

THE EASTERN CARIBBEAN SUPREME COURT
IN THE COURT OF APPEAL

SAINT CHRISTOPHER AND NEVIS

NEVHCVAP2022/0010

BETWEEN:

JAMES LIBURD

Appellant

and

[1] NOEL ERROL LIBURD JR.

[2] NOEL'S COURTESY GARAGE LIMITED

Respondents

Before:

The Hon. Mde. Margaret Price Findlay
The Hon. Mr. Trevor M. Ward
The Hon. Mde. Esco L. Henry

Justice of Appeal
Justice of Appeal
Justice of Appeal

Appearances:

Mr. Brian Barnes and Mr. Adrian Daniel for the Appellant
Mr. Kris Liburd for the Respondents

2025: March 11;
2026: March 23.

Civil appeal – Shareholding of a company – Directors of a company – Appeal against order appointing the 1st respondent as a managing director and removing the appellant as a director – Whether the appellant is entitled to all rights and privileges of a director and shareholder of the company – Whether the records and resolutions of Directors and Shareholders filed on 31st January 2018 and 15th November 2019 at the Nevis Companies Registry had the legal effect of changing the ownership and constitution of the company – Whether the shareholding in the company of the deceased belongs to his estate and is held jointly with the appellant as the owners of the company – Whether any and all amendments to the records of the company by the first respondent without the appellant's authorisation and consent, prior to and post the deceased's death are null, void and of no effect – Whether the equity provision under section 241 of the Companies Ordinance was properly applied by the learned judge

This appeal concerns the question as to whether a surviving brother, James Liburd, is a director and majority shareholder of the company Noel's Courtesy Garage Limited ('the company') which, when incorporated, listed him and his now deceased brother Noel Errol Liburd Snr. ('the deceased') as the sole shareholders, each holding one share. The company was incorporated in 1991 to, among other things, offer services in automobile rental, repair and maintenance. The appellant asserted that it was a shared dream between himself and his brother.

The appellant claimed that as a partner in the business, he worked alongside his brother and made significant contributions to the building and development of the company. The respondents refuted the appellant's claims that he contributed to the company's operations and capitalization. The appellant eventually admitted that the deceased financed the construction of the buildings from which the company operated and that he paid for all the materials and labour for the construction and all other costs related to the business.

In 2001, the company filed a number of documents in the Companies Registry that were needed to facilitate its continuance under the legal framework governing companies in the Federation. On those documents the deceased and appellant were named as directors. By the annual returns filed in August 2003, further changes were noted to the corporate structure including the addition of 2 shareholders and directors. In this later filing, the deceased was described as managing director and the appellant as one of four directors. The other named directors were Claudius Hanley and Mary Hanley-Queeley. Minutes of a meeting purportedly held on 23rd October 2003 were filed subsequently at the Companies Registry which appeared to confirm the changes to the directorship disclosed in the 2003 annual returns.

In 2015, the deceased took ill and could no longer conduct the company's operations. He invited his son to take over the management of the company's affairs and ultimately granted a power of attorney to the son authorising him to manage the company's affairs on the father's behalf. The appellant was made aware of this proposed arrangement and voiced no objections. Consequently, the son assumed management and administrative control of the company. The appellant made no inquiries about the company's status until 2020, after the deceased passed away.

On 31st January 2018, a notice of change of directors was filed at the Companies Registry that reflected that the appellant and Mr. Claudius Hanley had ceased to be directors and that the son was appointed as a director. A special resolution of the company bearing the same date was also filed. The resolution indicated that at an extraordinary meeting of the directors of the company in 2018, the decision was taken to remove the appellant as a director and shareholder and to issue 50,000 shares to the son. A further special resolution was filed in 2019 which stated that an extraordinary meeting of the company was held to reappoint Mr. Claudius Hanley as a director as well as appoint one Noella Liburd as a director and the son as a managing director. In the meantime, the father succumbed to his illness on or about 26th March 2019 and therefore any authority conferred on the son by the power of attorney would have lapsed on the father's death.

By letter dated 16th June 2020, the appellant's legal practitioner wrote to the son, directing him to desist from holding himself out as director and shareholder of the company and accused him of being illegally appointed as a director and unlawfully managing the company's affairs. Through this medium, the appellant indicated further that he intended to take over the management of the affairs of the company. In April 2021, he filed a Fixed Date Claim against the son and the company alleging that the son had by the power of attorney purported to and did unlawfully and without due authority exercise powers to change the constitution and ownership of the company to remove the appellant as director and shareholder, appoint himself managing director and appoint other officers. He claimed further that the company's operations have been affected by transactions inimical to the company's interest and 'the interest of James Liburd et al'. The appellant sought *inter alia*, a declaration that he is and always has been a shareholder and director of the company and that the records and the 2018 and 2019 resolutions were null and void. He also sought an order that the Registrar of Companies be directed to restore him as director and shareholder and that all amendments made by the son prior to and after his father's death be declared null and void.

A trial was held and a judgment was handed down on 20th July 2022. The learned judge declared that the appellant was the holder of one of the six shares in the company, ordered his removal as a director of the company, barred him from being re-appointed as a director in the future and ordered that the son be appointed as the company's managing director. Dissatisfied, the appellant appealed on 31st August 2022. He set out 8 grounds of appeal challenging the judge's findings in law and/or fact as to the formation and legal ownership of the company, his contributions towards the company's development, the distinction between subscriber shares, enrolment and issued shares, the appointment of the directors and shareholders and the application of equitable principles in relation to the appointment of the son as director. The grounds of appeal may be distilled into 5 main issues. They are: (i) whether the appellant is entitled to all rights and privileges of a director and shareholder of the company; (ii) whether the records and resolutions of Directors and Shareholders filed on 31st January 2018 and 15th November 2019 at the Nevis Company Registry had the legal effect of changing the ownership and constitution of the company; (iii) whether the shareholding in the company of the deceased belongs to his estate and is held jointly with the appellant as the owners of the company; (iv) whether any and all amendments to the records of the company by the first respondent without the appellant's authorisation and consent, prior to and post the deceased's death are null, void and of no effect; and (v) whether the equity provision under section 241 of the Companies Ordinance was properly applied by the learned judge.

Held: dismissing the appeal and affirming the learned judge's judgment and orders dated 20th July 2022, declaring that the directors of the company are those set out in the 2003 annual returns with the exception of the deceased and awarding costs to the respondents to be assessed by the Chief Registrar if not agreed within 21 days of today's date, that:

1. The question as to the identity of the directors, the shareholders and the extent of their shareholding in the company as at 2003 is one of mixed fact and law, depending for its resolution on the evidence and application of the law to the

findings of fact or inferences drawn from those facts. An appellate court must exercise restraint when invited to interfere with a lower court's findings of fact, the assessment of such facts and inferences drawn from such facts. The appellate court may disturb such findings and replace them with its own, only if satisfied that the trial judge committed an error in arriving at his findings by reason that there is no evidentiary basis for his conclusion or where it is pellucid that he misunderstood the evidence, failed to consider material evidence or erred in some other material respect and made a finding of fact that is plainly wrong. An appeal against a finding of law on the other hand would succeed if the appellant demonstrates that the learned judge applied an incorrect principle of law to the facts of the case or misapplied a correct legal principle.

Watt or Thomas v Thomas [1947] 1 All ER 582 applied; **Piglowska v Piglowski** [1999] 1 WLR 1360 applied; **Margaret Blackburn v James Bristol** GDAHCVAP2012/0019 (delivered 12th October 2015, unreported) followed.

