greatly extends and improves the means of redress open to individual shareholders in the courts, it will almost certainly be true in many cases that even the most sophisticated litigative weapons will be valueless for lack of information as to the details of suspected mismanagement. That information is, by its very nature, likely to be known by the suspected wrongdoers and unlikely to be known or voluntarily disclosed to those seeking to complain of the suspected wrongdoing. Accordingly, we have provided in [s. 229(2)] that if an applicant can satisfy the court that there are circumstances suggesting wrongdoing, an investigation order may be made in aid of litigation.
>
> Moreover, there is a public interest in the proper conduct of corporate affairs, and while the protection of the public interest may be a by-product of the protection of shareholder interests, we are not persuaded that it is a necessary by-product. Accordingly, [s. 229(1)] provides for an application by the [Director].

In many Caribbean jurisdictions, the legislation provides for a court-ordered investigation of a company's affairs where the court is satisfied that there are circumstances suggesting wrongdoing.[32] For example, Trinidad's *Companies Act* grants the court the power to order the investigation of the affairs of a private company or its affiliates on the following grounds:

> (2) If, upon an application under subsection (1) in respect of a company, it appears to the Court that –
>
> > (a) the business of the company or any of its affiliates is or has been carried on with intent to defraud any person;
> >
> > (b) the business or affairs of the company of any of its affiliates are or have been carried on in a manner, or the powers of the directors are or have been exercised in a manner, that is oppressive or unfairly prejudicial to, or that unfairly disregards, the interest of a shareholder or debenture holder;

[32] Burgess, *supra* note 3 at 344

> (c) the company or any of its affiliates was formed for a fraudulent or unlawful purpose, or is to be dissolved for a fraudulent or unlawful purpose;
>
> (d) persons concerned with the formation, business or affairs of the company or any of its affiliates have in connection therewith acted fraudulently or dishonestly; or
>
> (e) in any case, it is in the public interest that an investigation of the company be made,
>
> the Court may order that an investigation be made of the company and any of its affiliated companies.[33]

In the Bahamas, the authority to order an investigation is granted to the Registrar where there is "reasonable cause to suspect that the affairs of a company are being conducted in a fraudulent manner".[34] In Jamaica and St. Kitts and Nevis, only the Minister may order an investigation.[35] In Belize, the shareholders of the company may appoint an investigator by special resolution, and the investigator will have the same powers and duties as a court-appointed inspector but the investigator will report as directed by the shareholders rather than to the court.[36] On a procedural note, under many jurisdictions' companies statutes, the Registrar must receive reasonable notice of the investigation, and has the right to appear.[37] Further, where an application for an investigation is brought *ex parte*, it must be heard *in camera*, and there are strict prohibitions on what information may be published.[38]

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[33] *TT Act* at s. 498(2)

[34] Bahamas' *Companies Act*, Ch 308 at s. 270

[35] *JA Act* at s. 160; *SKN Act* at s. 129

[36] Belize's *Companies Act*, Ch 250 at s. 111

[37] Burgess, *supra* note 3 at 348

[38] *Ibid*

In most statutes, the court may order an investigation where it appears that the conduct at issue falls within the grounds enumerated in the relevant statutory provision. The language suggests that the burden of proof is lower than where the court must be satisfied (for example, in an application to bring a derivative action[39] or an oppression claim).[40] While mere suspicion is insufficient, the applicant is not required to meet the civil standard of proof but must establish a *prima facie* case based on specified grounds of misconduct.[41] While the investigation may produce a report that becomes the basis for an application pursuant to other shareholder remedies, the investigation must be *prima facie* in the interests of the company or its shareholders.[42]

The legislation will usually set out a list of orders that the court may make with respect to an investigator, although the enumerated orders do not constrain the court's broad jurisdiction to make any order it thinks fit in connection with an investigation. Where the court appoints an investigator, it will generally define the scope of the investigator's powers, but in some jurisdictions, either the Registrar may conduct a limited investigation or the Minister may appoint an investigator. [43]

Litigators must not overlook the information gathering mechanisms available pursuant to the Civil Procedure Rules. The claimant's duty to set out her case includes identifying or annexing a copy of any document which she considers to be necessary to

[39] Defined and discussed further below.

[40] *Ibid*

[41] Peterson, *supra* note 11 at 15.9

[42] Burgess, *supra* note 3 at 346

[43] *Ibid* at 348

the case.[44] Where the claimant fails to do so, the defendant may request, and if necessary, seek an order for production of those documents. The disclosure and inspection of documents is a fundamental step in the litigation process. Recall also that a party has the right to inspect a document which is referred to in a statement of case (which is a defined term but captures a broad scope of documents), affidavit, expert's report or witness statement/summary.

As an example, Part 28 of the *Eastern Caribbean Supreme Court Civil Procedure Rules 2000* ("**CPR 2000**") as well as Part 28 of Jamaica's *Civil Procedure Rules 2002* ("**CPR 2002**") impose a duty to disclose documents that are directly relevant to the matters in question in the proceedings. A document will be considered directly relevant if:

> (a) the party with control of the document intends to rely on it;
> (b) it tends to adversely affect that party's case; or
> (c) it tends to support another party's case[45]

Another tool to consider – particularly where the opposing party is withholding documents or information – is an application for specific disclosure. Pursuant to Rule 28.5 of CPR 2000 and Rule 28.6 of CPR 2002, any party may apply to the court for an order for specific disclosure of documents which are directly relevant to one or more matters at issue in the proceedings. The relevance of documents is analyzed by reference to the pleadings, and the factual issues in dispute on the pleadings.[46] The

