

**THE EASTERN CARIBBEAN SUPREME COURT
IN THE COURT OF APPEAL**

ANGUILLA

AXAHCVAP2021/0010

BETWEEN:

JOHN OLIVER DYRUD

Appellant

and

[1] PALMAVON JASAMIN WEBSTER

[2] FIRST ANGUILLA TRUST COMPANY LIMITED

Respondents

AXAHCVAP2021/0011

ANGUILLA

BETWEEN:

PALMAVON J. WEBSTER

Appellant

and

[1] JOHN O. DYRUD

[2] FIRST ANGUILLA TRUST COMPANY LIMITED

Respondents

Before:

The Hon. Mde. Louise Esther Blenman

Justice of Appeal

The Hon. Mr. Mario Michel

Justice of Appeal

The Hon. Mr. Gerard Farara, QC

Justice of Appeal [Ag.]

Appearances:

Ms. Jean M. Dyer and Ms. Liska Hutchinson for the Appellant/Respondent

John Dyrud

Mrs. Tana'ania Small-Davis QC for the Respondent/Appellant

Palmavon Jasamin Webster

2022: February 10;
April 27.

Interlocutory appeal – Section 268 of the Companies Act of Anguilla – Judicial discretion – Overriding objective of the Civil Procedure Rules 2000 – Part 26 of the Civil Procedure Rules 2000 – Appeal against case management orders of trial judge - Expert evidence - Part 32 of the Civil Procedure Rules 2000 - Failure to comply with Part 32 of the Civil Procedure Rules 2000 - Delay in application for appointment of expert witness - Delay in trial dates as a result of late application for appointment of expert witness - Impartiality and independence of expert witness – Whether expert evidence was necessary to determine the matter justly - Whether learned judge erred in refusing to appoint named expert witnesses - Whether learned judge had discretion to make order for the appointment of expert witness in the absence of a live application by the parties – Whether decision to make order for the appointment of expert witness was wrong for failure to consider factual and legal issues to be determined – Whether learned judge had discretion to order amendment and filing of supplemental witness statement – Costs

Mr. John Oliver Dyrud (“Mr. Dyrud”) and Ms. Palmavon Jasamin Webster (“Ms. Webster”) are 50/50 shareholders of the second respondent, First Anguilla Trust Company Limited (“FATCL”), a licensed trust and company management entity incorporated under the laws of Anguilla. Mr. Dyrud was at all material times the managing director of FATCL and Ms. Webster, a non-executive director. In November 2018, Ms. Webster brought a claim against Mr. Dyrud seeking certain relief under section 268 of the Companies Act of Anguilla (“the Companies Act”) on the basis that the affairs of FATCL have been, are being, or are likely to be conducted in a manner oppressive or unfairly discriminatory or unfairly prejudicial to her in her capacity as a member of FATCL. She also claimed that the business and affairs of FATCL were conducted as a quasi-partnership from the inception of the company until 31st December 2006 when the quasi-partnership ended. In her amended claim form, Ms. Webster sought orders including that her shareholding in FATCL be bought-out by Mr. Dyrud or/and FATCL, the price of such buy-out to be determined by a professional valuer as at certain alternative dates, such valuer to be agreed by the parties by a certain date, failing which, the court shall direct the appointment of a valuer from a short list to be provided by the parties, directions for the terms and criteria to be used for the valuation including the costs of the valuation, and interest on the price of the share buy-out (“the section 268 Claim”).

At the first case management conference in December 2020, the parties were ordered to file and exchange witness statements on or before 26th February 2021, which witness statements shall stand as examination-in-chief. The parties were also granted liberty to apply for further directions and orders, such applications to be made on or before 19th March 2021 (“the December 2020 CMC Order”). No sanction was imposed by this order for failure to comply. A further case management conference was fixed for 25th March 2021 and the trial date, to be determined by the court in 2021.

Pursuant to the December 2020 CMC Order, Ms. Webster filed the witness statement of Mr. Christopher Horne ("Mr. Horne") on 26th February 2021 which included matters of expert opinion on such matters as the financial statements of FATCL and his purported valuation of the shares in FATCL ("the Horne Witness Statement"). No permission had been sought or granted for Mr. Horne to be appointed as an expert witness to assist the court with expert opinion on any issue in the proceedings.

On 15th June 2021, almost three months beyond the time frame stipulated by the December 2020 CMC Order, Ms. Webster filed an application in which she sought, pursuant to rules 26.1(2)(k) and (w) and 32.6 of the Civil Procedure Rules 2000 ("CPR") an extension of time to 15th June 2021 to file an application for the appointment of experts; orders deeming Mr. Horne an expert in the field of accountancy, including financial reporting, auditing, forensic accounting, corporate finance, and accounting systems and processes and valuation of a company for the purpose of sale; an order permitting Ms. Webster to rely at trial on the Horne Witness Statement and/or an expert report that he may provide; and an order permitting Ms. Webster to call Mr. Johnny Law ("Mr. Law") at trial as an expert witness in the field of corporate secretarial governance and trust company management and compliance ("the Webster Application"). Ms. Webster urged that the trial court would benefit from the expert evidence of Mr. Horne in respect of the valuation of the shares in FACTL and that he had the expertise required to undertake the analysis of the audited accounts of FACTL and to provide an opinion as to the interpretation of the said accounts and the conclusions that may be drawn therefrom. In respect of Mr. Law, she averred that he had extensive experience in corporate governance and, as such, he was qualified to assist the court in understanding all the corporate governance issues both from a regulatory and practical point of view. She also contended that the court's determination of the issues of oppression, unfair prejudice and unfair discrimination will be assisted by the evidence of the experts concerning the manner in which FACTL's governance, administration and financial affairs were conducted by Mr. Dyrud and its impact, if any, on the value of the company.

On 11th October 2021, the learned judge delivered his decision on the Webster Application ("the Judgment"). The learned judge summarised at paragraph 4 of the Judgment, the seven issues which arose for his consideration. After analyzing the facts and submissions, the learned judge found that Mr. Horne lacked the impartiality and independence necessary of an expert witness as his interests went beyond mere familiarity with the litigation and the parties. He accordingly found that Mr. Horne ought not to be permitted to give expert evidence at the trial. The learned judge also found that the Horne Witness Statement did not conform with CPR 32.14 and that this failure to comply with the rule meant that it could not stand as an expert report. As it relates to the areas in which Ms. Webster sought to have Mr. Law give evidence, the learned judge was of the view that those areas brought into play the provisions of section 97 of the Companies Act dealing with the duty of care to be exercised by directors of a company, and are matters best left to be determined by the court as matters of fact and law.

He held that the issues identified in the section 268 Claim involved questions of fact and law which the court was well placed to determine having regard to the Companies Act, the Company's By-Laws, the Resolutions passed by FATCL, and other documentary and oral evidence. The learned judge was of the view that the only issues which require the court to

receive assistance by way of expert evidence was in respect of which of the remedies provided for by section 268(2) of the Companies Act is better suited to meet the exigencies of the relationship of the parties within the corporate context, and if the remedy contemplated by section 268(2)(a) is desirable in the circumstances, the methodology to be used in determining the value of Ms. Webster's shareholdings in FATCL and the time at which the valuation is to be determined. However, the learned judge ultimately only ordered expert evidence in the area of the valuation of Ms. Webster's shares in FATCL and the time at which such valuation is properly to be made.

The learned judge dismissed the application for an extension of time to apply to the court for the appointment of the named experts and for permission to rely on their respective witness statements and or expert reports (the Webster Application) at paragraph 105(1) of his judgment. The learned judge then, in reliance of his purported discretion under CPR 32.9, ordered at paragraphs 105(2) to (6) that the parties agree on the appointment of one expert in relation to the valuation of the shares in FATCL and made other consequential directions and orders pertaining to the obtaining and deployment at trial of such expert evidence, and awarded costs of the Webster Application to Mr. Dyrud at paragraph 105 (7).

Upon the oral application of Ms. Webster, the learned judge: (1) ordered that the Horne Witness Statement I be redacted so as to exclude all matters and expressions of expert opinion contained therein; (2) granted leave to Ms. Webster to file and serve a supplemental witness statement of Mr. Horne within 10 days; (3) granted leave to Mr. Dyrud to file a supplemental witness statement within 7 days of the date of service by Ms. Webster of the supplemental witness statement of Mr. Horne; (4) ordered that any objections to a supplemental witness statement filed by the parties be taken at the trial; (5) fixed new trial dates for the 6th to 8th December 2021; and (6) ordered trial bundles to be filed in accordance with CPR 39.1 ("the Order").

Dissatisfied with the Judgment and the Order, Mr. Dyrud appealed against paragraphs 105(2) to (6) of the Judgment and paragraphs 1 to 4 of the Order on the following grounds: (1.) that the judge had no discretion under CPR 32.9 (having dismissed the Webster Application) to, of his own initiative, direct that expert evidence is to be given by one expert witness; (2.) that the decision was wrong in law because the exercise of his discretion failed to take into account that several important factual and legal issues fell to be determined at trial, including whether Mr. Dyrud's conduct caused the value of FATCL's shares to fall, the valuation of those shares, the valuation methodology to be applied, and whether FATCL is a quasi-partnership; (3.) that in making the orders complained of, the learned judge failed to exercise his discretion properly or at all; (4.) the decision to give Ms. Webster permission to amend the Horne Witness Statement involved a serious procedural irregularity which rendered the decision unjust as the judge had no discretion under the CPR; (5.) if the judge had such a discretion, he ought to have exercised it so as to order that any amendments to the Horne Witness Statement are to be in accordance with CPR 29.9. Mr. Dyrud also seeks costs in the appeal ("the Dyrud Appeal").

Dissatisfied with the Judgment, Ms. Webster appealed against paragraphs 105(1) and (7) seeking orders that they be set aside. She seeks an order appointing Mr. Law as an expert and to provide an expert report in the areas of corporate secretarial governance and trust

company management and compliance. Ms. Webster's grounds of appeal are as follows: (a.) the learned judge erred in concluding that the court would not be assisted by expert evidence in the field of accountancy as an expert analysis of the financial statements of FATCL is necessary to arm the judge with material to determine the factual and legal issue of whether Mr. Dyrud in managing the affairs of FATCL has acted in a manner oppressive, unfairly prejudicial or unfairly disregards the interests of Ms. Webster as a shareholder; (b.) the learned judge appears to have only addressed the need for expert evidence on corporate governance issues and failed to consider that the court will be greatly assisted by the identification of industry practice in the application of the regulatory requirements governing financial services providers such as FATCL, what degree of seriousness attend the various breaches and the way in which the Financial Services Commission addresses licensees; (c.) that the learned judge, having acknowledged the benefit of expert evidence as to the standards in a profession in order for a court to be able to determine whether the professional conduct is a departure from that established by institutionalized professional bodies, wrongly declined to get an expert opinion as to what are the accepted standards for company service providers; (d.) that the learned judge erred by focusing on whether the Horne Witness Statement met the requirements of CPR 32 and whether its contents would assist him, when the Webster Application sought an order deeming Mr. Horne an expert and that he be permitted to file an expert report while allowing the opinions expressed in his witness statement to stand and that the judge failed to appreciate that the said witness statement was never filed as an expert report; (e.) the learned judge erred in refusing the application on the basis that it was too late and therefore would cause the trial date to be lost, when the Webster Application was heard in good enough time for the October trial dates to have been kept; (f.) having found that Mr. Horne was not an independent impartial witness to provide expert evidence, the learned judge could have directed that another expert (Mr. Law) be appointed to provide the expert evidence with respect to which Ms. Webster had sought the appointment of Mr. Horne; (g.) that in refusing the Webster Application, the learned judge erred in the exercise of his discretion ("the Webster Appeal").

Held: allowing ground 1 of the Dyrud Appeal and refusing grounds 2, 3, 4 and 5; and dismissing the Webster Appeal except to the limited extent stated at paragraph 129 and summarized at paragraph 141 of this judgment.; and making the directions as to costs contained in paragraph 143 of this judgment, that:

1. An appellate court must exercise restraint in appeals which challenge the exercise of judicial discretion by a lower court. Thus, for an appeal against judicial discretion to succeed, there must be some error of principle, whether of commission or omission, in the judge's identification, consideration or evaluation of the relevant factors or some error of law, which when taken, singularly or collectively, in the assessment of the appellate court, so undermines the proper exercise of judicial discretion as to transcend the generous ambit within which reasonable judicial disagreement is possible so as to be adjudged to be clearly or blatantly wrong. In respect of appeals against case management orders, the level of appellate restraint is even greater and an appellate court will be very slow to overturn on appeal, orders made or directions given by a first instance judge for the proper and efficient management of the case or proceedings.

Rule 1.1 of the **Civil Procedure Rules 2000** applied; **Attorney General of Montserrat et al v Geraldine Cabey** MNIHCVAP2008/008 (delivered 12th January 2009, unreported) applied; **Michel Dufour v Helenair Corporation Ltd and others** (1996) 52 WIR 188 applied; **Tawney Assets Ltd v East Pine Management Ltd et al** BVIHCVAP2012/007 (delivered 17th September 2012, unreported) applied.

2. While the overriding objective is to be deployed and given effect to when seeking to interpret a rule or exercise a discretion, it cannot be relied upon to deviate from the requirements of specific provisions of the CPR. CPR 32.2 sets out the overarching duty and general parameters within which a court may, in its discretion, permit expert evidence to be deployed in civil proceedings by restricting expert evidence to that which is 'reasonably required to resolve the proceedings justly'. CPR 32 does not empower a judge or the court to appoint one or more expert witnesses of its own initiative or in the absence of an application by one or more of the parties to do so. CPR 32.9 is unambiguous in its terms. It empowers the court or case management judge, when faced with two or more parties wishing to submit expert evidence on a particular issue, to exercise its undoubted jurisdiction to control, restrict and to approve of the type and scope of the expert evidence necessary or reasonably required to assist the court in its determination of that issue, and to direct that expert evidence be given by only one expert. It does not empower a judge or the court to make such an order absent an application by two or more of the parties referred to as "the instructing parties". In the instant matter, only one party (Ms. Webster) sought to appoint an expert witness, which application was dependent on the court granting an extension of time to make the application for the appointment of experts. The judge having dismissed the Webster Application in its entirety, there was no live application before the learned judge to appoint experts when he made the order for the appointment of a single expert witness in purported exercise of his powers under CPR 32.9. Moreover, the learned judge did not do so at a case management conference nor did he make an order dispensing with a case management conference in exercise of his powers under CPR 27.6. The learned judge had no power or discretion under CPR 32.9 to appoint an expert of his own initiative and could not do so without first following the procedure under CPR 26.2 (unless he received the consent of the parties), to which rule he, in any event, did not allude to and failed to inform himself of. These errors are such as to render this decision and the said orders and directions seriously flawed, such as to be clearly or blatantly wrong, and therefore liable to be set aside. Accordingly, the orders made, and the directions given by the learned judge at sub-paragraphs (2) to (6) of paragraph 105 of the Judgment are set aside.

Part 32 of the **Civil Procedure Rules 2000** applied; **Part 26** of the **Civil Procedure Rules 2000** considered; **Rule 27.6** of the **Civil Procedure Rules 2000** considered; **Ormiston Ken Boyea et al v East Caribbean Flour Mills Limited** High Court Civil Appeal No. 3 of 2004 (delivered 16th September 2002, unreported) applied; **UK Practice Direction on Experts (PD35)** distinguished;

Civil Procedure The White Book Service Sweet & Maxwell, Vol. 1. considered.

3. The finding of the Court that the orders made at sub paragraphs (2) to (6) of paragraph 105 are set aside is entirely dispositive of the Dyrud Appeal challenging the learned judge's orders providing for the appointment of one professional valuer of the shares of FATCL. However, if the said decision is incorrect and the judge did have the power and discretion under CPR 32.9 to make the said orders, this Court ought to go on to consider whether the learned judge exercised his discretion properly. There is no principle of law which prohibits a court from making case management orders in a section 268 Claim for the valuation of property which is in dispute, including a valuation of shares in a company which is or may be a quasi-partnership. Furthermore, the presence of fact sensitive issues in dispute does not restrict the power of the judge to make case management orders or to give directions for the appointment of an expert witness and for a particular issue or issues to be addressed by that expert. It is within the judge's case management province to manage cases justly to decide whether, in a section 268 Claim, the issues as to liability and the appropriate relief should liability be established, be tried together in one trial. Accordingly, if the learned judge had a discretion to appoint an expert witness after dismissing the Webster Application and, to make the order for the appointment of one expert to value the shares in FATCL, there was nothing wrong in principle or in logic with him making the order at that stage of the proceedings and before the unfair prejudice claim was successful.

Section 268 of the **Companies Act of Anguilla** considered; **Rule 32.9** of the **Civil Procedure Rules 2000** applied; **Rules 26.2, 32.8 and 32.11(1) and (2)** of the **Civil Procedure Rules 2000** considered; **Lynwood Bell v Malcolm Hope-Ross and others** AXAHCV No. 13 of 2004 considered; **JF Ming Inc and another v Ming Siu Hung** BVIHCMAP2016/0039 (delivered 30th June 2017, unreported) considered; **Re Dinglis Properties Ltd** [2020] BCLC 107 considered; **Ebrahimi v Westbourne Galleries Ltd and others** [1973] AC 360 considered.

4. CPR 26.1(2)(w) allows the court or case management judge to take any step, or give directions, or make any other order for the purpose of managing the case and furthering the overriding objective. CPR 29 contains the regime concerning the giving or leading of evidence before a court by witness statements, witness summaries and orally. CPR 29 is also intended to further the overriding objective of the court to deal with cases justly and to ensure, so far as practicable, that the parties are on equal footing. In the instant matter, two matters arise from the language and application of the provisions of CPR 29. Firstly, where a party to proceedings does not serve a witness statement or witness summary within the time specified by the court, that party cannot call that witness to give oral evidence at the trial unless the defaulting party has applied for and been granted relief from sanctions under CPR 26.8 or the court

permits. Secondly, where a party serves a witness statement or witness summary within the prescribed time or any extended time granted by the court, that witness may give oral evidence at the trial and may be permitted by the court to amplify his or her evidence on certain issues of fact, including giving evidence in relation to new matters arising since their witness statement had been served on the other parties (CPR 29.9).

