

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

CLAIM NO. AXAHCV 2019/0063

BETWEEN:

THE ATTORNEY GENERAL OF ANGUILLA

Claimant

and

- (1) THE ANGUILLA ELECTRICITY COMPANY LIMITED**
- (2) HAROLD RUAN**
- (3) SHINETTE SIMONE CONNOR**
- (4) GARETH HODGE**
- (5) KENT WEBSTER**
- (6) DAWNETTE GUMBS**
- (7) LINETTE SASSO**
- (8) CLAUDE SMITH**
- (9) WILFRED RICHARDSON**

Defendants

Appearances:

Mr. Dwight Horsford, Honourable Attorney General, with him Ms. Erica Edwards for the claimant

Mr. Frank Walwyn, with him Mr. Chesley Hamilton and Mr. Carlyle Rogers for the 1st, 2nd, 3rd, 6th, 7th & 9th named defendants

2020: February 27;
April 8.

Company Law – Public limited company – Claim for oppression and unfair prejudice – Companies Act, R.S.A c. C65, section 268 – Whether the affairs of the corporate entity have been conducted in a manner that is oppressive and unfairly prejudicial to majority shareholders interest – Board of Directors – Failure to convene annual general meeting – Section 106 (3) of Companies Act requiring convening of annual general meeting within 15 months of last annual general meeting – Whether section 106 (3) of the Companies Act mandatory – Whether tenure of Board of Directors expired by operation of section 106 (3)

of the Companies Act – Whether failure to convene Annual General Meeting within time prescribed by section 106 (3) of the Companies Act resulting in the directors ceasing to have any authority to conduct the business of public corporate entity – Whether board of directors lawfully constituted – Whether directors had automatically vacated office – Whether court should intervene to direct convening of Annual General Meeting – Whether alternative remedy available to claimant under the Companies Act to rectify the default in convening the annual general meeting

JUDGMENT

- [1] **INNOCENT, J.:** This is a claim brought by the Honourable Attorney General of Anguilla ('the Attorney General') seeking relief pursuant to section 268 of the Companies Act Revised Statutes of Anguilla C.140 (the 'Companies Act') wherein the court's intervention is sought to resolve what the Attorney General describes as oppressive, unfair and prejudicial conduct on the part of the Board of Directors of The Anguilla Electricity Company Limited ('ANGLEC').
- [2] The Attorney General brings this claim on behalf of the Government of Anguilla ('the GOA') in its capacity as a member of ANGLEC, who holds a controlling interest in the share capital of ANGLEC, being the majority shareholder of 79% of the shares in ANGLEC.
- [3] ANGLEC is a public limited liability company, incorporated under the Companies Act and is the only licensed electricity supplier in Anguilla. Its affairs are controlled by a Board of Directors elected by the shareholders of ANGLEC.
- [4] The second to ninth named defendants constitute the Board of Directors of ANGLEC ('the Board of Directors') which is chaired by Mr. Harold Ruan ('Mr. Ruan'). Mr. Ruan was first appointed a director in July 2000. He was re-elected in 2008 and retired in September 2011. Mr. Ruan was again elected Chairman of the Board of Directors on 30th October 2015 and continued to serve as Chairman until 11th November 2016. Thereafter, subsequent to the annual general meeting of February 2018, Mr. Ruan resumed his position on the Board of Directors as its Chairman and continues to hold that office which he claims is by virtue of the decision taken at the annual

general meeting held on 15th February 2018 and affirmed at the Special Meeting of 16th April 2019. Mr. Ruan, Ms. Dawnette Gumbs ('Ms. Gumbs') and Mr. Erville Hughes ('Mr. Hughes') are the longest serving members of the Board of Directors. Mr. Hughes resigned from the Board of Directors in November 2019.

- [5] The pleaded case of the GOA is concerned with the conduct of the Board of Directors since the holding of the last annual general meeting on 5th February 2018 and which was adjourned and concluded on 28th August 2018. The GOA alleges that the Board of Directors have egregiously and flagrantly breached the provisions of the Companies Act and the By-laws by failing to convene an AGM within the period prescribed by section 106 (3) of the Companies Act and to timeously provide to and lay before the shareholders, ANGLEC's audited financial statements. As a result, the GOA contends that the Board of Directors who were to be rotated out of retirement on an annual basis coupled with their failure to convene an AGM was calculated to unlawfully perpetuate the existence of the present Board of Directors whose tenure had expired by operation of section 106 (3) of the Companies Act.
- [6] Therefore, the GOA contended that by virtue of the Board of Directors tenure having expired by virtue of section 106 (3) of the Companies Act¹ the Board of Directors ceased to have any lawful authority to conduct the business of ANGLEC as of 29th November 2019 when their tenure expired.
- [7] The last AGM of ANGLEC was held on 28th August 2018. By virtue of section 106 (3) of the Companies Act, ANGLEC was required to hold its AGM at intervals of no more than 15 months. Article 12.1 of ANGLEC's By-Laws provides that:
- "The annual meeting of the shareholders shall be held on each day in each year and at such time within Anguilla as the directors may by resolution determine."

¹ **106.** (1) Subject to subsections (2) and (3), the directors of a company—

(3) Not more than 15 months shall elapse between the date of one annual meeting of share-holders and the next.

[8] At a previous AGM held on 5th February 2018, the shareholders and members approved a motion to forgo the election of directors and resolved that the three longest serving directors would retire automatically by rotation at the end of their three year tenure, at the next annual general meeting. At a special meeting requisitioned and convened by the GOA pursuant to section 121 (1) of the Companies Act on 16th April 2019, the GOA proposed that the following resolution be put to the shareholders:

“To consider and if thought fit, to pass with or without modifications(s), resolutions to remove the board of directors and to elect suitable persons to fill the vacancies.”

[9] At the special meeting the proxy for the GOA proposed a modification to the resolution in its original form to remove specific directors. The proposed resolution in its modified form was not accepted. The shareholders voted instead to uphold the decision taken at the previous AGM held on 5th February 2018.

[10] Article 4.6 of ANGLEC’s By-Laws provides:

“Unless the tenure is sooner determined, a director shall hold office for a period of three (3) years.”

[11] Article 4.6.1 of ANGLEC’s By-laws provides:

“At each annual general meeting one-third of the directors for the time being, or if their number is not three or a multiple of three then the number closest to one-third, shall retire from office. The directors to retire in every year shall be those who have been longest in office since their last election, but as between persons who become directors on the same day those to retire shall (unless they otherwise agree among themselves) be determined by lot.”

[12] Article 4.6.2 of the By-laws provides:

“The shareholders may, by resolution, extend the tenure of any director appointed prior to the adoption of these By-Laws until such time as they become eligible for retirement by rotation pursuant to By-Law 4.6.1 above.”

[13] The GOA’s contention is that the AGM should, at the latest, have been held on 29th November 2019. In fact, no meeting was held in 2019. The reasons for the failure to convene the AGM was a matter of dispute between the parties. The GOA

complained that the Board of Directors had failed to finalise and publish the audited financial statements for the financial periods 2017 and 2018. The Board of Directors claimed that it was not possible to finalise the audit of ANGLEC's accounts for presentation at the AGM because of certain unforeseen events beyond the control of the Board of Directors including acts of God, particularly the occurrence of Hurricane Irma in September 2017.

[14] Prior to the last annual general meeting held on 5th February 2018, ANGLEC's previous annual general meeting was held on 10th November 2016. The annual general meeting of 5th February 2018 was adjourned twice, that is, to 26th February 2018 and 28th August 2018. There has been no annual general meeting convened since then.

[15] In the present proceedings the GOA has claimed the following reliefs, namely:

1. A Declaration that the tenures of the directors have expired by operation of section 106 (3) of the Companies Act and consequently the Board of Directors of ANGLEC is vacant.
2. A Declaration that no later than 29th November 2019, the said directors ceased to have any or any relevant authority to conduct or transact or approve the transaction of any business of ANGLEC.
3. A Declaration that the affairs of ANGLEC have, since 28th August 2018 been conducted in a manner that is oppressive and unfairly prejudicial to the GOA as a shareholder and member of ANGLEC by virtue of the directors' continued violation of the mandates of the Companies Act relative to the convening of the annual general meeting and financial disclosures.
4. An order pursuant to section 268 of the Companies Act regulating the affairs of ANGLEC in relation to appointing the date, time and place of the AGM.

