EASTERN CARIBBEAN SUPREME COURT
IN THE COURT OF APPEAL

TERRITORY OF THE VIRGIN ISLANDS

In the Matter of an Interlocutory Appeal from the Commercial Division Made with the Leave of the Court Pursuant to CPR 62.10

BVIHCMAP2013/0006

BETWEEN:

[1] ANDRIY MALITSKIY
[2] IGOR FILIPENKO

Appellants

and

OLEDO PETROLEUM LTD

Respondent

and

BETWEEN:

OLEDO PETROLEUM LTD

Appellant

and

[1] ANDREY GRIGORYEVYCH ADAMOVSKY
[2] STOCKMAN INTERHOLD S.A.

Respondents

Before:
The Hon. Mr. Don Mitchell Justice of Appeal [Ag.]

On written submissions:

Mr. Justin Fenwick, QC, instructed by Martin Kenney & Co. for the Appellants
Mr. Peter McMaster, QC, Mr. Andrew Willins and Mr. Jonathan Ward instructed by Appleby, for the Respondents

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2013: August 16.

Civil appeal – Interlocutory appeal filed with leave - BVI company – Derivative claim – Unfair prejudice claim – Cross appeal against order for costs filed without leave – BVI Business Companies Act, 2004 – Eastern Caribbean Supreme Court (Virgin Islands) Act

The appellants appealed the refusal of the Commercial Court judge to make final a provisional sanction earlier granted, and the dismissal of their derivative claim on the basis that they had also filed an unfair prejudice claim, the consequence of which was that there were two inconsistent claims seeking different remedies when an unfair prejudice claim (properly pleaded) was capable of giving them everything which they could obtain if they were successful in the derivative claim. The appellants urged their right to bring both the derivative claim and the unfair prejudice claim. They sought personal remedies in their unfair prejudice claim and corporate remedies in the derivative claim. The respondents cross-appealed the award of costs in their favour as inadequate.

Held: dismissing the appeal and the cross appeal, that:

1. The same facts may well found either a derivative claim or an unfair prejudice claim.

   Re Charnley Davies Ltd (No 2) [1990] BCC 605 applied; Section 184C and 184I of the BVI Business Companies Act, 2004 applied.

2. The availability of the unfair prejudice claim is a factor to consider and not a mandatory bar to a derivative claim.

3. The learned trial judge was obviously right to rule that the cost and expense of two claims should not persist when the problem can be eliminated without any prejudice to the appellants by limiting the issues to a single claim.

   Franbar Holdings Ltd v Ketan Patel et al [2008] EWHC] 1534 applied.

4. The cross-appeal of the respondents being an appeal against the judge's order for costs required the prior leave of the court, and no leave having been sought or obtained the cross-appeal was not properly before the court.

   Section 30 of the Eastern Caribbean Supreme Court (Virgin Islands) Act applied.

JUDGMENT

[1] MITCHELL JA [AG.]: This is an interlocutory appeal against parts of an order of Bannister J made on 18th January 2013 in the Commercial Division and brought with leave of this Court granted on 9th May 2013. It has been passed to me as a single judge of the Court in accordance with rule 62.10 of the Civil Procedure Rules 2000 ("CPR").

[2] Mr. Malitskiy and Mr. Filipenko own one half of the BVI company Oledo Petroleum Ltd ("Oledo"). Mr. Adamovsky owns the other half. Through Oledo the parties owned a chain of filling stations in the Ukraine. In April or May 2009 the parties agreed to separate, and to distribute the assets they jointly owned *in specie*. They agreed to sell Oledo's business for some US$71.5 million, so that some one half of the proceeds would belong to Mr. Malitskiy and Mr. Filipenko and the other half to Mr. Adamovsky. Mr. Adamovsky and Mr. Malitskiy were joint signatories on an Oledo company bank account, but Mr. Adamovsky was the sole director of the company. On selling Oledo's business, Mr. Adamovsky, using his authority as sole director, and without telling Mr. Malitskiy, removed Mr. Malitskiy from the mandate and caused the US$71.5 million to be transferred from Oledo's account at a bank in Latvia to an account in the name of his company Stockman Interhold SA ("Stockman") in January 2010. He has disbursed all the money, and Oledo is an empty shell.