5. While CPR 29 does not expressly speak to or permit a party to file and serve a 'supplemental' witness statement or witness summary, the filing of more than one witness statement or witness summary by the same person is not expressly excluded or prohibited, although such a practice should not be encouraged as a matter of prudent and cost saving case management. In this matter, in light of the learned judge's conclusion that the Horne Witness Statement contained matters of expert opinion when no permission was sought or granted to have Mr. Horne deemed an expert witness in the proceedings, and his finding that Mr. Horne was not a sufficiently independent and impartial witness to be appointed to give expert evidence, the offending parts of his witness statement clearly could not stand. Accordingly, there is no discernible error of principle or procedure in respect of paragraph 1 of the Order of 11th October 2021 which required those offending parts to be redacted so as to exclude matters and expressions of expert opinion therein. However, although paragraph 2 of the learned judge's said Order granting permission to Ms. Webster to file and serve the supplemental witness statement of Mr. Horne was made without formerly extending the time for making applications and was, accordingly, irregular in light of the timelines stipulated by the December 2020 CMC Order, this was not such an error in principle that would propel an appellate court to set aside that limb of the Order made on 11th October 2021. Moreover, any perceived prejudice as a result of the exercise of the trial judge's case management powers to order the filing of a supplemental witness statement was significantly minimized by the other orders made at paragraphs 3 and 4 of the Order. In the premises, there is no basis to set aside paragraphs (1) to (6) of the said Order. **Rule 26.1(2)(w) of the Civil Procedure Rules 2000 applied; Part 29 of the Civil Procedure Rules 2000 applied.**
6. In civil litigation, expert evidence must be restricted to what is reasonably required to resolve the proceedings justly and the court is guided by four considerations in determining its admissibility. These are: i.) whether the proposed evidence will reasonably assist the court in its task of deciding the proceedings justly; ii) whether the witness has the necessary or appropriate knowledge and experience to provide the required expert evidence; iii.) whether the witness is sufficiently impartial and independent of the parties so as to render their impartial opinion and independent product; iv.) whether there is a reliable body of knowledge or experience to underpin the expert's evidence. Ultimately, when a court or judge is determining whether to admit expert evidence, regard must be had to the overriding objective of the CPR to deal with cases justly, which includes saving expense. A court will usually require the assistance of expert evidence where the valuation of property, including the

valuation of shares in a company, is a matter in issue or likely to be an issue. There is no principle that expert evidence is required in every case before a finding of a departure from acceptable professional standards can be made. Where liability rests, in whole or in part, on proof of pleaded allegations of breaches of professional or accepted standards, there will invariably be a necessity for the court to receive expert evidence as to what those standards are, whether the conduct complained of falls below or falls short of these standards and, if so, to what degree and to what level of seriousness.

7. In this case, the learned judge was of the clear view at paragraph 43 of the Judgment that the court could benefit from and would require the assistance of expert evidence in relation to which of the discretionary remedies provided for in section 268(2) of the Companies Act is better suited to meet the relationship of the parties within the corporate context of FATCL; if a buy-out is the desirable remedy, the methodology to be used to value the shares in FATCL, and the date and time at which such valuation ought to be determined. However, the judge ultimately confined the terms of his order to the issues of the valuation of the shares and the time at which such valuation is properly to be made. This order did not fully accord with his findings and conclusions at paragraph 43 of his Judgment. His failure to include in his order at paragraph 105(2) the issue of the appropriateness of the remedies or reliefs available to the court under section 268 of the Companies Act, was therefore incorrect. This conclusion, however, does not lead to this Court allowing Ms. Webster's appeal and setting aside the judge's order dismissing the Webster Application and/or her application to extend time to apply to adduce and rely on expert evidence.

Barings plc and another v Coppers & Lybrand and others [1996] EWCA Civ 1021 considered; **Barings Futures (Singapore) Pte Ltd (in liquidation) v Mattar and others** [2003] EWHC 2371 (Ch) considered; **Liverpool Roman Catholic Archdiocesan Trustees Incorporated v Goldberg** (No. 3) [2001] 1 WLR 2337 considered; **Kennedy v Cordia (Services) LLP** [2016] 1 WLR 597 applied; **Pora v The Queen** [2015] UKPC 9 at 24 considered; **Young v her Majesty's Advocate 2014 SLT 21** considered; **R v Gilfoyle** [2001] 2 Cr App R 5 considered; **Davie v Magistrates of Edinburgh** (1953) SC 34 considered.

8. The Webster Application sought to appoint Mr. Horne as an expert in the stated fields. The learned judge found such evidence inadmissible due to the lack of impartiality and lack of independence of Mr. Horne to be appointed an expert witness. The Horne Witness Statement could not, in the face of that finding which was not appealed, be deemed expert evidence as to any of the areas for which the appointment of Mr. Horne was sought in the Webster Application, including matters relative to the appropriate remedies or the methodology for the assessing and valuation of the shares in FATCL, or on any other area or field of expertise pertaining to the alleged liability of Mr. Dyrud in the section 268 Claim.

9. In relation to the limb of the Webster Application which sought the appointment of Mr. Law as an expert witness, it was not alleged or pleaded by Ms. Webster that Mr. Dyrud, by his alleged conduct or failures, breached any established standards or practice applicable to licensed providers of corporate secretarial services and financial services in Anguilla. In fact, there was no pleading or affidavit evidence of any particular standard or practice, other than those set out in the applicable statutory and regulatory laws of Anguilla. In the court's opinion, the assessment of the alleged corporate governance failures and mismanagement allegations against Mr. Dyrud and whether his conduct fell below general corporate governance standards and practice and amounts to oppression or unfairly prejudicial conduct or breach of his fiduciary duties as a director of FATCL contrary to sections 97 and 268 of the Companies Act, are matters of fact and law which the court is well capable of determining. It is for the trial court to consider and find the facts from the evidence given by the parties, make the determination whether there were any breaches of fiduciary or other duties, and then determine the appropriateness of any relief. The learned judge did not err or commit any error of principle in the exercise of his discretion in respect of the issue of liability of Mr. Dyrud. The learned judge did not commit any errors of principle in the exercise of his case management powers such that would take it outside of the generous ambit within which reasonable judicial disagreement is possible and render his decision blatantly wrong.

Avondale Exhibitions Ltd v Arthur J Gallagher Insurance Brokers Ltd [2018] EWHC 1311 applied; **Midland Bank v Hett, Stubbs & Kemp** [1979] 1 Ch 384 applied; **Re Marco (Ipswich) Limited** [1994] 2 BCLC 354 applied; **Caribbean Steel Company Limited v Price Waterhouse (a Firm)** [2013] UKPC 18 applied.

10. CPR 32.14 lists the matters which must be included or addressed in an expert report. In this case, the Webster Application sought to treat the Horne Witness Statement, which did not comply with the applicable rules for expert reports contained in CPR 32, as an expert report. In short, the learned judge was correct to not treat it as an expert report, but purely as a witness statement, as it failed to comply with the mandatory requirements of CPR 32. Further, it was not open to the learned judge to appoint Mr. Law as an alternative expert to Mr. Horne since it was not a ground in the Webster Application that Mr. Law be treated as an expert in the fields in which Ms. Webster sought to have Mr. Horne appointed as an expert. Likewise, no such relief was sought in Ms. Webster's notice of appeal. In addition, given that the finding of the learned judge that expert evidence was not needed in the areas of expertise for which the Webster Application sought to have Mr. Law appointed has been upheld by this Court, there is no basis for setting aside the order of the learned judge dismissing the Webster Application and for this Court to make an order appointing Mr. Law as an expert in areas in which Ms. Webster originally sought to have Mr. Horne appointed.

Rule 32.14 of the **Civil Procedure Rules 2000** considered.

11. The Webster Application was filed some 189 plus days after the December 2020 CMC and almost three months after the date stipulated by the December 2020 CMC Order for applications for further directions. In these proceedings, it ought to have been clear to the parties that the trial court would need to have the benefit of expert evidence on certain issues raised in the claim. Despite this, no previous application was made to appoint and to rely on expert witnesses. No such application was made at the December 2020 CMC or at the case management conference on 19th March 2021, at which a pre-trial review was fixed for 7th June 2021. It was only at the pre-trial review that Ms. Webster indicated, for the first time, an intention to apply for permission to adduce expert evidence, and she was given by the court until 15th June 2021 to file the said application. The learned judge after hearing the application reserved his decision. It is from the date of the delivery of the Judgment that the delay in making the application and, if granted, the consequential effect on the trial dates, is to be calculated or ascertained. In the circumstances, the learned judge was correct to find that the grant of permission to rely on expert evidence at that stage of the proceedings, would affect the already set trial dates, and that the making of the application at a late stage may have the effect of defeating the purpose and intent of CPR 32 and the overriding objective of the rules. The delay in the trial dates was directly attributable to the late application.

JUDGMENT

- [1] **FARARA JA [AG.]:** These two interlocutory appeals, filed separately by Mr. John Oliver Dyrud (“Mr. Dyrud”) and Ms. Palmavon Jasamin Webster (“Ms. Webster”) on 22nd December 2021, challenge different decisions and orders made by Innocent J (“the learned judge” or “the judge”) in his judgment dated 11th October 2021 (“the Judgment”) in Claim No. AXAHCV2018/0044 following an *inter partes* hearing on 13th July 2021, and different limbs of the Order of the learned judge, also dated 11th October 2021 (“the Order”), made consequent upon an oral application by Ms. Webster. The appeals were, for convenience and with the agreement of counsel for the parties, heard together.
- [2] The Judgment is the written decision of the learned judge on the application by Ms. Webster (the claimant in the court below) filed 15th June 2021 (“the Webster

Application”). By the Webster Application she sought, pursuant to rules 26.1(2)(k) and (w) and 32.6 of the **Civil Procedure Rules 2000** (“CPR”), an extension of time to 15th June 2021 to file the said application for the appointment of experts; orders deeming Mr. Christopher Horne (“Mr. Horne”) an expert in the field of accountancy, including financial reporting, auditing, forensic accounting, corporate finance and accounting systems, and processes and valuation of a company for the purpose of sale; an order permitting Ms. Webster to rely at trial on the witness statement of Mr. Horne filed 26th January 2021 and/or an expert report that he may provide; and an order permitting Ms. Webster to call (at trial) Mr. Johnny Law (“Mr. Law”) as an expert witness in the field of corporate secretarial governance and trust company management and compliance.

- [3] The orders made by the learned judge consequent upon his disposition of the Webster Application are set out at sub-paragraphs (1) to (7) of paragraph [105] of the Judgment. By paragraph 105(1), the learned judge dismissed Ms. Webster’s application for an extension of time to apply to the court for the appointment of the named persons as expert witnesses and for permission to rely on their respective witness statements and/or reports. Having dismissed the said application, the learned judge went on to order, at sub-paragraphs (2) to (7) of paragraph [105] : (2) that the parties shall agree on the appointment of one expert in relation to the valuation of the shares in the Second Respondent, First Anguilla Trust Company Limited (“FATCL”) and the time at which such valuation is properly to be made within 14 days of the said order; (3) that in the absence of agreement by the parties on who should be the expert witness, the court shall select the expert from a list prepared or identified by the parties within 14 days of the said order; (4) the expert so appointed shall comply fully with the provisions of CPR 32; (5) that each party may give directions to the expert witness with a copy thereof to the other party; (6) that the parties shall be jointly and severally liable for the payment of the fees and expenses of the expert witness; and (7) costs of the Webster Application is awarded to Mr. Dyrud to be assessed if not agreed within 21 days of the date of the said order.

- [4] By the Order, the learned judge, upon the oral application of Ms. Webster, (1) ordered that the witness statement of Mr. Horne filed 26th February 2021 shall be redacted “so as to exclude all matters and expressions of expert opinion contained therein”; (2) granted leave to Ms. Webster to file and serve a supplemental witness statement of Mr. Horne within 10 days; (3) granted leave to Mr. Dyrud to file a supplemental witness statement within 7 days of the date of service by Ms. Webster of the supplemental witness statement of Mr. Horne; (4) ordered that any objections to a supplemental witness statement filed by the parties be taken at the trial; (5) fixed new trial dates for 6th to 8th December 2021; and (6) ordered that trial bundles are to be filed in accordance with CPR 39.1. By a previous case management order dated 8th December 2020, the trial date had been fixed initially for 4th to 7th October 2021.
- [5] In Appeal No.10 of 2021, Mr. Dyrud appeals against the orders made by the learned judge at sub-paragraphs (2) to (6) of paragraph [105] of the Judgment and the orders made by the learned judge at paragraphs 1 to 4 of the Order.
- [6] In Appeal No. 11 of 2021, Ms. Webster appeals against sub-paragraphs (1) and (7) of paragraph [105] of the Judgment.

Background in Summary

- [7] Mr. Dyrud and Ms. Webster are 50/50 shareholders of the second respondent, FATCL, a licensed trust and company management entity under the laws of Anguilla. Both are (and were at the material times) directors of FATCL. Mr. Dyrud was the managing director of FATCL and Ms. Webster a non-executive director. Disputes arose between them concerning various matters and entities, including FATCL. On 31st November 2018, Ms. Webster brought a claim in the High Court against Mr. Dyrud seeking certain relief under section 268 of the Companies Act of Anguilla (“the Companies Act”)¹ on the basis that the affairs of FATCL have been, are being, or are likely to be conducted in a manner oppressive or unfairly

¹ Chapter C65, Revised Statutes of Anguilla.

discriminatory or unfairly prejudicial to her in her capacity as a member of FATCL. In her claim, Ms. Webster pleads that the business and affairs of FATCL had been conducted as a quasi-partnership between herself and Mr. Dyrud from the inception of the company until around 31st December 2006 when the quasi-partnership ended.

- [8] By Amended Claim Form filed 31st July 2020, Ms. Webster seeks orders that: (i) her shareholding in FATCL be bought-out by Mr. Dyrud or/and FATCL; (ii) the price for such buy-out shall be determined by a professional valuer as at 31st December 2006, alternatively, as at 30th August 2013, alternatively as at a date to be fixed by the court; (iii) the parties shall endeavour to agree upon the identity of the professional valuer by a date certain, failing which the court shall direct which valuer shall be appointed from a shortlist to be provided by both Ms. Webster and Mr. Dyrud; (iv) directions for the terms and criteria to be used for the valuation, including the cost of the valuation; (v) interest at the judgment rate on the price of the buy-out from the date of the judgment until payment to Ms. Webster; (vi) further or other relief; and (vii) costs (“the section 268 Claim”).
- [9] The first case management conference took place on 8th December 2020 and certain orders were made by Master Sandcroft (“the December 2020 CMC Order”). Master Sandcroft ordered the parties, *inter alia*, to give standard disclosure on or before 22nd January 2021, and to file and exchange witness statements on or before 26th February 2021, which witness statements shall stand as examination-in-chief. The parties were also granted liberty to apply for further directions and orders, such applications to be made on or before 19th March 2021. However, no sanction was imposed by the order for a failure by a party to file any such application by the said date. By the said order, a further case management conference was fixed for 25th March 2021, and the trial, estimated for 3 days duration, was to be fixed for a date to be determined by the court in 2021.
- [10] Pursuant to the December 2020 CMC Order, the parties filed their respective witness statements. On Ms. Webster’s side, these included the witness statement

of Mr. Horne filed 26th February 2021 (“the Horne Witness Statement”). It is not in dispute that in the Horne Witness Statement, he addressed matters of expert opinion. These matters included his opinion on the financial statements of FATCL and his purported valuation of the shares in FATCL. No permission had been applied for by Ms. Webster, and none had been granted, for Mr. Horne to be appointed as an expert witness to assist the court with expert opinion on any issue in the proceedings, including the appropriate methodology for the valuation of the shares in FATCL. Accordingly, the filing by Ms. Webster of the Horne Witness Statement was, indisputably, in breach of rule 32.6(1) of the CPR which provides that a party shall not call or put before the court the report of an expert witness without first obtaining the court’s permission to do so. In fact, prior to the Webster Application, neither party had applied for permission to adduce expert evidence at the trial in this matter. By CPR 32.6(2) ‘the general rule’ is that a party seeking to adduce expert evidence must apply for permission to do so at ‘a case management conference’.

- [11] On 21st May 2021, the parties each filed their pre-trial memorandum. As matters stood when the Webster Application was filed on 15th June 2021, a trial date had, on 7th June 2021, been fixed for 4th to 7th October 2021.
- [12] The failure by either party (up to the stage of the Webster Application) to apply to deploy expert evidence in these proceedings, must be considered in the context of the section 268 Claim brought by Ms. Webster against Mr. Dyrud., whereby Ms. Webster has sought orders of the court that her shareholding in FATCL be bought out by Mr. Dyrud, an order for the buy-out price to be determined by a professional valuer, and “that the parties shall endeavour to agree upon the identity of the professional valuer by a date certain, failing which the Court shall direct which valuer shall be appointed from a shortlist to be provided by both [Ms. Webster] and [Mr Dyrud]”. Further, there has been no application and no order has been made for a split trial of the issues of liability and appropriate reliefs. The court’s jurisdiction to grant relief to a shareholder pursuant to section 268 is a wide one. It includes, but

is not limited to, an order that one party (shareholder) buy-out at fair value the shares of the other party (shareholder).

The Webster Application

- [13] Pursuant to the December 2020 CMC Order the parties were, *inter alia*, granted liberty to apply for further directions and orders, and to do so by 19th March 2021. The Webster Application was filed almost 3 months beyond the timeframe stipulated in the said case management order. As stated, CPR 32.6(2) stipulates that, as a general rule, an application for permission to rely on expert evidence at the trial should be made at a case management conference. The first case management conference on 8th December 2020 was some 189 days prior to the filing of the Webster Application. However, in keeping with the 'general rule', permission to rely on expert evidence may be sought at any case management conference. Moreover, it is well-established that CPR 32.6(2) stipulates the 'general', and not a mandatory or absolute rule. Accordingly, the court retains the power and discretion to grant permission to a party, after the case management stage of the proceedings, to adduce expert evidence. This power is to be exercised in accordance with the court's overriding objective to manage cases justly and proportionately between the parties, and upon cogent and persuasive reasons being shown.²
- [14] It is also not in dispute that the court has the power to extend time to comply with any rule, order or direction of the court pursuant to its case management powers under rule 26.1(2)(k) and to do so upon well-established principles which are set-out in a consistent line of decisions of this Court, including **Hyacinth v Joseph** and **Lindsay F.P. Grant and another v Tanzania Tobin Tanzil**.³ It is likewise not in dispute that as part of its suite of case management powers, the court may take any step, give any direction or make any other order 'for the purpose of managing the case and furthering the overriding objective.'⁴ Furthermore, pursuant to CPR 26.9,

² Khouly Construction & Engineering Limited v Edmond Mansoor ANUHCVP2020/0023 (delivered 15th April 2021, unreported).

³ SKBHCVAP2020/0004 (delivered 6th July 2020, unreported) at para 17.

⁴ CPR 26.1(2)(w).

any error of procedure or any failure to comply with a rule, practice direction or court order or direction does not invalidate any step in the proceedings unless the court so orders, and where such breach or failure to comply does not carry with it a stipulated sanction, the court retains the power to put matters right. The court may exercise such powers and make such orders or give directions to put matters right either upon or without an application by a party.