2. With reference to the status of the shareholders and the directors of the company (issues 1 and 3), the judge was correct in concluding that the deceased's estate held three shares and the appellant one share, and that the directors named in the 2003 annual returns remained the company's directors up to the date of trial. The learned judge had regard to the appellant's and Mr. Hanley's written and oral testimony, the filings at the Companies Registry including the Articles of Continuance and the 2003 annual returns as well as Mauva Daniel's account. He preferred the account of Mr. Hanley to the appellant's and explained his reasons for doing so at paragraph 27 of the judgment in the court below. Further, although not mentioned by the learned judge, section 69(6) of the Companies Ordinance provides that a director's appointment is current unless the shareholders fail to elect new directors in keeping with the statutory dictate. This is a perfectly sound legal basis on which to hold that the directors named in the 2003 annual returns remained directors up to the date of trial. It follows that if the appointments of the persons named as directors in the 2003 annual returns were legitimate, their directorship would last until they are replaced through election by shareholders, by reason of death or other legally valid mechanism.

Section 69(6) of the **Companies Ordinance** Chap. 7.06 of the Revised Laws of Saint Christopher and Nevis considered.

3. Additionally, the documentary evidence lends credible support to the learned judge's preference for Mr. Hanley's account, particularly in circumstances where the appellant produced no evidence to discharge his burden of proof of establishing on a balance of probabilities that (a) he was not present at the 2003 meeting which according to the minutes was attended by him and the two other shareholders in their capacity as directors; (b) the shareholdings and directorship as at August 2003 was other than recorded in the annual returns filed on 12th August 2003; and c) the court would be entitled to or justified in disregarding the statutory import of sections 105(1), 372(3) and 194 of the Companies Ordinance to the effect that the annual returns are, without more, evidence of the identity of

shareholders and directors in a company. The evidence and the relevant statutory provisions and applicable legal principles eminently support those factual and legal findings. There is no legal or evidentiary basis for disturbing them. The related grounds of appeal should therefore be dismissed. The directors of the company as at 2003 and up to the date of the trial are James Liburd, Claudius Hanley and Mary Hanley-Queeley.

Sections 105(1), 372(3) and 194 of the **Companies Ordinance** Chap. 7.06 of the Revised Laws of Saint Christopher and Nevis considered.

4. None of the challenged findings of fact or of law set out in the notice of appeal take issue with the learned judge's determination that the son had no authority to attempt to alter the shareholding and directorship of the company through the 2018 and 2019 resolutions because the power of attorney would not have empowered him to do so unilaterally and moreover by then, his father had already passed away. Further, the judge ruled that the son could not make the resolutions and/or take any such action without notice to the other shareholders and furthermore, that the 2018 and 2019 resolutions were invalid (as the appellant contended) and ought to be set aside. In the premises, there is no viable issue for this Court's consideration in relation to the question of the legal effect and validity of the 2018 and 2019 resolutions because the appellant did not include any such ground of appeal in his notice of appeal. Moreover, it was not open to him to appeal on those bases since the judge had already determined the issue in his favour and made a declaratory order disposing of the related contentions. Consequently, issues 2 and 4 are non-issues requiring no deliberation or pronouncement by this Court.
5. The court is empowered by section 241 of the Companies Ordinance to rectify matters where it is satisfied, on application by a shareholder or other complainant, that the powers of the directors are being exercised or have been exercised in an oppressive or unfairly prejudicial manner or in a way that unfairly disregards the interests of any shareholder, creditor, director or officer of the company. The reliefs that may be granted by the court include, but are not limited to an order restraining the conduct about which the complaint is made, an order requiring a company within a specified time to produce to the court or an interested person financial statements in the form required by section 149 or an accounting in such other form as the court may determine, and/or an order compensating an aggrieved person. In the context of whether it would be just and equitable to grant such relief, the question is whether the expectation is reasonable having regard to the facts of the specific case, the relationships at issue, and the entire context, including the fact that there may be conflicting claims and expectations.

Section 241 of the **Companies Ordinance** Chap. 7.06 of the Revised Laws of Saint Christopher and Nevis considered.

6. The learned judge found that the actions taken by the company and the directors during the period of the son's management of the company did not constitute

conduct that was oppressive, unfairly prejudicial towards the appellant or unfairly disregarded his or the company's interests. In fact, the judge commended the son for taking remedial action to salvage the company's business prospects at a time when the appellant was aloof from the company's management and was content to allow the son to assume responsibility for the company's operations including its debt obligations when it was no longer in good standing with the Registry of Companies; and financial institutions were attempting to foreclose on its real assets. Moreover, the judge found that the appellant's lack of interest in the company's operations characterized his relationship with the company for most of its existence. There was abundant evidence from which the learned judge could so find. The learned judge extracted and recited the relevant principles governing the operation and interpretation of section 241 of the Companies Ordinance and cannot be faulted for arriving at the factual conclusions that he did. The oral and documentary evidence overwhelmingly support those findings.

PIC Insurance Company Ltd. v Zona Bartley and Zorol Bartley et al ANUHCVP2019/0003 (delivered 28th January 2021, unreported) followed; **BCE Inc. v 1976 Debentureholders** 2008 SCC 69 considered.

7. An examination of section 241(1) reveals that the predicate to the court granting relief is an application by a complainant alleging oppressive conduct by the company or its directors. The court is authorised to grant relief based on such application, but only if, it is satisfied that the company's or a director's powers or the company's business affairs have been exercised in a manner that is oppressive, unfairly prejudicial to or unfairly disregards the interests of any shareholder, creditor, director or officer of the company. It is instructive that once such an application is presented the court is placed on inquiry regarding the overall conduct of the company's affairs and not only as regards the allegations by the complainant. The court is therefore, not limited to considering the interests of the complainant but also the company's interest and the interest of other interested persons such as creditors and shareholders.
8. In determining whether an individual is a *de facto* director, the touchstone is whether the defendant was part of the corporate governing structure. Inherent in that touchstone is the distinction between someone who participates, or has the right to participate, in collective decision-making on corporate policy and strategy and its implementation, on the one hand, and others who may advise or act on behalf of, or otherwise for the benefit of, the company, but do not participate in decision-making as part of the corporate governance of the company. Accordingly, the test is not satisfied by someone who was at all times and in all material decisions subordinate to the *de jure* directors. Taking into account that the appellant and Mr. Hanley were aware that the son was being charged with managing the company's business and had essentially given him free rein to determine the company's direction and that he did just that, the judge ruled that the son was the *de facto* director. There is no appeal against that finding. It is clear that the gist of the judge's reasoning is that he found that the appellant's course of dealing with the company as a director for the most part, ran afoul of section

241(2)(c) in that his conduct was unfairly prejudicial to and unfairly disregarded the interests of the creditors and by extension the shareholders and amounted to a breach of his fiduciary duties to the company as a director. On the facts, the judge was entitled to so find as a matter of law. No factual or legal basis has been advanced for disturbing those findings.

State for Trade and Industry v Hollier and others [2006] EWHC 1804 (Ch) applied.

JUDGMENT

[1] **HENRY JA:** The dispute in this case brings to mind the saying:

“Family quarrels are bitter things. They don’t go according to any rules. They’re not like aches or wounds, they’re more like splits in the skin that won’t heal because there’s not enough material.”¹

At the heart of this case is the vexed question as to whether a surviving brother, James Liburd, is a director and majority shareholder of the company Noel’s Courtesy Garage Limited (‘the company’) which, when incorporated in 1991 listed him and his now deceased brother Noel Errol Liburd Snr. (‘the deceased’) as the sole shareholders, each holding one share. The appellant contends that this is the status of the shareholdings and directorship of the company.

[2] James Liburd is the appellant. His nephew Noel Errol Liburd Jr., one of the deceased’s sons (‘the son’) and the company are the respondents. The respondents contended that although the appellant subscribed for one share on the company’s Memorandum of Association at its incorporation in 1991 he never contributed to its capitalization through money or money’s worth and therefore cannot claim to be entitled to all the rights and privileges accorded to a holder of fully paid-up shares without more.

[3] They contended further that he is not entitled to enjoy the rights and privileges of a *de jure* director of the company because he breached sections 58 and 97 of the **Companies Ordinance**² by not being involved in exercising the company’s

¹ F. Scott Fitzgerald.