[44] See, for example, CPR 2000 at Rule 8.7; Barbados' *Supreme Court Rules* at Rule 8.5; Jamaica's CPR 2002 at Rule 8.9; Trinidad and Tobago's *Supreme Court Rules* at Rule 8.6

[45] ECSC CPR, Rule 28.1(4). See also Jamaica's CPR 2002, Rule 28.1(4)

[46] Civil Procedure – *The White Book Service 2011* (London, UK: Sweet and Maxwell, 2011), Vol 1 at 890-891

court will also consider whether an order for specific disclosure is necessary in order to dispose fairly of the claim or to save costs, having regard to the following factors: (a) the likely benefits of specific disclosure; (b) the likely cost of specific disclosure; and (c) whether it is satisfied that the financial resources of the party against whom the order would be made are likely to be sufficient to enable that party to comply with any such order.[47]

An order for the discovery of a document is "necessary for disposing fairly" of the claim if and only if the document is likely to contain information which would give substantial support to the applicant's contention on an issue which arises in the case and for that reason, the order would facilitate the applicant's success in the proceedings.[48]

Litigators should not underestimate the importance of these discovery mechanisms for the early determination of documents and information that can impact on their client's case. A well-crafted application for specific disclosure may ferret out the precise information needed to settle a case or to bring a further application for judgment.

Practical Solutions and Litigation Strategies

(i) Derivative Action

The derivative action is a relatively recent addition to the remedies available to shareholders in the Caribbean; it was only introduced to BVI's *Business Companies Act*

[47] *CPR 2000*, Rule 28.6

[48] *Tele-Art Inc. & Anr. v. Ming Kown Koo* (BVI, Civil Appeal No 3 of 1996) at 3

in 2005.[49] A derivative action is not in itself a remedy but rather a mechanism which enables a shareholder or other specific party to act on behalf of the company where the directors either refuse to do so or are engaged in conduct that breaches the duties owed to the company.[50] Where the court grants an application for a derivative action, it allows a shareholder or other stakeholder to commence or defend an action on behalf of the company and at the company's expense.

The derivative action remedy is now enshrined in many jurisdictions' companies legislation but finds its roots in the common law. Statutory derivative action provisions are a response to the so-called rule in *Foss v. Harbottle*.[51] In light of the court's deference to the governance of a corporation, the court has long been reluctant to allow shareholders to pursue a right held by the corporation as a separate legal entity, rather than its members.[52] This reluctance is explored in the classic case of *Foss v. Harbottle*, from which evolved the rule that a shareholder could not bring an action related to the affairs of the corporation if the underlying issue could be resolved by a vote.[53] One must remember that the company is a separate legal person, so a wrong perpetrated on the company is not necessarily a wrong on the shareholder.[54]

[49] Colin Diegels and Ian Mann eds, *British Virgin Islands Commercial Law* (Hong Kong: Sweet & Maxwell, 2012) at 63

[50] *Ibid*

[51] [1843] 67 ER 189

[52] Peterson, *supra* note 11 at 16.6

[53] *Ibid* at 16.7

[54] Burgess, *supra* note 3 at 324

At common law, four exceptions to the rule in *Foss v. Harbottle* developed, as elaborated in *Edwards v. Halliwell*.[55] The exceptions are summarized as:

> 1. *Ultra Vires Acts*: ". . . in cases where the act complained of is wholly ultra vires the company or association the rule has no application because there is no question of the transaction being confirmed by any majority."
>
> 2. *Fraud on the Minority*: ". . . where what has been done amounts to what is generally called in these cases a fraud on the minority and the wrongdoers are themselves in control of the company, the rule is relaxed in favour of the aggrieved minority who are allowed to bring what is known as a minority shareholders action on behalf of themselves and all others."
>
> 3. *Special Majorities*: "An individual member is not prevented from suing if the matter is one which could be validly done or sanctioned not by a simple majority of the members . . . but only by some special majority."
>
> 4. *Personal Rights*: Where "the personal and individual rights of membership of [the plaintiff] have been invaded", the rule "has no application at all."[56]

These exceptions to the rule in *Foss v. Harbottle* were considered by the Jamaican Supreme Court in *Rowe v. Sunshine Developers*,[57] and the Court recently indicated that the common law exceptions have now been replaced by s. 212 of the *Companies Act*.[58] Despite these exceptions, minority shareholders were afforded little protection or power at common law in relation to the majority controlling the company.

The statutory derivative action makes important strides towards curing that power imbalance and serves two purposes. It enables shareholders (or rather, stakeholders)

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[55] [1950] 2 All ER 1064 at 1067

[56] Peterson, *supra* note 11

[57] JM 2004 SC 67 (23 July 2004, per Sinclair-Haynes J [Ag])

[58] *Valley Slurry Seal Caribbean v. Earl Lewis et al.*, [2012] JMCC Comm 18 (19 December 2012, per Mangatal J) at paras. 7-10 [*Valley Slurry*]

to protect the company's rights where (i) the directors refuse to do so or (ii) where the directors have breached their duties to the company and must be held accountable. [59]

The test for bringing a derivative action was recently summarized by the English High Court in *Universal Project Management Services Ltd v. Fort Gilkicker Ltd & Others*,[60] which is discussed further below. The Honourable Justice Briggs held:

