THE REPUBLIC OF TRINIDAD AND TOBAGO

IN THE HIGH COURT OF JUSTICE

Claim No. CV2017-00316

BETWEEN

TRINIDAD CEMENT LIMITED

Claimant

AND

DR. ROLLIN CLIFTON BERTAND

Defendant

Claim No. CV2017-01902

DR. ROLLIN CLIFTON BERTAND

Claimant

AND

TRINIDAD CEMENT LIMITED
WILFRED ESPINET
ALISON LEWIS
NIGEL EDWARDS
FRANCISCO AGUILERA MENDOZA
ALEJANDRO ALBERTO RAMIREZ CANTU
JEAN MICHEAL CHOY
CHRISTOPHER DEHRING
MICHAEL GLENN HAMEL SMITH
CARLOS ALBERTO PALERO CASTRO

Defendants

Before the Honourable Mr. Justice Robin N. Mohammed

Date of Delivery: 27 April 2022

Appearances:

Mr. B. ST. Michael Hylton Q.C. leading Mr. Ravi Heffes-Doon instructed by Ms. Alana Bissessar for Trinidad Cement Limited

Mr. Elton Prescott S.C. leading Mr. Frederick Gilkes instructed by Mr. Yuri Saunders for Dr. Rollin Clifton Bertrand

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DECISION ON DEFENDANT'S APPLICATION FOR SUMMARY JUDGMENT

I. INTRODUCTION

[1] Before this Court is the Notice of Application dated 4 September 2017 of the Defendant in **Claim No. CV2017-00316**, seeking summary judgment pursuant to **Part 15.2 of the Civil Proceedings Rules 1998 ("the CPR")** against the Claimant, Trinidad Cement Limited ("TCL) on the whole of their claim. The application also seeks an order pursuant to **Part 26.2 of the CPR** for the striking out of TCL's Claim Form and Statement of Case and orders for costs on the said application and the substantive claim.

[2] It must be stated from the outset that neither of the parties' submissions and authorities addressed the application from the standpoint of striking out pursuant to **CPR Part 26.2(1)(c)**, but rather focused predominantly on summary judgment in accordance with **CPR Part 15.2(b)**. As such, the Court made no definitive finding on the said application save to dismiss the application for want of argument.

[3] Dr Bertrand's application for summary judgment is premised on the ground that TCL has no realistic prospect of succeeding on their claims against him and accordingly, the Court should spare itself and the parties the costs and inconvenience of a trial on these issues. This application is supported by the affidavit of the Defendant, Dr Rollin Clifton Bertrand ("Dr Bertrand") filed on 4 September 2017.

[4] On 22 January 2021, TCL filed the affidavit of TCL's Corporate Secretary, Ms Michelle Davidson in opposition to the application for summary judgment. An affidavit in response to same was filed by Dr Bertrand on 5 February 2021.

[5] Submissions on the application were filed by Counsel for Dr Bertrand and TCL on 5 March 2021 and 19 April 2021, respectively and submissions in reply were filed by Dr Bertrand on 28 April 2021.

[6] Having considered the arguments and authorities of the parties, the Court will now give its decision on the application for summary judgment. In doing so, I found it prudent to set out the background of these proceedings.

II. BACKGROUND

[7] From 1998 to 2014, Dr Bertrand served as the Group Chief Executive Officer ("CEO") of TCL and concomitantly as a member of TCL's Board of Directors, until his resignation from the Board of Directors and subsequent dismissal as TCL's CEO.

[8] Prior to his resignation and dismissal, TCL was considered to be in financial distress as it fell short of meeting its financial obligations to third parties and had experienced drastic declines in share price. As a result, shareholder confidence in Dr Bertrand's stewardship and directorship began to wane.

[9] On or about 14 June 2013, a group of TCL's minority shareholders holding approximately 5.68% of TCL's issued shares submitted a proposal to be included in TCL's Management Proxy Circular. The proposal put forward the nomination of five persons for election as directors of TCL at its Annual General Meeting scheduled for 12 July 2013. TCL issued a Notice of Refusal dated 24 June 2013 to the minority shareholders informing them that their proposal would not be included in the Management Proxy Circular.