[16] Previously, the GOA had sought an interim injunction that the directors be restrained from continuing, purporting or proceeding to conduct or transact or approve the transaction of any business of ANGLEC until final determination of the claim. The interim relief was granted by the court for the purpose of preserving the status quo until the court determined the issues in contention between the parties.

[17] The court has been asked to determine the following issues, namely:

1. Whether the directors of ANGLEC as of 5th February 2018, are deemed to have retired as directors on the 29th November 2019, the last annual general meeting of ANGLEC having taken place on 28th August, 2018.
2. If so, were the directors entitled to exercise the powers of the Board of Directors of ANGLEC and lawfully conduct business on behalf of ANGLEC.
3. Whether the affairs of ANGLEC have been conducted in a manner that is oppressive, unfair and prejudicial to the GOA.

[18] The GOA contends that if the first issue is answered in the affirmative, then there is no need to consider the other issues that arise on this claim. The court is of the view, that this may not necessarily be the correct approach, since the tenure of the directors and the failure to convene an annual general meeting for the purpose of electing directors is only one aspect of the claim for oppression and unfair prejudice. The court ought not to attempt to bifurcate the issues, in this manner, in order to determine the relief which is sought by the GOA.

[19] The GOA's submissions on the first issue may be summarized as follows. The GOA submits that the clear meaning of Article 4.6 and 4.6.1 of the By-laws is that the directors are required to retire pursuant to its provisions at each AGM, that this is a mandatory requirement insofar as it provides that a director so appointed "shall hold office only until the commencement of the AGM following next after his appointment and by providing that such director "shall retire from office."

- [20] The GOA contends that the obligation to retire must be read in conjunction with section 106 (3) of the Companies Act, which oblige the directors to convene annually an AGM in accordance with their terms.
- [21] According to the GOA, that should the directors fail to comply with these provisions and neglect to convene an AGM, then those directors, who should have resigned, will be deemed to have vacated their office on the last day on which the next AGM should lawfully have been held. In the present case the AGM for 2018 should have been held on or before 29th November 2019, and so the GOA contends that all the directors vacated their office on that day.
- [22] It is clear, that ANGLEC is required to hold an AGM every year and not more than 15 months may elapse between the date of one AGM and that of the next AGM. The issue that arises is whether section 106 (3) of the Companies Act implies that should the directors fail to call an AGM as required by statute and the By-laws, implies that the directors automatically vacated office on the last day, which the meeting should lawfully have been held.
- [23] However, section 106 (3) is silent as to what is to happen if the directors fail in their duty to convene the meeting. In effect, it appears that the GOA requires the court to imply a provision into section 106 (3) of the Companies Act, to the effect that should the directors fail to convene an AGM as required by section 106 (3) of the Companies Act, the directors will automatically vacate office on the last day on which the meeting ought to have been lawfully held. There are two reasons why the court should not imply the suggested provision.
- [24] Section 121 of the Companies Act makes express provision regarding what should occur should the directors fail to convene an AGM as required by statute and the By-Laws. The section provides:
- “(1) The holders of not less than 5% of the issued shares of a company that carry the right to vote at a meeting sought to be held by them may

requisition the directors to call a meeting of shareholders for the purposes stated in the requisition.

(2) The requisition referred to in subsection (1), which may consist of several documents of like form, each signed by one or more shareholders of the company, shall state the business to be transacted at the meeting and shall be sent to each director and to the registered office of the company.

(3) Upon receiving a requisition referred to in subsection (1), the directors shall call a meeting of shareholders to transact the business stated in the requisition, unless—

(a) a record date has been fixed under section 107(2) and notice of it has been given under section 109; or

(b) the directors have called a meeting of shareholders and have given notice of it under section 110.

(4) If, after receiving a requisition referred to in subsection (1), the directors do not call a meeting of shareholders within 21 days after receiving the requisition, any shareholder who signed the requisition may call the meeting.”

[25] In the court’s view, the provisions of section 121 of the Companies Act provides a shareholder who is aggrieved by the directors’ failure to convene an AGM in the manner and at the time stipulated by law, a practical remedy by means of which the default can be rectified. In the circumstances, the operation of section 121 of the Companies Act permits a member of ANGLEC who meets the statutory shareholding requirement, the right to requisition a meeting after 29th November 2019 and that meeting could be treated as the 2019 AGM at which the directors would be required to resign. Therefore, in light of this statutory provision, the court is of the considered opinion that, should the directors default in their statutory duty to convene the AGM, the court should not imply into section 106 (3) the suggested position of automatic resignations.

[26] In addition, the court cannot imply a similar provision into Article 4.6.1 of the By-laws. Had it been intended, that the failure to hold an AGM, where the resignation of directors by rotation at each AGM would result in the automatic resignation of those directors, whose turn it is to retire and their respective office deemed to have been vacated, it would have been expressly provided for in the By-laws.

[27] The court has also taken into account other provisions of the Companies Act that relate to corporate governance. The existence of these provisions, has brought the court to the conclusion, that there are other remedies available to the GOA to rectify the current position and to obtain the remedy and relief that it seeks. This has lead the court to the ineluctable conclusion, that the intervention of the court is not required to remedy the current default by the directors to convene an AGM.

[28] Section 68 of the Companies Act provides:

“(3) Subject to section 70(b), the shareholders of a company shall by ordinary resolution at the first meeting of the company and at each following annual meeting at which an election of directors is required, elect directors to hold office for a term expiring not later than the close of the third annual meeting of the shareholders of the company following the election.

(4) It is not necessary that all the directors of a company elected at a meeting of shareholders hold office for the same term.

(6) Notwithstanding subsections (2), (3) and (5), if directors are not elected at a meeting of shareholders, the incumbent directors continue in office until their successors are elected.

(7) If a meeting of shareholders fails, by reason of the disqualification, incapacity or death of any candidates, to elect the number or the minimum number of directors required by the articles of the company, the directors elected at that meeting may exercise all the powers of the directors as if the number of directors so elected constituted a quorum.”

[29] Section 60 of the Companies Act provides:

“A company must have at least one director but a public company shall have no fewer than 3 directors, at least 2 of whom are not officers or employees of the company or any of its affiliates.”

[30] In addition, the court has also considered the provisions of section 71 of the Companies Act which provides:

“(1) A director of a company ceases to hold office when—

(a) he dies or resigns;

(b) he is removed in accordance with section 72; or

(c) he ceases to be qualified under section 65 or 66.”

[31] The court is also guided by the provisions of section 72 of the Companies Act, the relevant provisions of which are as follows:

“(1) Subject to section 70(g), the shareholders of a company may—
(a) by ordinary resolution at a special meeting, remove any director from office; or

(b) where a director was elected for a term exceeding one year and is not up for re-election at an annual meeting, remove that director by ordinary resolution at that meeting.

(2) Where the holders of any class or series of shares of a company have an exclusive right to elect one or more directors, a director so elected may only be removed by an ordinary resolution at a meeting of the shareholders of that class or series of shares.

(3) Subject to sections 70(b) to (e), a vacancy created by the removal of a director may be filled at the meeting of the shareholders at which the director is removed, or, if the vacancy is not so filled, it may be filled pursuant to section 74.

[32] The Attorney General has cited several authorities in support of their argument, that the failure to convene an annual general meeting by the directors has resulted in their automatic resignation and vacating of their office as a result of the mandatory operation of section 106 (3) of the Companies Act. The court will examine these authorities, in order to determine whether the conclusions which the court has arrived at, in relation to, the two separate issues that it has been called upon to determine are correct in light of the Attorney General’s construction of section 106 (3) and the By-laws.

[33] The Attorney General relies on the decision in **Attorney General v William Valentine Herbert**² to support the argument that the provisions of section 106 (3) of the Companies Act, being expressed in clear and unambiguous terms, are mandatory in nature and abhor the exercise of any discretion in its application once the 15 month period had expired.

