

**IN THE EASTERN CARIBBEAN SUPREME COURT
IN THE HIGH COURT OF JUSTICE
ANGUILLA CIRCUIT
(CIVIL)
A.D. 2020**

CLAIM NO. AXAHCV 2018/0038

BETWEEN:

PALMAVON JASAMIN WEBSTER

Applicant

and

**JOHN OLIVER DYRUD
WDM LTD**

Respondent

Appearances:

Mr. Gerhard Wallbank, with him Ms. Rayana Dowden instructed by Webster LP of
Counsel for the Applicant

Ms. Jean M. Dyer instructed by JM Dyer & Co of Counsel for the Respondent

2019: March 25;
2020: February 6.

DECISION

[1] **INNOCENT, J. (Ag.):** This matter came on for hearing on a Notice of Application filed by the applicant, Palmavon Jasamin Webster ('Ms. Webster') filed on 13th July, 2018 pursuant to the court's inherent jurisdiction and section 263 of the Companies Act, R.S.A. c. C65 (the 'Companies Act') for (1) an order directing Mr. John Oliver Dyrud ('Mr. Dyrud') the first-named respondent to deposit forthwith the bank draft numbered 886082/85365 issued by Scotia Bank in favour of WDM Ltd & CIBC First Caribbean International Bank (Barbados) Ltd (the 'Bank') in the amount US\$241,371.89 and (2) further and in the alternative, permission for Ms. Webster to bring legal proceedings against Mr. Dyrud in the name of the WDM Ltd (the 'Company') and at the Company's expense (the 'Derivative Action') respectively. By

order of Mathurin J. dated 26th November 2018, Ms. Webster was granted leave to withdraw and discontinue paragraph (1) of the Notice of Application.

Introduction

- [2] The undisputed facts and historical background to these proceedings can be summarized in the manner hereinafter appearing.
- [3] Ms. Webster and Mr. Dyrud are the only shareholders and directors of the Company with a shareholding of 50% each in the issued share capital of the Company.
- [4] The Company is the registered owner of the property registered as East Central Block 89319B Parcel 55, upon which is situated, the premises known as Mitchell House (the 'Property'). The Company's interest in the Property was charged to the Bank to secure a loan up to an amount of US\$450,000.00. This indebtedness to the Bank was also secured by a policy of insurance that was assigned to the Bank in accordance with the loan agreement.
- [5] On 6th September, 2017 the Property was devastated by the ravages of Hurricane Irma and thereby rendered unusable. Incidentally, the ground floor of the Property was leased and occupied by another disputed entity First Anguilla Trust Company Limited ('FATCL').
- [6] The insurance company NAGICO ('NAGICO') settled the damage to the Property in the sum of US\$241,371.89. On 4th April 2018 NAGICO issued a bank draft in the aforesaid sum drawn on its bank and made out in the names of WDM Ltd and the Bank as payees.
- [7] It appears from the evidence presented to the court that the parties have had a long history of disagreement and controversy between them. Therefore, it seems that a resolution of the matter in dispute cannot be arrived at within the context of the democratic corporate process.

- [8] There is significant disagreement between the parties regarding the application of the proceeds of the insurance settlement. This fact, Ms. Webster says, has created a deadlock regarding the affairs of the Company and what is in the best interest of the Company.

Historical Background

- [9] Ms. Webster and Mr. Dyrud formed a partnership, Webster Dyrud and Mitchell ('WDM') for the purposes of carrying on a law practice by a written partnership agreement (the 'Partnership Agreement') dated 18th January 1993. The partnership was for a fixed term and was to expire on 31st December 2002 unless otherwise agreed. The partnership continued after its term had expired as a partnership at will.
- [10] The Company had been formed as a holding company to acquire and own the Property.
- [11] On or about September 2005 Ms. Webster and Mr. Dyrud, as partners in the firm of WDM, jointly borrowed the sum of US\$450,000.00 (the 'Loan') from the Bank by way of refinancing the firm WDM. The Loan was secured by way of charge against the Company's Property. The Loan was also secured by a policy of insurance obtained from NAGICO and assigned to the Bank in accordance with the terms of the finance agreement. The Loan was repaid from the rental paid by FATCL to WDM.
- [12] The partnership failed due to a breakdown in relations between Ms. Webster and Mr. Dyrud, and the disputes between the parties were referred to an arbitrator. According to the Arbitration Award, Ms. Webster was adjudged to be liable for the indebtedness of WDM.
- [13] After the arbitrator held Ms. Webster personally liable for the indebtedness of WDM, on or about February 2017, ceased paying the rent to WDM. Prior to this date the rental arrangement for financing the Loan had continued throughout the arbitration proceedings.