[15] The Webster Application was made pursuant to the court's case management powers under CPR 26.1(2)(k) and (w) and CPR 32. It was supported by the affidavit of Ms. Webster. Exhibited to her said affidavit was the curriculum vitae of Mr. Horne and Mr. Law. In her affidavit in support, Ms. Webster sought to explain her lateness in filing the application to deem Mr. Horne an expert witness on matters of financial reporting and forensic accounting and valuation of company shares, and to have Mr. Law appointed an expert on matters corporate secretarial governance and trust company management and compliance. She averred that new counsel retained by her in May 2021, upon review of the case, "advised that expert evidence is required to advance her claim".⁵ She contended that the explanation given was a good one, the failure to do so was not intentional, and the delay not inordinate.⁶ She further asserted that any extension to file the application will not cause any prejudice to Mr. Dyrud, the granting of the order would serve the overriding objective to manage cases justly, it will not have any impact on the trial date already fixed by the court for the determination of the matter, and that she has been generally compliant with the prior orders of the court.⁷

[16] Most notably, Ms. Webster contended that the court would benefit from the expert evidence of Mr. Horne as to the available methodologies for valuation of the shares in FATCL, and the most appropriate methodology to be used for such valuation given the nature of the company and the context of the valuation required to be

⁵ See para. 2 of the affidavit in support of application.

⁶ See para. 14 of the affidavit in support of application.

⁷ See paras. 3 and 14 of the affidavit in support of application.

done.⁸ She also averred that Mr. Horne has the expertise required to undertake an analysis of the audited accounts of FATCL and to provide an opinion as to the interpretation of the said accounts and the conclusions that may be drawn therefrom.⁹ As to the expertise of Mr. Law, Ms. Webster averred that he had extensive experience in corporate governance and, as such, he was eminently qualified to assist the court “in understanding all the corporate governance issues both from a regulatory and practical point of view.”¹⁰ Ms. Webster also contended that “the court’s determination of the issues of oppression, unfair prejudice and unfair discrimination will be assisted by the evidence of the experts concerning the manner in which [FATCL’s] governance, administration and financial affairs were conducted by [Mr. Dyrud] and its impact, if any, on the value of the company.”¹¹

- [17] On 22nd June 2021, Mr. Dyrud filed his affidavit in opposition to the Webster Application. He disputed Mr. Horne’s impartiality and independence to be permitted to give expert evidence in the case and, specifically, to provide expert evidence as to the valuation of the shares in FATCL. He also alleged that Mr. Horne’s prior relationship and connection with Ms. Webster would lead a reasonable person to apprehend that he was ‘predisposed to be unduly favourable to Ms. Webster’ – an allegation of apparent bias.¹² He also contended that permission cannot be given retroactively to deem the Horne Witness Statement an expert report. Mr. Dyrud contended further that Ms. Webster had not, in her application, provided any cogent and/or persuasive reasons for her non-compliance with CPR Part 32 or for the delay in making the application outside the timeframe permitted pursuant to the December 2020 CMC Order. He also contended that, given the time limit between the hearing of the application and the trial date, should the court grant Ms. Webster’s application to adduce expert evidence, this will not permit him to adduce evidence to counter such evidence and will cause a delay in the trial date. Pointedly, Mr. Dyrud

⁸ See paras. 7 & 17 of the affidavit in support of application.

⁹ See para. 7 of the affidavit in support of application.

¹⁰ See para. 19 of the affidavit in support of application.

¹¹ See para 20 of the affidavit in support of application.

¹² See paras. 12 onwards of the affidavit of John Dyrud in opposition to the application.

contended, that expert evidence was not required in the circumstances of this case to assist the court in its determination of the issues, as the court is already readily equipped to assess and reach a fully informed decision without the hearing of expert opinion.¹³

[18] In support of the allegation of lack of impartiality and independence, Mr. Dyrud exhibited certain correspondence from Mr. Horne addressed directly to him, but not disclosed to Ms. Webster. By letter dated 'November 2020', Mr. Horne suggested, as a means of resolving the dispute between Mr. Dyrud and Ms. Webster, that Mr. Dyrud sell his shares in WDM Limited, Sea Island Inc, FATCL and First Nevis Trust Company Limited, and all litigation be discontinued. He also enquired, should Mr. Dyrud be amenable to such a proposal, as to how much money would he wish to receive and whether he would be agreeable to 'being paid over a period of time'.¹⁴ By a further email sent 8th February 2021 to Mr. Dyrud,¹⁵ Mr. Horne offered to purchase FATCL from Mr. Dyrud, requested a copy of draft accounts of the company up to 31st December 2020, following which he 'will put forward detailed proposals to [Mr. Dyrud] on the basis that you close down Dyrud Law on 31 March 2021, and sell FATCL from that date...' Some elements of a possible proposal were also alluded to by Mr. Horne in the said correspondence to Mr. Dyrud, which ended with these words written in caps and in bold: **'THIS HAS NOT BEEN MENTIONED TO – YET ALONE DISCUSSED WITH – HARRY OR PAM.'**

[19] In response to Mr. Dyrud's said affidavit, Ms. Webster filed a second affidavit on 28th June 2021. In her second affidavit, Ms. Webster denied allegations made by Mr. Dyrud as to the apparent lack of impartiality or independence of Mr. Horne as an expert to carry out a valuation of the shares in FATCL. With regard to the correspondence sent by Mr. Horne to Mr. Dyrud referred to above, Ms. Webster

¹³ See paras. 10 onwards of the affidavit of John Dyrud in opposition to the application.

¹⁴ See Exh. "JOD-2".

¹⁵ See Exh. "JOD-3".

confirmed that she had not been aware of said correspondence and averred that Mr. Horne 'did try to negotiate a settlement between the parties.'¹⁶

The Judgment

[20] In the Judgment, the learned judge identified seven (7) issues which fell for determination on the Webster Application.¹⁷ These were:

- “(1) whether the intended expert evidence is admissible; and by extension,
- (2) whether the expert evidence is reasonably required to resolve the proceedings justly;
- (3) whether the claimant [Ms. Webster] has satisfied the requirements of CPR 32;
- (4) whether the intended expert can assist the court impartially on the matters relevant to his expertise and whether his duty is overridden by any obligation to the person by whom he is instructed or paid;
- (5) whether the intended expert evidence is an independent and impartial product of the expert uninfluenced by the vagaries of the litigation;
- (6) whether the intended expert's witness statement filed prior to the application for leave pursuant to CPR 32 can be deemed an expert report and can be received as such at the trial; and
- (7) whether, in all the circumstances of the case, the claimant [Ms. Webster] ought to be granted an extension of time to deploy expert evidence at the present state of the proceedings. “

[21] In relation to the fifth issue, the learned judge, in dismissing the Webster Application, found that Mr. Horne lacked the impartiality and independence necessary of an expert witness and, accordingly, he ought not to be permitted to give expert evidence at the trial of the claim in this matter. At paragraph [78], having analyzed the facts and submissions, including the correspondence passing between Mr. Horne and Mr. Dyrud in which Mr. Horne did express a desire to purchase the shares in FATCL, and having considered the relevant test and applicable principles concerning whether the nature and extent of a person's interest in or connection with the litigation and its outcome precludes him or her from giving expert evidence in the litigation, the learned judge concluded (on this issue) in these terms:

“[78] In the circumstances, this is not a case where Mr. Horne's mere connection to the litigation or the parties thereto would be insufficient to

¹⁶ See para. 10 of the second affidavit in support of application.

¹⁷ See para. [4] of the Judgment.

preclude him from testifying as an expert witness on a matter in issue in the proceedings. In the Court's view, Mr. Horne's interest goes beyond mere familiarity with the litigation and the parties thereto. Therefore, having considered and applied the test espoused in *Armchair Passenger Transport Limited*, the Court has concluded that Mr. Horne should not be permitted to give expert evidence."

[22] From this finding and ruling, there has been no appeal. Indeed, there is no proper or sound basis upon which to disturb the learned judge's conclusion as to the lack of impartiality and independence of Mr. Horne to be appointed by the court as an expert witness in this matter. The effect of this ruling, which stands, is two-fold. First, Mr. Horne is completely precluded from giving expert evidence in this matter. Second, his prior witness statement (the Horne Witness Statement), in which he admittedly made or purported to give expert evidence and opinion on certain accounting, financial and share valuation issues, could not stand as expert evidence on those issues or, in some way, as his expert report – his independent product 'uninfluenced as to form or content by the demands of the litigation', or as his independent and unbiased opinion, in conformity with the mandatory requirements of CPR 32.4.

[23] The learned judge, in considering the first and second issue (whether expert evidence is admissible as being reasonably required to assist the court in resolving the proceedings (the section 268 Claim) justly, opined that 'none of the issues [identified in Ms. Webster's pre-trial memorandum] save with the exception of perhaps the issue that touches and concerns the valuation of [Ms. Webster's] shareholdings in [FATCL] requires the Court [to] receive assistance by way of expert evidence.'¹⁸ In addressing the necessity for expert evidence as to the valuation of shares in a company, the learned judge opined:

'[23] The Court subscribes to the view that the valuation of the shares of a company is an exercise that requires professional skill and judgment. There may be, as readily apparent in the present case, more than one method of approaching such valuation.'

¹⁸ See para. [22] of the Judgment.

[24] The learned judge also was of the view that the issues listed in Ms. Webster's pretrial memorandum involved questions of fact and law which the Court was well placed to determine. He expressed:

'[24] The issues enumerated in [Ms. Webster's] pretrial memorandum involve questions of both fact and law which the Court is well placed to determine on its own having regard to the Companies Act, the Company's By-Laws, the Resolutions passed by [FATCL] and the other documentary and oral evidence to be lead at the trial. In addition, it appears that [Ms. Webster's] contentions on this point presupposes that the Court will inevitably make an order pursuant to section 268(2)(a) of the Companies Act. The Court is of the view that section 268(2) of the Companies Act confers a wide discretion on the Court with respect to the nature of the orders and relief that it may grant in a shareholder's remedy claim. It appears that [Mr. Dyrud's] pretrial memorandum is capable of leading the Court to the very same conclusion.'

[25] The learned judge specifically addressed Ms. Webster's contention that in determining the issues of oppression, unfair prejudice and unfair discrimination, the court would benefit from the assistance of the intended experts concerning 'the manner in which [FATCL's] governance, administration and financial affairs were conducted by [Mr. Dyrud] and its eventual impact, if any, on the value of [FATCL]', and the argument that 'the areas of accountancy and corporate secretarial administration and the management of financial services providers are fields of specialized knowledge and practice'. He posited that while these arguments might hold true as to matters of professional conduct and practice in relation to persons carrying on that kind of business, 'it does not necessarily mean that in resolving the issues in the present case the Court will in any way be assisted by expert evidence in these specific fields.' The judge regarded questions as to adherence to established or recognized practice in the areas of company governance, administration and financial affairs, as 'questions of fact the existence or nonexistence of which the Court is quite able to distill by reference to the particular statutory regime governing those areas of corporate practice.'¹⁹

¹⁹ See para. [26] of the Judgment.

[26] Moreover, the learned judge concluded that to hold otherwise would 'permit a usurpation of what is clearly the province of the Court', which is 'to determine whether, as a matter of law, [Mr. Dyrud] had embarked on a course of conduct which in the Court's opinion would entitle [Ms. Webster] to relief under section 268 of the Companies Act.' He did, however, recognize that 'where the issue to be resolved is in respect of [Mr. Dyrud's] departure from the professional standards particularly those set out by regulatory institutions and bodies, it may very well benefit the Court in having the views of a qualified and reputable independent expert who can provide an opinion as to whether there has indeed been a departure from recognizable professional standards.'²⁰

[27] Specifically with regard to the Horne Witness Statement, the learned judge concluded that it 'does not appear save and except for the purpose already described by the Court, that Mr. Horne's expert opinion is reasonably required to assist the Court. What Mr. Horne is not permitted to do (sic) is to render his own personal opinion on matters upon which the Court can arrive at its own conclusions that concern questions of fact and law.'²¹ The learned judge opined that the Horne Witness Statement does not conform or comport with the requirements of CPR 32.14 and, therefore, cannot stand as an expert report 'simply because it does not comply with the requirements of the rule.'²²

[28] As to the necessity for expert evidence on the issue of whether or not Mr. Dyrud had departed from the standard of conduct that was expected in the field of corporate management and in the management of FATCL's affairs generally, (the issues or areas on which Ms. Webster had sought to have Mr. Law appointed an expert), the learned judge, reviewed the principles and dicta as set out in a number of cases relied on by the parties; namely **Caribbean Steel Company Ltd v Price Waterhouse**;²³ **Avondale Exhibitions Ltd v Arthur J Gallagher Insurance**

²⁰ See para. [28] of the Judgment

²¹ See para. [29] of the judgment.

²² See paras.[49] to [52] of the Judgment.

²³ [2013] UKPC 18.

Brokers Ltd;²⁴ **Midland Bank Trust Co. Ltd v Hett, Stubbs & Kemp;**²⁵ and **Sansom v Metcalfe Hambleton and Co.**²⁶ He was of the opinion that the complaints by Ms. Webster in her pleaded case brings into play the provisions of section 97 of the Companies Act dealing with the duty of care to be exercised by directors of corporate entities. In his view, 'the matters to which sections 97 and 268 of the Companies Act relate are matters that are best left to be determined by the court as matters of fact and law.'

[29] Having acknowledged that the exercise of the court's discretion whether to impose liability under section 268 'is inextricably tied to the particular facts of each case' and must be assessed 'on a case-by-case basis', the learned judge opined:

'[42] In the circumstances, barring what the Court has said in relation to the valuation of [Ms. Webster's] shareholdings for the purpose of a possible remedy pursuant to section 268(2)(a) of the Companies Act, it cannot be anticipated what the Court is likely to apply [as] the remedy contemplated by that section to alleviate the oppressive, prejudicial and discriminatory conduct. The Court must first determine whether such conduct in fact exist and then determine which, if any, of the discretionary remedies it would apply given the circumstances peculiar to the case. Therefore, the Court is not of the view that it will in any way benefit from the assistance of expert evidence in determining [whether] the conduct alleged is sufficient to establish liability under section 268 of the Companies Act.'

[30] Accordingly, on the extent of expert evidence which would be reasonably required to assist the court in determining the section 268 Claim and the issues arising therefrom, the learned judge concluded that it would be beneficial for the court:

'to have assistance in relation to deciding the questions of whether given the present corporate existence of [FATCL], which of the discretionary remedies provided for by section 268(2) of the Companies Act is better suited to meet the exigencies of the relationship of the parties within the corporate context and, if the remedy contemplated by section 268(2)(a) is desirable in the circumstances, the methodology to be used in determining the value of [Ms. Webster's] shareholdings in [FATCL] and the time at which the valuation is to be determined.'²⁷

²⁴ [2018] EWHC 1311(QB).

²⁵ [1979] 1 Ch. 384.

²⁶ [1998] P.N.L.R. 542.

²⁷ See para. [43] of the Judgment.

[31] The learned judge dealt with the application to extend time to file (the said application) for the appointment of experts as the seventh and last of the issues he had identified for his determination. In addition to grounding her application on the powers of the case management court pursuant to CPR 26.1(2)(k) and (w), Ms. Webster also relied on CPR 26.9. Having considered the dicta of this Court in **South Asia Energy Limited v Hybcabex-American Energy Inc**,²⁸ and provisions of CPR 32 governing an application to adduce expert evidence, the delay of in excess of 189 days from the December 2020 CMC Order in bringing the Webster Application, the court's duty to consider and apply the overriding objective when considering whether to extend time to comply with a rule or order of the court, learned judge stated:

[94] ...Therefore, the Court has formed the view, that the making of the application at a late stage of the proceedings, particularly where a party is seeking to have the court deem a witness statement expert evidence for the purposes of the trial, may very well have the effect of defeating the purpose and intent of CPR 32 and the overriding objective.'

[32] The learned judge considered, at some length, the decision by the Privy Council in **Bergan v Evans**²⁹ in which the Board upheld the decision of the trial judge to admit expert evidence adduced at the commencement of the trial (albeit for different reasons). However, the learned judge was of the opinion that **Bergan v Evans** was decided on its own peculiar facts. He sought to distinguish the observations of the Board in that case on the basis that the Horne Witness Statement 'falls woefully short of what is required by CPR 32 for an expert to give oral testimony or to deploy his report at the trial.'³⁰

[33] The learned judge encapsulated his conclusion on and dismissal of the application to extend time in these words:

[101] Given the observations that the Court has made in this judgment regarding the substance of [Ms. Webster's] application, there appears to be no need to consider the issue of whether [Ms. Webster] has satisfied the

²⁸ SKBHCVAP2016/0015 (delivered 4th December 2017, unreported).

²⁹ [2019] UKPC 33.

³⁰ See para. [100] of the Judgment.

requirements for an extension of time to deploy the intended expert evidence.

[102] For the reasons that the Court has already given in this judgment, [Ms. Webster's] application is dismissed.'

- [34] Having dismissed the application to extend time, which effectively dismissed the Webster Application, the learned judge considered that the court had a duty to further the overriding objective by actively managing cases, and was mindful of the court's powers under CPR 32 to restrict expert evidence to what is reasonably required to resolve the proceedings justly. Accordingly, he concluded that:

'[103] ...in light of one of the discretionary reliefs that the Court can grant on a claim brought pursuant to section 268 of the Companies Act, in particular that provided for by section 268(2)(a), it would be necessary for the Court to have the benefit of expert evidence in the area of valuation of the shares. The Court will be ill-equipped to make such a determination without the assistance of expert evidence.

[104] ... The Court is of the view that this is an appropriate case in which to utilize the power conferred by CPR 32.9 and will order accordingly.'

- [35] The learned judge then went on to make an order for the parties to agree on the appointment of one expert in relation to the valuation of the shares in FATCL and the time at which such valuation is properly to be made, and other consequential directions and orders pertaining to the obtaining and deployment at trial of such expert valuation evidence.³¹

Mr. Dyrud's Grounds of Appeal

- [36] Mr. Dyrud's appeal (filed 22nd December 2021 with leave) seeks orders setting aside paragraphs 105(2) to (6) of the Judgment and paragraphs 1 to 4 of the Order dated 11th October 2021. He also seeks an order requiring Ms. Webster to pay his costs of this interlocutory appeal. His notice of appeal sets out five grounds of appeal. These may be distilled as follows:

³¹ See para. [105] (2) to (6) of the Judgment.

- (i) the judge had no discretion under CPR 32.9 (having dismissed the Webster Application) to, of his own initiative, direct that expert evidence is to be given by one (1) expert witness;
- (ii) the decision of the learned judge was clearly wrong in law because the exercise of his discretion failed to take into account that several important factual (and legal) issues fell to be determined at the trial. These were: (a) whether Mr. Dyrud has by his conduct caused the value of FATCL's shares to fall; (b) the valuation date for the shares; (c) the valuation methodology to be applied; and (d) whether FATCL is a quasi-partnership;
- (iii) in making the orders complained of the judge failed to exercise his discretion properly or at all;
- (iv) the decision to give Ms. Webster permission at large to amend [the Horne Witness Statement] involved a serious procedural irregularity which rendered the decision unjust in that the learned judge had no discretion under the CPR 2000;
- (v) in any event, if the learned judge had such a discretion, he ought to have exercised it so as to order that any amendments to Mr. Horne's witness statement are to be in accordance with CPR 29.9.