² Cap. 7.06 of the Revised Laws of Saint Christopher and Nevis.

powers or directing its management; and by not discharging his fiduciary duties towards it to act honestly and in good faith with a view to the company's best interests, and by failing to exercise the care, diligence and skill that a reasonably prudent person would exercise in comparable circumstances.

[4] In a judgment dated 20th July 2022, the learned judge declared that the appellant was the holder of one of the six shares in the company; ordered his removal as a director of the company, barred him from being re-appointed as a director in the future; and ordered that the son be appointed as the company's managing director. The son was directed to take all necessary steps to ensure that a certified accountant be appointed to assess the company's affairs and he had to serve the resulting report on the remaining shareholders.

[5] Being dissatisfied with the judgment, Mr. James Liburd filed a notice of appeal on 31st August 2022. In it, he set out eight grounds of appeal challenging the judge's findings in law and/or fact as to the formation and legal ownership of the company, his contributions towards the company's development, the distinction between subscriber shares, enrolment and issued shares, the appointment of the directors and shareholders and the application of equitable principles in relation to the appointment of the son as director.

[6] The respondents filed no counter-notice or respondent's notice pursuant to rule 62.9 or 62.10 of the **Civil Procedure Rules (Revised Edition) 2023** ('CPR').

Background

[7] To put the appeal in context, it is important to set out a brief chronology to set the context in which the dispute arose. The deceased was an auto mechanic and the appellant is a self-avowed businessman who is involved in the construction trade. The company was incorporated for among other objects, to offer services in automobile rental, repairs and maintenance.

- [8] As chronicled by the learned judge, the appellant asserted that 'it was a shared dream between himself and his brother to offer automobile rental, repair and maintenance services to the people of Nevis. ... that, as a partner in the business, he worked alongside his brother and made significant contributions to the building and development of the company. ... he contributed to the construction of buildings at Farms Estate, Nevis from where the business was operated. ... [that] he contributed to the business by acting as the contractor which saved significant costs to the construction. ... [and he] constructed the home in which his brother lived as part of his contribution to the incorporation of the company.' He acknowledged that he did not assist the deceased with the management of the company.
- [9] The respondents refuted the appellant's claims that he contributed to the company's capitalization or operations. The appellant eventually admitted that the deceased financed the construction of the buildings from which the company operated and that he in fact paid for all of the materials and labour for the construction and all other costs related to the business operations. The judge found that the appellant's contribution to the construction would have been limited to the contractor's fees but not in relation to all of the buildings or property that were part of the deceased's business dealings.
- [10] In 2001, the company filed a number of documents in the Companies Registry that were needed to facilitate its continuance under the legal framework governing companies in the Federation. On those continuance documents the deceased and appellant were named as directors.
- [11] By annual return filed in August 2003, further changes were noted to the corporate structure including the addition of two shareholders and directors. In this later filing, the deceased was described as managing director and the appellant as one of four directors. The other named directors were Claudius Hanley and Mary Hanley-Queeley. Minutes of a meeting purportedly held on 23rd October 2003 were

filed subsequently at the Companies Registry which appeared to confirm the changes to the directorship disclosed in the 2003 annual returns.

- [12] Sadly, the deceased took seriously ill in 2015 and could no longer conduct the company's operations. He invited his son to take over the management of the company's affairs. By then, the company was struggling to pay its substantial debts, had not filed annual returns for several years and had been struck off the register of companies.
- [13] One of the company's creditors was the Nevis Cooperative Credit Union ('the Union'). A meeting was arranged with the Union on 16th March 2015. The son represented the company at that meeting where it was proposed that the company's buildings be offered for sale in a bid to satisfy its debts and the father's personal debts. Other options were considered. Ultimately, the decision was taken for the father to grant a power of attorney to the son authorizing him to manage the company's affairs on the father's behalf. The appellant was made aware of this proposed arrangement and voiced no objections. Consequently, the son assumed management and administrative control of the company. It appears that from 2015 the appellant made no inquiries about the company's status until years later – in 2020 - after the deceased passed away.
- [14] The son seemed to have free rein to make decisions on the company's behalf and he did just that. On 31st January 2018, a notice of change of directors was filed at the Companies Registry that reflected that the appellant and Mr. Claudius Hanley had ceased to be directors and that the son was appointed a director. A special resolution of the company bearing the same date was also filed with the Registry of Companies ("the 2018 Resolution"). The resolution indicated that at an extraordinary meeting of the directors of the company on 26th June 2017 the decision was taken to remove the appellant as a director and shareholder and to issue 50,000 shares to the son.

- [15] Another special resolution was filed with the Registry of Companies on 15th November 2019 ("the 2019 Resolution"). It stated that at an extraordinary meeting of the company held on 11th November 2019, Mr. Claudius Hanley was re-appointed as a director. In addition, one Noella Liburd was appointed as a director and the son was appointed as managing director.
- [16] In the meantime, the father had succumbed to his illness. He passed away on or about 26th March 2019. As a matter of law therefore, any authority conferred on the son by the power of attorney would have lapsed on the father's death.
- [17] By letter dated 16th June 2020 from the appellant's legal practitioner to the son, he was directed to desist from holding himself out as director and shareholder of the company and accused of being illegally appointed as a director and unlawfully managing the company's affairs. Through this medium, the appellant indicated further that he intended to take over the management of the affairs of the company.
- [18] Those are the unfortunate circumstances that served as the catalyst for the initiation of legal proceedings by the appellant. In April 2021, he filed a Fixed Date Claim against the son and the company alleging that the son had by the power of attorney purported to and did unlawfully and without due authority exercise powers to change the constitution and ownership of the company to remove James Liburd as director and shareholder, appoint himself managing director and appoint other officers. He claimed further that the company's operations have been affected by transactions inimical to the company's interest and 'the interest of James Liburd et al'.
- [19] The appellant sought a declaration that he is and always has been a shareholder and director of the company; a declaration that records and the 2018 and 2019 Resolutions were done without lawful authority and were null and void and of no effect; an order that the Registrar of Companies be directed to restore him as

director and shareholder; a declaration that the deceased's shareholdings in the company belong to his estate; a declaration that all amendments made by the son prior to and after his father's death are declared null, void and of no effect; an order directing that a full accounting of the effects of the company be provided to him by the son, of his stewardship and administration of the company; an order directing the son to account for all assets of the company sold, transferred or otherwise dealt with during his stewardship and administration of the company; an order that all assets and instruments of the company in the son's possession be handed over to him and an injunction that the son be restrained by himself, his agents and assigns from dealing with or entering into any agreement or transaction on behalf of the company without the appellant's consent or approval.

The Judge's Decision

[20] The judge held that the 2018 and 2019 Resolutions were made without lawful authority and were therefore null and void. He made the following orders and declarations:

- “(a) Mr. James Liburd is the holder of 1 out of 6 shares issued in the 2nd defendant company. The remaining shareholders are as outlined in the annual returns filed for the year 2003;
- (b) Subject to the remaining orders below, the resolutions passed on 31st January 2018 and 15th November, 2019 are declared null and void;
- (c) Mr. Noel Liburd Jr. is to be appointed as the managing director of the 2nd defendant company;
- (d) Mr. James Liburd is to be removed as a director and is not to be appointed as a director in the future;
- (e) Mr. Noel Liburd Jr. is to take all steps necessary to ensure that a certified accountant is appointed to conduct an assessment of the affairs of the company. A report is to be filed with the court and served on the remaining shareholders of the company;
- (f) Orders f, G, H, and I as sought in the claim form and affidavit of James Liburd are all denied;

- (g) The Registrar of Companies is to take all steps necessary to ensure that the records of the company are brought up to date in line with the orders of this court;
- (h) Given that each party has enjoyed some measure of success in this claim, there is no order as to costs.”