- [14] Sometime in the year 2014, Ms. Webster refinanced the Loan. By this time the operations of WMD had been taken over by Webster LP. Webster LP at this time had taken over WDM's loan facility at the Bank and assumed responsibility for the Loan.
- [15] It appears that one of the terms of such refinancing was that the collateral provided by the Company in the form of the Property would remain in place until the loan facility made available to Webster LP was liquidated. Mr. Dyrud was not part of this transaction.
- [16] Although the Bank requested, that Mr. Dyrud execute certain documents relating to the refinancing arrangements, to have the charge on the Property pledged to cover the outstanding balance on the debt, which had been taken over by Webster LP, Mr. Dyrud never executed these documents.

The Impasse

- [17] The parties appear to be deadlocked over the application of the proceeds of the insurance settlement (the 'Settlement'). Ms. Webster is desirous of having the proceeds of the Settlement applied to discharging or reducing the Company's indebtedness to the Bank, which she says is in the best interest of the Company.
- [18] On the other hand, Mr. Dyrud disagrees and instead contends that it is in the best interest of the Company to have the Property reinstated. Ms. Webster disagrees. Therefore, there appears to be no disagreement that the directorate of the Company is deadlocked on the issue of the application of the Settlement.
- [19] In the circumstances, Ms. Webster considers that the directorship of the Company is hopelessly deadlocked on the issue, and, in the circumstances, she has no other alternative but to seek the court's directions and guidance, and, further or in the alternative, to seek leave of the Court to bring a derivative action.

[20] By order of Her Ladyship, the Honourable Justice Cheryl Mathurin dated 26th November 2018, the parties were required to file written submissions on the subject matter of the present application. The court has paid regard to both the written and oral submissions of both counsel and the court extends its gratitude to them for the same.

The Applicant's Position

[21] In a nutshell, Ms. Webster contends that the conduct of Mr. Dyrud complained of is not in keeping with his duties pursuant to section 97 of the Companies Act, to the extent that they amount to a breach of his fiduciary duty to the Company in his capacity as director. In support of this contention she relies on the following matters.

[22] Ms. Webster says, that the problem arose because the Settlement was not immediately deposited by Mr. Dyrud into the Company's account. Ms. Webster relies on her letter to Mr. Dyrud dated 20th April 2018, referred to at paragraph 21 of her affidavit, to which she said Mr. Dyrud failed to respond. According to Ms. Webster, Mr. Dyrud, despite her request contained in her letter of 20th April, 2018 has refused to deposit the Settlement in the Company's bank account and has instead deposited the same into the account of another entity, Dyrud Law LP, purportedly to avoid the loan being repaid in the interest of the Bank.

[23] Ms. Webster contends that the Property is being used to secure the Loan, a fact which she says, is accepted and recognized by Mr. Dyrud. In support of this contention, Ms. Webster relies on correspondence and exchanges between NAGICO, the Bank and Mr. Dyrud. She says that the evidence presented shows that Mr. Dyrud has ignored entirely the Bank's interest in the proceeds of the Settlement.

[24] In the circumstances, Ms. Webster contends that the court should step into the shoes of the Board of Directors of the Company, separate and apart from the trial process, under the derivative action or employ some other process to break the deadlock.

- [25] The court was apprised of new developments since the commencement of these proceedings by Mr. Wallbank. He stated that after the proceedings were filed the parties came to an agreement by way of Resolution dated 19th April 2018, that the Settlement would be deposited into a holding account in the joint names of Ms. Webster and Mr. Dyrud, and that, any disbursement from the holding account would require the signature of both parties. The cheque representing the proceeds of the Settlement has since been deposited into the holding account. Incidentally, the Bank has since ceased operations in Anguilla and the proceeds of the Settlement are now held in a holding account at the Bank's branch in Antigua. There has been no attempt by the Company since then to retrieve the proceeds of the Settlement from this holding account.
- [26] The posture adopted by Ms. Webster in these proceedings is that, notwithstanding that she is seeking leave to file a derivative action but also guidance from the court on the question of whether a possible liquidation of the Company would be a more efficacious way of dealing with the impasse if no other solution is available.
- [27] According to counsel for Ms. Webster, Mr. Dyrud, by his conduct, displays a breach of his fiduciary duty to act in the best interest of the Company pursuant to section 97 of the Companies Act. According to Ms. Webster, the breach of fiduciary duty owed by Mr. Dyrud to the Company can best be exemplified by the following. First, Mr. Dyrud has avoided the payment to the Bank despite the Settlement being made payable to the Company and the Bank. Second, Mr. Dyrud's knowledge that the security for the Loan was still extant in light of it being a registered encumbrance against the title recorded under the Registered Land Act. Third, that Mr. Dyrud recognizes that the Bank's security over the Property still exist, a fact which is supported by the Bank's letter to Mr. Dyrud.
- [28] The current book balance on the Company's loan account with the Bank is in the sum of approximately US\$184,000.00 and the estimated costs of reinstatement of the Property far exceeds this amount; a fact which Mr. Dyrud does not dispute. The estimated cost of reinstating the property stands somewhere in the region of

approximately US\$430,000.00. According to Mr. Wallbank, Mr. Dyrud has not given any indication of how the shortfall will be accounted for or what efforts he has made to secure the same. Ms. Webster argues, that bearing all of the above in mind, it is not in the best interest of the Company to reinstate the Property in light of the Company's indebtedness to the Bank.