Ms. Webster's Grounds of Appeal

[37] By notice of appeal filed 22nd December 2021 (with the leave of the court), Ms. Webster seeks orders of this Court setting aside paragraphs 105(1) and (7) of the Judgment. She seeks an order appointing Mr. Law as an expert in the field of corporate secretarial governance and trust company management and compliance, for him to provide an expert report, and for him to give evidence as an expert witness at the trial. Ms. Webster also seeks an order of this Court that Mr. Dyrud pay her

costs of this appeal and in the court below. Ms. Webster relies on seven (7) grounds of appeal as set out in her notice of appeal. These may be stated as follows:

- (a) the learned judge erred in concluding that the court would not be assisted by expert evidence in the field of accountancy as an expert analysis of the financial statements of FATCL is necessary in order to arm the judge with material to determine the factual and legal issue of whether Mr. Dyrud in managing the affairs of FATCL has acted in a manner oppressive, unfairly prejudicial or unfairly disregards the interests of Ms. Webster as a shareholder;
- (b) the learned judge appears to have only addressed the need for expert evidence on corporate governance issues and failed to consider that the court will be greatly assisted by the identification of industry practice in the application of the regulatory requirements governing financial services providers such as FATCL, what degree of seriousness attend the various breaches and the way in which the Financial Services Commission addresses licensees;
- (c) the learned judge having acknowledged the benefit of expert evidence as to the standards in a profession in order to be able to properly assess whether the professional conduct under scrutiny is a departure from that established by institutional bodies, he wrongly declined to get such opinion as to what are the accepted institutional standards for company service providers;
- (d) the learned judge erred in focusing on [the Horne Witness Statement] to assess whether it met the requirement of CPR Part 32 and whether its contents were such as would assist him, when the Webster Application sought an order deeming Mr. Horne an expert and that he be permitted to file an expert report, while allowing the opinions expressed in his filed witness statement to stand. Further, the judge's criticism of [the Horne Witness Statement] as not giving reasons for

[Mr. Horne's] opinion, failed to appreciate that the said witness statement was never filed as an expert report and therefore did not comply with the requirements of CPR Part 32;

- (e) the learned judge erred in refusing the application on the basis that it was made too late and therefore would have caused the trial date to be lost, when the Webster Application was heard in good enough time for the October trial dates to have been kept;
- (e) having found that Mr. Horne was not an independent impartial witness to provide expert evidence, the learned judge could have directed that another expert (Mr. Law) be appointed to provide the expert evidence with respect to which Ms. Webster had sought the appointment of Mr. Horne; and
- (g) in refusing the Webster Application, the learned judge erred in the exercise of his discretion by taking into account matters that were not relevant and by failing to take into account the relevant factors.

[38] Specifically, as regards to what are and are not 'live' issues in both the Dyrud Appeal and the Webster Appeal, I make the following preliminary observations. First, in light of the judge's findings as to Mr. Horne's lack of impartiality and independence disqualifying him to be appointed as an expert witness in this case, there is no live issue in these appeals concerning the judge's refusal to treat the Horne Witness Statement as an expert report or to give permission for Mr. Horne to be called as an expert witness at the trial and to provide a report on any issue with respect to which expert evidence is or ought to be reasonably required. This includes the issue as to the appropriate methodology to be used in arriving at and the valuation of the shares in FATCL. Consequentially, there can be no live issue as to the correctness of the learned judge's conclusion that the Horne Witness Statement, which in breach of CPR 32.9 contained expressions of expert opinion, could not stand as expert evidence or an expert report in the proceedings. This is so even if Mr. Horne's

qualifications and experience would have rendered him qualified as an expert in the fields in which Ms. Webster sought to have his expert evidence deployed at trial.

[39] As to the limb of the Webster Application by which she sought the appointment of Mr. Law as an expert witness in the field of corporate secretarial governance and trust company management and compliance, the rejection by the judge of the need for the assistance of an expert regarding such matters, has been challenged by Ms. Webster in her appeal, and therefore, falls to be considered.

[40] It is also the submission of Ms. Webster that the judge, having correctly rejected Mr. Horne as an expert witness because of his apparent lack of impartiality and independence, ought to have gone on to consider appointing Mr. Law as an expert witness in relation to the issues with respect to which she sought to have the court give permission for Mr. Horne to be appointed, namely, the fields of accountancy, including financial reporting, auditing, forensic accounting, corporate finance and accounting systems and processes, and the valuation of FATCL for the purpose of the buy-out of Ms. Webster's shareholding therein. With respect to the latter expertise, the learned judge did accept that expert evidence would be reasonably necessary and did make an order and directions for the parties to agree on one expert.

[41] However, in the proceedings before the learned judge, Ms. Webster did not offer Mr. Law as an alternative to Mr. Horne as an expert in the areas or fields of the latter's expertise, and there is no ground of appeal in the Webster Appeal challenging the judge omission to do so. Further, in the reliefs sought therein, Ms. Webster merely seeks an order of this Court appointing Mr. Law an expert witness to provide a report in the fields of 'corporate secretarial governance and trust company management and compliance', but not in the fields of financial reporting, auditing, forensic accounting, corporate finance and accounting systems and processes. Importantly, the relief sought does not seek an order appointing Mr. Law as an expert to opine as to the appropriate methodology and to conduct a

valuation of the shares in FATCL. This point was raised for the first time by Mrs. Small- Davis QC, learned counsel for Ms. Webster, during her oral argument before this Court. In my view, this is most unsatisfactory and a wholly inappropriate way in which to seek to challenge the learned judge's dismissal of the limb of the Webster Application seeking to have Mr. Horne appointed as an expert witness in those areas and with respect to those issues upon which his appointment was sought. Moreover, such an approach, being not one put to the learned judge either by way of the Webster Application or in submissions to the judge, does not accord with the requirements of an application seeking permission to appoint an expert or experts and to adduce their evidence at trial under Part 32.

Principles of Appellate Restraint - appeals from the exercise of discretion and case management decisions

[42] Before turning to deal in turn with the Dyrud and Webster grounds of appeal, I make a few pertinent observations with regard to both appeals. The first is that these appeals seek to set aside certain case management orders made by the learned judge. The principles which guide appellate restraint when considering appeals from the exercise of judicial discretion by a lower court and from case management orders, are well-settled. These principles have been stated and re-stated in several decisions of this Court. As regards appeals from the exercise of discretion, there must be some error of principle, whether of commission or omission, in the judge's identification, consideration or evaluation of the relevant factors or some error of law, which when taken, singularly or collectively, in the assessment of the appellate court, so undermines the proper exercise of judicial discretion as to transcend the generous ambit within which reasonable judicial disagreement is possible so as to be adjudged to be clearly or blatantly wrong.

[43] In **Attorney-General of Montserrat et al v Geraldine Cabey**,³² Gordon JA held that an appellate court must caution itself that it is not permitted, as a matter of principle, to substitute its own exercise of discretion for that of the first instance

³² MNIHCVAP 2008/008 (delivered 12th January 2009, unreported) at paras 25 and 26.

judge, simply because the appellate judges (or a majority of them) would have exercised the original discretion differently. The oft cited statement of these principles is this passage from the judgment of Sir Vincent Floissac CJ in **Michel Dufour v Helenair Corporation Ltd and others**:³³

'We are thus here concerned with an appeal against judgment given by a trial judge in the exercise of a judicial discretion. Such an appeal will not be allowed unless the appellate Court is satisfied (1) that in exercising his or her discretion, the learned judge erred in principle either by failing to take into account or giving too little or too much weight to relevant factors and considerations or by taking into account or being influenced by irrelevant factors and considerations and (2) that as a result of the error or the degree of error in principle, the trial judge's discretion exceeded the generous ambit within which reasonable disagreement is possible and may therefore be said to be clearly or blatantly wrong.'

- [44] With respect to appeals against case management orders, the level of appellate restraint is even greater.³⁴ Put differently, an appellate court will be very slow to overturn on appeal, orders made or directions given by a first instance judge for the proper and efficient management of the case or proceedings. This cautionary approach to appellate restraint when reviewing case management orders and directions, is underpinned by a number of bedrock principles. They include, but are not limited to, the court's overriding objective to deal with cases justly. This entails ensuring, so far as is practicable, that the parties are on an equal footing, to save expense, dealing with cases in a proportionate way, ensuring that proceedings are dealt with expeditiously, and allotting an appropriate share of the court's resources, while taking into account the need to allot resources to other cases.³⁵ These guiding principles, which embody the court's overriding objective, are to be applied or given effect to by a court or judge when interpreting a rule or exercising a discretion given to it by a rule. They are of particular importance when the court is exercising its case management powers pursuant to CPR 25 and 26. Another cogent reason for appellate restraint when considering appeals from case management orders, is that

³³ (1996) 52 WIR 188 at paras. 190-191.

³⁴ See *Tawney Assets Ltd v East Pine Management Ltd et al* BVIHCVAP2012/007 (delivered 17th September 2012, unreported).

³⁵ CPR 1.1.

great deference must be given to the first instance judge who has or may have had charge of the case for a substantial period, and is presumed to have a more in depth or thorough knowledge and understanding of the proceedings and of the issues, legal and factual, to be decided at a trial.

**Dyrud Appeal Ground 1 – the Judge had no discretion under CPR 32.9
Mr. Dyrud's submissions**

- [45] As mentioned above, Mr. Dyrud challenges and seeks to have set aside the orders of the learned judge appointing a (single) expert and granting Ms. Webster permission at large to supplement the Horne Witness Statement. He does not challenge the order for the said witness statement to be redacted to remove the offending parts proffering expert evidence. As to ground 1 in his appeal, Mr. Dyrud submits that the learned judge committed a serious procedural error or other irregularity in making the order appointing a single expert, as CPR 32.9 conferred no such discretion on the judge to do so of his own initiative. Such power to direct that one expert be appointed falls within the ambit of CPR 32.9 and is exercisable only where two or more parties to the litigation wish to submit expert evidence on a particular issue. This provision is only triggered in circumstances where there are two or more applications before the judge to adduce expert evidence. In the instant matter, there was never two such applications before the judge, the only application to adduce expert evidence being the Webster Application and, in any event, that application having been dismissed by the learned judge, he was not possessed or imbued with the power or jurisdiction to go on and appoint one expert witness of his own initiative. At the time he made the said order appointing a single expert, there were no 'live' applications before him. Moreover, in deciding to act of his own initiative in making the said order, the learned judge did not bring this to the attention of counsel for the parties, he had not been invited to do so in circumstances where he determined that the Webster Application should be dismissed, and he did not apply and failed to follow the mandatory procedure under CPR 26.2 whereby a court is empowered to make orders of its own initiative.

[46] CPR 26.2 stipulates –

‘(1) Except where a rule or other enactment provides otherwise, the court may exercise its powers on an application or of its own initiative.

(2) If the court proposes to make an order of its own initiative, it must give any party likely to be affected a reasonable opportunity to make representations.

(3) The opportunity may be to make representations orally, in writing, telephonically or by any other means as the court considers reasonable.

(4) If the court proposes to –

(a) make an order of its own initiative; and

(b) hold a hearing to decide whether to do so;

the court office must give each party likely to be affected by the order at least 7 days’ notice of the date and place of the hearing.’

Ms. Webster’s submissions

[47] In response to these submissions by learned counsel for Mr. Dyrud, learned counsel for Ms. Webster, counters that their interpretation of CPR 32.9 by learned counsel for Mr. Dyrud and their understanding of the purpose of expert evidence in civil proceedings is fundamentally flawed. Having pointed to CPR 32.2 which provides: ‘Expert evidence must be restricted to that which is reasonably required to resolve the proceedings’, counsel for Ms. Webster submits that ‘the learned judge recognizing that at the end of the case he would be called upon to grant relief by way of a buy-out order, made a case management order to enable the court to be able to conclude the case in one sitting as it were, bearing in mind that neither party had ever suggested that this was to be a bifurcated trial.’³⁶ Counsel also pointed to the second and third reliefs sought by Ms. Webster in her Amended Claim Form, which reliefs seek a buy-out of her shares by Mr. Dyrud and/or FATCL and an order that the parties agree upon the identify of a professional valuer, failing which the court shall appoint such valuer from a short list provided by both Ms. Webster and Mr. Dyrud.

[48] Learned counsel, Ms. Small-Davis QC also drew our attention to correspondence passing between counsel for the parties with respect to the appointment of a valuer,

³⁶ See para. 7 of Ms. Webster’s respondent skeleton argument.

as supportive of the necessity to have this step taken in the proper conduct and conclusion of this litigation of the section 268 Claim.

[49] Our attention was also drawn to the **UK Practice Direction on Experts**³⁷ which underscores the importance of the parties looking to instruct a single joint expert wherever possible and that a court will take into account all the circumstances, including a list of certain factors, in determining whether it is appropriate to appoint one joint or separate experts.³⁸

[50] Specifically with regard to claims such as section 268 claims and claims involving questions of quantum relative to the valuation of properties, counsel for Ms. Webster placed much reliance in her submissions on an extract from **The Chancery Guide**³⁹ in submitting that where, as in the instant matter, the primary issue is likely to be one of liability, it is more appropriate for the court to appoint one expert on the issue of quantum, which involves a valuation of the property, namely, the shares in FATCL. The pertinent extract from **The Chancery Guide** states in part:

‘The factors which the court will take into account in deciding whether there should be a single expert include those listed in PD35 paragraph 7. Single experts are, for example, often appropriate to deal with questions of quantum or valuation in cases where the primary issues are as to liability...There remains, however, a substantial body of cases where liability will turn upon expert opinion evidence **or where quantum is a primary issue and where it will be appropriate for the parties to instruct their own experts. For example, in cases where the issue for determination is whether a party acted in accordance with proper professional standards, it will be of value to the court to hear the opinions of more than one expert as to the proper standard in order that the court becomes acquainted with the range of views existing upon the question and in order that the evidence can be tested in cross-examination.**’ (emphasis added)

[51] Ms. Webster also relied on an extract from the **Civil Procedure The White Book Service**.⁴⁰ It states as follows:

³⁷ UK Practice Direction on Experts (PD35).

³⁸ See extract at para. 8 of Ms. Webster’s respondent skeleton argument.

³⁹ Para. 17.49.

⁴⁰ The White Book Service, Sweet & Maxwell, Vol. 1.

'Rule 35.7 provides that where several parties wish to submit expert evidence on a 'particular issue', the court may...instead of permitting each party to submit the evidence of an expert...direct that the evidence 'on that issue' should be given by one expert only. **Such a discretion may be given by the court on its own initiative (see r.3.3)** This is yet another way in which the court may exercise its power to control expert evidence for the purpose of reducing costs and delay by doing away with the need to call multiple experts, see **Layland v Fairview Homes plc** [2002] EWHC 1350 Ch.

This discretionary power may be exercised at any time. It is unrestricted power, which the court has a wide discretion to exercise to further the overriding objective, see *Peet v Mid Kent Area Healthcare NHS Trust* [2001] EWCA Civ 1703 at para. 14. It will more usually be capable of being exercised where it appears to the court, on the information then available, that the issue falls within a substantially established area of knowledge and where it is not necessary for the court to sample a range of opinion or where the issue is uncontroversial, where that, due to the nature of the issue is not justified, as well as to further the aim of reducing scope for experts to adopt a partisan approach and this strengthen the impartial role of experts.' (emphasis added)

Decision on Dyrud Appeal Ground 1

[52] With respect to this ground of appeal, I find the submissions of counsel for Mr. Dyrud more attractive and compelling, both as to the proper interpretation and powers of the court under CPR 32.9 and as to the legal basis of what the learned judge did in making the order for the appointment of a single expert to conduct a valuation of the shares in FATCL. In this respect, I do not find the passages from the **UK Practice Direction on Experts (PD35)**, **The Chancery Guide** at paragraph 17.49, and the **Civil Procedure The White Book Service** on Rule 35.7 relied on by learned counsel for Ms. Webster to be of much assistance to her in countering the submissions of learned counsel for Mr. Dyrud, Ms. Dyer.

[53] There can be no question that a judge has the power and discretion pursuant to CPR 32.9 to decide whether it is appropriate in all the circumstances of the particular matter to appoint one or more expert witnesses. This is so whether the decision on this issue arises as to liability or quantum or appropriate reliefs. This much is clear from CPR 32.9(5) which states: 'The court may appoint a single expert witness

instead of the parties instructing their own expert witnesses or may replace expert witnesses instructed by the parties.’ This is also pellucid from CPR 32.9(1) which provides: ‘If two or more parties wish to submit expert evidence on a particular issue, the court may direct that expert evidence be given by one expert witness.’ These provisions in Part 32, are consistent with the modern approach to the management and conduct of civil litigation before our courts and consistent with the overriding objective of the CPR which are intended to enable courts to deal with cases justly and to apply the overriding objectives when interpreting any rule or exercising any discretion given to it by the said Rules.⁴¹

[54] However, the regime under the CPR relating to the application for and the granting of permission to adduce and to rely on expert evidence is set out in Part 32. It is the procedure enshrined in CPR 32 which applies and must be followed by any party to civil litigation who seeks to rely on expert evidence. While the overriding objective is to be deployed and given effect to when seeking to interpret a rule or exercise a discretion granted by a rule, it is not to be used and cannot be relied upon to deviate from the requirements of the specific provisions of CPR 32. Similar statements of this principle have been authoritatively stated in several decisions of this Court. One such case is **Ormiston Ken Boyea et al v East Caribbean Flour Mills Limited**.⁴²

[55] CPR 32 makes provision for a judge or a court to appoint an expert witness or witnesses in a matter of its own initiative. This must usually be done upon the application of a party pursuant to CPR 32.6 which encompasses the court’s overarching power to restrict or, put differently, to control the use or deployment by the parties of expert evidence in a case. Accordingly, a party cannot call an expert witness or put in the report of an expert witness without the court’s permission, which permission is, generally, to be sought at a case management conference. CPR 32.6(3) sets out the mandatory requirements of any application by a party for permission to call an expert witness or rely on an expert report and the kind of

⁴¹CPR 1.2.

⁴² Civil Appeal No. 3 of 2004 (delivered 16th September 2002, unreported).

directions which the court must make when granting such permission. Accordingly, a court cannot of its own volition call an expert witness at the trial of a case or put into evidence the report of an expert witness.

[56] This is materially and jurisdictionally different from the power and discretion of a judge to permit only one expert witness on an issue or issues in the litigation, to which the extracts relied on by Ms. Webster and referred to above speak eloquently. These extracts all speak to situations where there is one or more applications by parties to appoint expert witnesses and the court determining, taking all relevant factors into account including the issues of liability and quantum, including, if applicable, the valuation of property, in determining whether it is more desirable and appropriate to appoint a single expert or to grant permission to the parties to engage the separate experts and to have them produce their own report. As is commonplace, where more than one expert is appointed, the appointing order usually provides for them to meet and to seek to reduce or limit the areas upon which they disagree and to identify the nature and extent of their disagreement on any particular issue upon which they had been instructed to opine.