² (1975) 22 WIR 527

- [34] The Attorney General argued that where a legislative enactment prescribes the manner or form in which a duty is to be performed, the Court must decide whether the requirement is mandatory or directory. If mandatory, the requirement would be essential to the validity of the acts done in pursuance of it and the omission would be fatal.
- [35] Applying this principle in relation to the provisions of section 106 (3) of the Companies Act, with which the Court has no doubt is a correct statement of the principle, the Attorney General contended that the failure to comply with the mandatory provisions of section 106 (3) of the Companies Act, is fatal to the validity of any acts performed or decisions made by the directors after the 15 month period. On that basis, the Attorney General implores the Court to find that section 106 (3) of the Companies Act is mandatory and that any default by the directors to convene a meeting within the statutory period, had the effect of not only rendering the acts performed by the directors and the decisions made by them a nullity, but also resulted in their automatic resignation and vacation from office.
- [36] It is beyond doubt, that the provisions of section 106 (3) of the Companies Act spells out the duty of the directors to convene an annual general meeting within the period prescribed by section 106 (3) and the By-Laws. However, it appears that the same statute also prescribes a remedy to a shareholder or member for the breach of the directors' mandatory duty to convene an annual general meeting within the prescribed statutory period.
- [37] The Court has formed this view, without derogating from the principle of law contained in the decision in **Attorney General v Herbert**. The Companies Act sets out a clear and precise regime regarding corporate governance and the democratic process to be adhered to in the event that such breaches as contemplated by section 106 (3) are concerned. The Companies Act has built into it remedies that exist for the protection of shareholders and members in relation to the actions of the directors in the management and governance of corporate entities. The Companies

Act is tailored in such a way as to provide protection to shareholders and members who are aggrieved by decisions of the directors. Therefore, the provisions of the Companies Act should be read as a whole.

[38] In the present case, the GOA has not shown that it has been deprived of the ability to take advantage of such protective measures or has been prevented by the directors from availing themselves of such protective measures that exist under the Companies Act. This is not to say that there exist no instances when it would become necessary for shareholders and members of a corporate entity to seek the intervention of the courts to obtain some relief or remedy against a decision or actions of the directors. In the present case, the court is of the view that this may just be one of those instances.

[39] In support of the argument, that any decisions made or actions taken by the directors were null and void, the Attorney General relied on the decision in **Re New Cedos Engineering Co Ltd**³ for the proposition that, where a company's articles, in this case By-Laws, provides for the retirement of one third of the directors annually but the number of directors is not three or a multiple of three, the number nearest to one third shall retire. The Attorney General argued that this mandatory requirement is deserving of no exception. Therefore, it is on this basis that the GOA challenges the extension of the tenure of the directors by a resolution passed at a special meeting of ANGLEC held on 5th February 2018 wherein it was resolved that the tenure of the directors who were required to retire by rotation would be extended until the next annual general meeting.

[40] Relying on the principles, set out in **Re New Cedos Engineering Co Ltd** the Attorney General contended that the defendants' argument, that in relation to those directors who were slated to retire by rotation, their tenure was lawfully extended until the next annual general meeting by a resolution of the shareholders at a special

³ [1994] 1 BCLC 797

meeting of 5th February 2018 was untenable. The Attorney General submitted that the resolution of 5th February 2018 (the 'Resolution') was void; and in the circumstances, the tenure of Mr. Ruan and other directors who were slated to retire by rotation were not extended by virtue of the Resolution; and are deemed to have retired and vacated office by operation of the law and in accordance with the By-laws.

- [41] On the aforementioned basis, the Attorney General submitted that the tenure of those directors who were slated to retire, not having been effectually extended by the agreement of the shareholders at the annual general meetings of 5th February 2018 and 28th August 2018 and reaffirmed at the Special Meeting of 16th April 2019 rendered any subsequent actions taken and decisions made by the directors a nullity.
- [42] The posture adopted by the Attorney General, appears to be that the motion passed at the annual general meetings on 5th February 2018 and 28th August 2019 wherein the shareholders decided to forego the election of directors and that the longest serving directors would retire automatically by rotation at the end of their three year term at the following annual general meeting was void.
- [43] The Court understands the Attorney General's submission to be premised on two limbs. First, that any such agreement by the shareholders at the previous annual general meetings were ultra vires the By-laws and the Companies Act. Second, the decision to postpone the presentation of the financial reports and the election of directors at the annual general meeting of 5th February 2018 was also a nullity because the directors were deemed to have vacated their office on that date. Also, the resolution had the effect of overriding articles 4.6 and 4.6.1 of the By-laws.
- [44] The Attorney General takes the argument further, to the extent that there being no lawfully constituted Board of Directors as of 5th February 2018, any decisions made and actions taken at the subsequent annual general meeting concluded on 28th

August 2018 were also null and void. In addition, any decisions of the directors after 29th November 2019 were also null and void. In other words, the directors for the time being would not be empowered by the Companies Act and the By-laws to convene an annual general meeting.

[45] In the court's view, the issue is whether the decision to extend the tenure of the existing directors at the annual general meeting held on 5th February 2018 was ultra vires the By-laws and the Companies Act. If this question is answered in the affirmative, then clearly the directors would have been deemed to have vacated office as of that date and any subsequent actions taken or decisions made by them would be a nullity. In determining the legality of the decision to extend the tenure of the existing directors, it is necessary to determine whether the procedure employed was lawful.

[46] Distilled to its essence, the Attorney General's submission on this point appears to be that the effect of the decision to extend the tenure of the directors was ultra vires the By-laws, to the extent that it purported and or had the effect of amending the By-laws in a manner contrary to the provisions of the Companies Act.

[47] The directors' power to make, amend or repeal any By-laws for the regulation of the business or affairs of a company is set out in section 63 of the Companies Act. Indeed, if the intention was to amend the provisions of articles 4.6 and 4.6.1 of the By-laws, then the procedure set out under section 63 of the Companies Act would have to be complied with at the annual general meeting.

[48] Section 63 of the Companies Act provides:

“(1) Unless the articles, a by-law, or any unanimous shareholder agreement otherwise provides, the directors of a company may by resolution make, amend, or repeal any by-laws for the regulation of the business or affairs of the company.

(2) The directors of a company shall submit a by-law, or any amendment or repeal of a by-law made under subsection (1) to the shareholders of the company at the next meeting of shareholders after the making, amendment

or repeal of the by-law, and the shareholders may, by ordinary resolution, confirm, amend or reject the by-law, amendment or repeal.

(3) A by-law, or any amendment or repeal of a by-law, is effective from the date of the resolution of the directors making, amending or repealing the by-law until—

(a) the by-law, amendment or repeal is confirmed, amended or rejected by the shareholders under subsection (2); or

(b) the by-law, amendment or repeal ceases to be effective under subsection (4); and, if the by-law, amendment or repeal is confirmed or amended by the shareholders, it continues in effect in the form in which it was confirmed or amended.

(4) When a by-law, or an amendment or repeal of a by-law is not submitted to the shareholders as required by subsection (2), or is rejected by the shareholders, the by-law, amendment or repeal ceases to be effective, and no subsequent resolution of the directors to make, amend or repeal a by-law having substantially the same purpose or effect is effective until the resolution is confirmed, with or without amendment, by the shareholders.

(5) A shareholder who is entitled to vote at an annual meeting of shareholders may make a proposal to make, amend or repeal a by-law.”

[49] It does not appear that the provisions of section 63 of the Companies Act were employed in obtaining what was in effect an amendment to the By-laws. Even though the resolution amounted to an amendment of the By-laws, the purported amendment could not override the dictates of section 106 and other provisions of the Companies Act as they relate to the presentation of financial reports. The court is fortified in this view by the provisions of section 22 of the Companies Act⁴.

[50] The only power to extend the tenure of any director is contained in Article 4.6.2 of the By-laws which states:

“The shareholders may, by resolution, extend the tenure of any director appointed prior to the adoption of these By-laws until such time as they become eligible for retirement by rotation pursuant to By-law 4.6.1.”

⁴ (1) The articles and by-laws of a company have no effect to the extent that they contravene, or are inconsistent with this Act.

(2) Subject to this Act, the articles and by-laws of a company are binding as between—

(a) the company and each shareholder; and

(b) shareholders.

- [51] The By-laws came into force on 22nd September 2011. Therefore, the motion to extend the tenure of the directors at the general meeting of shareholders on 5th February 2018 could not have been made in reliance on the provisions of By-law 4.6.2. Furthermore, none of the directors was a director appointed prior to the adoption of the By-laws. Therefore, Article 4.6.2 was not triggered in the present case.
- [52] Although, the GOA appears to have bifurcated its claim, to the extent that the determination of the issue of whether the tenure of the directors had expired, if decided in its favour, would inevitably dispose of the proceedings; and in that case there would be no reason to consider the question of whether the conduct of the directors amount to oppressive conduct and unfair prejudice towards the GOA in the conduct of the affairs of ANGLEC. The court is of the view that the two issues cannot be bifurcated in this way. The issue regarding the tenure of the directors is inextricably bound up with the claim for unfair prejudice.
- [53] At the 5th February 2018 annual general meeting, a resolution was passed deferring the presentation of the Financial Statements for the years 2017 and 2018. The last Financial Statements were served on the GOA for the year 2016. The GOA has requested that they be served with copies of the Financial Statements for the years 2017 and 2018. These have not been forthcoming from the directors and neither have the Financial Statements been presented at an annual general meeting. The GOA wrote to the directors by letter dated 18th December 2018 seeking disclosure of the Financial Statements and requesting that an annual general meeting be convened so that the GOA could be adequately apprised of the state of ANGLEC's affairs.
- [54] The directors published a notice explaining the reason for the delay in serving the Financial Statements. Since the commencement of the present proceedings the directors have caused the Financial Statements for the years 2017 and 2018 to be published on ANGLEC's official website.