> The conditions for the bringing of an ordinary derivative action are most easily to be found in the Court of Appeal's decision in *Prudential Assurance Co. Ltd v Newman Industries & ors (No. 2)* [1982] Ch 204, at pages 211 A-B and 221H-222B in the Judgment of the Court. The would-be claimant must show a *prima facie* case (i) that the company is entitled to the relief claimed and (ii) that the claim falls within the proper boundaries of the relevant exception to the rule in *Foss v Harbottle*. That exception arises where:
>
> "what has been done amounts to fraud and the wrongdoers are themselves in control of the company. In this case the rule is relaxed in favour of the aggrieved minority, who are allowed to bring a minority shareholders' action on behalf of themselves and all others. The reason for this is that, if they were denied that right, their grievance could never reach the court because the wrongdoers themselves, being in control, would not allow the company to sue."[61]

There is no automatic right to bring a derivative action. Rather, the complainant must first seek leave to commence the action. The court may grant leave where the complainant meets the statutory pre-conditions. Some of the factors the court will consider include:

> (a) whether the member is acting in good faith;
>
> (b) whether the derivative action is in the interest of the company taking account of the views of the company's directors on commercial matters;

[59] Peterson, *supra* note 3 at 16.28

[60] [2013] All ER (D) 313 [*Universal Project*]

[61] *Ibid* at para. 17

> (c) whether the proceedings are likely to succeed;
>
> (d) the costs of the proceedings in relation to the relief likely to be obtained; and
>
> (e) whether an alternative remedy to the derivative claim is available.[62]

Certain statutes refer to the standard of proof on an application for leave to commence a derivative action. For example, pursuant to the CBCA, the court may grant leave "where it is satisfied that the statutory requirements are met".[63] Where the legislation is silent, the civil burden of proof must generally be met. The onus, which falls on the applicant, is considered to be "high", and is intended to dissuade frivolous or vexatious actions while nevertheless ensuring that legitimate applications for derivative action may succeed.[64]

The complainant must have given reasonable notice to the company's directors of the intention to bring a derivative action if the directors fail to "bring, diligently prosecute, defend or discontinue an action".[65] This notice requirement has been given a generous interpretation.[66] In addition, the complainant must be acting in good faith, based on the facts of the case.[67] The derivative action must be *prima facie* in the best interests of the company.[68] Finally, where the court grants leave to commence a

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[62] *The BVI Business Companies Act, 2004*, No 16 of 2004 amended by 26 12005 at s. 184C(2) [*BVI Act]*

[63] Peterson, *supra* note 11 at 16.4

[64] *Ibid*

[65] For a discussion of the notice requirement in Jamaica's *Companies Act*, see *Valley Slurry, supra* note 58 at para. 13

[66] Burgess, *supra* note 3 at 328

[67] *Ibid*

[68] *Ibid* at 329

derivative action, it has broad powers to make any order it thinks fit in connection with the action, including an order:[69]

> (a) authorizing 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 and 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. [70]

Multiple or Double Derivative Action

The Eastern Caribbean Supreme Court of Appeal recently considered the issue of multiple or double derivative actions in *Microsoft Corporation v. Vadem Ltd*.[71] Microsoft was a minority shareholder in Vadem BVI, which was the sole owner of Vadem Inc., a California company. Microsoft commenced proceedings in the United States against Vadem Inc.; certain of the claims in the American action were asserted derivatively on behalf of Vadem BVI. After the US proceedings were dismissed because Microsoft had not obtained leave to bring a derivative action on behalf of Vadem BVI, Microsoft brought a leave application before the Commercial Court in the BVI. At first instance, the Honourable Justice Edward Bannister granted leave to bring a derivative action on behalf of Vadem BVI. Microsoft then filed an appeal seeking an

[69] *Ibid*

[70] *JA Act* at s. 213(1)

[71] [2013] ECSCJ No 209 [*Microsoft*]

order that leave granted by Bannister J be extended to encompass causes of action vested in the California subsidiary. The Honourable Justice of Appeal Mario Michel confirmed that BVI law does not permit double derivative actions and held:

> (…) it is not open to the BVI court to give leave to a member of a company to bring proceedings not just in the name of and on behalf of the company of which he is a member but so too in the name of and on behalf of a company of which the first company is a member.[72]

The Court of Appeal simply granted leave to Microsoft to bring proceedings on behalf of Vadem BVI.

The Court of Appeal's decision in *Microsoft* comes on the heels of the English High Court's decision in *Universal Project*, where Briggs J considered whether a right to bring a multiple derivative action existed at common law and if such a right had been abolished by the *Companies Act 2006*. After reviewing cases in which standing had been granted to a member of a parent company to bring an action on behalf of the subsidiary, Briggs J characterized the purpose of the remedy and its state prior to the enactment of the UK *Companie*s *Act 2006*, in the following terms:

> Once it is recognised that the derivative action is merely a procedural device designed to prevent a wrong going without a remedy (see *Nurcombe v Nurcombe* [1985] 1 WLR 370 at 376A) then it is unsurprising to find the court extending *locus standi* to members of the wronged company's holding company, where the holding company is itself in the same wrongdoer control. The would-be claimant is not exercising some right inherent in its membership, but availing itself of the court's readiness to permit someone with a sufficient interest to sue as the company's representative claimant, for the benefit of all its stakeholders.
>
> (…)

[72] *Ibid*

> In my judgment the common law procedural device called the derivative action was, at least until 2006, clearly sufficiently flexible to accommodate as the legal champion or representative of a company in wrongdoer control a would-be claimant who was either (and usually) a member of that company or (exceptionally) a member of its parent company where that parent company was in the same wrongdoer control. I would not describe that flexibility in terms of separate forms of derivative action, whether headed "ordinary", "multiple" or "double". Rather it was a single piece of procedural ingenuity designed to serve the interests of justice in appropriate cases calling for the identification of an exception to the rule in *Foss v Harbottle*.[73]

The Court held that, based on the statutory construction of the relevant provisions, the 2006 Act did not abolish the common law right to multiple derivative actions.