[57] However, the instant matter is not such a situation or scenario. Here only one party sought to have expert witnesses appointed or permission granted to call and to rely on their report at trial. That was the gravamen of the Webster Application which, subject to the court granting an extension of time to make the said application, sought to have both Mr. Horne and Mr. Law appointed expert witnesses to opine on separate or different fields of expertise relating to this matter. In the end, the learned judge concluded that '[g]iven the observations that the Court has made in this judgment regarding the substance of [Ms. Webster's] application, there appears to be no need to consider the issue of whether [Ms. Webster] has satisfied the requirements for an extension of time to deploy the intended expert evidence.'

[58] These earlier findings include a finding that the Horne Witness Statement could not be deemed an expert report or expert evidence pursuant to the requirements of CPR

32. Of course, it was a witness statement rendered in the usual format of such documents in civil proceedings and not a report or expert report which satisfied the requirement of CPR 32.4, 32.13 and 32.14. While CPR 32.7(1) empowers a court to direct that expert evidence be provided in a form other than by way of a written report, there was no such application made to the court below and it is not being suggested by counsel on behalf of Ms. Webster that it would have been appropriate for the judge to have so ordered in this matter in relation to Mr. Horne, such as, for example, by way of an affidavit. Of course, in light of the judge's finding (not appealed) that Mr. Horne was not a person capable of being appointed an expert witness because of his apparent lack of partiality and independence, this aspect is entirely moot. The judge also dismissed Ms. Webster's application to extend time having found that the issues upon which Ms. Webster had sought the appointment of Mr. Law as an expert witness were not matters upon which the court reasonably required assistance. In short, the judge's finding was that, for the reasons already stated in this judgment, '[Ms. Webster's] application to extend time to apply to the court for the appointment of the named experts, and for permission to rely on their respective witness statements and reports is dismissed.'⁴³ In fact, the learned judge earlier at paragraph [102] had also stated conclusively: 'For the reasons that the Court has already given in this judgment, [Ms. Webster's] application is dismissed.'

[59] In my opinion, having dismissed Ms. Webster's application to extend time to apply for the appointment of experts, and having apparently also dismissed the entirety of the Webster Application, there was no extant or 'live' application before the learned judge when he went on to consider and to make the order directing the appointment of a single expert witness in the purported exercise of his powers under CPR 32.9. Moreover, the learned judge did not do so at a case management conference nor did he make an order dispensing with a case management conference in exercise of his powers under CPR 27.6. Indeed, the court having dismissed the first limb of the said application - to extend time to apply, the time stipulated in the December 2020 CMC Order for making applications having expired, the other limbs, which

⁴³See para. [105] (1) of the Judgment.

sought the appointment of Mr. Horne and Mr. Law as expert witnesses, did not arise as pending or 'live' applications to be given further or independent consideration by the learned judge. In such circumstances, was it then open to the judge, and did he have the power, to go on to give directions for the appointment of a single expert witness in relation to the valuation of the shares?

[60] The learned judge considered that he had the power and discretion to do so pursuant to CPR 32.2 and 32.9. In my respectful opinion, the learned judge was clearly wrong. CPR 32.2 sets out the overarching duty and general parameters within which a court may, in its discretion, permit expert evidence to be deployed in civil proceedings by restricting expert evidence to that which is 'reasonably required to resolve the proceedings justly'. This provision does not empower a judge or the court permission to appoint one or more expert witnesses of its own initiative or in the absence of an application by one of the parties to do so. Likewise, while CPR 32.9 does empower the court, when exercising its undoubted jurisdiction to control and to approve of the nature and scope of expert evidence necessary or reasonably required to be deployed at the trial to assist the court in its determination of certain issues of fact or law, it does not empower a judge or the court to make such an order absent an application by one or more of the parties.

[61] More cogently, CPR 32.9 is very clear. There is no inherent ambiguity in its provisions such as would engage the court's principles of statutory interpretation. The powers granted to the court under CPR 32.9 are to be applied by a judge in circumstances where there are applications from two or more parties to adduce expert evidence. Where those circumstances exist, the judge has the undoubted power and discretion to decide whether to direct, assuming any such evidence is in the judge's determination reasonably required to resolve any issue in the proceedings, that the expert evidence be given by only one expert or whether more appropriately, by separate experts engaged by each of the parties, referred to as "the instructing parties". It is where the court directs or is minded to direct that there be only one expert witness, that provision is also made for the parties to agree on

the identity of that single expert, and in the absence of agreement, the court may select the expert from a list prepared and provided by the instructing parties.⁴⁴

[62] Reliance was placed by counsel for Ms. Webster on CPR 32.9(5) in submitting that this sub-paragraph of rule 32 creates a separate and independent power in the court to appoint expert witnesses of its own volition. Learned counsel submits that the judge having determined that expert evidence was reasonably required on the issue of the valuation of the shares in FATCL, it was open to him to consider as he did at paragraph [102] of his judgment, in furtherance of the overriding objective to manage cases justly, and to form the view having regard to one of the discretionary reliefs which the court can grant on a section 268 claim, that it would be necessary for the court to have the benefit of expert evidence in the area of the valuation of the shares,⁴⁵ and to conclude that it is appropriate for the court to utilize the power conferred by CPR 32.9 and direct the appointment of a single expert witness in relation to that issue. CPR 32.9(5) states: 'The court may appoint a single expert witness instead of the parties instructing their own expert witness or may replace expert witnesses instructed by the parties.'

[63] While the learned judge's attempt, in light of his conclusion that expert evidence limited to the valuation of the shares in FATCL is reasonably required to resolve the proceedings justly, to advance the proceedings towards a trial in keeping with the overriding objective and his case management and discretionary powers, is understandable, in my view the learned judge went about achieving this laudable and proper objective in the wrong way. He had no power or discretion to do what he did under CPR 32.9 and could not do so without first following the procedure under CPR 26.2, unless he had received the consent of the parties.

[64] As matters turned out, the learned judge did not inform the parties of his intention go on to consider appointing one expert in relation to the valuation of the shares in

⁴⁴ CPR 32.9(3).

⁴⁵ See para. [103] of the Judgment.

FATCL nor did he seek the consent of the parties to make such an order. He was obliged to follow the procedure mandated by CPR 26.2 if he intended to pursue that course of action. This he did not do. The procedure laid out by CPR 26.2 is to ensure that while a judge may of his own initiative, in the absence of an application by one of the parties, and in exercise of his or her case management powers, make certain orders or give certain directions in proceedings, he cannot do so without first notifying the parties affected or who would be affected by the intended course of action, order or direction, and afford them a reasonable opportunity to be heard and to make representations.

[65] That opportunity did not require him to conduct a formal in person hearing with the parties and their respective counsel. The requirement, and it is a requirement, may be met in other ways or utilizing different means, such as written submissions and deciding the matter on paper, or by a telephonic hearing, which may be a short hearing as the exigencies of the matter require. None of these means were embarked upon or deployed by the learned judge. In fact, the judge did not allude to or inform himself of the provisions of CPR 26.2. In doing so, he committed a serious error of principle and procedure which undermines the veracity and correctness of his decision, and the consequential orders at sub-paragraphs (2) to (6) of paragraph [105] of the Judgment. These errors render his decision and the said order and directions seriously flawed, such as to be clearly or blatantly wrong, and therefore liable to be set aside on the principles regarding appellate review of a judge's exercise of discretion and case management orders referred to above.

[66] Accordingly, the appellant Mr. Dyrud, has succeeded on ground 1 of his appeal in No. 10 of 2021 and the orders made and directions given by the learned judge at sub-paragraphs (2) to (6) of paragraph [105] of the Judgment are set aside.

Dyrud Appeal Grounds 2 and 3 – whether the judge, in any event, failed to exercise his discretion properly in making the orders at paragraph 105(2) to (6) Mr. Dyrud’s submissions

- [67] These two grounds of appeal challenge the exercise by the judge of his discretion when making the orders at paragraph [105] (2) to (6) inclusive. The gravamen of Mr. Dyrud’s complaint on these grounds is that the learned judge failed to take into account several factual and legal issues and the decision which he made (albeit erroneously) at paragraph [103] that ‘it would be necessary for the court to have the benefit of expert evidence in the area of valuation of shares’; and that ‘the court will be ill equipped to make such a determination without the assistance of expert evidence’, were prematurely made as his discretion, if he had one, had not yet been triggered.⁴⁶ In support of these submissions, counsel for Mr. Dyrud relied on the first instance decision in **Lynwood Bell v Malcolm Hope-Ross and others**⁴⁷ for the proposition that the exercise of the court’s discretion under section 268(2) to determine the relief that is just and equitable, is only triggered when the unfair prejudice action is successful. This case concerned a claim made by Mr. Bell, a shareholder in Counsel Limited, against the remaining shareholders in the said company brought pursuant to section 266 of the Companies Act. The claim was made on the basis that the affairs of the company have been or are being or are likely to be conducted in a manner oppressive, unfairly discriminatory or unfairly prejudicial to him as a shareholder. Section 266 was the earlier equivalent to what is now section 268 of the Companies Act. George-Creque J (as she then was) stated at paragraph 48 of her judgment that the exercise of the discretion in considering what orders best suit the justice of the case is triggered where the unfair prejudice action is successful.
- [68] Reliance was also placed by learned counsel for Mr. Dyrud on the first instance decision of the Commercial Division in **JF Ming Inc and another v Ming Siu Hung**⁴⁸ where the trial judge made a buy-out order after finding that the unfair prejudice

⁴⁶ See para. 16 of Mr. Dyrud’s appellant skeleton argument.

⁴⁷ AXAHCV No. 13 of 2004.

⁴⁸ BVIHCMAP2016/0039 (delivered 30th June 2017, unreported).

claim had been made out. Ms. Dyer submitted that on a proper reading of the Amended Claim Form, Ms. Webster's claim contemplates a two-stage or two-phase trial of liability and quantum including the issue of valuation of the shares in FATCL. In support of this assertion, she points to the reliefs at paragraphs 1, 2 and 3 which would follow only after liability under section 268 had been established to the court's satisfaction.⁴⁹ Ms. Dyer argues that these are matters which the learned judge gave no consideration to and, accordingly, he fell into error when exercising his discretion under CPR 32.9 (assuming he had one) to make the order and give the directions for the appointment of one expert witness.⁵⁰

- [69] Counsel for Mr. Dyrud also submitted that the learned judge in exercising his discretion (if he had one) to make the said orders failed to give any weight to certain factors, namely, (a) based upon the pleaded case of the parties, the effective date for the buy-out and hence the valuation of the FATCL shares is in dispute and fact sensitive, with Ms. Webster contending for an earlier date and Mr. Dyrud for some other or later date (if that relief is to be ordered); (b) the determination of the appropriate valuation method is also dependent upon the facts of the case as to be found by the trial court and; (c) the issue of whether FATCL is a quasi-partnership as contended by Ms. Webster in her statement of claim and denied by Mr. Dyrud in his defence, is an issue of fact to be determined after a trial and is relevant to the valuation of the shares in FATCL "as the general principle is that upon a finding that a company is a quasi-partnership, the appropriate basis of the valuation is on a non-discounted basis."⁵¹

Ms. Webster's submissions

- [70] In response to Mr. Dyrud's grounds 2 and 3, learned counsel for Ms. Webster counters that before this Court, is the first time that Mr. Dyrud has sought to object that her application to appoint expert witness to value the shares in FATCL was

⁴⁹ See para. 15 of Mr. Dyrud's appellant skeleton argument.

⁵⁰ See para. 16 of Mr. Dyrud's appellant skeleton argument.

⁵¹ See *Re Dinglis Properties Ltd* [2020] BCLC 107 at para. 367).

premature and is only triggered when the unfair prejudice claim is successful.⁵² She denied that her approach in her pleaded case is a two phased trial. Such an approach for a bifurcated trial of liability and then quantum including valuation of the shares in FATCL, has never been raised by either party and there is no order or direction providing for a split or two-phased trial. Indeed, there can be no question that up to where the matter stood at the time of the hearing of the Webster Application, the December 2020 CMC Order had provided for a single trial and certainly no CMC order has been made providing for a split or two-phase trial.

[71] Ms. Webster, having reviewed the nature of her claim and the relief which she seeks, characterized the breakdown in the relationship between herself and Mr. Dyrud as 'irretrievable'. She submits that this is an important factor to be taken into account by the court in determining the appropriate relief, should she succeed in establishing her unfair prejudice claim. She submits further that even without a finding of oppression or unfair prejudice, the court can nevertheless consider it appropriate to grant relief in circumstances where it concludes that mutual trust and confidence held by the partners to the quasi-partnership of FATCL (as she contends it is) has been irreparably damaged. In this respect, strong reliance was placed on the much cited dicta of Lord Wilberforce in **Ebrahimi v Westbourne Galleries Ltd and others**.⁵³ Lord Wilberforce considered the import and full force of the meaning and effect of the expression 'just and equitable'. The entire passage does not warrant replicating here. It suffices, in my view, to give this extract:

'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.'

⁵² See para. 12 of Ms. Webster's respondent skeleton argument.

⁵³ [1973] AC 360 at page 379A.

[72] Ms. Webster also submitted that another factor favouring the appointment of a single expert to carry out a valuation of the shares in FATCL is the Consent Order dated 22nd July 2019 in Claim AXAHCV2017/0039 **John Oliver Dyrud v Palmavon Jasamin Webster**, whereby the learned judge ordered, *inter alia*, that ‘the shares in [FATCL] and First Nevis Trust Company Limited shall be valued’; and for each party to be at liberty to appoint and instruct his/her own valuer, and for both valuers to be given identical instructions.⁵⁴ It was stated that to date, Mr. Dyrud has failed to comply with the said Consent Order for the valuation of the shares in FATCL. I merely note the said order was not made in this matter (No. 44 of 2018) and, secondly, it provided not for a single valuer to be appointed, but for each party to appoint their own valuer of the shares in FATCL.

Decision on Dyrud Appeal Grounds 2 and 3

[73] I have already found that the judge’s orders and directions at sub-paragraphs (2) to (6) of paragraph [105] must be set aside and have so ordered. That finding and order is completely dispositive of the challenge on appeal by Mr. Dyrud to the order providing for the appointment of one professional valuer of the shares in FATCL either by agreement of the parties or, in the absence of their agreement, by the court from a short list to be provided by the parties. That decision was on the basis that the learned judge committed certain errors of law and procedure which go to the soundness of his decision and order rendering them serious flawed and blatantly wrong. However, if I am wrong and the learned judge did have both the power and discretion to make the order and to issue the case management directions which he did at sub-paragraphs (2) to (6), I must go on to consider whether he exercised that discretion properly or whether, as Mr. Dyrud asserts, he erred fatally when doing so.

[74] The starting point in my view is that there is no principle of law which prohibits a court from making case management orders in a section 268 Claim for the valuation of the property which is in dispute or the value of which is disputed by the contending parties, including a valuation of shares in a company or a company which is or may

⁵⁴ See Trial Bundle p. 215-217.

be effectively on equitable principles, a quasi-partnership. This is not the import of the decision of George Creque J (as she then was) in the **Hope-Ross** case or the decision in the **Ming Siu Hung** case. It is for the trial judge to decide in the exercise of his case management powers whether to order a split trial on the issues of liability and quantum (including appropriate reliefs and the valuation of property or shares in a company). No split trial, with the issue of liability being decided first, has been ordered in the instant matter, and certainly not at the time when the Webster Application was heard and determined by the learned judge and his orders made on 11th October 2021. Further, neither party has requested an order for a split trial. Accordingly, at the time of the Judgment and the Order, the learned judge was in no way constrained by any such order to not make an order for the appointment of an expert witness in relation to the valuation of the shares in FATCL.

- [75] There is nothing in my view which is inherently wrong in principle or premature in a section 268 claim for the issue of liability and the issue of reliefs or the appropriate relief, should liability be established or found, being tried together in one trial. These matters are quintessentially within the province of the trial judge or case management judge to decide, having considered all the relevant circumstances. Accordingly, if the learned judge had power and discretion which he exercised in a procedurally proper or correct way, to go on, having dismissed the Webster Application, to make the order for the appointment of an expert to value the shares in FACTL, there was nothing in principle or in logic wrong with him making the order which he did at that stage of the proceedings and before the unfair prejudice claim was successful. Such an order, in light of the judge's clear finding that the court would benefit from the assistance of an expert on the methodology and valuation of the shares in FATCL is, in my opinion, in furtherance of the overriding objective and in discharge of the court's duty to manage cases justly. In coming to this conclusion, I do not consider that Ms. Webster's claim necessarily calls for a split or two-phased trial, which is in any event a matter for the court to determine and not a matter dictated by the way in which a party has chosen to plead their case. It would be open to the trial judge at the conclusion of a unified trial of liability and quantum,

during which evidence as to the valuation of the shares in FATCL was led through an expert valuer, for the court, if it considers it appropriate to order a buy-out of the shares on one shareholder by the other, to determine the buy-out price.

[76] Learned counsel Ms. Dyer submitted that in any event the buy-out/valuation date is fact sensitive as the parties are contending for different dates. This is consistent with paragraph 2 of the relief in the Amended Claim Form where Ms. Webster puts three possible dates in the alternative. They are: (i) as at 31st December 2006; (ii) as at 30th August 2013; and (iii) as at a date to be fixed by the court. Mr. Dyrud also contends for a fourth date in his defence. In my view, while this is clearly an important factual and legal issue ultimately for the trial judge's determination, it does not preclude the expert valuer appointed by the court opining on not only the correct or appropriate methodology, but on its application to each of the dates being contended for by the parties and the resulting valuation, and hence, the buy-out price. Similarly, this does not preclude a valuation based upon a possible finding that FATCL is in fact a quasi-partnership and the application of the non-discounted basis as the appropriate basis for the valuation of its shares. These and other material issues pertinent to the conduct of the valuation by the expert, can be discerned by him from the pleaded cases of the parties, copies of which are usually provided to the expert witness upon receiving their formal instructions. Legal issues which may touch and impinge upon his approach to the valuation can also be included by the parties either in a separate or a joint written instruction. These matters may also be drawn to the attention of the expert in the written instructions given pursuant to the order at sub-paragraph (5) of paragraph [105] or CPR 32.11(1) and (2). Scope is also provided to address any and all of these issues and concerns in the questions posed by one party to the expert pursuant to their right to do so under CPR 32.8. In short, none of these issues raised by Mr. Dyrud prohibit or limit the ability and latitude given to the court to manage cases justly and, in doing so, to make and to craft the appropriate orders and directions for the appointment of an expert witness, the conduct of the valuation, and to the issues must be addressed

or covered by the expert in his report, including his opinion on the valuation using different dates contended for by the parties.