Grounds of Appeal

[21] It is useful to set out the grounds of appeal. They are as follows:

- “(i) The learned trial judge failed (sic) in facts and law in according due regard to the legal ownership of the Appellant (sic) 50% shareholding in the 2nd Respondent Company on basis of capitalization of the company and participation in the management of the company.
- (ii) The learned trial judge erred in facts and law in discounting the contribution made by the appellant to the development of the company by way of his profession as a Contractor, in the form of construction done on the company's premises. Consequently, the Learned Trial judge erred in accepting evidence of construction with no corroboration from any independent witness.
- (iii) The learned trial judge erred in facts and law in accepting the Defendants' position regarding the formation of the company in the early years, when in fact the 1st respondent was not born at the time of the formation and could therefore not be privy to the inner workings of the company or what was agreed between the subscribers. In any event in the early years of the company, the 1st Respondent was a baby, hence any evidence given by the 1st Respondent about the formation and plans would be hearsay evidence at best. Further the learned trial judge erred in law in accepting the Appellants (sic) ownership as mere formality.

- (iv) When the clear evidence led at trial showed that the 1st respondent was not applying the applicable principles of law to the terms of the Memorandum of Association of the company, and in so doing, failed to appreciate the distinction between subscriber shares, enrolment and issued shares, and consequently erred in finding that subscriber shares were initially issued to the Appellant and not capitalized.
- (v) The learned trial judge erred in facts and law in considering the evidence before the Court between 2001 and 2003 and the appointment of directors and shareholders, and failed to realize that the appointment of directors and the issue of additional shares were not supported by any evidence of any meeting or any resolution of the directors in compliance with the memorandum of Association and consequently unlawful. Further, the Learned Trial Judge erred in accepting the annual returns of 2003 as conclusive proof of appointment of directors and shareholders where there was no independent evidence to confirm same. Consequently, the directorship of Mr. Hanley and Miss Queeley and their shareholdings along with additional shares to Noel Liburd Snr., were null and void.
- (vi) The learned trial judge erred in law in finding that Noel Liburd Snr., held the majority of shares in the company in the face of no evidence to support that any lawfully issue of shares or appointment of directors took place.
- (vii) The learned trial judge erred in facts and law in seeking to turn the company over to the 1st respondent by using the law of equity in contravention of the clear provisions of the company law under the company ordinance, when in circumstances the 1st respondent may have been paid for his services and may be paid for services rendered.

- (viii) The learned trial judge erred in law in interpreting the case cited by the Appellants (sic) in support of their case in omitting the full context of the judgment of Thomas J and fell into error in holding that subscriber shares should be capitalized.”

Issues

[22] Recognising that there was considerable overlap in some of the grounds of appeal the parties helpfully agreed that the eight grounds may conveniently be distilled into five issues for the Court’s consideration. They are:

- (i) Whether the appellant is entitled to all rights and privileges of a director and shareholder of the company.
- (ii) Whether the records and resolutions of Directors and Shareholders filed on 31st January 2018 and on 15th November 2019 at the Nevis Companies Registry had the legal effect of changing the ownership and constitution of the company.
- (iii) Whether the deceased’s shareholding in the company belongs to his estate and is held jointly with the appellant as owners of the company.
- (iv) Whether any and all amendments to the records for the company by the first respondent without the appellant’s authorisation and consent, prior to and post the deceased’s death are null, void and of no effect.
- (v) Whether the equity provision under section 241 of the **Companies Ordinance** was improperly applied by the learned judge.

Issues 1 and 3 – Shareholding and Directorship in the Company

[23] The first and third issues are related, concerning respectively, the appellant’s status as a shareholder and director of the company and the deceased’s shareholding in the company. It is noteworthy that most of the challenged findings of facts and law in the Notice of Appeal and the grounds of appeal focused on these two issues.

[24] The judge's findings on these two issues are set out at paragraphs [27], [28] and [65] of the judgment. At paragraph [27] he found that the annual returns filed in 2003 were an accurate reflection of the shareholding and directorship of the company at that time. However, he made no formal declaratory order as to the directorship in the judgment. He ruled at paragraph [28] that as at 2003 the appellant owned 1 out of the 6 shares in the company, had taken no steps to capitalize them, that although he was named as a director of the company in the company's 2003 annual returns, he had generally not fulfilled his duties as a director and was not involved in any meaningful way in its day to day management. He endorsed Mr. Hanley's assertion that the appellant was a shareholder and director in name only.

[25] At paragraph [65] of the judgment the judge remarked that the appellant had been aware of the change in shareholders and directors since 2003 and raised no objections to it. He considered the testimony of the appellant, the deceased's cousin Mr. Claudius Hanley, as well as that of the deceased's life partner Ms. Mauva Daniel who is also the son's mother. The judge made the point that he considered Mr. Hanley's testimony to be credible and that he acted on it as being truthful.³ He therefore declared that Mr. James Liburd is the holder of 1 out of 6 shares issued in the company and that the remaining shareholders are as outlined in the annual returns filed in 2003.

Appellant's Submissions

[26] In relation to his shareholding in the company, the appellant maintained that having
subscribed to the memorandum of association on the company's incorporation in 1991, he became a member holding 50% of the shares in the company with the other 50% being held by the deceased. He submitted that the ownership of the

³ At paragraph [27] of the judgment.

shares in the company are as set out in the Memorandum of Association and remained unchanged, no evidence having been adduced that he participated in or consented to the altering of the company's constitution or corporate structure.

- [27] He contended that the respondents adduced no evidence of minutes of any meeting that supports the issuance of additional shares or the appointment of additional directors or that he approved or consented to such changes in the company's corporate structure. He asserted that he became aware of those purported changes only in 2020 after the deceased's passing following a search at the Companies Registry. The appellant reasoned that on the evidence, no proper procedure had been employed to effect the changes to the shareholding and directorship of the company and the learned judge therefore erred in finding that the issued shares had been increased to 6 shares and of which only one was his.

Respondents' Submissions

- [28] As to the appellant's shareholding, the respondents argued that there is no dispute that the appellant subscribed to one share on the company's Memorandum of Association. Citing section 57 of the **Companies Ordinance** the respondents submitted that the appellant cannot rely on the paid construction services he provided to the company as fair consideration for his share. Accordingly, he cannot claim to be entitled to all the rights and privileges accorded to a holder of fully paid-up shares, without more.
- [29] It was submitted that the appellant's subscription is coupled with an obligation to pay the said share. The respondents cited **Myrtle Looby v Geo Tech Limited and Dorothy Gittens as Personal Representative of the Estate of George Looby**⁴ and **Zavarco plc v Sidhu**⁵ in support of this contention.

⁴ ANUHCv2009/0092 (delivered 11th March 2011, unreported).

⁵ [2023] 2 BCLC 309.

- [30] Additionally, the respondents argued that as a matter of law, a share in the company does not entitle a shareholder to the company's property but instead creates a right in respect of the company's capital. **Bradbury v English Sewing Cotton Company Limited**⁶ was cited as authority for this proposition.

Discussion

- [31] The question as to the identity of the directors, the shareholders and the extent of their shareholding in the company as at 2003 is one of mixed fact and law, depending for its resolution on the evidence and application of the law to the findings of fact or inferences drawn from those facts. It is well-established that an appellate court is bound to exercise restraint when invited to interfere with a lower court's findings of fact, the assessment of such facts and inferences drawn from such facts. The appellate court may disturb such findings and replace them with its own, only if satisfied that the trial judge committed an error in arriving at his findings by reason that there is no evidentiary basis for his conclusion or where it is pellucid that he misunderstood the evidence, failed to consider material evidence or erred in some other material respect and made a finding of fact that is plainly wrong.
- [32] In **Watt or Thomas v Thomas**⁷ Lord Thankerton explained the legal principle thus:

“...the principle...is a simple one, and may be stated thus: I. Where a question of fact has been tried by a judge without a jury, and there is no question of misdirection of himself by the judge, an appellate court which is disposed to come to a different conclusion on the printed evidence, should not do so unless it is satisfied that any advantage enjoyed by the trial judge by reason of having seen and heard the witnesses, could not be sufficient to explain or justify the trial judge's conclusion; II. The appellate court may take the view that, without having seen or heard the witnesses, it is not in a position to come to any satisfactory conclusion on the printed evidence; III. The appellate court, either because the reasons given by the trial judge are not satisfactory, or because it unmistakably so appears from

⁶ [1923] AC 744.