Multiple derivative actions are clearly a live issue and given the ever increasing reliance on structuring business interests through the use of holding companies, particularly in offshore jurisdictions, it is one that is certain to come before the courts again in the near future.

(ii) Oppression Remedy

The oppression remedy, also referred to as the unfair prejudice remedy, may be the best known and most obvious remedy available to a shareholder. The remedy has been described by the Court of Appeal for the Eastern Caribbean as follows:

> The oppression remedy is a most flexible device given by Parliament to the court in order to protect the interests of minority shareholders. Since this remedy is a peculiar creature of statute, the court must, before resorting to it, ensure that certain essential elements are present. The court must also engage in a fine balancing act. On the one hand it must protect the legitimate interests of the minority shareholder. But at the same time it must take care not to usurp the function of the board of directors. While

[73] *Universal Project*, supra at note 60 at paras. 24, 26

> the minority must not be treated unfairly, the court should respect the justifiable exercise of control by the majority.[74]

The lower court in that case noted:

> (…) An overview of the operation and scope of this remedy is stated in the Butterworths Shareholders Remedies in Canada at 18.21 as follows:
>
> > "In many ways, the oppression remedy can be viewed as an equitable remedy. It is a broad and flexible tool, designed to protect the interests of corporate stakeholders in a variety of corporate circumstances. Nevertheless, the oppression remedy is also a creature of statute and certain essential elements must be present if a court is to have jurisdiction to invoke the remedy. It is imperative that the remedy be applied in a way that balances the protection of corporate stakeholders and the ability of management to conduct business in an efficient manner."
>
> In *Brant Investments Ltd v Keep Rite Inc.* (1987) 37 B.L.R. 65 (Ont. H.C.) at p. 99, Anderson J. commented that:
>
> > "The jurisdiction is one which must be exercised with care. On the one hand the minority shareholder must be protected from unfair treatment; that is the clearly expressed intent of the section. On the other hand the court ought not to usurp the function of the board of directors in managing the company, nor should it eliminate or supplant the legitimate exercise of control by the majority....Business decisions, honestly made, should not be subjected to microscopic examination. There should be no interference simply because a director is unpopular with the minority."[75]

[74] *In the Matter of the Companies Act 1996 and another v Du Boulay Holdings Limited and others*, [2005] ECSCJ No 18

[75] [2003] ECSCJ No 292 at paras. 10-11

Legitimate Interests

The oppression remedy provides relief for a complainant's "thwarted expectations".[76] While the remedy extends beyond a shareholder's strict legal rights, it will not protect all expectations; only reasonable expectations will be protected. The court must determine not only the expectations of the shareholder but whether they are reasonable.

Jamadar J's decision in *Lalla* offers guidance on how to determine whether expectations are reasonable. The Court referred to the Ontario Court of Appeal's decision in *Naneff*, where Galligan JA held that "the Court must determine what the reasonable expectations of that person were **according to the arrangements which existed between the principals**".[77] Galligan JA also held that "[t]he determination of reasonable expectations will also have an important bearing upon the decision as to what is a just remedy in a particular case." Jamadar J emphasized that the determination of whether there has been oppression is case-specific.

> [I]t must be that **it is essentially a question of fact whether or not there has been Oppression**. Therefore, each case must turn on its own particular circumstances. To do so, clearly, the courts must consider both the nature of the acts complained of and the method by which they were carried out, in the context in which they arise. **Oppression must necessarily be, in my opinion, context specific** (Smith v. first Merchant Equities Inc. 50 D.L.R. (4th) 369 at 373). [Emphasis added][78]

The consideration of expectations can be particularly challenging in the context of closely held corporations (also known as quasi-partnerships) and family businesses.

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[76] Burgess, *supra* note 3 at 332

[77] *Lalla, supra* note 2 [Emphasis added]

[78] *Ibid*

In these situations, the court will often look to the parties' "legitimate expectations" or "equitable considerations", which are defined as:

> an expectation or consideration arising out of a fundamental understanding between the shareholders, which formed the basis of their association, but which was not written into the constituent document.[79]

What is a Closely Held Corporation?

When a client is a minority shareholder in a company where the majority is alleged to have engaged in unlawful or improper conduct, one important consideration is whether the company may be characterized as a closely held corporation. Lord Wilberforce in the now classic decision in *Ebrahimi v. Westbourne Galleries Ltd.* set out guidelines for determining whether a company may be characterized as a closely held corporation.

> Certainly the fact that a company is a small one, or a private company, is not enough. There are very many of these where the association is a purely commercial one, of which it can safely be said that the basis of association is adequately and exhaustively laid down in the articles. The superimposition of equitable considerations requires something more, which typically may include one, or probably more, of the following elements: (i) an association formed or continued on the basis of a personal relationship, involving mutual confidence - this element will often be found where a pre-existing partnership has been converted into a limited company; (ii) an agreement, or understanding, that all, or some (for there may be 'sleeping' members), of the shareholders shall participate in the conduct of the business; (iii) restriction upon the transfer of the members' interest in the company - so that if confidence is lost, or one member is removed from management, he cannot take out his stake and go elsewhere.[80]

[79] Burgess, *supra* note 3 at 332

[80] [1973] AC 360

In the context of closely held corporations, the House of Lords has moved toward the concept of equitable considerations. In *O'Neill and Another v. Phillips and Others*, Lord Hoffman held in reference to his earlier decision in *Re Saul D. Harrison & Sons Plc* [1995] 1 B.C.L.C. 14:

> It was probably a mistake to use this term [legitimate expectations], as it usually is when one introduces a new label to describe a concept which is already sufficiently defined in other terms. In saying that it was "correlative" to the equitable restraint, I meant that it could exist only when equitable principles of the kind I have been describing would make it unfair for a party to exercise rights under the articles. It is a consequence, not a cause, of the equitable restraint. The concept of a legitimate expectation should not be allowed to lead a life of its own, capable of giving rise to equitable restraints in circumstances to which the traditional equitable principles have no application. That is what seems to have happened in this case.[81]

Certain of the remedies discussed in this paper may be available to protect the equitable rights of shareholders, particularly in closely held corporations which tend to resemble a partnership more than a commercial enterprise.