- [77] In the premises, I am of the view that there is little or no merit in these two grounds of appeal. To the extent that the orders made by the learned judge at subparagraphs (2) to (6) of paragraph [105] in exercise or purported exercise of his case management powers, may prove to be not as full as they ought to be and/or are in need of variation, the court has the power to do so under CPR 32.9(5), and it may do so either of its own initiative in compliance with the procedure prescribed by CPR 26.2 or upon the application of one or more of the parties to the litigation. Accordingly, grounds 2 and 3 of the Dyrud Appeal fail.

Dyrud Appeal Grounds 4 and 5 – Permission to amend the Horne Witness Statement

Mr. Dyrud's submissions

- [78] Before this Court, Ms. Dyer, learned counsel for Mr. Dyrud, while she did not address us on these two grounds of appeal, she did not abandon any of them, and must be taken to have relied on Mr. Dyrud's written submissions filed in support of appeal No. 10 of 2021. In those written submissions, Mr. Dyrud complains that, as a matter of law, the judge's order permitting Ms. Webster to amend the Horne Witness Statement at large was highly irregular for several reasons, not least of which is that the learned judge had no discretion to do so under CPR 29. It is also submitted on behalf of Mr. Dyrud, that if the judge had a discretion (which is denied) there was no material before him on which he could exercise that discretion. No written application was filed by Ms. Webster explaining the reasons for seeking to add to the Horne Witness Statement. Accordingly, the learned judge had nothing before him which would have conveyed or given to the court a clear picture of the extent to which Mr. Horne will be deviating from his original witness statement at trial, and whether the intended amendments thereto would prejudice Mr. Dyrud. It was also posited in oral submissions (consistent with ground 5) that the more appropriate course of action would have been for Ms. Webster to invoke at trial the

provisions of CPR 29.9, and to seek the permission of the court to have Mr. Horne amplify his witness statement.

Ms. Webster's submissions

- [79] The written submissions filed on behalf of Ms. Webster in opposition to the Dyrud Appeal, does not address grounds 4 and 5, and learned counsel Ms. Small-Davis QC did not address them in oral argument. Nevertheless, it cannot be said that Ms. Webster agrees with or does not oppose the Dyrud Appeal being allowed on either of these two grounds.

Decision on Dyrud Appeal Grounds 4 and 5

- [80] In my considered view, there is little or no merit in grounds 4 and 5 of the Dyrud Appeal. The orders complained of by Mr. Dyrud were made by the learned judge on 11th October 2021 after delivery of the Judgment on the Webster Application.⁵⁵ The learned judge, having heard learned counsel for Ms. Webster and Mr. Dyrud at some length on any consequential orders or directions which he should make, ordered the redacting of certain parts of the Horne Witness Statement (filed 26th February 2021) 'so as to exclude all matters and expressions of expert opinion contained therein.' This order was made consequential upon the judge's clear pronouncement or recognition in the Judgment, that portions of the Horne Witness Statement contained expressions of expert opinion, when no permission had been sought or granted to have Mr. Horne deemed an expert witness in the proceedings, and his finding that Mr. Horne was not a sufficiently independent and impartial witness to be appointed to give expert evidence. The offending parts of the Horne Witness Statement clearly could not stand, and the judge was correct to order them redacted or expunged from the said witness statement. This was consistent with the court's case management powers under CPR 26.1(2)(w) to 'take any step, give any direction, or make any other order for the purpose of managing the case and furthering the overriding objective.' I can discern no proper or sound basis upon

⁵⁵Transcript of proceedings on 11th October 2021 – Hearing Bundle pages 583 to 620.

which it can be said that, in making the first order, the learned judge committed an error of principle or procedure.

[81] By the second order, the learned judge granted leave to Ms. Webster to file and serve a supplemental witness statement of Mr. Horne within 10 days. This was not the subject of the Webster Application which the court dismissed. It arose from an oral application made to the judge by counsel for Ms. Webster requesting permission to “file a substitute witness statement on behalf of ... [Mr. Horne].” Ms. Dyer objected to this oral application, and to Mr. Horne being called as a witness of fact. Objections were also made to the learned judge proceeding in this way to consider an oral application for Mr. Horne to provide a supplemental witness statement addressing issues of fact.⁵⁶ The learned judge commented that both the application for the Horne Witness Statement to be deemed expert evidence and for him to give expert evidence at the trial “have been thrown out the window” by the Judgment. However, the learned judge was of the opinion that, subject to redacting the parts which relate to expert opinion, Mr. Horne may be called as a witness of fact in relation to the rest of his witness statement.⁵⁷ The learned judge also raised with counsel for Ms. Webster the question as to whether Mr. Horne’s witness statement, following the redaction of the offending parts, is capable of being amplified at trial, to which the response was positive.⁵⁸

[82] The learned judge, during the hearing, raised the issue of whether it was more appropriate for Ms. Webster to make a formal application to file a supplemental witness statement of Mr. Horne, and to exhibit thereto a copy of the intended supplemental witness statement of Mr. Horne so that the court and counsel for Mr. Dyrud could have the opportunity to consider in advance of the hearing of such application the extent of the supplemental evidence which he would give at the trial and the court would be better positioned to deal with any objections thereto. The learned judge also mused that the court would ‘obviously not grant leave at large’

⁵⁶ See Transcript of proceedings on 11th October 2021 – Hearing Bundle pages 589 to 590.

⁵⁷ See Transcript of proceedings on 11th October 2021 – Hearing Bundle pages 590 to 591.

⁵⁸ Ibid page 594.

for Ms. Webster to file a supplemental witness statement of Mr. Horne⁵⁹ and that any new matters ought to be limited more to matters of amplification of his original witness statement. After extensive exchanges with and submissions by counsel for both parties as to the merits and appropriateness of any such orders, the learned judge made the orders as enshrined the formal Order of the court.⁶⁰

[83] The second of the orders made by the learned judge on 11th October 2021, permitting Ms. Webster to file a supplemental witness statement of Mr. Horne within 7 days, was made by the learned judge upon the oral application made by learned counsel for Ms. Webster, and in purported exercise of his case management powers, in particular, his powers at CPR 26.1(2)(w). No written application had been put before the court seeking permission to file and serve a supplemental witness statement of Mr. Horne addressing factual issues. There was no evidence, by affidavit or otherwise, before the judge as to the reasons for the application, the necessity for a further witness statement by Mr. Horne, and the matters which he would be addressing in a supplemental witness statement. Accordingly, the procedure adopted by the learned judge in considering and making such an order was irregular. The granting of permission to Ms. Webster to file and serve the supplemental witness statement of Mr. Horne without formerly extending the time for making applications was also irregular, especially in light of the requirements of the December 2020 CMC Order for all witness statements to be filed by the parties on or before 26th February 2021, and for any other applications to be made on or before 19th March 2021.

[84] Part 29 of the CPR makes provision for the giving and leading of evidence in civil proceedings before the court by witness statements, witness summaries and orally both at trial and at a hearing. CPR 29.1 provides that the court may control the evidence to be given at any trial or hearing by giving appropriate directions, at a case management conference or by other means. The general rule is that evidence

⁵⁹ Ibid page 603 L 7-8.

⁶⁰ See Transcript of proceedings on 11th October 2021 – Hearing Bundle pages 611 to 619.

of any fact to be proved by a witness at trial is to be proved by oral evidence given in public. However, the general rule is subject to any order of the court and any provision to the contrary contained in the CPR or elsewhere. Such exceptions provided for in the Rules, include the court permitting the evidence of any witness to be given by video link or by any other means. CPR 29.4 provides that the court may order a party to serve on the other party a statement of evidence (a witness statement) of any witness upon which the first party intends to rely at trial. Such written evidence may also be given through the medium of witness summaries pursuant to CPR 29.6. In both instances, the witness must be called to give evidence if the party wishes to rely on the evidence of that witness. The practice has developed in civil claims before the courts of the Eastern Caribbean since the enactment of the CPR, for courts to provide in their case management orders for the parties to file witness statements and for such statements, subject to their correctness and truthfulness being verified by the witness on oath at the trial, to be deemed their examination-in-chief. Additionally, by CPR 29.9 a witness giving oral evidence may, with the court's permission, amplify the evidence set out in his or her witness statement in the ways and in the manner prescribed in the said rule. These incorporate not just amplification of evidence, the substance of which is set out in the witness statement, but also to give evidence in relation to new matters arising since the witness' statement was served, and to comment on the evidence given by other witnesses (whether in their respective witness statement or orally). The sanction for a party not serving a witness statement or witness summary within the time specified by the court, is that the party cannot call that witness at the trial, unless the court permits; and the court may not give its permission at the trial unless the party seeking such permission has a good reason for not previously seeking relief under CPR rule 26.8.

- [85] This regime concerning the giving or leading of evidence before a court, is intended to further the overriding objective of the court managing cases justly and to ensure, so far as practicable, that the parties are on an equal footing. There is a clear distinction drawn in the language and application of the CPR Part 29 provisions,

between a situation where a party to proceedings does not serve a witness statement or witness summary within the time specified by the court, the consequence of which is that the party cannot call that witness to give oral evidence at the trial unless the defaulting party has applied for and been granted relief from sanctions under CPR 26.8 or the court permits; and where a party serves a witness statement or witness summary within the prescribed time or any extended time granted by the court, the effect of which is that the party can call that witness to give oral evidence and may seek the court's permission to allow that witness to amplify his or her evidence on certain issues of fact, including giving evidence in relation to new matters arising since their witness statement had been served on the other parties.

[86] In my view, while CPR 29 does not expressly speak to or permit a party to file and serve a 'supplemental' witness statement or witness summary (for that matter), the filing of more than one witness statement or witness summary is not expressly excluded. I ask the question rhetorically, what is to prevent a party from filing and serving within the time prescribed by a case management order, two or more witness statements or witness summaries by the same person? While such a course of action is not to be encouraged as a matter of prudent and cost saving case management, the Rules do not prohibit it. In my view, this is for good reasons, not least of which is that the fundamental role of the court is to seek to do justice between the competing parties according to applicable law. It is not to exclude material and relevant evidence utilizing stringent technical rules of procedure. Moreover, the sanction in CPR 29.11 does not bite until the time prescribed by the court for serving witness statements or witness summaries has expired; and even then, the Rules permit the court to give permission to the party to call such witness at the trial.

[87] Despite my disquiet with the way in which the learned judge went about deciding to permit Ms. Webster to file and serve a supplemental witness statement of Mr. Horne, which supplemental witness statement must clearly be confined to addressing only

factual issues, in my opinion this by itself does not lead to an error of principle such that would propel an appellate court to set aside the said order No. 2. Any perceived prejudice to Mr. Dyrud as a result, was addressed by the judge and minimized by the other orders which the judge made at paragraphs 3 and 4 of the Order. By these paragraphs, the judge permitted Mr. Dyrud to also file a supplemental witness statement within 7 days of service of Mr. Horne's supplemental witness statement, and, most importantly, that any objections to a supplemental witness statement filed by the parties shall be taken at the trial. In this way, the learned judge sought to preserve the right of Mr. Dyrud, in particular, (as the person likely prejudiced) to object to Mr. Horne's supplemental witness statement or parts thereof. Furthermore, as the transcript of the proceedings reveal, the judge also emphasized that Mr. Dyrud is not precluded from taking steps prior to the trial (then fixed for 6th to 8th December 2021) to mount any objections to Mr. Horne's supplemental witness statement or any parts thereof.⁶¹ I would also add for completeness, that any witness called to give evidence at the trial may be cross-examined on the evidence set out in his or her witness statement(s).⁶²

- [88] In the premises, I find no basis upon which to set aside the case management orders made by the learned judge on 11th October 2021 at paragraphs (1) to (6). Mr. Dyrud has not satisfied the Court that the said orders (or any of them) are clearly or blatantly wrong such as to not be within the generous ambit in which reasonable disagreement is possible. It follows that grounds 4 and 5 of the Dyrud Appeal are dismissed. I now turn to the Webster Appeal.

Webster Appeal – Grounds (a), (b) and (c)
Ms. Webster's Submissions

- [89] The main thrust of the Webster Appeal is that the learned judge, in exercising his discretion whether to extend time to permit Ms. Webster to apply for permission to adduce and to rely at trial on expert evidence, erred in his determination of the scope

⁶¹ See Transcript of proceedings on 11th October 2021 – Hearing Bundle page 616, L11-17.

⁶² CPR 29.10.

and issues in relation to which expert evidence was reasonably required to resolve the matters in dispute in the proceedings justly. By grounds (a), (b) and (c) of her notice of appeal, Ms. Webster challenges three main aspects of the learned judge's conclusion that, in the instant matter, the court could only benefit from expert evidence in relation to the valuation of the shares in FATCL.

- [90] The first main challenge is to the judge's conclusion that the court did not need assistance from an expert in the field of accountancy in analyzing the financial statements of FATCL, in order to determine the factual and legal question, whether Mr. Dyrud, in his management of the financial affairs of FATCL has acted in a manner that is oppressive, unfairly prejudicial or unfairly in disregard of Ms. Webster's interest and rights as a shareholder. The second main challenge is that while accepting, as the learned judge found, that the court is capable or well-equipped without the assistance of an expert, of examining the actions of Mr. Dyrud against the relevant powers set out in the By-Laws of FATCL, the provisions of the Companies Act, and the Resolution dated 1st September 2005, the judge erred in not concluding that court will be greatly assisted in determining whether Mr. Dyrud's actions were in breach of section 97 of the Companies Act, by expert evidence identifying any industry practice regarding the application of the regulatory requirements governing financial services providers in Anguilla, such as FATCL; the degree of seriousness attendant to various breaches of any applicable regulations; and the way in which the Financial Services Commission ("FSC") addresses licensees. Ms. Webster's third main challenge to the scope of the judge's finding in relation to necessary expert evidence is that the learned judge, having accepted the benefit to a court of expert evidence as to the established standards in a profession in assessing whether the professional conduct under scrutiny is a departure from that which has been established by institutional bodies, erred in declining to find that the court could benefit from expert evidence as to what is the accepted institutional standards for licensed company service providers.

- [91] As to the need for expert evidence in the field of accountancy in analysing the financial statements of FATCL and its financial management by Mr. Dyrud, it is the submission of Ms. Webster that the need for such assistance by the court in determining these matters is readily apparent, and ought to have been appreciated by the learned judge. She contends that an expert analysis of the financial statement of FATCL is “necessary in order to arm the trial judge with material to assist him in determining the factual and legal issue of whether [Mr. Dyrud] in managing the financial affairs of [FATCL] had acted in a manner that is oppressive, unfairly prejudicial or unfairly disregards [Ms. Webster’s] interest and rights as a shareholder.”⁶³
- [92] Learned Queen’s Counsel for Ms. Webster relied on the formulation by Evans-Lombe J in **Barings plc and another v Coppers & Lybrand and others**⁶⁴ and **Barings Futures (Singapore) Pte Ltd (in liquidation) v Mattar and others**,⁶⁵ of the two-stage process to be embarked upon by a court when determining the admissibility of expert evidence in civil litigation. These principles were relied on by Evans-Lombe J in his later decision in **Liverpool Roman Catholic Archdiocesan Trustees Incorporated v Goldberg (No. 3)**.⁶⁶ The first stage is an examination of whether the evidence in question qualified as admissible expert evidence. As Evans-Lombe J observed, the first stage turns on whether the evidence comes within the provisions of any statutory provision governing the meaning of ‘expert evidence’. The second stage is an inquiry as to whether, if the evidence to be proffered qualifies as expert evidence, it should actually be admitted as being of assistance to the court in determining the factual and legal issues which the court has to decide in the case. This second stage turns on the nature of the evidence sought to be given.

⁶³ See para. 12 of Ms. Webster’s appellant skeleton argument.

⁶⁴ [1996] EWCA Civ 1021.

⁶⁵ [2003] EWHC 2371 (Ch).

⁶⁶ [2001] 1 WLR 2337.

- [93] In the instant matter, the complaint being made by Ms. Webster falls within the second stage. There is no real issue before this Court as to whether the evidence sought to be given at trial qualifies as 'expert evidence', as distinct from some other type of factual or opinion evidence. The real or overarching question which was before the judge below and is before this Court on the Webster Appeal, is whether the expert evidence which was sought to be led by Ms. Webster through Mr. Horne and Mr. Law, is reasonably required to resolve the issues or certain of the issues in the proceedings before the High Court.
- [94] An example of the distinction between the two stages is illustrated by the decision in the **Liverpool RC Trustees** case, where Evans-Lombe J ruled that the expert evidence of Mr. Flesch was inadmissible having not satisfied the second stage. The judge reasoned that while Mr. Flesch's evidence qualified as that of an expert within the meaning of section 3 of the Civil Evidence Act 1972, it was inadmissible and should be disregarded on the ground that Mr. Flesch was unable to fulfil the role of an expert witness because of his close relationship with the defendant Mr. Goldberg.
- [95] This decision bears a striking similarity to the instant matter. In this matter, there being no issue as to whether Mr. Horne was qualified to provide expert evidence on the issues on which he was being put forward by Ms. Webster as an expert (the first stage), the learned judge determined correctly (the second stage) that the expert evidence of Mr. Horne was inadmissible on the basis that Mr. Horne, who was being put forward by Ms. Webster as an expert in the fields of accounting and financial management, lacked the impartiality and independence necessary to give such expert evidence in this matter.
- [96] This ruling in relation to Mr. Horne which disqualifies him as an expert witness to assist the court at trial with expert evidence, and which encompasses both the statements of expert evidence in the Horne Witness Statement already filed and expert evidence sought to be given by way of a report pursuant to CPR 32, has not been appealed. In the face of that ruling, it cannot in my opinion, be open to

Ms. Webster to contend that the learned judge failed to exercise his discretion to extend time for Ms. Webster to file her application for the appointment of Mr. Horne as an expert witness in the case or to rely on the Horne Witness Statement as expert evidence. By that decisive ruling, both are or would be inadmissible as expert evidence in the case. That leaves Ms. Webster's grounds of appeal relative to the scope of the expert evidence reasonably necessary to assist the court in determining the issues in this case, and the failure to appoint Mr. Law as an expert witness in relation to corporate secretarial governance and trust company management and compliance and/or, as Mrs. Small- Davis QC argues, as an expert in relation to the areas for which the appointment of Mr. Horne had been inappropriately sought and rightly rejected, namely, accountancy including financial reporting, forensic accounting, corporate finance and the valuation of a company for the purposes of a sale or buy-out.

[97] In **Kennedy v Cordia (Services) LLP**,⁶⁷ the Supreme Court of the United Kingdom endorsed the guidance given by King CJ in the South Australian case of **R v Bonython**.⁶⁸

'Before admitting the opinion of a witness into evidence as expert testimony, the judge must consider and decide two questions. The first is whether the subject matter of the opinion falls within the class of subjects upon which expert testimony is permissible. This first question may be divided into two parts: (a) whether the subject matter of the opinion is such that a person without instruction or experience in the area of knowledge or human experience would be able to form a sound judgment on the matter without the assistance of witnesses possessing special knowledge and experience in the area, and (b) whether the subject matter of the opinion forms part of a body of knowledge or experience which is sufficiently organized or recognized to be accepted as a reliable body of knowledge or experience, a special acquaintance with which by the witness would render his opinion of assistance to the court. The second question is whether the witness has acquired by study or experience sufficient knowledge of the subject to render his opinion of value in resolving the issues before the court.'