[3] Mr. Malitskiy and Mr. Filipenko claim that Mr. Adamovsky used part of the proceeds (some US$35 million) to purchase in the name of Stockman shares in a company called Assofit Holdings Ltd. ("Assofit"). The appellants say this was not only a misappropriation by Mr. Adamovsky of Oledo's funds, in breach of his fiduciary duty, but that Stockman is fixed with knowledge of Mr. Adamovsky's breach of fiduciary duty and cannot in conscience retain the Assofit shares in question. Mr. Adamovsky says it was an act of commercial probity, motivated by a desire to keep the money out of the hands of the appellants who would have

disappeared with their 50% share of the proceeds leaving creditors of the group of companies unpaid. Mr. Adamovsky claims to have applied US$71,128,488.40 in satisfying the former partnership debts.

[4] This dispute has resulted in Mr. Malitskiy and Mr. Filipenko bringing two cases before the Commercial Division. The first is an unfair prejudice claim for relief for improper dealings with Oledo's assets to the appellants' loss. They seek compensation for the diminution in value of their shares. The second is a derivative claim brought by Mr. Malitskiy and Mr. Filipenko in the name of Oledo against Mr. Adamovsky and Stockman. The purpose of this action is to recover the sum of US$71.5 million. The company seeks either recovery of the money, and/or a finding of a constructive trust of assets bought with that money. The learned trial judge found that there was a possibility that at trial and after full disclosure it may be shown that Oledo has a good claim to a beneficial interest in any property purchased with its money by Mr. Adamovsky.

[5] The statutory provision governing the issue of a derivative claim is section 184C of the BVI Business Companies Act, 2004 ("the Act").[1] This section provides as follows:

> "184C. (1) Subject to subsection (3), the Court may, on the application of a member of a company, grant leave to that member to
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> (a) bring proceedings in the name and on behalf of that company; or
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> (b) intervene in proceedings to which the company is a party for the purpose of continuing, defending or discontinuing the proceedings on behalf of the company.
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> (2) Without limiting subsection (1), in determining whether to grant leave under that subsection, the Court must take the following matters into account
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> (a) whether the member is acting in good faith;

[1] Act No. 16 of 2004, Laws of the Virgin Islands 2004 (as amended by the BVI Business Companies (Amendment) Act, 2005, Act No. 26 of 2005, Laws of the Virgin Islands 2005).

(b) whether the derivative action is in the interests of the company taking account of the views of the company's directors on commercial matters;

(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.

(3) Leave to bring or intervene in proceedings may be granted under subsection (1) only if the Court is satisfied that

(a) the company does not intend to bring, diligently continue or defend, or discontinue the proceedings, as the case may be; or

(b) it is in the interests of the company that the conduct of the proceedings should not be left to the directors or to the determination of the shareholders or members as a whole."

[6] The statutory provision governing the bringing of an unfair prejudice claim is section 184I of the Act which provides as follows:

"184I. (1) A member of a company who considers that the affairs of the company have been, or are being or are likely to be, conducted in a manner that is, or any act or acts of the company have been, or are, likely to be oppressive, unfairly discriminatory, or unfairly prejudicial to him in that capacity, may apply to the Court for an order under this section.

(2) If, on an application under this section, the Court considers that it is just and equitable to do so, it may make such order as it thinks fit, including, without limiting the generality of this subsection, one or more of the following orders

(a) in the case of a shareholder, requiring the company or any other person to acquire the shareholder's shares;

(b) requiring the company or any other person to pay compensation to the member;

(c) regulating the future conduct of the company's affairs;

(d) amending the memorandum or articles of the company;

(e) appointing a receiver of the company;

(f) appointing a liquidator of the company under section 159(1) of the Insolvency Act on the grounds specified in section 162(1)(b) of that Act;

(g) directing the rectification of the records of the company;

(h) setting aside any decision made or action taken by the company or its directors in breach of this Act or the memorandum or articles of the company.