In *Re Caribbean Paper*, the Jamaican Supreme Court adopted the House of Lords' judgment in *Ebrahimi*. The petitioner was one of three shareholders and directors of the company, and sought an order for the purchase of his shares pursuant to s. 213A of the *Companies Act*. Brooks J held:

> The application of the provisions of Section 213A, in the context of an entity such as the Company, has been demonstrated in the case of Ebrahimi v. Westbourne Galleries Ltd. and Others [1973] A.C. 360. In that case the House of Lords ruled that a company, which has been formed on the basis of more than the mere creation of a legal entity, and in which its subscribers had good reason to expect the continuation of personal relations and the participation in the management of the entity, may be wound up

[81] [1999] 1 WLR 1092

> upon the proof of a change from that situation, to the detriment of a subscriber.[82]

Brooks J also referred to the Jamaican Court of Appeal's decision in *Radcliffe Butler v. Norma Butler*[83] as an authority for ordering the purchase of one shareholders' interest in the company by another.

The determination of legitimate interests in the context of close corporations is further complicated where the shareholders are related. The Ontario Court of Appeal in *Naneff*, which judgment was adopted in the Trinidadian case of *Lalla*, emphasized the distinction between a dispute between shareholders in a normal commercial operation and in a family business, noting that the dynamics of the relationship in the case of the latter must be taken into consideration in an oppression action. Referring to Lord Wilberforce's speech in *Westbourne Galleries*, Galligan JA held:

> At the outset I think it is important to keep in mind that this is not a normal commercial operation where partners make contributions and share the equity according to their contributions or where persons invest in a business by the purchase of shares. This is a family business where the dynamics of the relationship between the principals are very different from those between the principals in a normal commercial business. As the courts below have correctly held, the fact that this is a family business cannot oust the provisions of s. 248 of the O.B.C.A. Nevertheless, I am convinced that the fact that this is a family matter must be kept very much in mind when fashioning a remedy under s. 248(3) as it bears directly upon the reasonable expectations of the principals.
>
> I have come to that conclusion after considering certain observations made by Lord Wilberforce during the course of his speech in Ebrahimi v. Westbourne Galleries Ltd., [1973] A.C. 360, [1972] 2 All E.R. 492 (H.L.). The statute under consideration, the Companies Act, 1948, s. 222, authorized the court to wind up a company if it was "just and equitable" to do so. In my opinion, the words "just and equitable" convey the same meaning as the word

[82] *Re Caribbean Paper, supra* note 19 at 7

[83] [1993] 30 JLR 348

> "fit" in s. 248(3) of the O.B.C.A. Lord Wilberforce explained that when this jurisdiction is being exercised, the relationship between the principals should not be looked at from a technical legal point of view; rather the court should examine and act upon the real rights, expectations and obligations which actually exist between the principals.[84]

The oppression remedy, which provides an avenue to relief which was not necessarily available at common law as a result of the rule in *Foss v. Harbottle*, is intended to balance the rights of the claimant against the company management's ability to continue to operate the business.[85]

In an oppression claim, the applicant must satisfy the court on a balance of probabilities, although the lower standard of a strong *prima facie* case is used where the applicant seeks interim relief.[86] By placing the onus on the applicant but setting a lower burden of proof, the legislation recognizes the need to balance management's ability to continue to operate the company with the reality that the majority is in a position to deny information to the applicant, and may use tactics to resource-exhausting delay the litigation and drive up costs. It is also important to appreciate the business judgment or indoor management rule, which reflects the high degree of deference that the court will give to the decisions made by management in the operation of the company, and may "preclude a court from reviewing a transaction unless there is evidence which casts in doubt the honesty, prudence and good faith of directors".[87]

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[84] *Naneff*, *supra* note 10 at 5-6

[85] Peterson, *supra* note 11 at 17.1; Burgess, *supra* note 3 at 330

[86] Peterson, *supra* note 11 at 17.18

[87] *Ibid* at 17.21

Oppressive and Unfairly Prejudicial: Defining What is Actionable

Caribbean company law provides relief from conduct that is oppressive, unfairly prejudicial or unfairly disregards the rights of the complainant. In Jamaica, the *Companies Act* provides that relief may be granted to a complainant where:

> (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;
>
> (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, any shareholder or debenture holder, creditor, director or officer of the company, the Court may make an order to rectify the matters complained of.[88]

In Barbados and Trinidad, the legislation includes a third category of actionable conduct: conduct which "unfairly disregards the interests of" a specified party.[89] The remedy found in the Bahamas also includes conduct which "unfairly disregards".