⁶⁷ [2016] 1 WLR 597 at para 43.

⁶⁸ (1984) 38 SASR 45.

[98] In **Kennedy v Cordia**, Lord Reed and Lord Hodge, giving the unanimous opinion of the Supreme Court, formulated (at para. 44) four considerations which govern the admissibility of expert evidence in civil proceedings. These are:

- (i) whether the proposed evidence will assist the court in its task;
- (ii) whether the witness has the necessary knowledge and experience;
- (iii) whether the witness is impartial in his or her presentation and assessment of evidence and;
- (iv) whether there is a reliable body of knowledge or experience to underpin the expert's evidence.

[99] Of these, the factors which fall to be considered in the Webster Appeal are (i) and (iv). As to (ii), there was no issue before the learned judge as to the expertise and knowledge of either Mr. Horne or Mr. Law in relation to the areas or fields for which they were, respectively, put forward as expert witnesses. As to (iii), the objection to the impartiality and lack of independence of Mr. Horne was accepted by the judge and is not challenged on appeal. There was never any issue raised before the judge or on appeal as to the impartiality or lack of independence, actual or apparent, of Mr. Law such as to disqualify him from being appointed to provide expert evidence in the proceedings.

[100] It is on factor (i) – assisting the court- that Ms. Webster's submissions are most focused. She submits that the learned judge got it wrong in determining the nature and scope of the expert evidence which will be of assistance to the court in its determination of the issues in the proceedings. Specifically with regard to strictly opinion evidence, the threshold requirement for admissibility is the necessity for the expert evidence sought to be adduced by a party. The guiding principle is that it is for the court (the judge) to decide whether the expert evidence is needed.⁶⁹ On the other hand, where the expert evidence sought to be adduced is 'skilled evidence of fact' (where a skilled witness draws on the knowledge and experience of others rather

⁶⁹ [2016] 1 WLR 597 at para 45.

than or in addition to his personal observations or its equivalent), all four factors identified by the Board in **Kennedy v Cordia** apply.

[101] An important principle is that a judge considering an application to rely on expert evidence, must caution himself or herself against too rigid an interpretation of what expert evidence of fact is necessary to assist the court. In relation to that category of expert evidence, the test for its admissibility is not strict necessity “as otherwise, the court could be deprived of the benefit of a skilled witness who collates and presents to the court in an efficient manner the knowledge of others in his or her field of expertise.”⁷⁰ Where skilled evidence of fact is likely to be of assistance to the efficient and proper determination of the issues in the case, the judge ought to admit it.⁷¹ I would add that a judge, having permitted expert evidence of fact to be adduced by way of an expert report or reports, any lingering issues as to admissibility or relevance or otherwise, can and should be addressed either before or during the course of the trial upon objection being taken thereto. Further, questions as to the appropriate weight to be accorded to expert evidence or parts of it, are matters to be assessed by the trial judge taking all other relevant evidence and factors into account, factual and legal, including the cross-examination of the expert witness, and the evidence of another expert witness or witnesses called during the trial relevant to such issues.

[102] Importantly, it is permissible for an expert witness to express his or her opinion on the issues or ultimate issue which the court is called upon to determine. This does not, in of itself, render the opinion expressed inadmissible as expert evidence, such as to lead to a dismissal of an application to appoint that person as an expert witness or a finding that such opinion evidence of fact is inadmissible. In civil litigation, expert evidence must be restricted to what is reasonably required to resolve the proceedings justly⁷² and expert witnesses are to give their impartial opinion on matters relevant to

⁷⁰ *ibid* at para 46.

⁷¹ *Ibid* at para. 47.

⁷² CPR 32.2.

his or her expertise.⁷³ This role and function of expert evidence in civil litigation does not extend to supplanting the constitutional role of the court as the decision-maker.⁷⁴ Accordingly, an expert witness discharges their duty to the court by providing material (be it opinion or skilled evidence of fact) from which the court can make its own findings and reach its own conclusions on the relevant issues as held in **Pora v The Queen**.⁷⁵

[103] As to factor (iv), what constitutes a reliable body of knowledge and experience is dependent upon the subject matter of the proposed skilled evidence and its relevance to the issues for determination by the court. In short, the methodology deployed by an expert witness must be based on an established body of knowledge. By contrast, a subject of recent academic research or a methodology not yet sufficiently developed or tested, is not to be treated as reliable.⁷⁶

[104] The embedded general principle of ‘economy in litigation’ is an important yardstick having regard to the court’s overriding objective to deal with cases justly by, inter alia, saving expense. It is an important consideration when a judge or a court is deciding on whether to permit expert evidence in a case and, if so, whether, in its discretion, to limit such evidence to that of one expert.⁷⁷ A judge will consider such matters when exercising his or her case management powers, and must seek to encourage the parties to avoid unnecessarily lengthening the trial by adducing evidence on matters, either with respect to which the court does not reasonably require assistance, or matters which are not contentious. Moreover, in granting permission to adduce expert evidence, a court will seek to minimize the cost of the litigation by making orders and giving consequential directions relative to the specific issues upon which expert evidence is needed or reasonably required to resolve the proceedings justly, and, where two or more experts are appointed, for the two experts to meet (in person or

⁷³ CPR 32.3.

⁷⁴ See *Davie v Magistrates of Edinburgh* (1953) SC 34 at 40.

⁷⁵ [2015] UKPC 9 at 24.

⁷⁶ See, for example, *Young v her Majesty’s Advocate* 2014 SLT 21; and *R v Gilfoyle* [2001] 2 Cr App R 5.

⁷⁷ [2016] 1 WLR 597 at para. 60)

virtually) and to seek to narrow the areas of disagreement, and to identify for the court the areas upon which they nevertheless retain some disagreement and the extent of each such line of departure.

[105] In the written submissions filed by Ms. Webster in support of the Webster Appeal, she points to the learned judge's statements at paragraph [43] of the Judgment as an example of where the judge erred by taking into account an irrelevant matter in reaching his decision on the nature and scope of expert evidence which is reasonably necessary to resolve the matter justly between the parties. With due respect, I do not agree with this submission for the simple reason that, from my reading of paragraph [43], the statements made there by the learned judge are not irrelevant but, to the contrary, are supportive, to some extent, of Ms. Webster's case that the judge adopted too restrictive an approach to the scope and nature of the expert evidence necessary to assist the court in resolving the proceedings justly. At paragraph [43], the learned judge, having in the immediately preceding paragraph determined that the court will not in any way benefit from the assistance of expert evidence 'in determining [whether] the conduct alleged is sufficient to establish liability under section 268 of the Companies Act', goes on at paragraph [43] to make the clear and unqualified pronouncement that he has:

'formed the view that it would be beneficial to the Court to have assistance in relation to deciding the questions of whether given the present corporate existence of [FATCL], which of the discretionary remedies provided for by section 268(2) of the Companies Act is better suited to meet the exigencies of the relationship of the parties within the corporate context and, if the remedy contemplated by section 268(2)(a) is desirable in the circumstances, the methodology to be used in determining the value of [Ms. Webster's] shareholding in [FATCL] and the time at which the valuation is to be determined.'

[106] The judge's statements at paragraph [43] must also be read with his pronouncements at paragraph [23] of the Judgment which reads:

'The Court subscribes to the view that the valuation of shares of a company is an exercise that requires professional skill and judgment. **There may be, as readily apparent in the present case, more than one method of approaching such valuation.**' (emphasis added)

[107] The cumulative effect of these passages is that the learned judge was of the clear view that the court could benefit from and would require the assistance of expert evidence in relation to the following areas dealing with the appropriateness and practicality of the court's wide discretionary remedies under section 268. These are:

- (i) which of the discretionary remedies provided for in section 268(2) is better suited to meet the relationship of the parties within the corporate context of FATCL;
- (ii) if a buy-out is desirable as the remedy (relief), the methodology to be used to value the shares in FATCL; and
- (iii) the time or date at which such valuation ought to be determined.

[108] In the end, the learned judge did not make an order providing for expert evidence addressing all three of these issues or areas which he identified as beneficial for the court to receive the assistance of expert evidence. Instead, he confined the relevant terms of his order to the issues of the 'valuation of the shares' and the time at which such valuation is properly to be made. In this respect, the learned judge clearly erred. Accordingly, the judge's conclusion at paragraph [103] by which he limited the assistance of expert evidence to 'the area of the valuation of the shares' and his order at sub-paragraph (2) of paragraph [105] of the Judgment was too limiting and, in my considered opinion, too imprecise and narrow in its scope and incorrect as a matter of principle. It failed to incorporate his earlier conclusions on this issue which also included receiving expert opinion on the appropriateness of the remedies or reliefs available to the court under section 268, including a buy-out of Ms. Webster's shareholding in FATCL. In my opinion, any order, properly made providing for expert evidence in these proceedings, ought, at minimum, to specify all three of the matters summarized at paragraph [107] above of this judgment

[109] Regarding the judge's refusal to permit expert evidence in the area of accountancy and forensic analysis of the financial statements of FATCL, it is submitted on behalf of Ms. Webster that while a judge may be able to read financial statements and listen to the evidence of the parties in relation to them or aspects of them, the analysis of

them by a professional accountant is important in ‘assisting the court in determining the weight to be given to their context and effect.’⁷⁸ It is also submitted that such a forensic analysis of the financial statements is a different and separate exercise from and is not to be collated with, the share valuation exercise. The reason given is that such a forensic analysis is ‘needed to inform whether there was any breach of the fiduciary duty to properly manage the financial affairs’ of FATCL.⁷⁹ Put simply, the share valuation exercise goes to possible remedies in the event that liability is established, while the forensic analysis of the company’s financial statement goes to the question of alleged breaches of proper or established corporate finance and financial reporting by Mr. Dyrud and, hence, his liability as the managing director of FATCL for breach of fiduciary duties under section 97 of the Companies Act.

[110] As to matters of corporate governance, Ms. Webster takes issue with the judge’s conclusion that the court is well-equipped to determine whether Mr. Dyrud’s actions breached his duty as a director under section 97 of the Companies Act. While she does not dispute or take issue with the court being capable of examining Mr. Dyrud’s actions against the powers set out in FATCL’s By-Laws, the Companies Act and the Resolution dated 1st September 2005, it is submitted that the learned judge did not give proper regard to the evidence of industry practice and the application of regulatory requirements governing financial services providers such as FATCL. Accordingly, she submits, such evidence is not only necessary, but must be given by an independent expert who can speak to the degree of seriousness attendant on any breach of those regulations, provisions and resolution, and ‘the way in which the [FSC] addresses licensees and the impact of the citation [given to FATCL] by the FSC.’

[111] Ms. Webster submits that mismanagement of a company’s affairs can constitute unfairly prejudicial conduct if it amounts to ‘serious misconduct’ and relies on **Re Marco (Ipswich) Limited**⁸⁰ in support of this proposition. It is argued that the

⁷⁸ See para. 17 of Ms. Webster’s appellant skeleton argument.

⁷⁹ See para. 17 of Ms. Webster’s written appeal submissions.

⁸⁰ [1994] 2 BCLC 354.

learned judge, having recognized the benefit of expert evidence as to the established standards in a profession as a means of determining whether a party had departed from such standards⁸¹ he erred in declining to permit expert evidence of “the acceptable institutionalized standards for company service providers”, such as FATCL.

[112] Much reliance was placed both before us and in the court below, by learned Queen’s Counsel for Ms. Webster, on the Privy Council case of **Caribbean Steel Company Limited v Price Waterhouse (a Firm)**.⁸² In fact, the learned judge (somewhat rhetorically) expressed his acceptance of the approach adopted by the Board in that case.⁸³ At paragraph [11] of the unanimous opinion of the Board, Lord Toulson stated poignantly: ‘...it is important to remember that the valuation of the shares in a company is an exercise requiring professional skill and judgment. There may be more than one way of approaching it.’ This passage underscores two important matters. The first is that the learned judge cannot be said, in principle, to have got it wrong when he concluded that the court would benefit from expert evidence as to the valuation of the shares in FATCL (as Mr. Dyrud has argued in his appeal). The second, is that the learned judge did get it wrong, as already addressed above, by not framing his conclusion at paragraph [103] and the order at paragraph [105] (2) to incorporate all three issues upon which he concluded at paragraph [43] were the issues upon which the court could benefit from expert evidence in relation to possible remedies.

[113] Counsel for Ms. Webster also stressed that in **Caribbean Steel**, the Board was careful to state, as a guiding principle (at paragraph 11), that a court ought to be slow, in the absence of expert evidence as to the requisite professional standards, to find that a professional had fallen below the accepted standards of their profession. The relevant part of paragraph 11 reads:

⁸¹ See para. [28] of the Judgment.

⁸² [2013] UKPC 18.

⁸³ See para. [31] of the Judgment.

'The question facing the courts in this case is whether PW fell below the standards properly to be expected of an accountant carrying out such an exercise. In such a case, if a properly qualified and reputable independent expert expresses a reasoned opinion that the valuation met the required professional standard, it is for the claimant to establish why that view should be rejected.'

[114] In my considered view, these statements of principle from the decision of the Board in the **Caribbean Steel** case, are clear authority of the highest level, for two important principles when a court is considering whether to allow expert evidence in a civil case. First, the necessity for expert evidence where the valuation of property, including the valuation of shares in a company, is a matter in issue or likely to be an issue once liability has been established. Second, where the issue of liability before the court rests, in whole or in part, on proof of pleaded allegations of breaches of professional standards or accepted standards in a field or profession, there will invariably be the necessity for the court to receive expert evidence as to what those standards are, whether the conduct complained of falls below or falls short of these standards and, if so, to what degree and to what level of seriousness. The first of these have already been addressed. As to the second, this will depend on the pleaded case of Ms. Webster and her affidavit evidence in support of the Webster Application, to which I shall turn later in this judgment.

[115] Support for the principles restated above relating to the requirement for expert evidence of breaches of established professional standards, can also be found in the decision of the Queens Bench in **Avondale Exhibitions Ltd v Arthur J Gallagher Insurance Brokers Ltd**.⁸⁴ There the judge set out the following guiding principles:

(a) usually, a court will need expert evidence of the standards generally observed within a profession before it will be willing to make any findings of negligence;

⁸⁴ [2018] EWHC 1311.

(b) there is no law that expert evidence is required in every case before a finding of professional negligence can be made, but decisions along these lines may indicate a common-sense approach; and

(c) it was “striking” that the claimant had asked the court to find that the defendant fell below the standards of reasonably careful and competent insurance brokers without adducing any expert evidence of the standards of the profession.

[116] What was stated in **Avondale** (in the extract cited by the learned judge at paragraph [32]) is:

‘It is clear, in my judgment, that, however the matter is put, **the profession cannot be the ultimate arbiter of the applicable standard, because it is ultimately for the court to decide what amounts to reasonable competence** and the court may conclude that the standards ordinarily observed by a particular profession fall short of what is reasonably required.’ (emphasis added)

[117] Reliance was also placed by counsel for Ms. Webster on the decision of Oliver J in **Midland Bank v Hett, Stubbs & Kemp**,⁸⁵ a case dealing with whether a lawyer’s conduct had fallen below the standards of the profession. In the passage at page 402C,⁸⁶ Oliver J stated (in part):

‘**The extent of the legal duty in any given situation must I think, be a question of law for the court.** Clearly, if there is some practice in a particular profession, some accepted standard of conduct which is laid down by a professional institute or sanctioned by common usage, **evidence of that can and ought to be received. But evidence which amounts to no more than an expression of opinion by a particular practitioner of what he thinks he would have done had he been placed, hypothetically and without the benefit of hindsight, in the position of the defendants, [which] is of little assistance to the court.**’ (emphasis added)

Oliver J was also of the view that evidence from a witness of his or her view of what, as a matter of law, the solicitor’s duty was in the particular circumstances of the case

⁸⁵ [1979] 1 Ch 384, at 402C.

⁸⁶ (Quoted fully at para. 23 of Ms. Webster’s appellant skeleton argument and partially at para. [37] of the Judgment.

is, 'inadmissible, for that is the very question which it is the court's function to decide.'

[118] At paragraph [34] of the judgment in the instant matter, the learned judge opined that the decision in **Avondale** 'does not establish a rule of law of general application that expert evidence is required in every case before a finding of a departure from acceptable professional standards can be made.' Further, at paragraph [36], the learned judge opined that where the matters are of a technical nature more or less dependent on professional qualifications, the more likely it is that a court may require the assistance of expert evidence. He continued:

'Otherwise, the standard reasonably to be required of a professional is a matter for the court. In the latter instance it may be regarded as challenging to [ask] the court to find that a particular professional's conduct fell below a standard that can be (sic) reasonably be seen as careful and competent without adducing any expert evidence as to the standards in that profession. In such a case the lack of expert evidence is likely to significantly diminish, although not excluding, the possibility of a finding that the professional's conduct (sic) [was] a departure from (sic) [that] established by institutionalized professional bodies.'

[119] The learned judge surmised that:

'many of the complaints lodged by [Ms. Webster] in the present action interrogates [Mr. Dyrud's] conduct in carrying out his duties as one of the directors of [FATCL]. The issues raised by [Ms. Webster's] allegations brings into play the provisions of section 97 of the Companies Act which deals with the duty of care (sic) to be exercised by directors of corporate entities.'⁸⁷

In his view, matters to which sections 97 and 268 relate "are matters left to be determined by the court as matters of fact and law." He was not of the view that the court would be greatly assisted in its determination of these matters by expert evidence. Specifically with regard to a claim of oppression and unfair prejudice where the complaint concerns the conduct of a director of the company, the learned judge considered that the court was concerned with "a consideration of the broad

⁸⁷ See para. [38] of the Judgment.

and general corporate law context.”⁸⁸ Likewise, at paragraph [26] of the Judgment, the learned judge posited that the question of whether there was adherence to established or recognized practice in the fields of accountancy, secretarial administration and the management of financial services, “are questions of fact the existence or nonexistence of which the Court is quite able to distill by reference to the particular statutory regime governing those areas of corporate practice.” The learned judge was of the opinion that to hold otherwise “would seem to permit a usurpation of what is clearly the province of the court in this particular instance.”⁸⁹

[120] Having directed himself that the court must first determine the issue of liability, that is, whether the conduct complained of in fact exists, before considering and determining which, if any, of the discretionary remedies it ought to apply in the circumstances of the case, the learned judge concluded at paragraph [42]:

‘Therefore, the Court is not of the view that it will in any way benefit from the assistance of expert evidence in determining the conduct alleged is sufficient to establish liability under section 268 of the Companies Act.’