[55] It appears that the GOA's purpose for requiring the disclosure of the Financial Statements for the period, is derived from the need to value its shares for the purpose of a prospective sale, a fact which the directors were well aware of prior to the passing of the Resolution deferring the publication and service of the Financial Statements.

[56] The GOA's complaint, as the court understands it, is that the failure of the directors to serve the Financial Statements for the years 2017 and 2018 and the Resolution deferring the service and presentation of the same including the deferring of the convening an annual general meeting amounted to oppression and unfair prejudice in relation to it as a shareholder and member of the company. It appears that the allegation is that the failure to convene the annual general meeting was concomitant on the unavailability of the Financial Statements.

[57] Section 130 (2) of the Companies Act provides:

“(2) Subject to subsections (3) and (4) and to section 131, the directors of a public company shall place before the shareholders at the second and every subsequent annual meeting of the share-holders of the company—

(a) comparative financial statements relating separately to—

(i) the period that began immediately after the end of the last completed financial year and ended not more than 6 months before the annual meeting of share-holders, and

(ii) the immediately preceding financial year;

(b) the report of the auditor; and

(c) any further information respecting the financial position of the company and the results of its operations required by the articles of the company, its by-laws, or any unanimous shareholder agreement.

(3) The financial statements required by subparagraph 2(a)(ii) may be omitted if the reason for the omission is set out in the financial statements, or in a note to the financial statements that are placed before the shareholders at an annual meeting.

(4) The Registrar may in any particular case adjust the period relating to which comparable financial statements are to be placed before the shareholders at any annual meeting.

(5) A director who contravenes subsection (1) commits an offence.”

- [58] This provision of the Companies Act is mandatory in its operation. In the court's view this provision cannot be waived by the shareholders or the directors by resolution.
- [59] In addition, section 134 of the Companies Act provides:
- “(1) Not less than 21 days before each annual meeting of the shareholders of a public company or before the signing of a resolution under section 120(1) (b) *in lieu* of its annual meeting, the company shall send a copy of the documents referred to in section 130 to each shareholder, except a shareholder who has informed the company in writing that he does not want a copy of those documents.
- (2) A company that contravenes subsection (1) commits an offence.”
- [60] Section 134 is in mandatory terms. A breach of the obligations imposed by the section may result in the complaint of unfair prejudice being made against the company or its directors in certain circumstances.
- [61] The GOA relies on what it describes as the directors' refusal and or failure to place the financial reports before the shareholders at the annual general meeting together with the auditor's report in conformity with the provisions of section 134 of the Companies Act as grounds for making out their case for oppression and unfair prejudice.
- [62] These matters are expressly stated in the affidavit of Mr. Larry Franklin ('Mr. Franklin'). In his affidavit Mr. Franklin states, that on the instructions of the Chief Minister he wrote to Mr. Ruan in his capacity as chairman of the Board of ANGLEC by letter dated 18th December 2018 regarding the urgent necessity for convening an annual general meeting of the shareholders in order for them to be properly apprised of the financial state of the company and the taking of necessary action regarding the company's affairs. It appears that Mr. Ruan responded in an untimely manner by email dated 10th January 2019. It is necessary for the present purposes to set out the text of this email in full. The email reads:

“Dear Mr. Franklin,
I, unlike the disrespectful, inconsistent, Hon. Chief Minister and his government, hereby acknowledge receipt of correspondence. I wish to state

that it seems quite ironic, that this very Hon. Chief Minister, less than 90 days ago DECLINED to deal with a critical matter, on the request of Anglec's corporate office, during the absence of the minister responsible.

Now the minister responsible for government equity in Anglec, Mr. Curtis is on island and is available but for some strange reason/reasons, the said Hon. Chief Minister, apparently finds himself muddling in Hon. Curtis Richardson's ministry.

I guess everyone will appreciate consistently (sic) in leadership.

Moreover, there are some very critical prerequisites, the gracious Hon. Chief Minister needs to address, before such advance is made. Furthermore, the conduct of all stakeholders of a public entity, is regulated by legal instruments of that particular organization, such as the Bylaws, NOT "bully boy tactics".

Regards,

Harold (SHAREHOLDER)"

- [63] The GOA argued that the directorship of the company under the stewardship of Mr. Ruan had no power or authority to defer, postpone, reschedule or delay the holding of the annual general meeting in the manner in which it did.
- [64] It appears that the company's 2017 and 2018 financial reports were published on the company's website on or about December 2019, despite there being no compliance with section 134 of the Companies Act. The GOA claims that the publication of the financial statements has raised certain matters of great concern to the GOA as a shareholder of the company. Notably, the total fixed deposit of the company which includes a self-insurance reserve, was according to the auditor, was fully exhausted and as at 31st December 2018, the company was fully exposed in terms of its liquidity requirements. The GOA also submitted that the financial reports also revealed that as at 31st December 2018 the company was operating at a net loss 9.1 Million Eastern Caribbean Dollars.

- [65] The GOA also contended that the provision of the financial information regarding the company was critical to the GOA's consideration of the implementation of its policy, for the intended divestment of its shareholdings in the company and its ability to show the company's viability to prospective purchasers.
- [66] In the circumstances, the GOA argued that the conduct of the Board of Directors has deprived the GOA of its rights as a shareholder, which amounts to oppressive and unfairly prejudicial conduct towards the GOA on the part of the directors. Furthermore, the GOA contends that it has lost all confidence in the directors' ability to properly manage and conduct the affairs of the company.
- [67] The GOA argued that unless the court intervenes by exercising its powers pursuant to section 268 of the Companies Act, the directors will continue to conduct the affairs of the company in a manner that is oppressive and unfairly prejudicial to the GOA.
- [68] GOA also complains that the intention of the directors in delaying the holding of an annual general meeting was to promote and further the directors' own agenda. In support of this complaint, the GOA relies on the following matters set out below.
- [69] It appears that on 2nd October 2019 the directors, at a meeting of directors, it was resolved that the annual general meeting would be convened on 28th November 2019. According to Mr. Franklin's affidavit, it appears that at this meeting the directors made no preparation for the presentation of the financial reports at the next annual general meeting. According to Mr. Franklin, the situation remained the same when the directors again met on 27th November 2019. It appears from Mr. Franklin's affidavit that the meeting of 27th November 2019 concluded with no new date being set for the convening of the annual general meeting.
- [70] In further support of their argument that the directors of ANGLEC have, and continue to carry on the affairs of the company in a manner contrary to the best interest of the company and its shareholders and have conducted the affairs of the company in furtherance of their own agenda, have also relied on the following matters.

- [71] The GOA relied on the evidence of Mr. Franklin contained in his affidavit, that the directors, particularly Mr. Ruan, have delayed the holding of the annual general meeting in order to preserve their tenure in office, in order to further their personal agenda, which included dismissal of the Human Resource Manager and obtaining the approval of the directors for the purchase of land, which had been vetoed by the majority of the Board of Directors.
- [72] It appears from Mr. Franklin's affidavit, that at the directors' meeting of 27th November 2019, the proposal for the purchase of land at Corito was again canvassed by Mr. Ruan and placed at the top of the agenda at the meeting. Incidentally, it appears that at this meeting the convening of the annual general meeting was placed at the bottom of the agenda. This meeting concluded with no date being set for the annual general meeting. According to Mr. Franklin's affidavit, at a meeting of the directors held on 5th December 2019, the decision was taken to terminate the Human Resource Manager's employment.
- [73] It also appears from Mr. Franklin's affidavit that at a directors meeting held on 16th December 2019, the consideration of the land purchase was again placed at the top of the agenda and the annual general meeting at the bottom. At this meeting the directors also approved 30th January 2020 as the date for holding the annual general meeting and a further meeting of the directors was scheduled for 23rd December 2019 to discuss the land purchase.
- [74] Relying on the affidavit of Mr. Gareth Hodge ('Mr. Hodge') one of the directors of the company, the GOA alleged that subsequent to the grant of the injunctive order made by the court, and at the direction of Mr. Ruan, the corporate secretary, and the Chief Executive Officer of the company, paid legal fees to legal practitioners from the company's account to represent the directors in the present proceedings.