⁷ [1947] 1 ALL ER 582 at 487.

the evidence, may be satisfied that he has not taken proper advantage of his having seen and heard the witnesses, and the matter will then become at large for the appellate court.”

[33] In **Margaret Blackburn v James A. L. Bristol**,⁸ a judgment from this Court, Baptiste JA opined: ‘[t]he injunction against interfering with findings of fact unless compelled to do so, applies not only to findings of primary fact, but also the evaluation of those facts and inferences to be drawn from them’. As to the evaluation of the facts, guidance was also provided by the House of Lords in **Piglowska v Piglowski**.⁹ Lord Hoffman explained the rationale for appellate caution:

“The appellate court must bear in mind the advantage which the first instance judge had in seeing the parties and the other witnesses. This is well understood on questions of credibility and findings of primary fact. But it goes further than that. It applies also to the judge's evaluation of those facts. If I may quote what I said in *Biogen Inc. v. Medeva Plc.* [1997] R.P.C. 1, 45:

‘The need for appellate caution in reversing the trial judge's evaluation of the facts is based upon much more solid grounds than professional courtesy. It is because specific findings of fact, even by the most meticulous judge, are inherently an incomplete statement of the impression which was made upon him by the primary evidence. His expressed findings are always surrounded by a penumbra of imprecision as to emphasis, relative weight, minor qualification and nuance...of which time and language do not permit exact expression, but which may play an important part in the judge's overall evaluation.’”

[34] An appeal against a finding of law on the other hand would succeed if the appellant demonstrates that the learned judge applied an incorrect principle of law to the facts of the case or misapplied a correct legal principle. In evaluating the merits of the competing arguments in relation to the 1st and 3rd issues, a useful starting point would be the principles of law and/or legal provisions applicable to

⁸ GDAHCVP2012/0019 (delivered 12th October 2015, unreported) at paragraph 11.

⁹ [1999] 1 WLR 1360.

how someone acquires shares in a company and as to the appointment of directors.

[35] The **Companies Ordinance** provides at section 105(1) that the following persons are shareholders in a company:

- “(a) a person who is a member of the company under subsection (3) of section 372;
- (b) the personal representative of a deceased shareholder and the trustee in bankruptcy of a bankrupt shareholder;
- (c) a person in whose favour a transfer of shares has been executed but whose name has not been entered in the register of members of the company or, if two or more such transfers have been executed, the person in whose favour the most recent transfer has been made.”

[36] Section 372(3) states: “‘Member’, in relation to a company, means an incorporator of the company and any other person who agrees to become a member of the company and whose name is entered in the company’s register of members; and for the purposes of subsections (1) and (2) ‘past member’ includes the estate of a deceased member ...’.

[37] With respect to the appointment of directors, section 69 of the **Companies Ordinance** provides for notice to be given to the Registrar of Companies of the names of the company’s directors at the time of incorporation and such directors hold office until the first meeting of the shareholders. The shareholders are empowered to elect directors at annual general meetings at which such election is required. Subsection (3) stipulates that the term of office of a director expires no later than the ‘close of the third annual meeting of the shareholders of the company following such election’. However, by virtue of subsection (6) an incumbent director continues in office until his successor is elected, even if there is no election on the third anniversary of the appointment as provided in subsection (3).

- [38] Notice of shareholders' meetings must be given to each director in accordance with section 74 of the **Companies Ordinance**. A director is entitled to attend and make representations at all such meetings.
- [39] Provision is also made by section 194 of the **Companies Ordinance** mandating each company to update its record of shareholders and directors every year after its incorporation or continuance, by filing an annual return at the Companies Registry, outlining specified information. The Notice of Directors must be certified by a director or officer of the company. The prescribed form requires that among other details, the names and addresses of each shareholder and director must be supplied. Non-compliance with that provision constitutes an offence by the company and each director and officer. Section 194(1) states:
- “Annual returns. 194. (1) A company shall, not later than the first day of April in each year after its incorporation or continuance under this Ordinance, send to the Registrar a return in the prescribed form containing the prescribed information made up to the preceding thirty-first day of December and accompanied with the prescribed fees.”
- [40] The conjoint effect of sections 105(1), 372(3) and 194 is that generally, at any given point in time, it is possible to ascertain the names of the shareholders and directors of a company by examining the annual returns for the period under review. An exception would obviously arise in the event that the annual returns are falsified prior to or after filing or are inaccurately compiled, whether through mistake of fact or law, by reason of being filed or altered under duress or otherwise.
- [41] In the case at the appeal bar the company was incorporated on 28th March 1991¹⁰ under the Companies Ordinance, Cap. 335 of the laws of Saint Christopher and Nevis. That Ordinance (referred to as ‘the former-Act’) was replaced by the current **Companies Ordinance**. Under the new Ordinance, a company registered during the currency of the former-Act is referred to as a ‘former-Act company’. Such

¹⁰ See page 27 of the Amended Record of Appeal which contains the application for Articles of Continuance showing the incorporation date.

companies had to be continued under the new statute, either by application to the Registrar of Companies (to be made within two years of the commencement of the Ordinance)¹¹ for a certificate of continuance or by being deemed by section 369 to be continued under the Ordinance, where no application is made for a certificate of continuance within the stipulated two years. The company is therefore a former-Act company.

[42] It is not disputed that the shareholding at the incorporation of the company is accurately captured in the Memorandum of Association which indicated that the deceased and the appellant each subscribed for one share in the company, as signified by their signatures appended to it and witnessed by Hazeline Huggins the solicitor's clerk.¹² There is also common ground that the deceased was named as the sole director and the appellant as secretary in the same record.

[43] The next chronologically relevant filings adduced in evidence at trial were the company's Articles of Continuance and Notice of Directors that were filed on 7th March 2001.¹³ The deceased and the appellant are named as directors in the Notice of Directors. It is not clear whether a Resolution accompanied the filing.

[44] The Annual Return dated 12th August 2003 was produced at the trial.¹⁴ It recorded that three ordinary shares were held by the deceased and that the appellant, a Claudius Hanley and one Mary Hanley-Queeley each held one ordinary share, for a total of six issued shares. The four shareholders were also listed in the annual return as the company's directors.

[45] A document referencing minutes of a meeting of the Board of Directors held at Prospect Nevis on 24th October 2003 in relation to the company was produced by

¹¹ Section 363 of the Ordinance.

¹² See page 27 of the Amended Record of appeal.

¹³ Pursuant to Sections 363 and 364 of the Companies Ordinance. See pages 28 and 30 of the Amended Record of Appeal.

¹⁴ See pages 47-48 of the Amended Record of appeal.

Filed on May 24th 2005 pursuant to section 194 of the Companies Ordinance. See pages 43, 45 – 46, 48 - 49 of the Amended Record of Appeal.

the appellant and was also considered by the judge. The four directors were noted as present at that meeting. In his reference to that meeting (at paragraphs [19], [22], [27] and [65] of the judgment) the date '24th November 2003' is used by the judge instead of '24th October 2003'. Neither party took issue with the obvious accidental slip. I harbour no doubt that he intended 'October' and not 'November' and will treat those references accordingly.

[46] In determining that the deceased held 3 shares and the appellant only one, in common with the Hanleys, and the status of directors in the company as at 2003 the judge had regard to the appellant's and Mr. Hanley's written and oral testimony, the filings at the Companies Registry of the Articles of Continuance and the 2003 annual returns. He also considered Mauva Daniel's account. He explained his reasons for preferring Mr. Hanley's account to the appellant's.