[121] Ms. Webster submits that the administration of a licensed financial services entity “is a specialized area of practice with standards of conduct established by the professional institute of corporate secretaries and the guidance of the regulator.”⁹⁰ Accordingly, it is submitted that the consequence in law of the judge’s approach and conclusions at paragraph [39] of the Judgment were that he:

- (a) misunderstood the function of expert evidence in that it was not being sought to be determinative of any fact or law, but was to assist the court in understanding the standards by which he ought to judge Mr. Dyrud’s conduct, and
- (b) failed to take into account an important relevant consideration that this was not broad and general corporate law context and that it involved conduct within a licensed and regulated entity which has a higher

⁸⁸ See para. [39] of the Judgment.

⁸⁹ Ibid para. [27].

⁹⁰ See para. 24 of Ms. Webster’s appellant skeleton argument.

standard of care. The question is whether the court would be in the best position to be able to assess the conduct of the financial affairs and management of the licensed business are acceptable or within acceptable range of conduct.

- [122] Finally, on these three grounds of appeal, it is the case for Ms. Webster that the learned judge erred in the exercise of his discretion by failing to give any or any proper consideration to the pleaded allegations against Mr. Dyrud's conduct of the management and control of the affairs of FATCL, particularly with regard to his alleged breaches of the company management license, and that this is a category of professional negligence and/or misconduct analogous to professional negligence. It is also submitted that the judge did not address the expertise of Mr. Law as a proposed expert, and it is to be inferred that he failed to take it into account "as a category of evidence" which could assist the trial judge in determining whether [Mr. Dyrud's] conduct and management of [FATCL] was below the accepted standards in the industry.

Mr. Dyrud's Response Submissions

- [123] In response to grounds (a), (b) and (c) of the Webster Appeal and submissions, Mr. Dyrud submits that the Court ought to be cautious not to interfere with the judge's finding that expert evidence, other than with respect to the valuation of the shares in FATCL, is not reasonably required to determine the issues of liability in the claim, purely on the basis of an attack on the weight which the judge attached to matters when coming to his conclusions. Reliance is place on this passage from the opinion of Lord Briggs in **Ming Sui Hung and other v JF Ming Inc and another**:⁹¹

'A view that a judge should have given 'more weight' to a relevant matter is not within the scope of appellate review. Matters of weight when exercising a discretion are for the judge, provided that his assessment of weight is not irrational.'

⁹¹ [2021] UKPC 1.

[124] Mr. Dyrud submits that the learned judge's assessment of this issue cannot be said to be irrational, as he gave due consideration to the issue of the management of FATCL's financial affairs (at paras. 20, 25, 26, 28 and 30 of the Judgment). It is also submitted that, unlike the facts in **Scott-Carlington v Sadler et al**, in the instant matter there is no allegation that the financial statements of FATCL are not full and accurate or that they contain unreliable information which prevented Ms. Webster from knowing the true financial affairs of the company. Accordingly, the judge was correct to find that expert accounting evidence regarding the financial statements of FATCL was not necessary or reasonably necessary to resolve any issue between the parties. And even if accountancy evidence was reasonably required, such evidence was given or to be given by Mr. Horne whom the judge found was not an independent and impartial witness.

[125] With regard to the alleged necessity for expert evidence as to industry practice and the application of regulatory requirements governing licensed financial services providers such as FATCL, Mr. Dyrud submits that the judge rightly found that such expertise was not reasonably required to assist the court in determining those issues which arise in the claim. He also submits that – "this dispute can be resolved by mere non-expert observations by the learned judge against the backdrop of certain findings which were made by the Arbitrator which bind Ms. Webster."⁹²

Decision on Webster Appeal Grounds (a), (b) and (c)

[126] I have foreshadowed above much of this Court's decision with regard to Ms. Webster's grounds (a), (b) and (c). I have found that the learned judge erred in limiting the scope of the expert evidence merely to 'the valuation of the shares' in FATCL. He ought to have incorporated all three areas/ issues which were identified at paragraph [43] of his Judgment (which I have listed at paragraph 107 above). These matters all relate to assisting the trial court in determining the appropriate remedy to be granted should Ms. Webster succeed in establishing her claim based upon oppression, unfair prejudice or unfair discrimination under section 268 of the

⁹² See para. 18 of Mr. Dyrud's respondent submissions; and para. 11 of Mr. Dyrud's Affidavit in opposition.

Companies Act. This conclusion on Ms. Webster's grounds (a), (b) and (c), however, does not lead to this Court allowing Ms. Webster's appeal and setting aside the judge's order dismissing the Webster Application and/or her application to extend time to apply to adduce and rely on expert evidence. The reason is that by the Webster Application, she sought orders appointing Mr. Horne as an expert witness to give evidence on a range of issues, including the said three issues identified by the learned judge at paragraph [43] and the judge found such evidence inadmissible since Mr. Horne was found, correctly, to lack the impartiality and independent necessary to be appointed an expert witness in the case. It also follows from that finding that the Horne Witness Statement could not, in any event, be deemed expert evidence as to any such matters relative to the appropriate remedies or the appropriate methodology and valuation of the shares in FATCL, or on any other area or field of expertise relating to issues pertaining to the alleged liability of Mr. Dyrud's in Ms. Webster's section 268 Claim.

- [127] This leaves the question of whether the judge was wrong in determining that the court would not need the assistance of an expert witness as to the identification of accepted or established practices applicable to service providers, the seriousness of any breaches of financial services regulations by Mr. Dyrud, and the way the FSC addresses licensed entities. It has not been pleaded by Ms. Webster that Mr. Dyrud has, by his alleged conduct or failures, breached any established standards or practice applicable to licensed providers of corporate secretarial services and financial services in Anguilla. The alleged corporate governance failures and serious mismanagement allegations are set out, in particular, at paragraphs 83 to 98 of the Amended Statement of Claim. Nowhere in her pleaded case is any particular standard or practice, other than those set out in applicable statutory and regulatory laws in Anguilla, pleaded. Moreover, in the Webster application and Ms. Webster's two affidavits filed in support thereof, no such established standard or practice has been alluded to as having been breached by Mr. Dyrud. At paragraph 9 of the grounds of the said application, it is stated that accountancy and corporate secretarial administration and the management of financial services provided are

fields of specialized knowledge and practice, without identifying or referring to any such standard or practice with respect to which expert evidence will be reasonably required in order for the trial court to decide on whether Mr. Dyrud's established conduct falls short of such standard or practice. Similarly vague statements or averments are made by Ms. Webster at paragraphs 11 and 12 of her affidavit filed 15th June 2021 in support of the Webster Application. At paragraph 12 she deposes (in part):

'Even though evidence of those facts can be given, and the breaches can be identified, it is my belief that the Court will be assisted by the expertise that a corporate secretary will bring to the issue in assessing the importance of compliance with [FATCL's] by-laws, the terms of its General Trust Licence and general corporate governance standards and practice.'

- [128] In my considered view, these are matters or issues with which the court is well-capable of assessing the actions of Mr. Dyrud in his management of the affairs of FATCL and determining whether Mr. Dyrud by his actions or failures breached FATCL's By-Laws, its corporate constitutional and governance documents including the Resolution, its General Trust Licence, and any applicable rules, regulations or practices imposed by the Financial Services Commission, the seriousness of any such breaches or infractions, and whether such conduct amounts to oppression or unfairly prejudicial or unfairly discriminatory conduct in the treatment of Ms. Webster in her capacity as a shareholder of FATCL. It is for the trial court to consider and find the facts from the evidence given by the parties, determine what, if any, breaches whether of fiduciary or other duties or of applicable rules and regulations has been committed, and then determine the appropriateness of any type of relief, including a buy-out of Ms. Webster's shares. These are matters which involve a consideration by the trial judge of issues of both fact and law. In my view, while I have some sympathy for certain of the points made by or on behalf of Ms. Webster, I am not satisfied that, in this matter, the trial judge would benefit from the expert opinion or expert factual evidence of a witness in these areas. Accordingly, I am not satisfied that the learned judge was incorrect in concluding that these are not matters with respect to which the court could benefit from expert evidence or that such evidence was reasonably necessary to determine these issues justly. It follows

that I am not satisfied that the learned judge committed any errors of principle in the exercise of his case management powers such that would take it outside of the generous ambit within which reasonable judicial disagreement is possible and render his decision plainly or blatantly wrong within the meaning of the **Helenair** principles.

[129] In summary, on the issues pertaining to liability, from the reasons given above, the judge did not err or commit an error of principle in the exercise of his discretion. On the matter of the appropriateness of any remedy in the event that liability was established by Ms. Webster, the scope of the matters on which expert evidence was required ought not to have been limited by the judge to the valuation of the shares and the time at which such valuation is properly to be made, but ought to have encompassed all three of the matters/issues listed at paragraph [107] above. I would add that in addressing these matters, an expert can give his opinion not just as to what ought to be the appropriate date for the valuation, but what would be the actual valuation at each of the dates contended for by Ms. Webster (in the alternative) and by Mr. Dyrud in his defence.

Webster Appeal Ground (d) – over emphasis on the Horne Witness Statement

[130] This ground can be disposed of shortly. Ms. Webster argues that the learned judge, in reaching his conclusions, focused too much on the Horne Witness Statement and the fact that it does not satisfy the requirements of CPR 32 pertinent to the way in which expert evidence is to be presented, that it is not a report and does not set out the contents that must be included or addressed in an expert witness report pursuant to rules, 32.4, 32.7 and 32.14. It is submitted that in focusing his attention in this way, the learned judge failed to appreciate that the Horne Witness Statement was prepared and filed as a witness statement and not as an expert report and, therefore, could not comply with the said requirements of CPR 32.

Decision on Webster Appeal Ground (d)

- [131] It was Ms. Webster's application to have the previously filed Horne Witness Statement deemed an expert report and/or to permit Mr. Horne to provide an expert report (relief No. 3 Webster Notice of Application). However, the judge found that Mr. Horne could not provide impartial and independent expert opinion in this matter and both alternative remedies were dismissed. The judge went on to make an order redacting the offending parts of his witness statement and permitted the rest of it to stand as his witness statement in the proceedings. Furthermore, it is my considered opinion that it would have been wrong as a matter of principle for the judge to have treated or accepted the Horne Witness Statement as expert evidence, and he was correct to not do so for all the reasons which he gave, including the fact that the said witness statement did not conform with the mandatory requirements of CPR 32 applicable to the reports of expert witnesses approved by the court. There is no merit in this ground of appeal which, accordingly, fails.

Webster Appeal Ground (f) – Judge ought to have considered alternate expert

- [132] Ms. Webster argues that the learned judge, having correctly rejected Mr. Horne as an expert witness, ought to have directed that another expert be selected, and ought to have acted on the material before him evidencing the expertise of Mr. Law, and appointed him as an expert witness "qualified in the fields of forensic accountancy, corporate governance and trust management and an experienced expert witness, as can be seen from his curriculum vitae." Mrs. Small-Davis QC in oral submissions emphasized that the judge had been invited in Ms. Webster's written submissions filed 13th July 2021 to appoint Mr. Law as an alternate to Mr. Horne and this submission was repeated during her oral presentation before the learned judge.

Decision on Webster Appeal Ground (f)

- [133] The short answer to this submission is that the Webster Application did not seek the appointment of Mr. Law as an alternate to Mr. Horne in the areas of accountancy, forensic accounting, corporate finance, accounting systems and the valuation of shares in a company for the purposes of a sale or buy-out. No application was made

to the judge (orally or otherwise) to amend the said application to seek the said relief in the alternative. Moreover, Ms. Webster does not seek the appointment of Mr. Law in relation to the said fields or areas of expertise in the reliefs and orders sought in her notice of appeal filed 22nd December 2021. Poignantly, she seeks, at paragraph 7(b), that Ms. Webster be permitted to call Mr. Law as an expert witness “in the field of corporate secretarial governance and trust company management and compliance”. These were the very same areas of fields upon which the appointment of Mr. Law as an expert witness was sought in the Webster Application. In addition, the judge’s finding that he did not require expert assistance with regard to such matters having been upheld by this Court, there is no scope for setting aside the judge’s dismissal of the Webster Application, including the application to extend time to apply to adduce expert evidence at the trial and for this Court to make an order appointing Mr. Law as an expert witness concerning such matters or with respect to the areas and field of expertise with respect to which Ms. Webster had sought the permission of the court below for Mr. Horne to be appointed an expert witness. Accordingly, ground (f) of Ms. Webster’s Appeal fails.

Webster Appeal Ground (e) - Refusal of Extension of Time

- [134] Ms. Webster submits that the learned judge was wrong to refuse her application to extend time on the basis that it was made too late and therefore would have caused the trial date to be postponed. She argues that the Webster Application, having been heard by the learned judge on 13th July 2021, there was enough time, if the application had been granted, for the previously set October trial dates, some 10 weeks away, to be kept. This was so as Mr. Dyrud would have had a maximum of 28 days from 13th July 2021 to put questions to the expert, and the judge could have put Ms. Webster on a shortened (tight) timetable to ensure that the said trial dates were kept. Accordingly, Ms. Webster argues, there was no good reason to refuse the application to extend time to file the application for permission to rely on expert

evidence, when, as matters turned out, the trial dates “were already lost by the delayed delivery of the Judgment a week past the trial dates as previously set.”⁹³

Decision on Webster Appeal Ground (e)

- [135] This line of argument is devoid of merit. Having heard extensive oral arguments on the Webster Application on 13th July 2021 (some 18 days before the long vacation period of the court), and the learned judge having reserved his judgment and delivered it on 11th October 2021, it is totally unreasonable and wholly unjustified to characterize its delivery on that date as “delayed”. In my view, the learned judge cannot be faulted in this way and any blame, in this respect, cannot, appropriately, be left at the doorstep of the court below.
- [136] The Webster Application sought the court’s permission to adduce expert evidence, in a section 268 Claim in which the primary reliefs/orders sought by Ms. Webster was a buy-out of her shareholding in FATCL by Mr. Dyrud, and for there to be a valuation of the shares for the purpose of such a buy-out order by a professional valuer. As indicated above, this application was filed on 15th June 2021 some 189 plus days after the December 2020 Case Management Conference, and almost 4 months after the 19th March 2021 date stipulated in the December 2020 CMC Order as the outside date for the parties to apply for further directions. It was made in proceedings where it ought to have been clear from the inception that the trial court would need to have the benefit of expert evidence on certain issues raised in the claim and statement of claim, at minimum, where liability has been established, with respect to the valuation of the shares in FATCL. In the face of the obvious, no prior application was made at a case management conference to appoint and to rely on the report of an expert witness or expert witnesses, by either party. The clear intention of the December 2020 CMC Order was to avoid the parties making late applications for further directions which, potentially or very likely, could have the

⁹³ See para. 34 of Ms. Webster’s appellant skeleton argument.

knock-on effect of postponing or further delaying the progress of the proceedings, which had been filed (originally) in 2018, towards a trial. Furthermore, there was another case management conference on 19th March 2021 at which a Pre-trial review was fixed for 7th June 2021. At the Pre-trial Review on 7th June 2021 trial dates of 4th to 7th October 2021 were fixed by the court. At this Pre-trial review was the first time Ms. Webster intimated an intention to apply for permission to adduce expert evidence, and leave was granted for her to do so by 15th June 2021, which is the actual date the Webster Application was subsequently filed. The last affidavit filed in relation to the Webster Application was her reply affidavit filed on 28th June 2021.

[137] Having heard detailed submissions on the Webster Application approximately 19 days later, the learned judge, quite properly, reserved his decision. In seeking to undermine the judge's finding of delay and the consequential effect on the trial date if an order extending time and granting permission to adduce expert evidence was made, it is wholly unrealistic and unreasonable for counsel for Ms. Webster to seek to calculate timeframes, for Mr. Dyrud to respond to the appointment of an expert witness, from the date of the hearing of the Webster Application. This can only properly be calculated from the date on which any judgment on the Webster Application was handed down by the learned judge. In my view, the judge was correct to conclude that the grant of permission to Ms. Webster to adduce expert evidence would prejudice Mr. Dyrud, not least because the knock-on effect or consequence would be the inevitable delay of the trial, as did happen anyway as a consequence of the late application. Likewise, I can find no fault, in the context of this case, with this statement of the learned judge at paragraph [94] of the Judgment:

‘... if the Court were to grant permission to [Ms. Webster] at this stage of the proceedings any projected trial date would be affected. Therefore, the Court has formed the view that the making of the application at a late stage of the proceedings, particularly where a party is seeking to have the court deem a witness statement expert evidence for the purpose of the trial, may very well have the effect of defeating the purpose and intent of CPR 32 and the overriding objective of the rules.’

[138] Ms. Webster also submits that learned judge adopted an inconsistent approach when dealing with the application to extend time and failed to exercise his discretion judicially. Again, this line of argument is entirely unmeritorious. The alleged inconsistency is said to be the fact that the judge went on to make an order for the appointment of a single expert witness, notwithstanding the lateness of Ms. Webster's application to appoint experts, the effect of which was to postpone the trial dates. In my view, the delay in the trial dates is directly attributable to the late filing of the Webster Application to extend time and to appoint expert witnesses, in a case in which, on the basis of Ms. Webster's contention, it is obvious that expert evidence was reasonably required to assist the trial judge to resolve the issues between the parties justly. That delay having occurred, and judgment being delivered on 11th October 2021 (after the trial dates), the postponement of them was inevitable, and so the judge's order purporting to appoint a single expert witness on the issue of the valuation of the shares was not the effective cause of the delay in the trial dates.

[139] For the reasons given above, ground (e) of the Webster appeal also fails.

Summary of Disposition of Dyrud Appeal and Webster Appeal

[140] With respect to the Dyrud Appeal No. 10 of 2021, Mr. Dyrud succeeds on ground 1 only. Grounds 2, 3, 4 and 5 of the Dyrud Appeal fail.

[141] With respect to the Webster Appeal No. 11 of 2021, this appeal fails, except to the limited extent summarized at paragraph [129] above.

[142] The effect of the disposition by the Court of these two interlocutory appeals is that Mr. Dyrud succeeds (on ground 1) in having the orders made by the learned judge at sub-paragraphs (2) to (6) inclusive of paragraph [105] of the Judgment set aside, but fails in his appeal against the orders at paragraphs 1 to 4 inclusive of the Order dated 11th October 2021. Ms. Webster's appeal against sub-paragraphs (1) and (7) of the Judgment fails.

Costs

- [143] On the issue of costs, I would direct that the parties file and serve, within fourteen (14) days of the date of delivery of this judgment, skeleton arguments, limited to no more than 3 typed pages, on the incident of costs relative to each of the two appeals, having regard to the Court's judgment and disposition of each of them. I can discern no basis upon which to set aside or to vary the costs order made by the learned judge at sub-paragraph (7) of paragraph [105] of the Judgment, which order is affirmed.
- [144] I take the opportunity to express the court's appreciation to counsel for each of the parties and their team for their helpful written and oral submissions.

I concur.
Louise Esther Blenman
Justice of Appeal

I concur.
Mario Michel
Justice of Appeal

By the Court

Chief Registrar