(3) No order may be made against the company or any other person under this section unless the company or that person is a party to the proceedings to which the application is made."

It is clear that the power to grant relief conferred on the court by section184I has deliberately been drafted in the widest possible terms.

[7] The learned trial judge had before him an application by Mr. Malitskiy and Mr. Filipenko in the derivative claim for the provisional leave earlier granted by Wallbank J to bring these proceedings in the name of Oledo to be made final. At the conclusion of the hearing, he dismissed the claim and set aside the Subject Matter Preservation / Freeze Order that Wallbank J originally made at a hearing on 15th August 2012 and subsequently continued. He ordered Mr. Malitskiy and Mr. Filipenko to pay 20% of the respondents' costs of the proceedings, to be assessed if not agreed and paid within 14 days of assessment or agreement.

[8] In considering section 184C and section 184I the learned trial judge observed:

"[14] I was referred to no authority upon the meaning of good faith where it occurs in section 184C(2)(a).[5] *[Nurcombe v Nurcombe [1985] 1 WLR 370, mentioned in Mr Adamovsky's skeleton, but not referred to in argument, was about estoppel by election and has nothing to do with the issues which arise in the present*

application]. In my judgment the provision is designed to enable the Court, in a proper case, to withhold permission to commence derivative proceedings from a shareholder who wishes to use the procedure otherwise than for the benefit of the company in question – in other words, in order to achieve a collateral purpose. On the other hand, and in accordance with generally accepted principles it seems to me that, once it is shown that it is in the interests of the company for the proposed claim to be brought, that the claim has a real prospect of success and that the true object of the shareholder in seeking leave to bring it is to seek redress on its behalf for a wrong done to the company, it is not relevant that the shareholder has some improper *motive* in advancing it. In other words, and provided that the other conditions are satisfied, the fact that the applicant may be motivated by spite or malice against the proposed defendant is nothing to the point – otherwise, as has been pointed out elsewhere, only persons of established and universal goodwill would be permitted to institute derivative proceedings...

"[15] So far as concerns the matters which the Court is required by subsections 184C(2)(b) and (c) to take into account in determining whether to sanction derivative proceedings (whether the proposed proceedings are in the interests of the company taking into account the directors' views on commercial matters; and whether the proceedings are likely to succeed), it seems to me that neither of those factors on their own causes any difficulty for the Applicants here.

"[16] Another of the matters, however, which the Court is required to take into account in deciding whether to sanction derivative proceedings is whether an alternative remedy is available. In this case the Applicants commenced proceedings under section 184I of the Act before they made their application under section 184C, although they did not serve them until after Wallbank J had granted his provisional leave.[6] *[the Applicants mentioned the fact that they had commenced the section 184I claim on the application to Wallbank J].* The section 184I claim is defective as it stands, since it seeks to combine claims which can be made only by Oledo itself (or by members of Oledo with permission to bring derivative proceedings on its behalf) with claims made by the Applicants in their own right under section 184I. It has, by agreement, been stayed pending the outcome of the present proceedings. The application notice before me asks that the section 184I claim be consolidated with the derivative proceedings.

...

"[18] In the present case... there can be no question of restoring Oledo to commercial life. The purpose of the derivative claim is not to remedy abuses done to Oledo so as to enable it to continue in business more prosperously or successfully. From the point of view of the Applicants, success in the derivative action would achieve no greater benefit than would success in the section 184I proceedings (provided that they were amended to claim only relief properly claimable under that section). In principle, therefore, it seems to me that on the particular facts of this case a claim under section 184I (properly pleaded) affords to the Applicants a true alternative remedy. Its juridical basis is quite different, but so far as remedy goes it is capable of giving them everything which they could obtain if they were successful in the derivative proceedings.