- [75] In addition, Mr. Hodge's affidavit suggest that on 23rd December 2019, Mr. Ruan, with the tacit or otherwise approval of the remainder of the directors, directed the company's Chief Executive Officer to shut down the operations of the company and close its offices as he had interpreted the purport and effect of the court's injunction order as directing such action to be taken. The GOA contends that this was again an action taken and a decision made by the directors that was not in furtherance of and in keeping with what was in the best interest of the company. The GOA's position, with which the court concurs, is that the management of the general operations of the company are conducted through its servants and agents duly employed by the company notwithstanding the vacancy of the company's directorship.
- [76] Not surprisingly, all of the GOA's contentions and allegations were denied by the Board of Directors.
- [77] In re **J.F. Ming Inc.; Ming Siu Hung, Ronald and others v J.F. Ming Inc. and another**⁵, an unfair prejudice claim brought by the claimants as minority shareholders pursuant to section 1841 of the British Virgin Islands ('BVI') Business Companies Act, 2004 in relation to the conduct of the affairs of a company by the company's majority shareholder and sole director. The claimants sought a remedy the removal of the changes to the company's articles made in 2014 by two members' resolutions signed by the second defendant as a minority shareholder, that their terms eliminated (waived), retrospectively and prospectively the claimants' rights as members rights including the claimants' rights as members to basic annual financial information about the company and the provision to the claimants of the Financial Statements. The claimants had not received Financial Statements since May 2006.

⁵ [2016] ECSCJ No. 143

- [78] The claimants' position was that it was unfairly prejudicial and unfairly discriminatory for the company not to provide the Financial Statements to the claimants since 2006. The claimants submitted that without the Financial Statements they could not determine whether the years of non-payment of dividends by the company was justified. They submitted that they were being unfairly deprived of the information to know whether there were good reasons not to pay dividends.
- [79] The company's memorandum and articles of association, article 120, required the directors of the company to provide to members annually, Financial Statements, unless the requirement is waived by a resolution of the members. Article 120 provided that "The directors shall unless such requirement be waived by resolution of members cause to be made out and shall serve on the members or lay before a meeting of members ... one at least in every calendar year a profit and loss account ... serve the preceding account ... and a balance sheet shall be drawn up so as to give respectively a true and fair view of the profit and loss of the company for the financial period, and a true and fair view of the state of affairs of the company as at the end of the financial period".
- [80] In that case the court held, that the obligation of the directors was to serve the financial statements on members unless there was a members meeting. The court also held that the director was not focused on the interest of the company, when he failed to provide the financial statements over the years or when he denied and ignored the claimants' express request for financial statements. It was further held that there was no requirement on members in article 120, or elsewhere, to request the financial statements from the directors or the company. Furthermore, it was held that there was no requirement on members in article 120, or elsewhere, to justify to the company or the directors of the company any desire or need for the financial statements in order to be entitled under article 120 to be served with the financial statements⁶. The court also opined that:

⁶ At paragraph 140 et seq.

“There was no caveat, in article 120 or elsewhere that a member was not required to be served with the financial statements if he or she already had some information about the financial position of the company.

There was no caveat in article 120 or elsewhere that a member was not required to be served with the financial statements if he or she wanted to use it to ascertain the value of his or her shares or use it in connection with the possible sale of his or her shares. Indeed that objective would be all the more reason why the financial statements should be provided.

The company’s failure to provide financial statements in each year from 2006 was not for the benefit of the company or for any other purpose but rather for the improper benefit of the defendant, including to keep from the claimant and other minority shareholders information about the financial affairs, operations and state of the Company (including in relation to the Second Defendant himself as sole director and operator of the Company and in respect of matters about which he could potentially be called upon by minority shareholders to explain and justify) and its ability to pay dividends, and the value of the Claimants' shares in the Company. The failure to provide Financial Statements based on the Resolutions was oppressive, unfairly discriminatory and unfairly prejudicial to each of the Claimants in their capacities as members of the Company.

[81] On appeal⁷, the learned judge’s finding of unfair prejudice was upheld. The Court of Appeal held:

“Notwithstanding that Lawrence had a duty to provide financial statements to the members of the Company pursuant to Article 120 of the Company's Articles of Association, and that this duty was breached as a result of him not doing so, a claim in unfair prejudice could not have been properly founded before Ronald, Bertha and Tong had specifically requested that he provide them with this information. Accordingly, once Bertha had done this in 2013 and because Lawrence refused to comply with her request, even after the Ronald, Bertha and Tong had filed the claim against him in 2014, a claim in unfair prejudice was properly brought against him. Lawrence's refusal to provide the financial information was both unfair and prejudicial to the interests of the minority shareholders. Furthermore, unfair prejudice also arose from Lawrence using the rules to alter Article 120 in a manner which equity would regard as contrary to good faith, namely, to waive the obligation to provide the financial information.”

⁷ [2017] ECSCJ No. 165

[82] In **J. F. Ming Inc.** Blenman JA gave an extensive and comprehensive analysis of the law and approach to be applied in unfair prejudice and oppression claims⁸. Having found that the provisions of section 1841 of the BVI Companies Act, mirrors the provisions of section 994 (1) of the UK Companies Act 2006 and sections 459 – 461 of the UK Companies Act 1985 examined the UK case law in relation to those provisions. The provisions of section 268 of the Anguilla Companies Act, also mirrors the aforementioned statutory provisions; and in the court's view is deserving of similar treatment. In determining, the issue of whether the judge in the court below had erred in holding that the conduct of the director amounted to unfair prejudice. Her Ladyship said, that the provisions of section 1841 played two roles. Blenman JA, relying on the decision in *O'Neil and Another v Phillips and Others* said:

"Lord Hoffmann in *O'Neill and Another v Phillips and Others*, in addressing section 459 of the 1985 Act, gave judicial acknowledgment to this. He stated that, first, it protects shareholders against the breach of the terms on which they have agreed that the affairs of the company should be conducted, through the articles of association or, say, some collateral agreement. Second, it protects them against some inequity that makes it unfair for those conducting the company's affairs to rely upon their strict legal powers.

It is also settled that the conduct complained of must consist of an act or omission of the company (including an act or omission on its behalf) and the shareholder's interests as a member must have been prejudiced unfairly. See *Re A Company*, a decision of Harman J, where he said at page 144:

"All these cases together, in my judgment, lead one clearly to the understanding that the conduct to be complained of must be in the affairs of the very company in respect of which the petition is presented."

It is trite law that the act or omission complained about must be in relation to the company conduct "dehors" the company. The leading authority on the interpretation and operation of the equivalent section to section 1841 of the Act is the decision of the House of Lords in *O'Neill v Phillips*. From Lord Hoffmann's speech one can further deduce the following: unfair prejudice claims can arise if the shareholder can demonstrate prejudice to his interests as a shareholder. This will usually include a breakdown of trust and confidence, save where it can be shown that the minority has done something seriously wrong so as to justify the treatment that it had received.

⁸ At paragraphs 64 – 72.

This, however, does not negate the fact that the courts, in seeking to determine whether the majority was justified in the conduct, had to examine the underlying facts of the case.

In *Re Saul D Harrison & Sons plc*, Hoffmann LJ, addressing the question of what amounts to unfair prejudice for the purposes of section 459 of the UK Companies Act, 1985, had this to say:

"In deciding what is fair or unfair for the purposes of s 459, it is important to have in mind that fairness is being used in the context of a commercial relationship. The articles of association are just what their name implies: the contractual terms which govern the relationships of the shareholders with the company and each other. They determine the powers of the board and the company in general meeting and everyone who becomes a member of a company is taken to have agreed to them. Since keeping promises and honouring agreements is probably the most important element of commercial fairness, the starting point in any case under s 459 will be to ask whether the conduct of which the shareholder complains was in accordance with the articles of association."

The allegedly unfair prejudicial remedy is summarised in the recent decision of *Grace v Biagioli*.