[47] At paragraph [27] of the judgment the learned judge stated:

“[27] On balance I accept Mr. Hanley's evidence as being truthful. Despite the fact that no resolution was filed along with the annual returns, I do not doubt that the filings in 2003 were an accurate reflection of the shareholding and directorship of the company as at that point. These were actions taken during Mr. Noel Liburd Sr.'s lifetime and this court, on balance, is not minded to impinge them. It seems to me that Mr. James Liburd would have had ample time to dispute or deny the accuracy of what was being presented to the Companies Registry. In addition, I find as a matter of fact that he was in attendance at the meeting of 24th November, (sic) 2003 and would have therefore been aware of the directorship of the company at that point. He raised no objections until after his brother's death some 16 years later, when he was no longer available to shed light on such issues.”

[48] No mention was made in the judgment of section 69(6) of the **Companies Ordinance** which provides that a director's appointment is current unless the shareholders fail to elect new directors in keeping with the statutory dictate. This is a perfectly sound legal basis on which to hold that the directors named in the 2003 annual returns remained directors up to the date of trial. Although not expressly relied on by the learned judge as a reason for his decision the law supports his

finding. It follows that if the appointments of the persons named as directors in the 2003 annual returns were legitimate, their directorship would last until they are replaced through election by shareholders, death or other legally valid mechanism.

[49] In my estimation, the judge's evaluation of the weight to be attached to the appellant's and Mr. Hanley's respective testimony was structured and logical. Additionally, the documentary evidence lends credible support to his preference for Mr. Hanley's account, particularly in circumstances where the appellant, apart from his *ipse dixit*, produced no evidence to discharge his burden of proof of establishing on a balance of probabilities that a) he was not present at the 2003 meeting which according to the minutes was attended by him and the two other shareholders in their capacity as directors; b) the shareholdings and directorship as at August 2003 was other than recorded in the annual returns filed on 12th August 2003; and c) the court would be entitled to or justified in disregarding the statutory import of sections 105(1), 372(3) and 194 of the **Companies Ordinance**, to the effect that the annual returns are without more, evidence of the identity of shareholders and directors in a company.

[50] In practical terms, this means that in the face of the validly filed and registered annual return a court is not entitled to go behind the filings to investigate the inner workings of the company in relation to its decision-making process unless a claimant has pleaded mistake of fact or law, director misfeasance or other actionable wrong and then discharged the burden of establishing a *prima facie* case in respect of such cause of action. The appellant did not in his claim allege in respect of the 12th August 2003 annual returns that they were falsified or otherwise unreliable or deficient. It was therefore unnecessary for the court to concern itself with such issues.

[51] In addition, while he took exception to any changes made to the shareholding and directorship in the company after the son became involved in the company's

operations in 2015¹⁵ it is striking that the appellant made no express disclaimer as to lack of knowledge about the changes made prior to that date. In similar vein, he did not deny receiving notice of prior meetings or of voting (whether personally or by proxy) at an earlier meeting or of otherwise consenting prior to 2003 to the increase of shareholders and directors reflected in the minutes of the 2003 meeting. From the appellant's own testimony, the learned judge was entitled to draw reasonable inferences equally from what was said and from what was not said and to conclude that the appellant did consent to such increase of shareholders and directors and that those decisions were taken by the deceased and him as shareholders and directors in satisfaction of the statutory requirement for majority shareholder agreement.

[52] For the foregoing reasons, I am of the considered view that the learned judge did not err in law or in fact in concluding that the deceased's estate owns three shares in the company, the appellant holds one share and is a director and that the other directors named in the 2003 annual returns were the company's directors at that point in time. The evidence, relevant statutory provisions (sections 105(1), 372(3) and 194 of the **Companies Ordinance**) and the applicable legal principles eminently support those factual and legal findings. There is no legal or evidentiary basis for disturbing them. I would dismiss the related grounds of appeal. For completeness and good order I would also make a formal declaration that the directors of the company as at 2003 and up to the date of the trial are James Liburd, Claudius Hanley and Mary Hanley-Queeley.

[53] The respondents' submissions as to capitalization of the company are not germane to the issue of whether the appellant is a shareholder. The learned judge's findings of fact and law in respect of the shareholding in and directorship of the company was not informed by his commentary or pronouncements as to subscriber shares and capitalization but was restricted to the evidence and relevant law. The learned judge quite properly held that capitalization was

¹⁵ See paragraph 6 of his affidavit filed on 16th April 2021.

irrelevant for purposes of deciding the ownership of shares. It was therefore not necessary to engage with those arguments.

- [54] Finally, in relation to the first and third issues, for the sake of completeness, it is worth noting that section 502 of the **Companies Ordinance** states that a certified copy of minutes or extracts from minutes of a shareholder's or director's meeting is proof of the facts so certified, in the absence of evidence to the contrary. While I recognize that the minutes of 24th October 2003 on which the judge relied were not certified, the absence of such certification would to my mind not impact the truth of the minutes but rather the weight to be attached to the contents. Additionally, the company included in its List of Documents¹⁶ the copy of the 12th August 2003 annual returns. Accordingly, in the absence of a notice by the appellant under rule 28.18 of the **Civil Procedure Rules (Revised Edition) 2023** that the respondents must prove the authenticity of the annual return at trial, the appellant is deemed to have admitted their authenticity.

Issues 2 and 4 – Legal Effect and Validity of the 2018 and 2019 Resolutions

- [55] Turning next to the second and fourth issues, I will consider them together since they are inextricably interwoven. Examining them against the grounds of appeal, it is readily apparent that neither issue finds expression in those grounds. Likewise, none of the challenged findings of fact or of law set out in the notice of appeal take issue with the learned judge's determination that the son had no authority to attempt to alter the shareholding and directorship of the company through the 2018 and 2019 Resolutions because the power of attorney would not have empowered him to do so unilaterally and moreover by then, his father had already passed away – paragraph [43] of the judgment.
- [56] Further and more significantly, the judge ruled that the son could not make the resolutions and/or take any such action without notice to the other shareholders

¹⁶ Filed on 10th September 2021.

and furthermore, the 2018 and 2019 Resolutions were invalid (as the appellant contended) and ought to be set aside.¹⁷ Additionally, at paragraph [70] (b) of the judgment the learned judge ordered:

“Subject to the remaining orders below, the resolutions passed on 31st January 2018 and 15th November, 2019 are declared null and void.”

- [57] In the premises, there is no viable issue for this Court’s consideration in relation to issues two and four because the appellant did not include any such ground of appeal in his notice of appeal. Moreover, it was not open to him appeal on those bases since the judge had already determined the issue in his favour and made a declaratory order disposing of the related contentions. Consequently, issues 2 and 4 are non-issues requiring no deliberation or pronouncement by this Court. I therefore refrain from re-visiting those matters in this appeal.

Issue 5 – Section 241 – Equity Provision

Appellant’s Submissions

- [58] The crux of the appellant’s contentions regarding section 241 of the **Companies Ordinance** is that on the basis of his 50% shareholding he invoked the provision to secure equitable relief and the learned judge erred by unreasonably applying the section to the son’s benefit. He contended that the evidence supported his arguments that the son engaged in oppressive and unfair conduct in the management of the company’s affairs that was prejudicial to his interests and which justified the grant of orders installing him as the sole director of the company with exclusive authority to make decisions on its behalf and for the son’s exclusion from dealings with the company’s affairs. In sum, his contention is that the judge improperly applied the provision against his interests and to the son’s benefit and thereby erred.

¹⁷ At paragraph [67] of the judgment.