- [29] Ms. Webster argues trenchantly that the Land Register still shows that the Property is encumbered to the Bank. She states at paragraph 3 of her Affidavit of 13th March 2019 that:

“The Respondent has stated that FirstCaribbean International Bank (Barbados) Limited does not have any security interest in Parcel 55, which is owned by WDM Ltd. Although no second charge was executed in relation to the additional sums advanced in 2014, the security interest, which had been put in place as collateral when funds were advanced in 2014 remain in place.”

- [30] Ms. Webster further contends that Mr. Dyrud has remained resolute and steadfast in his desire to reinstate the property despite having recognized the Bank's interest in the Property. The recognition of which is reflected in his email dated 11th April 2018 directed to a representative of the Bank wherein he wrote:

“..... We look forward to your response and a decision regarding whether the attached Insurance Proceeds cheque can be deposited to the Dyrud Law LP Client Account at CIBC-FCIB to ensure the property is repaired which is also in the interest of CIBC as it is used to secure the loan.”

- [31] Ms. Webster further relies on a letter from the Bank dated 1st August 2018 which stated inter alia:

“..... We do appreciate your cooperative spirit as we try to better understand and work through the apparent challenges with perfecting the subject in support of the take-over of its debt by Webster LP.

We confirm our conversation in which you opined that the existing charge remains valid security on which FirstCaribbean may rely on to secure its advances to Webster LP. In this regard, we spoke with our in-house legal counsel on the matter yesterday. In furtherance of our internal conversations, we seek your indulgence to share your legal views in writing

in support of our considered opinion that the charge remains valid and enforceable with regard to the advances made by FirstCaribbean to Webster LP which includes the assumption and consolidation of the WDM Limited's debt along with others."

- [32] Ms. Webster says that Mr. Dyrud continues to avoid the proceeds of the Settlement going to the Bank. She further contends that it is in the interest of the Company that its exposure under its security obligation to the Bank be reduced.
- [33] In support of her application, Ms. Webster further contends, that it is clear that Mr. Dyrud's intention and purpose is to prevent her from benefiting from the Settlement. To buttress this argument, she alludes to the fact that Mr. Dyrud has an ulterior motive which stems from the fact that she owes Mr. Dyrud sums of money resulting from the dissolution of the limited partnership that they previously shared (WDM). Essentially, Ms. Webster contends that Mr. Dyrud is refusing to discharge any of the former partnership's liabilities to the Bank or, alternatively, Mr. Dyrud is seeking to prevent her from discharging any of the former partnership's liabilities to the bank. Mr. Dyrud was a partner in the former professional partnership which the parties engaged in together.
- [34] According to Ms. Webster, Mr. Dyrud's motives in relation to the proceeds of the Settlement are personal. Mr. Dyrud is also accusing her of having her own ulterior personal motives. Therefore, both parties appear to have a personal interest in the proceeds of the Settlement. Therefore, Ms. Webster argues that Mr. Dyrud has by his conduct evinced an intention to put his own personal interest before that of the Company.
- [35] Ms. Webster is adamant that it is in the interest of the Company that its exposure to the debt owed to the Bank be reduced. However, Mr. Dyrud fears that Ms. Webster will benefit indirectly from this. Ms. Webster takes this argument further by suggesting that Mr. Dyrud by his conduct has shown that it is his intention to shift the Company's obligations entirely onto Webster LP which is why he contends that the Bank has no security interest in the property held by the Company; and that the loan balance owed to the Bank is nil.

- [36] Premised on the foregoing, Ms. Webster says that Mr. Dyrud is in breach of his fiduciary duty to the Company in acting in contravention of section 97 of the Companies Act. In the circumstances, Ms. Webster says that there is a case made out against Mr. Dyrud sufficient to trigger the court's powers to grant her leave to commence the derivative action.
- [37] Ms. Webster also argues that there is a clear basis upon which the Company could bring a claim against Mr. Dyrud in his capacity as director of the Company. Given the Company's current structure of corporate governance, no claim can or will be brought by the Company. Therefore, Ms. Webster is left with no other alternative than to seek a derivative action as a member of the Company.
- [38] In contrast to Ms. Webster's arguments, Mr. Dyrud paints an entirely different landscape of the state of the Company's affairs and the obvious impasse between the parties. Ms. Dyer appearing for Mr. Dyrud stated that, in highlighting the chronology of events giving rise to the present proceedings, Ms. Webster has overlooked salient events. Ms. Dyer contends, that contrary to Mr. Wallbank's assertion that Mr. Dyrud did nothing after Ms. Webster's letter to him of 20th April 2018, until she filed the present application, Mr. Dyrud did in fact respond to Ms. Webster through his attorney-at-law by letter of 29th June 2018 and again by letter of 13th July 2018. Therefore, he said, that it is not accurate to state that nothing happened in the intervening period.
- [39] Ms. Dyer's contention is that the Partnership Withdrawal Agreement (the 'PWA') is still a live issue between the parties. The main contention touching and concerning the PWA was whether Ms. Webster was liable for the obligations of WDM following Mr. Dyrud's retirement from the entity WDM. She says it was adjudged by the Arbitrator that this would have been as of 31st December 2006.
- [40] Therefore, Ms. Dyer contends on behalf of Mr. Dyrud, that it is within this context that the issue of res judicata arises. In any event, Ms. Dyer concedes that this is not an issue that engages the court at this time.