"[19] Two inconsistent claims seeking different remedies arising out of the same set of facts cannot be allowed to proceed in tandem. Consolidation is not an answer – the claims are brought in different characters and seek different remedies... The derivative proceedings can only be seen, in the light of the prior commencement of the section 184I proceedings, as an attempt to put pressure on the Defendants to buy the Applicants out. The Applicants can have no genuine interest in having Mr Adamovsky forced to pay into the empty shell which is all that is left of Oledo twice the amount of money to which on any footing they may establish an entitlement. For that reason, it seems to me that the derivative proceedings are to be treated as not having been commenced in good faith *as that term is to be understood in the context of section 184C(2)(a)*. I cannot stress too strongly that that finding carries no implication whatsoever of misconduct, still less of dishonesty.

"[20] In my judgment, therefore, not only is there an alternative remedy available to the Applicants in this case – the derivative claim itself must be taken to have been mounted to put collateral pressure on Mr Adamovsky. In those circumstances, the right course seems to me to leave the Applicants to their remedy under section 184I. For these reasons I refuse to make final the provisional sanction granted by Wallbank J for the Applicants to prosecute claim No BVIHC(COM)2012/0083..."

[9] Mr. Malitskiy and Mr. Filipenko have several quarrels with these findings. They ask for the derivative claim to be restored on four grounds of appeal. In particular, they complain that the learned judge erred:

(1) both in fact and in law in finding that "in principle, therefore, it seems to me that on the particular facts of this case a claim under section 184I (properly pleaded) affords to the Applicants a true alternative remedy... it is capable of giving them everything which they could obtain if they were successful in the derivative proceedings";

(2) in law in holding that the "two inconsistent claims seeking different remedies arising out of the same set of facts cannot be allowed to proceed in tandem";

(3) in finding as a fact that "The derivative proceedings can only be seen, in the light of the prior commencement of the section 184I proceedings as an attempt to put pressure on the Defendants to buy the Applicants out" in circumstances where there was no evidence to support this finding;

(4) The learned judge erred in law and in fact in finding that "The Applicants can have no genuine interest in having Mr. Adamovsky forced to pay into the empty shell which is all that is left of Oledo twice the amount of money to which on any footing they may establish an entitlement. For that reason it seems to me that the derivative proceedings are to be treated as not having been commenced in good faith as that term is to be understood in the context of section 184C(2)(a)".

[10] Mr. Adamovsky and Stockman in their cross-appeal offer additional reasons for upholding the order. They urge that the judgment should be upheld on the additional ground that the application to continue the derivative claim was made in bad faith, as the judge found, and the Court of Appeal should additionally find that at least from the date of the judgment it would be clear to the appellants that the unfair prejudice claim was capable of affording them all that success on the derivative claim would accomplish so that any continued prosecution of the derivative claim from that point in time would be for a collateral purpose and therefore in bad faith within the special meaning that he gave to that expression in

his judgment. Mr. Adamovsky and Stockman also cross appeal on the award of costs. They urge that when the judge dismissed the derivative claim and discharged the orders made under it he ordered Mr. Malitskiy and Mr. Filipenko to pay 20% of the costs of the proceedings and for the remainder of the costs to be treated as costs in the unfair prejudice claim. They should have received 100% of their costs of the applications. However, this cross-appeal has been filed without the leave of the court as required by section 30 of the Eastern Caribbean Supreme Court (Virgin Islands) Act[2] and is not properly before me.

[11] Mr. Malitskiy and Mr. Filipenko on their first ground of appeal urge their right to bring both the derivative claim and the unfair prejudice claim on the basis that a shareholder may well prefer a corporate remedy, as where he wishes to remain a member of the company, rather than any personal remedy which may otherwise be available to him. They point to a number of precedents by way of illustration:

(a) in Airey v Cordell and others[3] the claimant wished to pursue a derivative claim to recover diverted assets for the company so that he could participate in the long-term gains to be expected from their exploitation rather than be bought out of the company;

(b) in Kiani v Cooper[4] the claimant wanted the company to continue to pursue its development projects and wanted to remain a member of it; and

(c) in Suzy Belinda Hughes v Nigel Richard Weiss et al[5] the claimant did not want her shares to be bought nor did she want to buy out the respondent. She wanted financial remedies for the company for misfeasance;

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[2] Cap. 80, Revised Laws of the Virgin Islands 1991.
[3] [2006] EWHC 2728 (Ch).
[4] [2010] EWHC 577 (Ch).
[5] [2012] EWHC 2363 (Ch).