"From Lord Hoffmann's speech [in *O'Neill v Phillips*] one can deduce the following principles:

- (1) The concept of unfairness, although objective in its focus, is not to be considered in a vacuum. An assessment that conduct is unfair has to be made against the legal background of the corporate structure under consideration. This will usually take the form of the articles of association and any collateral agreements between shareholders which identify their rights and obligations as members of the company. Both are subject to established equitable principles which may moderate the exercise of strict legal rights when insistence on the enforcement of such rights would be unconscionable;
- (2) It follows that it will not ordinarily be unfair for the affairs of a company to be conducted in accordance with the provisions of its articles or any other relevant and legally enforceable agreement, unless it would be inequitable for

those agreements to be enforced in the particular circumstances under consideration. Unfairness may, to use Lord Hoffmann's words, 'consist in a breach of the rules or in using the rules in a manner which equity would regard as contrary to good faith' (see [1999] 2 BCLC 1 at 8, [1999] 1 WLR 1092 at 1099); the conduct need not therefore be unlawful, but it must be inequitable;

- (3) Although it is impossible to provide an exhaustive definition of the circumstances in which the application of equitable principles would render it unjust for a party to insist on his strict legal rights, those principles are to be applied according to settled and established equitable rules and not by reference to some indefinite notion of fairness;
- (4) To be unfair, the conduct complained of need not be such as would have justified the making of a winding-up order on just and equitable grounds as formerly required under s 210 of the Companies Act 1948;
- (5) A useful test is always to ask whether the exercise of the power or rights in question would involve a breach of an agreement or understanding between the parties which it would be unfair to allow a member to ignore. Such agreements do not have to be contractually binding in order to found the equity;
- (6) It is not enough merely to show that the relationship between the parties has irretrievably broken down. There is no right of unilateral withdrawal for a shareholder when trust and confidence between shareholders no longer exist. It is, however, different if that breakdown in relations then causes the majority to exclude the petitioner from the management of the company or otherwise to cause him prejudice in his capacity as a shareholder."

From the above, it is clear that once unfair prejudice is established the court is given a wide discretion as to the relief which should be granted. The court has to look at all of the relevant circumstances in deciding what kind of order it is just and equitable to make. It is not limited merely to reversing or putting right the immediate conduct which has justified the making of the order.

I now come squarely to address the main question: what is the nature of the conduct which is cognizable under the Act. The authorities are clear that there can be no exhaustive list of the types of conduct which will be recognised as amounting to unfairly prejudicial conduct. However, by way of emphasis, one thing is clear - the complaint which is made must be that in relation to the affairs of the company to which the claim is brought. Indeed, it must be demonstrated that the affairs of the company in question have been or are likely to be conducted in a manner which is unfairly prejudicial to the interests of the shareholder or the shareholders generally, but the categories of unfair prejudice are not closed. I wish to borrow from the words of Arden J in *Macro and Others v Thompson and Others*:

"[T]he jurisdiction under [section 184I] has an elastic quality which enables the courts to mould the concepts of unfair prejudice according to the circumstances of the case."

A breach of the Articles of Association is, *prima facie*, a ground for relief. Indeed, the members agreed that the affairs of the company should be conducted based on the Articles of Association. Provided it is not of a trivial nature, an unfair prejudice claim may be well founded. The ways in which a member's interests may be prejudiced are almost unlimited.

In the case at bar, there is no doubt that where Article 120 stipulated that the financial information should have been provided. Any failure to do so would amount to an egregious departure from what the parties have agreed and, in so doing, would breach the agreement as provided in Article 120. It is clear that Article 120 enabled Lawrence to waive the requirement to provide the financial information. However, that is not the end of the matter. Indeed, the next question is whether there are equitable considerations which bind Lawrence. In determining what equitable obligations arise between the parties, the court must look at all the circumstances, including the company's constitution, any written agreement between the shareholders, and the conduct of the parties. These matters were explained by Lord Hoffmann in *O'Neill v Phillips*:

"[T]here will be cases in which equitable considerations make it unfair for those conducting the affairs of the company to rely upon their strict legal powers. Thus unfairness may consist in a breach of the rules or in using rules in a manner which equity would regard as contrary to good faith. ... But this form of unfairness is also based upon established equitable principles and it does not arise in this case."

It is settled law that it is not necessary to show a course of conduct, nor one continuing at the date of filing of the claim. An isolated past act or omission is sufficient to give the court jurisdiction to intervene. The general rule that

is extrapolated from the above is that, a minority shareholder is entitled to complain of unfairness and prejudice in relation to which he agreed that the affairs of the company should be conducted. However, there are cases in which equitable considerations make it unfair for those conducting the affairs of the company to rely upon their strict legal powers. Thus, unfairness may consist of a breach of the rules or in using the rules in a manner which equity would regard as contrary to good faith. Indeed, one of the most important matters to which the courts will have regard is the terms on which the parties agreed to do business together. These are commonly found in the company's Articles of Association.

I nevertheless hold, by applying the principles stated in *O'Neill v Phillips*, that it is beyond doubt that once the request for the financial information was made in 2014, Lawrence ought to have provided the financial information. The non-provision of the financial information in 2014 suffices to establish the unfair prejudice claim and the judge was entitled to so conclude. This omission was made more egregious by the alteration of Article 120 of the Articles of Association, which purported to waive the requirement to provide the financial information both retrospectively and prospectively. It is clear to me that unfair prejudice also arose from Lawrence using the rules to alter Article 120 in a manner which equity would regard as contrary to good faith.”

[83] The Attorney General relied on the decision in **Bridgette Rosemarie Neipp v Gloria Watt⁹ and another** in support of the proposition that the rightful consequence of the directors' default in their duty to convene the annual general meeting in compliance with section 106 (3) of the Companies Act and the failure to adhere to the By-laws in relation to those directors who were to resign by rotation is that the named directors ceased to hold office and that any decision taken by them was a nullity.

[84] The decision in **Neipp v Watt** is distinguishable from the present case on its facts. Basically this case relates to a public company whereas **Neipp v Watt** related to the conduct of affairs of a private company. Nevertheless, the basic principles outlined by the court in **Neipp v Watt** sheds light on the question which presently confronts the court and on that basis any attempt to distinguish the decision in **Neipp v Watt** is purely artificial.

⁹ [2008] ECSCJ No. 270

[85] The court will not labour to recite all of the facts in **Neipp v Watt**. This case dealt with the consequences of the failure to observe the provisions of section 107 of the Antigua and Barbuda Companies Act which provided that:

"The directors of a company

- (a) shall call an annual meeting of shareholders not later than 18 months after the company comes into existence, and subsequently not later than 15 months after holding the last preceding annual meeting; "

[86] Section 132 (1) of the Antigua and Barbuda Companies Act confers on a shareholder or director of a company the right to apply to the court to obtain relief. Section 132 of the Antigua Companies Act provides:

- "(1) Upon the application to the court by a director of a company or a shareholder of the company who is entitled to vote at a meeting of the shareholders, or by the Registrar, the court may,
 - (a) when for any reason it is impracticable
 - (i) to call a meeting of shareholders in the manner in which meetings of shareholders can be called, or
 - (ii) to conduct the meeting in the manner prescribed by the by-laws and this Act, or
 - (b) when the directors fail to call a meeting of the shareholders in contravention of section 131, or
 - (c) for any other reason thought fit by the court,order a meeting of shareholders to be called, held and conducted in such manner as the court may direct.
- (2) Without restricting the generality of subsection (1), the court may order that the quorum required by the by-laws or this Act be varied or dispensed with at a meeting called, held and conducted pursuant to this section.
- (3) A meeting of the shareholders of a company called, held and conducted pursuant to this section is for all purposes a meeting of shareholders of the company duly called, held and conducted."

[87] The Anguilla Companies Act does not contain a provision comparable with section 132 of the Antigua Act. However, in **Neipp v Watt** the court dealt with a provision in the company's articles that although not similarly worded to article 4.6.1 of ANGLEC's By-laws was given similar treatment. Article 79 of the company's articles in **Neipp v Watt** read:

"At the third annual general meeting of the Company all the Directors shall retire from office and thereafter Directors shall retire in every year. Any retiring Director shall be eligible for re-election. The vacant offices shall be filled by the Company in general meeting, and if at such meeting the places of the retiring Directors are not filled up, the vacating directors or such of them as have not had their places filled up, shall be deemed to have been re-elected unless at such meeting or adjourned meeting it is expressly resolved not to fill such vacated office or unless a resolution for re-election of such Director shall have been put to the meeting and lost."

[88] It appears from a reading of the case of **Neipp v Watt**, that it is only fair to conclude that in order to fulfill the mandate of ANGLEC's By-laws, it was necessary to convene the annual general meeting. By extension, any decision made or action taken by the directors, who have failed to convene a meeting in the manner prescribed by law or the articles and or By-laws of the company would be rendered a nullity as their authority to act on behalf of the company had ceased by virtue of the vacation of their office.