- [41] Mr. Dyrud's position is that Ms. Webster is solely responsible for the debts of WDM. Mr. Dyrud contends, that the issue regarding which of the parties is solely responsible for WMD's loan facility with the Bank has already been decided in terms of the Arbitration Award. It appears that Mr. Dyrud refused to amend his statement of claim which would have referenced this claim. In other words, Mr. Dyrud does not acknowledge that he is responsible for the loan facility and places responsibility for the same squarely at the feet of Ms. Webster. This argument seems to suggest that Ms. Webster has a collateral motive for wanting to have the proceeds of the Settlement paid to the Bank. In other words, Ms. Webster simply wants the Company to discharge her obligations to the Bank, which Mr. Dyrud says is in furtherance of her own interest as opposed to the best interest of the Company.
- [42] Mr. Dyrud contends, that as far as the letter of 20th April 2018 is concerned, he had not had disclosure of certain information from the Bank. In addition, he relied on Ms. Webster's letter of 13th July 2018.
- [43] As far as Mr. Dyrud is concerned, Ms. Webster had assumed liability for all of WDM's indebtedness to the Bank as shown by letter dated 26th September 2018. According to Mr. Dyrud, the initial charge had been refinanced by Ms. Webster for and on behalf of Webster LP and, that he Mr. Dyrud, had not been involved in the refinancing process. In a nutshell he says, that Webster LP assumed all contractual obligations towards the Bank, an interpretation which he says is consistent with Ms. Webster's letter of 26th September 2018. Therefore, Mr. Dyrud has adopted the unwavering position that Webster LP and Ms. Webster are the only persons contractually obligated to the Bank.
- [44] On the foregoing premise, Mr. Dyrud holds firm to his position that Ms. Webster is not acting in good faith by attempting to bring this derivative claim on behalf of the Company. Mr. Dyrud is of the firm view that Ms. Webster's intentions and motives, particularly in relation to the application of the proceeds of the Settlement, are not in the best interest of the Company. He says that to apply the proceeds of the Settlement towards discharging Webster LP's and Miss Webster's indebtedness to

the Bank for the loan advances under the refinance arrangement where Webster LP and Miss Webster are both solely responsible for the same, is not in the best interest of the Company. The Company is not contractually responsible for these debts.

[45] Ms. Dyer referred the court to section 263 (2)¹ of the Companies Act which sets out the matters that the court must consider when considering the grant of leave to bring a derivative action. In a nutshell, Ms. Dyer submitted that Ms. Webster has not satisfied the requirements of section 263(2) of the Companies Act; and therefore, she ought not to be granted leave to bring the claim. In particular, Ms. Dyer relied on the fact that for all intents and purposes, Ms. Webster was not acting in good faith in bringing the claim.²

[46] Mr. Dyrud says that the court is entitled to withhold permission from a shareholder who wishes to use a derivative action otherwise than for the benefit of the company and instead for a collateral purpose.³ Mr. Dyrud says that the intended action is not in the best interest of the company since the company has no debt obligation to the Bank.

[47] Alternatively, Mr. Dyrud contended that there are other remedies available to Ms. Webster and cited the case of **Manohar Hargun Godhwani v Bhavika Manohar Godhwani and others consolidated with Bhavika Manohar Godhwani v Florensa Investments Inc**⁴. In that case the court held, inter alia, that:

“Section 184C (2) of the BVI Companies Act prescribes that matters which the judge must take into account in deciding whether to grant leave. Critically, the court focuses on whether an alternative remedy to the

¹ (2) Without limiting subsection (1), in determining whether to grant leave under that sub-section, the Court must take the following matters into account—

(a) whether the member is acting in good faith;

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

(c) whether the proceedings are likely to succeed;

(d) the costs of the proceedings in relation to the relief likely to be obtained;

(e) whether an alternative remedy to the derivative claim is available.

² See: paras. 14-18 and 4-5 respondent's skeleton arguments; also paras. 3-9 supplemental affidavit JOD.