The House of Lords in *Scottish Cooperative Wholesale Society Ltd v. Meyer* described oppressive conduct, which term originates in the UK's *Companies Act 1948*, as "burdensome, harsh and wrongful conduct" and required a continued pattern of

[88] *JA Act*, s. 213A [Emphasis added]

[89] *BB Act* at s. 228(2)

oppressive conduct rather than isolated acts. It is considered to carry the most rigorous burden of proof.[90]

Where conduct does not rise to the level of oppressive as defined in *Scottish Cooperative*, the court may find that it is unfairly prejudicial, which means that it is "prejudicial in the sense of causing prejudice or harm to the relevant interests of the complainant and both unfairness and prejudice must be proved".[91] Among other factors, the court may consider the conduct of the complainant in determining whether to grant relief for unfair prejudice; while there is no clean hands requirement, it is nonetheless an equitable remedy.[92] The final branch of actionable conduct – "unfairly disregards" – was interpreted to mean "unjustly or without cause pay no attention to, ignore or treat as of no importance the interests of the security holders, creditors, directors or officers."[93] Jamadar J in *Lalla* noted that a complainant is not required to establish bad faith, "although bad faith may be relevant in a determination of whether the quality or propriety of the conduct is oppressive or unfair".[94]

Where the court finds there is oppression, it may make any interim or final order it thinks fit. The list of orders included in the oppression provisions are not exhaustive.

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[90] This definition was adopted by the Eastern Caribbean Supreme Court in *Du Boulay Holdings Limited, supra,* note 74

[91] Burgess, *supra* note 3 at 335

[92] *Ibid*

[93] *Ibid* at 337; *Lalla, supra* note 2

[94] *Lalla, ibid*

The court's broad discretion to make orders in an oppression action is subject to an important limitation: the remedy should rectify the oppression or unfair prejudice but it should not exceed the reasonable expectations of the shareholders.

The Honourable Justice Adrian Saunders of the Court of Appeal for the Eastern Caribbean (as he then was) described the oppression remedy as "a most flexible device given by Parliament to the court in order to protect the interests of minority shareholders".[95] Similarly, the derivative action offers shareholders, in limited circumstances, the ability to protect the interests of the company (and by extension, their own interests in the company) where management refuses to do so. Counsel should, however, consider the costs of pursuing these two remedies, particularly the oppression action. If successful on an application for leave to commence a derivative action, the court will order that the costs of the application, as well as the costs of the subsequent proceedings, be covered by the company, as the shareholder is effectively acting in its place. In contrast, the claimant in an oppression action should expect to shoulder his litigation costs, which can add up quickly as such claims will be vigorously defended, often at the company's expense, throughout the course of the proceedings. The claimant may seek an interim costs order, as discussed below, but ensuring adequate funding is available to not only launch but maintain the action through to a final adjudication should be an important element of the litigation strategy. At its core, the oppression remedy reflects a balance between the rights of the shareholder and the interests of the company, and offers important, and sometimes the only, protection to

[95] *Du Boulay, supra* note 74 at para. 8

minority shareholders who have been excluded from participating in the company, while ensuring the continued operation of the company.

(iii) Winding-up

In a decision on an application for the appointment of liquidators, Bannister J of the Eastern Caribbean Supreme Court's Commercial Division made the following comment on the remedy:

> In my judgment the only purpose for which liquidators are appointed by the Court is in order for them to manage the final moments of companies which the Court has decided, according to established principles, ought to be put out of existence, whether because they are insolvent, or because their members cannot continue their management harmoniously, or because it has become impossible for them to carry on their businesses and the only course is for them to be put down like stricken animals.[96]

As is evident from Bannister J's comments, the court regards the liquidation, dissolution or winding-up of a company as an extraordinary remedy; in the litigator's arsenal, it is a nuclear weapon. In developing the litigation strategy, counsel should consider whether an order for winding-up will in fact achieve the client's goals.

BVI's *Business Companies Act* expressly empowers the court to order the appointment of a liquidator where it is just and equitable to do so.[97] The phrase "just and equitable" appears in the winding-up or dissolution provisions in the legislation of several Caribbean jurisdictions.[98] The rule will generally be applied in the following

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[96] *Aris Multi-Strategy Lending Fund Ltd v. Quantek Opportunity Fund, Ltd*, [2010] ECSCJ No 407

[97] *BVI Act* at s. 184I(2)

[98] For example, *TT Act,* s. 355(e) and *BB Act,* s. 373

situations: "disappearance of substratum, common law oppression of minority, partnership analogy, and deadlock."[99]

In *CVC/Opportunity Equity Partners Ltd & Another v. Almeida*,[100] the Judicial Committee of the Privy Council considered the winding-up remedy, and its relationship to the unfair prejudice remedy, in the context of the Cayman Island's *Companies Act* which provided for winding-up on just and equitable grounds but did not include a remedy for unfair prejudice. The Court of Appeal had discharged the lower court's injunction which enjoined the minority shareholder from bringing a petition pursuant to s. 94 of the *Companies Act* (1998 Revision) for the winding-up of the company. The minority shareholder sought relief on the basis that he had not received a fair offer for the purchase of his shares.

In the decision dismissing the appeal, Lord Millett for the Board reviewed the development of the unfair prejudice action in the UK, and considered the potential impact on a minority shareholder of a statute which provides winding-up as the only remedy:

> Section 210 of the English 1948 Act implemented a recommendation of the Cohen Committee on Company Law Amendment which reported in 1945 (Cmd 6659, para. 60). The Committee was anxious to strengthen the position of minority shareholders. It observed that the winding up of the company, which was the only remedy then available, would often not benefit the minority shareholder, since the break up value of the assets might be small, and the only available purchaser might be that very majority whose conduct had driven the minority to seek redress. Accordingly, the Committee recommended that the court should have a jurisdiction which it had previously lacked to impose