[89] Unlike the present case, the claimant in **Neipp v Watt** did not avail themselves of the statutory remedy available to them to enforce the right to have the directors convene an annual general meeting. In **Neipp v Watt** Blenman J. as she then was remarked as follows:

"In my respectful view, Ms. Neipp has failed to have recourse to the legal remedies that are available to her in her capacity as the personal representative of the majority shareholder and it is clear to me that a court of law can only go so far in protecting the interest of someone who has been wronged, provided that the correct legal procedures are utilized. Be that as it may, I nevertheless proceed to seek to bring about a just resolution to this unhappy impasse between the parties in spite of the approach adopted by Ms. Neipp."¹⁰

[90] The court in the present case, fortunately, is not faced with a similar task. In **Neipp v Watt**, the claimant had failed to avail herself of the statutory remedy notwithstanding, the court felt constrained to intervene in order to do justice

¹⁰ At paragraph 57

between the parties. However, in the present case, the GOA had already made an attempt to rectify the situation by convening a special meeting of the shareholders for the purpose of replacing the directors. That attempt was foiled by the directors at the meeting. The court is not minded to make any determination as to the procedure adopted at that meeting. Suffice to say that the procedure adopted by the GOA bore no fruit. It seems therefore, that the court's power to intervene in the circumstances of the present case arises within the context of the remedy provided by section 268 of the Companies Act. In particular, the court has paid regard to the provisions of section 268 (1) and (2) (c) and (h) of the Companies Act which provide as follows:

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

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

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

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

[91] In deciding, the question of whether the claimant in **Neipp v Watt** was entitled to an order from the court compelling the defendant and the company to convene a meeting of the company the court held that:

“The law requires that a company holds an annual general meeting after the appropriate notice convening it, are given. The usual business conducted at the annual general meeting includes the presentation of accounts and reports, and the appointment of directors in the case of either death of a director or the resignation of a director. It seems to me that the law, in its wisdom, requires that annual general meetings be convened in order to ensure that members are able to partake in the decision making process of the company and also to make resolutions on their own account.

Also, it is the law that the annual general meetings must be held by the directors whether they want to or not.”¹¹

[92] In resolving the issues raised in the present claim, the Court examined other authorities not cited in argument by the parties. Notwithstanding, that the issues raised in the present proceedings were not considered in the cases to which the court hereinafter refers, they provide compelling reasons for the court to decide whether to depart from the earlier conclusions that the court had arrived at on the examination of section 106 (3) and article 4.6.1 of the By-laws.

[93] In **Re Consolidated Nickel Mines Ltd**¹² where, in a claim in the liquidation of a company for arrears of remuneration by persons claiming to have been directors of the company, the liquidator denied the claim contending that by virtue of the company’s articles the directors had vacated office and accordingly, they were not entitled to remuneration. The articles which the court construed provided that:

“At the ordinary meeting in 1906 all the directors and in every subsequent year one third of all the directors shall retire from office. A retiring director shall retain office until the dissolution of the meeting at which his successor is elected.”

No general meetings of the company were called in 1906 and 1907, but two of the directors continued to act as directors. The court held:

“The meaning of article 101 is that the holding of the office of director was only to last until the end of 1906, or until the earlier date on which the ordinary meeting for that year was held ... The duty of the directors was to call a meeting in 1906 and 1907, and they cannot take advantage of their own default in that respect and say that they will remain directors ...”

[94] It appears that on the ordinary and natural meaning of the provisions of articles of the company in the case of **Re Consolidated Nickel Mines Ltd** that, having specified the year in which the directors were to resign, vacating of their office would occur at the end of that year, even if the company failed to hold an annual general meeting at which the resignation would formerly take place.

¹¹ At paragraph 74

¹² [1914] 1 Ch 883

- [95] The issue that arises if the Court adopts this construction is, whether the provisions of section 106 (3) and article 4.6.1 of the By-laws lend themselves to the same construction to the extent that the result would inevitably be similar to that obtained in **Re Consolidated Nickel Mines Ltd**. The Court is of the view that what is critical is the resolution of the question whether on the one hand the proper construction of section 106 (3) and article 4.6.1 lend themselves to the interpretation that resignation of the directors within the 15 month statutory period is mandatory and the failure to adhere to the same results in those directors being deemed to have vacated office and on the other hand the directors' resignation of office takes effect on the happening of a future event, namely, the annual general meeting.
- [96] The Court is of the considered view that the combined effect of section 106 (3) and article 4.6.1 was that the tenure of those directors who were required to retire by rotation was deemed to have expired on the date on which the annual general meeting was required to be held. Therefore, those directors were deemed to have automatically vacated office.
- [97] It appears that by the time the statutory period for holding the annual general meeting had passed all of the directors were eligible to retire by rotation in accordance with the By-laws. Therefore, there were no remaining directors who could have remained in office for the purpose of carrying out the functions of the Board of Directors. Furthermore, any actions taken or decisions made by the directors would have been null and void.
- [98] The case of **Kanssen v Rialto (West End) Ltd**¹³ dealt with the consequences of the failure to convene an annual general meeting. This case considered the provisions of article 93 in Table A to the Companies Act, 1929 which provided that:
- “...at the first general meeting of the company all the directors would retire and at the ordinary meeting in every subsequent year one third of the directors for the time being, or, if their number is not three or a multiple of three, then the number nearest one-third shall retire from office.

¹³ [1944] Ch. 346

- [99] In **Kanssen** an annual general meeting at which one of the directors should have retired was not held at the prescribed time. It was held that this director had been a director but he had vacated office on the date that the annual general meeting should have been held by reason of article 93.
- [100] In another case, **Alexander Ward v Samyang Navigation**¹⁴ a company registered in one jurisdiction, sued another company registered in a different jurisdiction for the recovery of a debt, using the arrestment of a vessel belonging to the latter company to found jurisdiction. The defendant company averred that, the claimants, not being the company, had no title to sue, as at the time that the action was raised there were no directors of the company in office, and thus there was no one to manage the business of the company, which would have included authorising the raising of an action on the company's behalf, and that the action, raised by the two individuals, was thus raised without such authority. The court held that, although the raising of the action was done without the authority of the company, the company being a competent principal in relation thereto could subsequently ratify the unauthorised act done in its name.
- [101] Mr. Walwyn counsel for the defendants has relied on the provisions of sections 68 (6)¹⁵ and 83¹⁶ of the Companies Act in support of the contention that, notwithstanding the automatic expiry of the term of the directors, that the directors continued in office as 'de facto' directors until they were replaced by election at an annual meeting of shareholders and that any action performed or decision made by them was valid.

¹⁴ 1975 SC (HL) 26.

¹⁵ 68(6) Notwithstanding subsections (2), (3) and (5), if directors are not elected at a meeting of shareholders, the incumbent directors continue in office until their successors are elected.

¹⁶ 83. An act of a director or officer is valid notwithstanding any irregularity in his election or appointment or any defect in his qualification.

[102] The court is of the view, that the provisions of section 83 of the Companies Act has no applicability to the present proceedings. First of all, the present claim does not specifically touch and concern the validity of any act of any of the directors which is challenged. Second, this provision can be triggered in the event where the qualification, election or appointment is being challenged.

[103] With respect to the provisions of section 68 (6) of the Companies Act, the operation of this provision presupposes the holding of a shareholders meeting. In the present case there has been none. In fact, the complaint made in the present case is in respect of the failure to convene an annual general meeting for the very purpose of electing directors. The GOA complains that the present directors have acted oppressively and unfairly in failing to convene the meeting for reasons that were not in the best interest of the company or its shareholders. In the circumstances, the court is of the view that section 68 (6) exist for the purpose of ensuring continuity in the management of the company by the directors where there has been a failure to elect directors at an annual general meeting. The statutory provision does not provide a justification for failing to convene a meeting of shareholders. To do so would permit the present directors to take advantage of this provision to perpetuate the existing state of circumstances against which the claimant in the present has registered its complaint.

[104] **Re Zinotty Properties Ltd**¹⁷ was another case in which the effect of a failure to hold an annual general meeting was considered in relation to an article dealing with the retirement of directors by rotation. In that case the company adopted article 89 of Table A to the Companies Act, 1948 with the result that the company's articles provided that at the first annual general meeting and at the annual general meeting in each subsequent year, one-third of the directors for the time being, or, if their number is not three or a multiple of three, then the number nearest one-third, shall retire from office. The court held that as no annual general meetings were held, this

¹⁷ [1984] 1 WLR 1249

fact coupled with article 89 meant that the original directors must both be deemed to have retired by 1970.