³ See: Tab 3 respondents skeleton arguments

⁴ BVIHCMAP 2018/0013

derivative claim is available. In the present case, the learned judge expressly asked whether an alternative remedy was available but because of counsel's negative reply, the judge did not go on to consider where there were available alternative remedies. It was open to the judge to consider whether an independent receiver could be appointed having regard to the fact that the dispute arises in a family context in which both sides accuse each other of misappropriating funds..."

- [48] Further, Ms. Dyer contended that Mr. Dyrud has not acted in breach of his fiduciary duties to the company as alleged by Ms. Webster or at all.
- [49] In this regard Mr. Dyrud relied on the matters contained at paragraphs 18 – 20 of his Supplemental Affidavit in support of his contention that he, at all material times acted in the best interest of the Company and in good faith. However, according to his Supplemental Affidavit, Mr. Dyrud suggests that by her actions in relation to the deposit arrangements for the proceeds of the insurance settlement, Ms. Webster has shown that her primary interest was that of applying the funds to the loan payments.
- [50] Mr. Dyrud relies on the fact that the Bank has never insisted that the proceeds of the Settlement be applied to discharging the loan account.⁵
- [51] Mr. Dyrud's position is that Ms. Webster is seeking to prosecute the case against him personally, therefore, she should not be permitted to pursue the derivative action. In other words, the real issue in contention is between him and Ms. Webster is personal and not with respect to the Company and Mr. Dyrud.
- [52] Therefore, Mr. Dyrud says, that the claim in any event is not likely to succeed because again the Company is not indebted to the Bank and, therefore, not obligated to discharge Webster LP's or Ms. Webster's indebtedness to them.
- [53] Mr. Dyrud also says, that the intended action is bound to fail because there is no wrong doing done against the Company by him and, it can hardly be said that the

⁵ See: para 23 Supplemental Affidavit

position taken by Mr. Dyrud amounts to a breach of his fiduciary duties to the Company.

[54] Mr. Wallbank submitted that the position regarding the Company's indebtedness to the Bank is not as clear and straightforward as Ms. Dyer suggest. According to Mr. Wallbank, the parties had by resolution of the Company agreed that the proceeds of the Settlement would be paid into and remain in the Company's account and not to be withdrawn except upon the agreement and signature of both parties. In light of this fact, the parties are still at odds as to how the funds ought to be applied. This he says, compounds the deadlock and raises the question of how this deadlock is to be resolved.

[55] Therefore, he submits, that either of the two directors, Mr. Dyrud or Ms. Webster should be permitted to bring a derivative action with a view to resolving the deadlock. This he says is the reason for Ms. Webster's inclusion as part of the relief sought in the application for the court to give directions, which directions he says the court is permitted to give in the circumstances. Mr. Wallbank also argued that in the alternative, in the event that the parties cannot find a way around the impasse, it is left to the court to order the liquidation of the Company.

Issues

[56] The issues arising for consideration, as the court sees it, in respect of whether leave should be granted by the court permitting Ms. Webster to bring the derivative action, are as follows:

- (a) Whether permission should be granted to Ms. Webster to bring a claim for derivative action in the name of the Company against Mr. Dyrud. In other words, whether Ms. Webster has satisfied the requirements of section 263 (2) and (3) of the Companies Act.
- (b) The resolution of issue (a) will also depend on whether Ms. Webster is acting in good faith in seeking to bring the derivative action.

- (c) Whether Mr. Dyrud is in breach of his fiduciary duties to the Company and has failed to act in the best interest of the Company by withholding payment of the Settlement towards payment of the debt owed to the Bank.
- (d) The resolution of issues (b) and (c) will depend on whether the Company is indebted to the Bank, or whether Ms. Webster and Webster LP are solely indebted to the Bank.
- (e) Clearly, if the answer to issue (d) is negative, then there can be no question of the parties being deadlocked and the matter stops there.
- (f) Whether some other alternative remedy to the derivative claim is available.

Whether leave should be granted

- [57] In order to determine this question, the court ought to reflect on the provisions of section 263 of the Companies Act and decide whether Ms. Webster has satisfied the requirements of that provision in light of the evidence that has been presented to the court.

Good faith

- [59] Ultimately, the resolution of this issue lies in determining, whether Ms. Webster in seeking to bring the derivative claim is acting in good faith. The evidence presented to the court in these proceedings have compelled the court to believe that she is not. The court is fortified in this view by the matters related to the refinancing of the previous loan facility and the continued charge against the Property by the Bank at the instance of Ms. Webster without the intervention of Mr. Dyrud in these transactions.
- [60] In addition, according the Arbitration Award, Webster LP and Ms. Webster were required to assume responsibility for this indebtedness to the Bank. Furthermore, it appears that Mr. Dyrud and the Company did not enter into any refinancing arrangement with the Bank and therefore, have no contractual obligation to the Bank in respect of the additional financing obtained by Ms. Webster for and on behalf of

Webster LP. Although the original loan of US\$450,000.00 in favour of the Bank still appears as a charge on the Land Register for the Property, the other loans obtained through the refinancing arrangement between Ms. Webster and Webster LP and the Bank are not registered charges against the Property and do not appear on the Land Register for the Property. The court is not certain whether the refinancing arrangement with the Bank entered into by Ms. Webster and Webster LP was authorized or sanctioned by the Company.