[99] Peterson, *supra* note 11 at 20.35

[100] [2002] UKPC 16, [2002] BCLC 108

> a just solution on the parties. In practice, the courts have generally sought to bring the matters complained of to an end by requiring one party, usually but not invariably the majority shareholders, to buy the other parties' shares at a fair price, fixed in case of dispute by the court.[101]
>
> As their Lordships have already noted, no such jurisdiction has been conferred on the court in the Cayman Islands. The only remedy available to a minority shareholder is to have the company wound up. This is likely to be contrary to his own interests and proportionately more so to the interests of the majority, and it is not normally what the minority shareholder really wants. But the risk that the company may be wound up tends to concentrate minds and encourages the parties to negotiate an acceptable compromise. This usually consists of an offer by the majority shareholders to buy out the minority at an appropriate price.[102]

In considering s. 94 of the Cayman Islands act, which provided that the court could wind-up a company where it was "just and equitable" to do so, the Board also reviewed Lord Wilberforce's speech in *Ebrahimi v. Westbourne Galleries Ltd*, on the concept of "just and equitable" in a closely held corporation.

> In his often cited speech In Re Westbourne Galleries Ltd [1973] AC 360 Lord Wilberforce explained the rationale of the 'just and equitable ground' for winding up a solvent company at the suit of a minority shareholder. At p. 379 he said:
>
> 'The words are a recognition of the fact that a limited company is more than a mere legal entity, with a personality in law of its own: that there is room in company law for recognition of the fact that behind it, or amongst it, there are individuals, with rights, expectations and obligations inter se which are not necessarily submerged in the company structure. That structure is defined by the Companies Act and by the articles of association by which shareholders agree to be bound. In most companies and in most contexts, this definition is sufficient and exhaustive, equally so whether the company is large or small. The "just and equitable" provision does not, as the respondents suggest, entitle one party to disregard the obligation he assumes by entering a company, nor the court to dispense him from it. It does, as equity always does, enable the court to subject the exercise of legal rights to equitable considerations; considerations, that is, of a personal

[101] *Ibid* at para.15

[102] *Ibid* at para. 16

> character arising between one individual and another, which may make it unjust, or inequitable, to insist on legal rights, or to exercise them in a particular way.'
>
> Companies where the parties possess rights, expectations and obligations which are not submerged in the company structure are commonly described as 'quasi-partnership companies'. Their essential feature is that the legal, corporate and employment relationships do not tell the whole story; and that behind them there is a relationship of trust and confidence similar to that obtaining between partners which makes it unjust or inequitable for the majority to insist on its strict legal rights. The typical characteristics of such a company are that there should be (i) a business association formed or continued on the basis of a personal relationship of mutual trust and confidence; (ii) an understanding or agreement that all or some of the shareholders should participate in the management of the business; and (iii) restrictions on the transfer of shares so that a member cannot realise his stake if he is excluded from the business. These elements are typical, but the list is not exhaustive.[103]

The Board relied on Lord Hoffman's decision in *O'Neill v. Phillips*, where the court held that it would not be unfair to exclude a minority shareholder if he received a reasonable offer for the purchase of his shares.

> In O'Neill v Phillips [1999] BCC 600 at p. 614; [1999] 1 WLR 1092 at p. 1107 Lord Hoffmann explained that the unfairness did not lie in the exclusion of the petitioner from the management of the company but in his exclusion without a reasonable offer for his shares. If the respondent has plainly made a reasonable offer, he said, then the exclusion as such will not be unfairly prejudicial and he will be entitled to have the petition struck out. Their Lordships draw attention to the requirement that the offer must plainly be reasonable: a respondent is not entitled to have the petition restrained or struck out if the reasonableness of his offer is open to question.
>
> As his reference to unfair prejudice shows, Lord Hoffmann was speaking in the context of a petition for relief under s. 459 of the Companies Act 1985, rather than a petition for a winding up on the just and equitable ground. Their Lordships will consider hereafter whether this affects what amounts to a reasonable offer; but there is no difference in principle. If the company possesses the relevant characteristics, then it is unfair for the majority to insist on

[103] *Ibid* at paras. 31-32

> their legal right to exclude the petitioner without making a reasonable offer for his shares. It is no less accurate to describe such conduct as unjust or inequitable than it is to describe it as oppressive or unfairly prejudicial to the interests of the minority. As their Lordships have already noted, a petitioner could not obtain a remedy under s. 210 of the Companies Act 1980 unless he alleged facts which would justify the court in making a winding-up order. The section provided an alternative remedy but the wrong was often the same.
>
> (…)
>
> In the case of a company possessing the relevant characteristics, the majority can exclude the minority only if they offer to pay them a fair price for their shares. In order to be free to manage the company's business without regard to the relationship of trust and confidence which formerly existed between them, they must buy the whole, part from themselves and part from the minority, thereby achieving the same freedom to manage the business as an outside purchaser would enjoy.[104]

The Board further held that it would be an abuse of process for a minority shareholder to bring a petition for winding-up if another means of achieving his goal was available. In the instant case, the only remedy available to the minority shareholder was a winding-up petition.

> Their Lordships would wish to emphasise that this does not mean that a minority shareholder can use the threat of winding-up proceedings in order to bring pressure on the majority to yield to his demands however unreasonable. As Re a Company No. 003843 of 1986 (supra) demonstrates, the court will be astute to prevent such conduct. In a case such as the present, it would be an abuse of the process of the court for a petitioner to commence or continue proceedings after he has plainly received a fair offer for his shares. If he holds out for more, the respondent can apply for the proceedings to be restrained or struck out. The court is fully in control and will not allow its process to be abused.[105]

The Cayman Island's *Companies Act* was later amended and s. 95(3) introduced the unfair prejudice remedy to the jurisdiction.