Respondents' Submissions

- [59] On the respondents' behalf, it was submitted that the court's order removing the appellant as a director of the company was a natural consequence of his failure as a director to carry out the fiduciary duties he owed to the company. In this regard, it was highlighted that he did not assume any responsibilities for the company's management or even condescended to make inquiries about its debt obligations with a view to assisting with the defrayal of any expenses, even though he was aware of the financial obligations it was encountering and that the son had assumed managerial and administrative control of the company at his father's request.
- [60] Citing **PIC Insurance Company Ltd v Zona Barthley and Zorol Barthley (Personal Representatives of the Estate of Dr. Rolston Barthley, Deceased), Zorol Barthley**¹⁸ the respondents argued that the court must bear in mind that it has a broad jurisdiction to enforce what is the just and fair consequence that arise in a case where oppression is alleged by a shareholder of a company. In doing so, it is required to have regard to the entire context and determine what is just and equitable. It was submitted that the learned judge achieved such an outcome and there is no justifiable reason to disturb his determination.

Discussion

- [61] The court is empowered by section 241 of the **Companies Ordinance** to rectify matters where it is satisfied, on application by a shareholder or other complainant, that the powers of the directors are being exercised or have been exercised in an oppressive or unfairly prejudicial manner or in a way that unfairly disregards the interests of any shareholder, creditor, director or officer of the company. The reliefs that may be granted by the court include, but are not limited to an order restraining the conduct about which the complaint is made, an order requiring a company

¹⁸ ANUHCVP2019/0003 (delivered 28th January 2021, unreported).

within a specified time to produce to the court or an interested person financial statements in the form required by section 149 or an accounting in such other form as the court may determine, and/or an order compensating an aggrieved person.

[62] The enactment of section 241 and similar reforms to the company law framework have been recognized as an effort by Parliament to craft an avenue for minority shareholders and other interested persons to seek relief from the courts if they are aggrieved by oppressive conduct of a directors of a company. Legal scholar Andrew Burgess in the text **Commonwealth Caribbean Company Law** remarked:

“These provisions are not a codification of the common law; rather, they are intended to confer upon individual shareholders and other complainants a remedy which removes the impediments of the rule in *Foss v Harbottle* [which held that only the company itself could sue its directors for a breach of their duty to it] and ensures that they are insulated from conduct that is oppressive or unfairly prejudicial or that unfairly disregards their interests.”¹⁹

[63] In **PIC Insurance Company Ltd. v Zona Bartley and Zorol Bartley et al** this Court considered section 241 of the Antigua and Barbuda Companies Act which is identical to the corresponding section 241 in the Saint Christopher and Nevis **Companies Ordinance**. The foregoing quote by Andrew Burgess was endorsed at paragraph [56] of that judgment. This Court noted further that section 241 is modelled on the identically numbered provision in the Canada Business Corporations Act, 1985 which was considered by the Supreme Court of Canada in **BCE Inc. v 1976 Debentureholders**.²⁰ In **BCE Inc** the court set out what it considered to be the best approach to interpret section 241(2). Its recommendation was adopted by the Court in the **PIC Insurance** case.

[64] It is useful to set out section 241(1), (2) and (3). They provide:

“241. Oppression restrained

(1) A complainant may apply to the court for an order under this

¹⁹ Commonwealth Caribbean Law Series Routledge, Oxon 2013.

²⁰ 2008 SCC 69.

section.

is satisfied (2) If, upon an application under subsection (1), the court

that in respect of a company or any of its affiliates—

- (a) any act or omission of the company or any of its affiliates effects a result;
- (b) the business or affairs of the company or any of its affiliates are or have been carried on or conducted in a manner; or
- (c) the powers of the directors of the company or any of its affiliates are or have been exercised in a manner, that is oppressive or unfairly prejudicial to, or that unfairly disregards the interests of, any shareholder or debenture holder, creditor, director or officer of the company, the court may make an order to rectify the matters complained of.

(3) In connection with an application under this section, the court may make any interim or final order it thinks fit, including—

- (a) an order restraining the conduct complained;
- (b) an order appointing a receiver or receiver-manager;
- (c) an order to regulate a company's affairs by amending its articles or bylaws, or creating or amending a unanimous shareholder agreement;
- (d) an order directing an issue or exchange of shares or debentures;
- (e) an order appointing directors in place of, or in addition to, all or any of the directors then in office;
- (f) an order directing a company, subject to subsection (6), or any other person, to purchase shares or debentures of a holder thereof;
- (g) an order directing a company, subject to subsection (6), or any other person, to pay to a shareholder or debenture holder any part of the moneys paid by him for his shares or debentures;
- (h) an order varying or setting aside a transaction or contract to which a company is a party, and compensating the company or any other party to the transaction or contract;”

[65] It is now accepted that the guiding principles informing the construction of the foregoing oppression restrained provision are anchored in the ideal of fair

treatment of shareholders and other interested persons, decided objectively by reference to reasonable expectations of their entitlement. In seeking to formulate a fair outcome in such disputes the court is required to take into account all of the relevant circumstances in recognition of the fact specific nature of an oppression claim. Further, the oppression restraints outlined in section 241 being inherently equitable and hence discretionary are recoverable only if the court is satisfied that it is just and equitable to make such an order in the specific circumstances of a given case.

[66] As explained by Michel JA in **PIC Insurance**:

“The actual expectation of a particular stakeholder is not conclusive. In the context of whether it would be just and equitable to grant a remedy; the question is whether the expectation is reasonable having regard to the facts of the specific case, the relationships at issue, and the entire context, including the fact that there may be conflicting claims and expectations.”²¹

Bearing those principles in mind, I turn to consider the appellant’s claim that the learned judge erred by deploying the oppression ‘relief’ in the son’s favour, when he could have simply ordered instead that the son be paid for the services he provided to the company

[67] The appellant’s pleadings allude to oppressive conduct inimical to his and the company’s interest, related to the decision by the son to purport to change the directorship and shareholding of the company pursuant to the power of attorney. In this regard, the Fixed Date Claim²² refers to those actions and continues:

“The operations of the Company have (sic) been affected by transactions inimical to the interest of the Company and James Liburd et al. to which relief are sought as follows: ...”

He supplemented this complaint with particulars in his affidavit²³ where he described his contributions to the company’s development and the shared intention with the deceased that the company would be used as a vehicle to

²¹ At paragraph [60].

²² Filed on 16th April 2021.

²³ Filed on 16th April 2021.

pursue a lifelong dream. His primary concern was that his reasonable expectations of benefiting from the company were frustrated by the unauthorized change in directorship and shareholding which, on his case, amounted to unfair treatment and formed the basis for the oppression remedies he sought.

[68] In addressing this aspect of the appellant's claim, the learned judge noted:

"[54] ... Mr. James Liburd has grounded his claim on the premise that he and his brother were expected to have incorporated a joint business venture as a lifelong dream and that his role in assisting with the construction of the buildings was his contribution to a 50% share in the corporation. For reasons which I have already explained, I am not satisfied that this assertion has been established. There is nothing about the dealings between the parties which points to any such expectation.

[55] ... even when the court were not to have found that to have been the case, I would not have been minded to exercise this equitable discretion in favour of Mr. Liburd in the manner submitted by his counsel. It seems rather clear to me even if there was that reasonable expectation in the start, that the nature of the operation of this business in the almost 30 years which elapsed between its incorporation and up to period of Mr. Liburd's illness and death, weighs heavily against such an approach. Mr. Liburd Sr. had generally been left to make the entirety of the investments which kept this company going, with no input from his brother. The company appears to me to have been operated exclusively by Mr. Liburd Sr.; and for his benefit for all that time. There was no evidence that any dividends were ever issued. Mr. James Liburd does not claim to have acquired any benefit from the company as a shareholder, nor did he ever capitalize those shares or make any complaints during his brother's lifetime. In addition to that, he

has played no significant role in fulfilling any of the obligations as a director of the company in excess of 30 years.”²⁴

[69] He ultimately concluded that it would be inequitable to grant any oppression remedy to the appellant. Clearly, he determined that although the appellant had established that the son had no authority to change the shareholding in the company, the appellant had not made out a case of a reasonable expectation in his favour. The learned judge stated:

“[56] ... even when the company was in dire straits, Mr. James Liburd appears to have been aloof from the management of this organization. Financial institutions were attempting to foreclose on the real assets of the company and it is no longer in good standing with the Registry of Companies. Yet, even in his illness, it was to his son Mr. Noel Liburd Snr. would turn to assist him with his process. There is nothing equitable about allowing Mr. James Liburd to simply take over the management of this company at this stage in the process, whilst staking a claim for 50% of its ownership. I would not be minded to adopt such an approach at (sic) it would certainly not meet the ends of justice.