- [61] However, the court has taken into consideration, the fact that the PWA mandates that Ms. Webster and Webster LP are liable for these debts. Therefore, it appears that at this stage, it is not possible to arrive at the conclusion that either the Company or Mr. Dyrud are liable for this indebtedness.
- [62] The court is also fortified in this view by the fact that the Bank has not sought to pursue any claim against the Company or Mr. Dyrud to enforce the security held by them over the Property. Therefore, Ms. Webster's claim that Mr. Dyrud has exposed the Company to the risk of recovery from the Bank is premature and fanciful.
- [63] Having accepted all of the above, it cannot be said with any degree of certainty that Ms. Webster is acting in good faith, by bringing this application for leave to bring a derivative claim. Clearly, Ms. Webster is seeking to apply the proceeds of the Settlement towards discharging a debt, for which neither Mr. Dyrud, nor the Company have assumed contractual responsibility. The court fails to see how Ms. Webster's posture would redound to the benefit of the Company or its members.
- [64] The court has also taken into account the fact that Ms. Webster is indebted to Mr. Dyrud and thus far has not discharged the debt owed to him. A debt which she appears to have a disinclination to discharge. Ms. Webster alleges, that Mr. Dyrud is withholding payment to the Bank as ransom for the debt which she owes him. This raises the question of why Mr. Dyrud would be inclined to threaten the viability of the Company's asset, by discharging a debt which is not entirely or at all owed by the Company. The court cannot see the logic in Ms. Webster seeking to bring a derivative claim, if it is that she has the best interest of the Company at heart.

[65] The court having been made aware of the Arbitration Award and the PWA alongside Ms. Webster's indebtedness to Mr. Dyrud; has taken the view that Ms. Webster seeks leave to bring the derivative claim, purely for the collateral purpose of having the Company pay off Webster LP's debt to the Bank. This is not a wholly untenable assumption and is capable of being discerned from the evidence presented. Therefore, the court finds that the application for leave to bring the derivative claim is not brought in good faith.

Interest of the Company

[66] The court is not of the view that it is in the best interest of the company to bring the present proceedings. The court has considered the interest of the Company in light of the views of both directors on commercial matters. Utilizing the proceeds of the Settlement to discharge an obligation, not owed by the Company, cannot be said to be in the best interest of the Company. In fact, Ms. Webster and Webster LP have acted to the detriment of the Company by entering into the refinance arrangement without first having sought to discharge the collateral pledged by the Company to secure the initial loan financing. By maintaining the charge over the Company's asset, while securing additional financing for unrelated entities, suggest that Ms. Webster jeopardized not only the Company's asset, but also its net worth, and net asset value. Her actions also threatened Mr. Dyrud's interest in the shares of the Company.

Whether Proceedings Likely to Succeed

[67] The court is also of the view that the proceedings are not likely to succeed. The court has already found that the Bank has not sought to enforce the charge against the Property against the Company or any of its directors. Therefore, it cannot be said that the claim can succeed against Mr. Dyrud even if it were brought by the Company. The court holds this view having considered the question of whether Mr. Dyrud has done any wrong to the company by failing to deposit the Settlement into the loan account.

- [68] In addition, the parties have resolved to deposit the proceeds of the Settlement into a holding account. The question now becomes, how this money will be disposed of. It seems that the parties are still divided on this issue. However, the court is of the view that in light of this partial resolution and what appears to be some concession on the part of Mr. Dyrud, the parties have seemingly agreed to hold the ring until the question of the Company's indebtedness to the Bank is resolved.
- [69] It is apparent that the only way to resolve the impasse between the parties is a judicial determination of how the funds ought to be applied. In other words, until the issue of whether Mr. Dyrud and the Company are contractually obligated to the Bank under the refinancing arrangement is resolved judicially or otherwise, it cannot be said that Mr. Dyrud has committed any wrong against the company that warrants bringing a derivative claim.
- [70] Furthermore, if this issue remains unresolved, it cannot be said that there is indeed an issue which cannot be resolved by the members of the Company that requires the court's intervention. The parties themselves have by the Resolution agreed to hold the ring. In the court's considered view, there really is no action that can be brought by the Company or Ms. Webster on behalf of the Company that has any likelihood of success at this point. As the court has already found, until the issue of the Company's and Mr. Dyrud's indebtedness to the Bank is determined, there clearly is no viable cause of action. Therefore, the court holds that Ms. Webster's attempt to bring a derivative action on that basis is premature, in light of the absence of any concrete evidence and the lurking doubt with respect to the Company's or Mr. Dyrud's indebtedness to the Bank.
- [71] Furthermore, it appears that the Bank is aware of the difficulty that exist in holding the Company liable under the refinancing arrangement with Ms. Webster and Webster LP. This is amplified by the very same letter upon which Ms. Webster relies to buttress her application. The court interprets the tenor of the letter as conveying the impression that the Bank holds Ms. Webster and Webster LP solely liable for the debts incurred under the refinancing arrangement.