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[104] *Ibid* at paras. 34-35, 42

[105] *Ibid* at para. 56

As mentioned above, a winding-up order is a nuclear option but where relief pursuant to the oppression remedy is unavailable or insufficient, it may be the last – and only – resort. However, in the proper circumstances the threat of commencing an action seeking such relief, or the commencement of the action, will be sufficient to negotiate a remedy for the client without incurring the costs of protracted litigation.

(iv) Interim Orders

As discussed above, securing adequate resources to fund a claim for relief may be one of the most significant challenges for counsel, particularly when a shareholder's funds are tied up in the defendant company. The court's significant jurisdiction with respect to shareholder remedies includes the power to make interim orders, and counsel should consider how to use interim orders to protect their clients' rights and as part of the overall litigation strategy.

The purpose of interim orders in these circumstances has been described as follows:

> The purpose of an interim order is to attempt, if possible, to preserve balance, and to encourage the parties to resolve the issues themselves without damaging the business. When parties are so focussed on their own interests, and fail to see their common interest in the success of their joint enterprise, the responsibility of the Court is to take only measures that are absolutely necessary to preserve the *status quo* until trial.[106]

The court has wide discretion to make interim orders, which may be particularly appropriate where it appears that the oppressive conduct will not continue and there is

[106] Peterson, *supra* note 11 at 17.168

no risk of irreparable harm.[107] However, where a party to a derivative or oppression action intends to use an interim application (such as an application to strike a statement of case) to force a settlement, counsel should be wary that pursuant to the companies legislation, the court must review and approve the stay or dismissal prior to trial.[108]

The court may also award interim costs, the purpose of which, as described in the *Dickerson Report*, is to offer "some assurance that apparently well-founded actions will not be abandoned for lack of funds to maintain the litigation".[109] The court may also order interim costs where funding is required to commence a derivative or oppression action[110] but the complainant may be held liable for the interim costs depending on the final disposition of the matter. The court has held that such an order may be appropriate where the applicant's financial difficulty arises from alleged oppressive conduct, which has been established *prima facie*.[111] The test was later reformulated so that "an applicant must first establish that there is a case of sufficient merit to warrant pursuit and then establish that the applicant is genuinely in financial need which, but for an interim costs order would preclude the claim from being pursued".[112]

In *Motor and General Insurance Co Ltd v. Sanguinette and Another (No 2)*,[113] Trinidad and Tobago's Court of Appeal discussed the tests for the award of interim

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[107] *Ibid*

[108] Burgess, *supra* note 3 at 342

[109] Peterson, *supra* note 11 at 3.6

[110] Burgess, *supra* note 3 at 342

[111] *Ibid*

[112] *Ibid* at 343

[113] TT 2006 CA 21 (10 July 2006, per Hamel-Smith JA)

costs. Following a review of the relevant case law from Ontario, Canada, the Honourable Justice of Appeal Allan Mendonca set out the following test:

> 33. In view of the above, in my judgment in order for an applicant to succeed to obtain an order for interim costs under s 244 he must establish (a) that there is an arguable case with a reasonable chance of success and (b) that his financial circumstances are such that he would be precluded from pursuing his claim but for an order for interim costs.
>
> 34. It must however be emphasised that the section gives the court a wide discretion to award interim costs and other circumstances may be relevant such as the delay in making the application for interim costs itself (see *Strilec v Alpha Pipe Fittings Ltd* (1995) 19 BLR (2d) 316, Ont Gen Div).[114]

Mendonca JA also noted that "there is no need to establish a link between the inability to fund the proceedings and the alleged impecuniosity".[115]

In addition to orders for interim costs, counsel may consider bringing an application for interim relief which may include an order for the appointment of a receiver or monitor to ensure proper management of the company pending a final disposition; an order restraining the company and/or its directors from further encumbering the company with new liabilities that are outside of the ordinary course of business; and an order for disclosure of the company's financial books and records. Depending on the nature of the action and the circumstances of the case, there may be grounds for seeking an order for an expedited hearing. Counsel should also consider whether the action may be heard before the Commercial Division,[116] which in the jurisdictions that offer a Commercial Division means conducting the proceedings before

[114] *Ibid* at paras. 33-34

[115] *Ibid* at para. 32

[116] See, for example, CPR 2000, Parts 69A and 69B

an adjudicator highly experienced in and dedicated to commercial matters as well as streamlined procedures intended to efficiently move commercial matters through the judicial system.

Conclusion

Company law in Jamaica and across the Caribbean offers strong protection to minority shareholders and other parties whose interests have been oppressed or unfairly prejudiced by the conduct of the company and its controlling shareholders. With the variety of remedies available, developing a litigation strategy should begin with a thorough consideration of the client's goals and objectives. In many cases, it may not be appropriate or necessary to immediately bring an application for relief pursuant to the oppression or unfair prejudice remedy. The information gathering and investigative remedies offered by the companies acts, as well as the Civil Procedure Rules, may be sufficient in cases where the company has withheld information from a minority shareholder. Interim orders may further assist in the collection of evidence that is necessary to support an oppression action, or may provide an option for funding litigation where the client cannot otherwise afford it. A derivative action, which is not a remedy in itself, may also enable a client to seek relief on behalf of the company, and at the company's costs, where the controlling majority refuses to do so. An oppression or winding-up action should be considered when all other avenues to relief have been exhausted. While these options will likely involve costly, drawn-out litigation, they can achieve significant results for the client, whether by encouraging settlement or by court order. Civil litigators must consider how they can best serve their clients while also

creating opportunities for themselves, and must focus on developing cost-effective litigation strategies which protect their clients' interests.