(d) in Alexander Marshall Wishart v Castlecroft Securities Ltd and others[6] the petitioner sought leave to bring derivative proceedings on behalf of Castlecroft Securities Ltd. The petitioner owned 40% of the shares while Mr. Black (40%) and his wife (20%) owned the remainder of the shares. The petitioner alleged that Mr. Black had diverted valuable property investment opportunities from Castlecroft to SJB, another company of which Mr. Black was the sole director, in breach of fiduciary duties owed to Castlecroft. The respondents opposed the grant of leave and argued that Mr. Wishart could obtain a satisfactory remedy by means of an unfair prejudice petition, in particular that Mr. Wishart be paid the value of his shareholding in Castlecroft. Upon consideration of this issue the Court held:

> "46. In the circumstances of the present case, we accept that the allegations made by the petitioner against Mr Black might form the basis of a petition under section 994. Such proceedings would however constitute, at best, an indirect means of achieving what could be achieved directly by derivative proceedings; and they could not provide any remedy against SJB. The petitioner's complaint is that Mr Black has acted unlawfully, with SJB's knowing assistance; not that the Company's affairs have been mismanaged. The relief the petitioner seeks is to have the Company restored to the position in which it ought to be, by an order for restitution or damages; not that he should be bought out. In that regard, we note that an order requiring him to be bought out at the present time, when the commercial property market is depressed, would not be an attractive remedy. The order sought in the proposed derivative proceedings, that the properties in question be declared to be held by SJB upon a constructive trust for the Company, would in reality be a more valuable remedy, since the petitioner could then benefit from any rise in the value of his shareholding over the longer term, consequent upon a recovery in the market. Furthermore, any inquiry into whether there had been mismanagement, or into the price at which the petitioner should be bought out, would require the court to establish the truth or otherwise of the petitioner's allegations, and the value of any property held by SJB which had been acquired through Mr Black's breach of his duties to the Company: the same

[6] [2009] CSIH 65.

> issues as would be raised more directly, and with the possibility of SJB's participating in the action and being ordered to make restitution or to pay damages, if derivative proceedings were permitted. We also note that the Company does not appear to be deadlocked, and that it continues to trade. In these circumstances, the availability of an alternative remedy under section 994 does not appear to us to be a compelling consideration."

(e) similarly, in Robin Stainer v Gerard Alan Lee et al,[7] Roth J considered a derivative action "entirely appropriate and "the theoretical availability to the Applicant of proceedings by way of an unfair prejudice petition... not a reason to refuse permission;" the applicant was "not seeking to be bought out."

[12] Based on the above, the appellants urge that a declaration that Stockman holds the Assofit shares on constructive trust for Oledo or an order for their transfer in specie may prove a more valuable remedy for them in this case as it would enable them to benefit indirectly through their shareholding in Oledo from any increase in the value of the Assofit shares over the long term. Such remedies are not able to be sought in the unfair prejudice claim as such claims can only be brought in the name of Oledo given their proprietary nature. The appellants say they do not want to be bought out. In the circumstances, the appellants submit that an unfair prejudice claim under section 184I is not "capable of giving them everything which they could obtain if they were successful in the derivative proceedings." The unfair prejudice claim is therefore not a true alternative remedy to a derivative claim.