[72] The court is further fortified in its view that Ms. Webster and Webster LP are solely responsible for the debts incurred under the refinancing arrangement by letter dated 27th August 2018 from the Bank in which it states:

“The current balance on the loan and the account in which it is held in is Nil as it was closed on December 9th 2015. The signatories to the abovementioned account are Palmavon Webster and John Dyrud.”

Breach of Fiduciary Duty

[73] Ms. Webster has sought to buttress her application on the ground that Mr. Dyrud by his conduct has breached his fiduciary duties to the Company by exposing the Company to a state of financial insolvency. As a result, she says, that Mr. Dyrud has failed to take into account the interest of the Company and its shareholders. Section 97 of the Companies Act provides:

“(1) Every director and officer of a company in exercising his powers and discharging his duties shall—

(a) act honestly and in good faith with a view to the best interests of the company; and

(b) exercise the care, diligence and skill that a reasonably prudent person would exercise in comparable circumstances.

(2) In determining what are the best interests of a company, a director shall have regard to the interest of the company’s employees in general as well as the interests of its shareholders.

(3) The duty imposed by subsection (2) on the directors of a company is owed by them to the company alone and the duty is enforceable in the same way as any other fiduciary duty owed to a company by its directors.”

[74] The court is of the view that Ms. Webster has failed to establish any breach of fiduciary duty on the part of Mr. Dyrud. This is so for the following reasons. The resolution of the issue, whether Mr. Dyrud has committed any wrong against the Company that amounts to a breach of his fiduciary duty as director, can only be resolved, as the court has said previously, if the issue of whether Ms. Webster and Webster LP are solely responsible for the debt owed to the Bank as opposed to Mr. Dyrud and the Company. If the Company and Mr. Dyrud hold no such contractual

obligation for the debt, then, there can be no fault on his part for withholding payment of the Settlement and not applying the same to the loan account at the Bank. In these circumstances, it cannot be said that Mr. Dyrud as a director of the Company, has failed to fulfill the Company's obligations to its creditors. Therefore, there can be no basis for a claim for breach of fiduciary duty or a derivative claim.

[75] It is the court's considered view, that in withholding the payment as he did, Mr. Dyrud was purporting to act in the best interest of the Company. If it is accepted that Mr. Dyrud and the Company are not indebted to the Bank in the manner alleged by Ms. Webster, then, clearly, Mr. Dyrud and the Company would have a right to the retention of the proceeds of the Settlement for and on behalf of the Company.

[76] Having been presented with evidence, that seems to suggest that, Ms. Webster had further indebted the Company by taking further advances against the asset of the Company to fund another entity, a transaction in which Mr. Dyrud played no part; and further that Mr. Dyrud never having signed the documentation creating the charge on the Company's asset; and the loan account statement having shown a nil balance prior to Ms. Webster having sought to refinance the existing charge, the court concludes, that it may be that, neither Mr. Dyrud nor the Company is indebted to the Bank.

Cost of Proceedings Relative to Relief Likely to be Obtained

[77] The Company is clearly not entitled to the relief which Ms. Webster claims. If the claim is pursued it may very well result in the finding that the Company is not indebted to the Bank in the manner alleged by Ms. Webster. If it is decided to the contrary it still would not redound to the benefit of the Company, it would render the Company insolvent in any event. In striking the balance, the court finds that any relief obtained, if any, would not warrant incurring the costs of the intended proceedings.

Company Not Intending to Bring the Proceedings

- [79] It is very clear that given the nature of corporate governance of the Company that the provisions of section 263 (3) (a) of the Companies Act are satisfied.

Whether in the interest of the Company that the impasse should be left for determination by Shareholders or Members as a whole

- [80] Given the nature of the relationship between the parties, both past and present, the court is satisfied that it is not in the interest of the Company that the current impasse should be left to the determination of the shareholders.

Alternative remedy

- [81] The Company owns the land upon which the destroyed building lies. Ms. Webster in support of the present application has complained about Mr. Dyrud's conduct in the management of the affairs of the Company. Obviously she is concerned about the effect of the Company's indebtedness to the Bank and its likely future insolvency would have on her shareholdings in the Company. These features of the case seem to suggest that Ms. Webster may very well have grounds for bringing an unfair prejudice or oppression claim as an alternative to the derivative action.