[64] ... I am generally not of the view that a reasonable expectation has been raised in favour of Mr. James Liburd in this case. I find as a matter of fact that there was no agreement between himself and his brother that this company would be used as a means to fulfil a lifelong dream. I also find that his role in the construction of the buildings does not amount to the capitalization of the shares he obtained upon subscribing to the memorandum of association. I find that his brother had singlehandedly built this company and used it as his main source of financial survival with no input from him to the point where they were not on speaking terms at the time of Mr. Liburd Sr.’s death.”²⁵

[70] The cumulative effect of the learned judge’s findings of fact and law at paragraphs 54 – 56 and 64 is that it amounts to a rejection of the appellant’s claim that the company’s business or affairs, its conduct and the powers of its directors were conducted in an oppressive or unfairly prejudicial manner towards the appellant or the company or disregarded the appellant’s interests as he alleged. The only conduct of the son with respect to the company’s affairs that was frowned upon

²⁴ At paragraphs 54 and 55 of the judgment.

²⁵ At paragraphs 56 and 64 of the judgment.

and sanctioned by the court were making of the 2018 and 2019 Resolutions (and implicitly the related filings) and their impact on the company's shareholding. In reality, those resolutions and filings were rendered invalid due to the son's lack of authority, and legally incapable of effecting the changes that they purported to do. Therefore, there was no change to the directorship in 2018 or 2019. Apart from the deceased whose directorship ceased on his death, the other directors remained in place for all purposes and intent.

[71] In essence, the judge found that the actions taken by the company and the directors during the period of the son's management of the company did not constitute conduct that was oppressive, unfairly prejudicial towards the appellant or unfairly disregarded his or the company's interests. In fact, the judge commended the son for taking remedial action to salvage the company's business prospects at a time that the appellant was aloof from the company's management and was content to allow the son to assume responsibility for the company's operations including its debt obligations when it was no longer in good standing with the Registry of Companies; and financial institutions were attempting to foreclose on its real assets. Moreover, the judge found that the appellant's lack of interest in the company's operations characterized his relationship with the company for most of its existence. In my view, there was abundant evidence from which the learned judge could so find.

[72] In arriving at his determination, the learned judge extracted and recited the relevant principles from the authorities and applied them to the factual findings made by him. In fact, he relied on **PIC Insurance** and **BCE Inc** as well as **Commonwealth Caribbean Company Law** (referenced earlier) in interpreting section 241. He studiously applied those principles to the facts found. He cannot be faulted for arriving at the factual conclusions that he did, since in my opinion, the oral and documentary evidence overwhelmingly supported those findings. I am satisfied that it was open to him to so conclude. In addition, I perceive no error in principle in the judge's reasoning or his application of the law to the facts. To the

extent that the appellant challenges the correctness of the judge's finding that he (the appellant) failed to meet the threshold for relief under section 241, he has not in my estimation satisfied the test for appellate interference of the judge's findings of fact or law.

[73] However, that is but one part of the appellant's contention with respect to the section 241 issue. The other part involves a consideration of whether the learned judge was entitled to craft a remedy under that provision which effectively gave control of the company to the son.

[74] An examination of section 241(1) reveals that the predicate to the court granting relief is an application by a complainant alleging oppressive conduct by the company or its directors. The court is authorised to grant relief based on such application, but only if, it is satisfied that the company's or a director's powers or the company's business affairs have been exercised in a manner that is oppressive, unfairly prejudicial to or unfairly disregards the interests of any shareholder, creditor, director or officer of the company. It is instructive that once such an application is presented the court is placed on inquiry regarding the overall conduct of the company's affairs and not only as regards the allegations by the complainant. The court is therefore, not limited to considering the interests of the complainant but also the company's interest and the interest of other interested persons such as creditors and shareholders.

[75] It is self-evident therefore that the judge was entitled to examine the conduct of the company's directors over the course of its operations in deciding whether to grant relief under section 241 to the appellant or any other interested person. He reasoned that having regard to the appellant's conduct as a director, in particular, his failure to perform his fiduciary duties to the company (especially during his brother's illness when the company was stressed financially and eventually struck off the register) made him ill-suited to assume control of the company's affairs. Further, the judge reasoned that it was in the company's interest to ensure that the

management of its debt portfolio proceeded unhindered and that a director be appointed to properly manage its affairs. In deciding who would be a suitable director to do this, the learned judge critically assessed the son's efforts and determined that having functioned commendably as the company's *de facto* director since 2015 when he was granted power of attorney by his father, he should be installed in the office of the company's managing director in exercise of the court's discretion under section 241(3)(e).

[76] In determining that the son was the company's *de facto* director from the date of execution of the power of attorney in 2015 up to the trial, the judge applied section 83 of the **Companies Ordinance** and the decision of the England and Wales High Court ('EWHC') in **State for Trade and Industry v Hollier and others**.²⁶ Section 83 of the Ordinance provides that notwithstanding any irregularity in the election or appointment of a director or any defect in his qualification his acts as a director are valid.

[77] In **State for Trade and Industry v Hollier and others** the court summarized the governing principles in deciding whether an individual is a *de facto* director. The EWHC stated among other things:

"(1) The touchstone is whether the defendant was part of the corporate governing structure. (2) Inherent in that touchstone is the distinction between someone who participates, or has the right to participate, in collective decision-making on corporate policy and strategy and its implementation, on the one hand, and others who may advise or act on behalf of, or otherwise for the benefit of, the company, but do not participate in decision-making as part of the corporate governance of the company. Accordingly, the test is not satisfied by someone who was at all times and in all material decisions subordinate to the *de jure* directors."

[78] Taking into account that the appellant and Mr. Hanley were aware that the son was being charged with managing the company's business and had essentially given him free rein to determine the company's direction and that he did just that, the

²⁶ [2006] EWHC 1804 (Ch).

judge ruled that he was the *de facto* director. There is no appeal against that finding. It therefore stands unchallenged.

- [79] Against this background, the appellant faced an uphill task on appeal to successfully impugn the learned judge's exercise of discretion to appoint the son as managing director pursuant to section 241(e). It is clear that the gist of the judge's reasoning is that he justified this decision by finding that the appellant's course of dealing with the company as a director for the most part, ran afoul of section 241(2)(c) in that his conduct was unfairly prejudicial to and unfairly disregarded the interests of the creditors and by extension the shareholders and amounted to a breach of his fiduciary duties to the company as a director. On the facts, the judge was entitled to so find as a matter of law. No factual or legal basis has been advanced for disturbing those findings. I would therefore dismiss the grounds of appeal from which this issue emerges.

Costs

- [80] Having prevailed on appeal, the son and the company are entitled to recover their costs pursuant to the CPR. Rule 65.20 provides expressly that the costs of any appeal are to be assessed.

Disposition

- [81] For the foregoing reasons, I would dismiss the appeal in its entirety, affirm the learned judge's judgment and his orders dated 20th July 2022, declare that the directors of the company are those set out in the 2003 annual returns with the exception of the deceased. I would award costs to Noel Errol Liburd Jr. and Noel's

Courtesy Garage Limited to be assessed by the Chief Registrar if not agreed within 21 days of today's date.

I concur.
Margaret Price Findlay
Justice of Appeal

I concur.
Trevor M. Ward
Justice of Appeal

By The Court

Deputy Chief Registrar