[13] On the second ground of appeal, the appellants point out that they seek personal remedies in their unfair prejudice claim and corporate remedies in the derivative claim. In Re Chime Corp Ltd,[8] Lord Scott expressed the view[9] that it is not appropriate for the court, on an unfair prejudice petition, to entertain what would, in

[7] [2010] EWHC 1539 (Ch).
[8] [2004] 3 HKLRD 922.
[9] At para. 61.

effect, be a corporate action to redress a corporate wrong against the company by its directors. This, in Lord Scott's words, is an attempt to circumvent the rule in Foss v Harbottle[10] and would be an abuse of process. Any such wrong should be established in a derivative action.[11] The appellants also rely on a decision of Bannister J in the case of Nigel Gray v Allan Leddra et al[12] where he said,

> "A derivative action requires permission under section 184C. In considering whether to grant permission, the Court here is mandated to take into account a number of important considerations.[5] *[section 185C(2)]*. The Court may not give permission unless it is satisfied that the company itself does not intend to make the claim and that it is in the interests *of the company* that conduct of the proceedings should not be left to the company or to a majority of its board or of its members... These conditions are of so stringent a nature that in my judgment it is an abuse of the process to attempt to mount a derivative claim without the consent of the Court under section 184C. If that permission is granted, then it seems to me that it is a matter of case management whether the derivative claim is prosecuted as part of unfair prejudice proceedings or is tried together with them or separately, but to attempt to bring such a claim without permission is, in my judgment, an abuse."

The appellants urge that they cannot seek corporate remedies on behalf of Oledo in their unfair prejudice action without the Court's permission under section 184C. If leave is given to bring a derivative claim, then it is a matter of case management whether a derivative claim is prosecuted as part of unfair prejudice proceedings, or whether they are tried together or separately. Any risk of inconsistent findings can be dealt with by appropriate case management directions.

[14] On Ground 3, whether the derivative proceedings can only be seen as an attempt to put pressure on the respondents to buy the appellants out, the appellants submit that there was no evidence to justify such a finding.

[15] On Ground 4, whether the appellants can have no genuine interest in having Mr. Adamovsky pay the full amount of $71.5 million into the empty shell which is

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[10] (1843) 2 Hare 461.
[11] At para. 63.
[12] Territory of the British Virgin Islands High Court Claim BVIHC(COM)2011/0079 (delivered 4th April 2012, unreported), para. 9.

all that is left of Oledo, being twice the amount of money to which on any footing they may establish an entitlement, the appellants submit that the judge erred. The fact that a company is not actively trading is not a bar to the granting of permission to bring a derivative claim, provided the other statutory criteria are met. So in Kiani v Cooper the fact that the company was no longer trading and may well have been insolvent was not a bar. In Charles Parry v Guy Bartlett,[13] the company had not traded since 2005 and had no employees. It was necessary for the applicant to get permission to continue the derivative claim to restore the company to the register before bringing proceedings. The applicant, being a 50% shareholder in the company, sought the return of moneys paid away from the company by a co-director and the other 50% shareholder in breach of trust. Ultimately he wished to receive his half share of the company's assets which he would have expected on a liquidation of the company. In Hughes v Weiss the company was dormant with no business, no employees, and no future save dissolution. The fact that the company would not resume trading but would be dissolved was not a compelling objection to the fact that a reasonable director would attach importance to continuing the derivative proceedings.

[16] The appellants contend that the parties had agreed that Oledo's funds were to be divided amongst the parties in proportion to their shareholding in Oledo. The learned trial judge therefore erred in finding that "the Applicants can have no genuine interest in having Mr. Adamovsky forced to pay into the empty shell which is all that is left of Oledo twice the amount of money which on any footing they may establish an entitlement".

[17] In Re Chime Corp Ltd[14] Mr. Justice Bokhary PJ said in relation to similar observations made by Deputy Judge Crowe in Atlasview Ltd v Brightview Ltd,[15]

> "That, if I may say so without any disrespect whatsoever to the learned Deputy Judge, may go to show that serious problems can result from

[13] [2011] EWHC 3146 (Ch).
[14] See para. 13 above.
[15] [2004] BCLC 191.