Discussion

- [82] The Court is faced with the unenviable prospect of having to decide almost the same issues in respect of two separate and distinct proceedings involving essentially the same parties riding on the heels of each other. The instant proceedings being a derivative action and the other being an unfair prejudice claim in which Ms. Webster is seeking relief by way of Mr. Dyrud purchasing her shareholdings in FATCL. However, the separate proceedings are not founded on the same factual and substantive legal basis, which further compounds the problem. However, both of the separate proceedings involve the same directors and shareholders in each case.

- [83] In the circumstances, the court is of the view that the availability of the unfair prejudice claim is a factor to consider and not a mandatory bar to the derivative action. However, the court cannot disabuse its mind from the existence of the two separate actions and the reasons why they may have been brought in the first place.
- [84] When taken within the context of the other extant claim for oppression and unfair prejudice, one is left with the feeling that the only reason for bringing that claim was to obtain a means of setoff against Ms. Webster's indebtedness to Mr. Dyrud that arose as a result of the Arbitration Award by forcing him to buy out her shares in FATCL. The present application on the intended derivative claim also suggest caprice and stratagem on the part of Ms. Webster in pursuing a claim for derivative action, when clearly there is no sustainable cause of action against Mr. Dyrud that can be brought by the Company in light of the findings that the court has made in relation to the likelihood of the intended derivative claim succeeding.
- [85] Ms. Webster seems to have buttressed part of her present application on Mr. Dyrud's conduct in the management of the affairs of the Company. This resembles a claim for unfair prejudice. It is inconceivable why Ms. Webster did not pursue this cause of action as opposed to seeking to bring a derivative claim if, as she says, Mr. Dyrud's conduct regarding the proceeds of the settlement was in breach of his fiduciary duty and amounted to a mismanagement of the assets of the Company which was likely to put her shareholdings in jeopardy.
- [86] Also, Ms. Webster could have availed herself of the provisions of section 262 of the Companies Act to obtain relief.
- [87] Therefore, it appears that Ms. Webster has other alternative remedies that she can or could have pursued. The court found it more than passing strange that Ms. Webster would have abandoned that alternative remedy and instead seek to have the court direct Mr. Dyrud to pay the Settlement into the Company's account with the Bank. The court finds that this is the ultimate objective of seeking to bring the derivative claim.

- [88] However, it appears that given the nature of the respective perennial grievances for which the applicant seeks relief in both proceedings, it may be prudent to limit the costs and expense of two separate claims by exploring the possibility of triggering some other process to resolve the impasse aside from the derivative action. It may very well be more efficacious if the two claims were consolidated.
- [89] The court has arrived at this conclusion based on the long history of contention between Ms. Webster and Mr. Dyrud that has consumed not only a significant amount of costs and expense but also a considerable amount of the court's resources. It may be, that the solution to this lies in what the parties by their respective counsel have conceded, that is, the liquidation of the Company. This may more likely than not resolve the impasse and matters in dispute between the parties in both claims.
- [90] Given the discord that exist between the parties and the total breakdown of the professional relationship that previously existed between them, the court is of the view that there is no prospect of returning the Company to a position of complete functionality. The only two directors and shareholders are unable to co-exist within the same corporate entity.

Conclusions

- [91] In the circumstances, the court has arrived at the following conclusions. First, Ms. Webster has failed to satisfy the court that either the Company or Mr. Dyrud is liable for the debt owed to the Bank. Second, unless the question of who is liable to pay the debt owed to the Bank is resolved, it cannot be said that Mr. Dyrud has acted against the interest of the Company by withholding payment of the Settlement in the manner that he did. Third, the parties having agreed by Resolution to keep the Settlement in a holding account to which they are joint signatories, supports the court's first conclusion mentioned above. The court would direct that the parties maintain this position until the issue regarding the Company's indebtedness to the Bank is resolved. Fourth, the court declines to hold that the parties are deadlocked on the question of how the Settlement ought to be applied. Again unless the issue

of the Company's indebtedness to the Bank is resolved with absolute certainty there quite sensibly cannot be any disagreement between the parties. It seems to me that the only real issue in contention between the parties is not how the Settlement ought to be applied, but rather whether the Company is indebted to the Bank. The court respectfully finds that Ms. Webster should have first sought to resolve this issue prior to contemplating this application. Fifth, it appears that the real grievance between the parties may lie elsewhere. In view of the obvious incompatibility between the parties it may very well be in their best interest to part ways and dissolve their common interest in the Company. The court has left it open to the parties to permit reason and good judgment to resume its seat.

Order

[92] In the circumstances, the court makes the following order:

1. Ms. Webster's application for leave to bring a derivative claim is dismissed.
2. Costs is awarded to Mr. Dyrud to be assessed in accordance with CPR 65.11 and 65.12 within 21 days of the date of this order unless otherwise agreed.

Shawn Innocent (Ag.)
High Court Judge

By the Court

Registrar