- [105] It appears from the authorities cited above that the provisions of section 106 (3) of the Companies Act and Article 4.6.1 of the By-laws are mandatory. There appears to be no need to imply any construction into those provisions as they speak for themselves. The clear and proper construction of section 106 (3) and Article 4.6.1 of the company's By-laws mandated that the annual general meeting must be called within the statutory period of 15 months from the date of the last annual general meeting. Also, the court is of the view, that there is no need to imply into the provisions of section 106 (3) or Article 4.6.1 the consequences of a failure to hold an annual general meeting within the time prescribed.
- [106] In the circumstances, the cumulative effect of section 106 (3) of the Companies Act and Article 4.6.1 of the By-laws of the company is that the office of those directors whose term of office was to expire by rotation was automatically vacated after the time for convening and holding the annual general meeting had expired. Therefore, any decisions or actions taken after this period by the directors is a nullity.
- [107] In addition, the decision to extend the tenure of the existing board of directors at the annual general meeting of 5th February 2018 and subsequent thereto was ultra vires both the provisions of the Companies Act and the By-laws of the company and were therefore a nullity.
- [108] The court also finds, that in relation to the decision to defer the presentation of the company's financial statements within the time and in the manner prescribed by the Company's Act was unlawful. In addition, the failure to comply with the statutory duty to provide the shareholders with the financial statements in the manner and at the time prescribed by the Companies Act was unjustified in all the circumstances of the case. The court is mindful of the fact that the Companies Act itself provided

the directors with a mechanism with which to comply with their financial reporting duties which they failed to adhere to¹⁸.

- [109] The court is also of the considered view that the failure of the directors to lay before the shareholders of the company the audited financial statements of the company as required by the provisions of the Companies Act amounted to an unlawful exercise of authority. Not only did this decision amount to a flagrant breach of the Companies Act but it also has the tendency to be attended by consequential criminal liability. The publication of the company's financial statements electronically on the company's website did not effectually amount to compliance with the dictates of the Companies Act.
- [110] In the premises, the directors, being well aware of the interest of the GOA in having the audited financial statements presented to them, and by failing to perform their duty as directors of the company in accordance with law, acted in a manner that was unfairly prejudicial and oppressive to the GOA. The inevitable result of the directors' conduct was a total loss of confidence in the ability of the directors to properly manage and conduct the affairs of the company. Mr. Ruan's conduct in particular as it relates to the GOA's inquiries concerning the provision of the audited financial statements of the company can aptly be described as a blatant abuse of authority, flippant and unbecoming of a person properly qualified to hold the position of director and chairmanship of a public company.
- [111] Having considered the evidence presented by both sides, the court is of the opinion that the conduct of the directors in failing to convene the annual general meeting and to lay before the company's shareholders the company's financial records for the years 2017 and 2018 was indicative of no other purpose than to prolong their tenure in office, for the ultimate purpose of pursuing their own mandate. There clearly was no justifiable reason for the continued deferment of the annual general

¹⁸ See: Companies Act section 131

meeting, for the reasons that the court has already stated, other than to enable the directors to remain in office. In addition, it appears that all of this was perpetuated, while the directors generally continued to wittingly or unwittingly misdirect themselves as to the law and their legal obligations to the shareholders.

[112] The court is also fortified in this view, by what it regards as an ingenious slight of hand properly conceived and devised to circumvent the court's injunctive order. The court has observed that notwithstanding the purport and effect of the injunctive order, a substantial payment was made to legal practitioners, including overseas counsel, purportedly or seemingly to defend as it were the company. However, the overall effect appears to be the primary purpose of safeguarding the conduct of the Board of Directors from the obvious criticism that it rightly deserved. Section 99 of the Companies Act¹⁹ does not avail the Board of Directors. Reliance has been placed on this provision of the Companies Act to support the contention that the directors were entitled to be indemnified personally against the present claim. This is not how section 99 of the Companies Act operates. Unless the court is misguided, section 99 of the Companies Act requires a director to be so indemnified if he has acted honestly and in the best interest of the company of which he is a director. Given the court's findings in relation to the question of whether the directors acted in the best interest of the company, it cannot be said that the directors herein were in a position to satisfy this provision of the Companies Act as it relates to indemnities

¹⁹ **99.** (1) Except in respect of an action by or on behalf of a company or body corporate to obtain a judgment in its favour, a company may indemnify—

(a) a director or officer of the company;

(b) a former director or officer of the company; or

(c) a person who acts or acted at the company's request as a director or officer of a body corporate of which the company is or was a shareholder or creditor,

and his legal representatives, against all costs, charges and expenses (including an amount paid to settle an action or satisfy a judgment) reasonably incurred by him in respect of any civil, criminal or administrative action or proceeding to which he is made a party by reason of being, or having been, a director or officer of that company or body corporate.

(2) Subsection (1) does not apply unless the director or officer to be so indemnified—

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

(b) in the case of a criminal or administrative action or proceeding that is enforced by a monetary penalty, had reasonable grounds for believing that his conduct was lawful.

to directors by the company. In addition, section 101²⁰ of the Companies Act has not been complied with. To take the matter further, section 103 of the Companies Act was also not complied with. Section 103 of the Companies Act requires a director who seeks to be indemnified to seek the court's approval²¹.

[113] Accordingly, the court finds that the directors, whether they authorized the payment of the legal costs of the present proceedings or not, were not entitled to be indemnified or claim an entitlement to be indemnified in the manner in which they did. The court makes this finding being well aware that it will lead to satellite litigation, but makes no determination or order with respect to the consequences of the disregard for the provisions of the Companies Act cited herein.

[114] The court is constrained by the strength of both judicial and statutory authority on the issues to be decided in the current proceedings to find in favour of the GOA. Section 268 of the Companies Act confers discretionary power on the court to make such order or orders as it thinks fit if the court considers it is just and equitable to do so.

²⁰ **101.** Notwithstanding anything in section 99 or 100, a person described in section 99 is entitled to indemnity from the company in respect of all costs, charges and expenses reasonably incurred by him in connection with the defence of any civil, criminal or administrative action or proceeding to which he is made a party by reason of being, or having been, a director or officer of the company or body corporate, if the person seeking indemnity—

(a) was substantially successful on the merits in his defence of the action or proceeding;
(b) qualified in accordance with the standards set out in section 99 or 100; and
(c) is fairly and reasonably entitled to indemnity.

²¹ **103.** (1) A company or person referred to in section 99 may apply to the Court for an order approving an indemnity under section 100 or 101, and the Court may so order and make any further order it thinks fit.

(2) An applicant under subsection (1) shall give the Registrar notice of the application and the Registrar may appear and be heard at the hearing of the application.

(3) Upon an application under subsection (1), the Court may order notice to be given to any interested person, and that person may appear and be heard at the hearing of the application.

Accordingly, the court makes the following orders:

1. It is hereby declared that the tenures of the directors have expired by operation of section 106 (3) of the Companies Act and consequently the Board of Directors of ANGLEC is vacant.
2. It is hereby declared that no later than 29th November 2019, the said directors ceased to have any or any relevant authority to have conducted or transacted or approved the transactions of any business of ANGLEC.
3. It is hereby declared that the affairs of ANGLEC have, since on or before 28th August 2018 been conducted in a manner that is oppressive and unfairly prejudicial to the GOA as a shareholder and member of ANGLEC by virtue of the directors' continued violation of the mandates of the Companies Act relative to the convening of the annual general meeting and presentation of the company's financial reports to its shareholders.
4. It is hereby ordered that the resolutions passed at the meetings held between 5th February 2018 and 16th April 2019 are a nullity. For the avoidance of doubt, the said resolutions are set aside effective as of the dates they were passed and are declared null and void.
5. The provision and service of the financial statements and the financial reporting requirements of the company shall be implemented forthwith in accordance with the provisions of section 134 of the Companies Act.
6. It is hereby ordered that an annual general meeting of the Anguilla Electricity Company Ltd. shall be convened no later than 7 days from the date of this order.

7. The Corporate Secretary of Anguilla Electricity Company Ltd. is ordered to give notice to the shareholders of the date, time and place of the annual general meeting along with the agenda of the meeting which shall include the election of the directors of the company forthwith.
8. The defendants shall pay costs to the claimant being prescribed costs and shall be determined in accordance with CPR 65.5 and shall be paid by the defendants jointly and severally.

Shawn Innocent
High Court Judge

By the Court

Registrar