> impatience with a call for resort to a derivative action as well as or in lieu of an unfair prejudice petition. When Mr Hildyard showed us that statement by the learned Deputy Judge, the problem with it was immediately pointed out by Lord Scott of Foscote NPJ. What about the company's creditors and, indeed, the revenue, if money due to the company by-passes its coffers and goes straight into the shareholders' pockets instead? No satisfactory answer was forthcoming."[16]

Discussion

[18] It is a commonplace that the same facts may well found either a derivative action or an unfair prejudice claim. In the words of Millett J in Re Charnley Davies Ltd (No 2),[17],

> "The very same facts may well found either a derivative action or a sec.459 petition. But that should not disguise the fact that the nature of the complaint and the appropriate relief is different in the two cases. Had the petitioners' true complaint been of the unlawfulness of the respondent's conduct, so that it would be met by an order for restitution, then a derivative action would have been appropriate and a sec.459 petition would not. But that was not the true nature of the petitioners' complaint. They did not rely on the unlawfulness of the respondent's conduct to found their cause of action; and they would not have been content with an order that the respondent make restitution to the company. They relied on the respondent's unlawful conduct as evidence of the manner in which he had conducted the company's affairs for his own benefit and in disregard of their interests as minority shareholders; and they wanted to be bought out. They wanted relief from mismanagement, not a remedy for misconduct."[18]

That means that an aggrieved shareholder may have a choice of remedy. Where the chosen remedy is the derivative claim, the circumstances may well also admit an unfair prejudice claim. The availability of an unfair prejudice claim is a highly relevant factor, but not a mandatory bar to the derivative claim.

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[16] See note 7 at para. 25.
[17] [1990] BCC 605.
[18] At. p. 625.

[19] Five of the appellants' authorities[19] are cases where a derivative claim had been commenced and reached the stage where permission was required to continue it. They were cases where on the facts either a derivative claim or an unfair prejudice claim was available. The defendants in those cases was making the claimant's life difficult by saying not that the claimant did not have a good arguable case, but that it had just brought the case in the wrong form, the consequence of this formal error being (so the submission went) that the wretched claimant had to start all over with the implications for cost and delay that this entailed. Unsurprisingly, that submission was not warmly received by the court in any of those cases. In each of these cases, the claimant brought a derivative claim to be met with a submission that on the facts an unfair prejudice claim could have been brought. All of these cases suggest that the court will not refuse permission to continue a derivative claim merely because the claimant could also have brought an unfair prejudice claim.

[20] In none of these cases was the court considering a case in which the context in which the derivative claim was commenced was an existing unfair prejudice claim; or, in which the question was whether both a derivative claim and an unfair prejudice claim should be continued in tandem. These cases are ultimately about the defendant trying to wrong foot the claimant by saying that the wrong procedure had been used to begin the claim. The respondent has never said that here. The respondent (Oledo) has only ever said that it should not be faced with both claims. The judge agreed. He was looking at a completely different situation from that being considered in those authorities. The authority that is on point is Franbar Holdings Ltd v Ketan Patel et al.[20] The judge in this case refused permission to continue a derivative claim because all that could be achieved in the derivative claim could be achieved in an existing unfair prejudice claim. He too was asked to

[19] Airey v Cordell; Kiani v Cooper; Hughes v Weiss; Wishart v Castlecroft Securities Ltd; Stainer v Lee at para. 11 above.
[20] [2008] EWHC 1534.

let them be consolidated, but took the view that the better course was to allow only one to proceed.[21]

[21] The first reason the judge gave for refusing the derivative claim was that there was a suitable alternative remedy and that it was already being pursued. Ground 1 attacks the judge's conclusion that there is a suitable alternative remedy. Having found that the unfair prejudice claim afforded a suitable alternative remedy the judge decided that both claims should not be allowed to continue in tandem. Ground 2 attacks this conclusion.

[22] It is not arguable that a judge of the Commercial Division equipped with such wide powers as are provided by section 184I of the Act[22] would be unable to provide to the member of the company everything that the member could achieve in a derivative claim. In particular, the court could in the circumstances of this case grant the appellants:

(1) a full account from Mr. Adamovsky and Stockman of the disbursement and ultimate application of the disputed monies, identifying supporting documentation, as has already been ordered on case management;

(2) a judicial determination of the assets (if any) into which the disputed monies can be traced (including but not limited to Assofit shares), for which an order for expert forensic accounting evidence has already been made;

(3) a judicial determination of the state of indebtedness of Oledo, which is one of the main issues on the pleadings;

(4) an order that one or both of the respondents acquire the appellants' shares;

[21] At para. 54.
[22] See para. 6 above.

(5) an order that one or both of the respondents or Oledo pay compensation to the appellants;

(6) that a receiver be appointed of Oledo's assets;

(7) that a liquidator be appointed of Oledo; or

(8) any other order that the court thinks fit (subject only to the condition that it be just and equitable to make the order).

[23] The learned judge's finding under challenge is only wrong if the appellants can demonstrate that the remedies above, alone or in combination, will not provide them with everything that could be obtained in a successful derivative claim. So, the judge may make an order for acquisition of the appellants' shares in Oledo, setting the price at which they are to be acquired at a figure that reflects the value of those shares assuming all wrong done to Oledo have been righted, including by full repayment of the Oledo monies and including by vesting in Oledo all traceable proceeds of those monies. By this route the appellants can receive the full value of whatever interest in Oledo that they would have had as shareholders if no wrong had been committed. As the company is an empty shell they have no bona fide interest in wanting more. Alternatively, the court may simply order the respondents to pay compensation to the appellants. The appellants have themselves sought this remedy in the prayer and the judge has held that this is an available remedy. In my view, the learned trial judge was entitled to find that there was no useful purpose in keeping the two claims running.

[24] Ground 2 is to the effect that the judge was wrong to say that the claims in the two actions are inconsistent and the remedies are different so that they cannot be allowed to proceed in tandem. In the derivative claim the company seeks recovery of money, alternatively a constructive trust of assets bought with that money. In the unfair prejudice claim the shareholders seek compensation for the diminution in value of their shares. In my judgment, both remedies are available, but they are

fundamentally inconsistent because if the company recovers its loss then there is no diminution in value of the shares. Success on one means failure on the other. In this sense the claims are mutually exclusive. Nor is there any point in simply, as the appellants suggest, allowing both claims to proceed in tandem and to deal with the fact that the remedies are inconsistent at a later stage. The learned trial judge was obviously right to rule that the cost and expense of two claims should not persist when the problem can be eliminated without any prejudice to the appellants by limiting the issues to a single claim. In the circumstances, there is no need for me to deal with the subsidiary Grounds 3 and 4.

[25] The respondents have a cross appeal on the quantum of their costs as ordered by the judge, and as previously described.[23] However, as it is not properly before me it is properly to be dismissed.

Application for Security for Costs

[26] There is an application for security for costs in the amount of US$250,000.00 or such other amount as the court may determine on the continuing unfair prejudice claim. This application is not opposed by the appellants. I would refer the application to the learned trial judge to be dealt with in the course of his case management and to make what he considers an appropriate order.

Order

[27] For the reasons set out above, I order that:

(1) the notice of appeal filed on 30th May 2013 is dismissed;

(2) the cross-appeal of the respondents dated 14th June 2013 is dismissed;

(3) the application by the respondents for security to be given for their costs is referred to the court below;

[23] At para. 10 above.

(4) the matter is remitted to the court below for any further case management directions to be given as necessary;

(5) the appellants will pay the costs of this appeal to be assessed by me if not agreed within 30 days of the date of this order. If there is no agreement, the respondents are to file and serve submissions on costs within 30 days thereafter. Any submissions from the appellants are to be filed and served within 30 days of service upon them of the respondents' submissions. Any response by the respondents to be filed and served within 14 days thereafter.

Don Mitchell
Justice of Appeal [Ag.]