[10] On 11 July 2013, the minority shareholders initiated legal proceedings ("the first shareholder action") claiming that TCL's refusal to include their proposal in the Management Proxy Circular was unlawful, null and void. They sought an injunction to restrain TCL from holding its Annual General Meeting ("AGM") until the determination

of their claim. On 12 July 2013, Harris J granted the injunction and the Court of Appeal affirmed the Court's order on 20 November 2013.

[11] On 24 June 2014, a group of shareholders (which included 10 of the 11 shareholders who initiated the first shareholder action) holding approximately 54.75% of TCL's shares requisitioned a compulsory meeting of shareholders to forthwith and immediately remove six persons as Board of Directors, including Dr Bertrand, and to elect seven new persons to serve as directors of TCL until the conclusion of TCL's next AGM.

[12] The requisition was issued pursuant to **Section 133 of the Companies Act** and was signed by one of the shareholders, Mr Kamal Ali. By letter dated 24 June 2014 Ms Gitanjali Gopeesingh, Attorney-at-Law for the said shareholders, wrote to Dr Bertrand urging his compliance with the requisition and advising that if he or any other director of TCL failed to act in good faith with a view to the best interests of the company and/or failed to exercise care, diligence and skill expected of a reasonably prudent person, legal proceedings may be taken against him.

[13] Notwithstanding this, the Requisition was refused by TCL on 14 July 2014 and on 31 July 2014, Mr Kamal Ali issued a Notice of Special (Compulsory) Meeting of Shareholders which was published in the Guardian newspaper on 3 August 2014. In line with the substance of the Requisition, the Notice proposed the removal of six named directors and the election of seven new directors and included the background, proposed directors, rights of directors and proxies.

[14] On 8 August 2014 TCL instituted a claim against the said Kamal Ali ("the second shareholder action") and filed a notice of application for an injunction restraining Mr Ali or others from holding or otherwise proceeding with the Special (Compulsory) Meeting until the hearing and determination of the proceedings or until the hearing and determination of the first shareholder action. The substantive grounds upon which the order was sought were that there were several serious issues to be tried including:

i. Contempt of Court- in that the meeting would undermine and/or violate the injunction of Harris J and render the first shareholder action nugatory;

ii. Lack of Bona Fides- in that there was an absence of reasons to effect a radical change to the Board of Directors and such change was likely to be motivated by an improper purpose;

iii. The invalidity of the Requisition on its face; and

iv. Abuse of Majority Rights and an attempt to redress personal grievances against directors.

[15] On 18 August 2014 Kangaloo J dismissed the application upon a finding that the shareholders were entitled to call the meeting, and in doing so there was no interference with the administration of justice as to visit contempt upon Kamal Ali as contended by TCL. The learned judge also found that the other grounds could not be made out.

[16] On 19 August 2014 Dr Bertrand resigned as a director of TCL and on September 22, 2014, TCL's new Board dismissed him as CEO. On 29 September 2014 TCL discontinued the second shareholder action.

The Claim

[17] On 25 January 2017, TLC initiated proceedings against Dr Bertrand seeking recovery of fees paid and a declaration that he breached his statutory duties as a director, his fiduciary duty, and his contractual duty as the Chief Executive Officer ("CEO") of TCL by doing the following:

(a) causing TCL to expend approximately $2,324,733.00 in legal fees in the institution and conduct of legal proceedings in order to, inter alia, restrain the holding of a Special (Compulsory) Meeting lawfully requisitioned on 24 June 2014 by 54.7% of TCL's shareholders pursuant to section 133 of the Companies Act, which proposed, inter alia, that Dr Bertrand be removed as a director of TCL; and

(b) utilizing TCL's monies for the purpose of perpetuating himself in office and, to that end, for the purpose of attempting to obstruct the legitimate and lawful actions of the majority of shareholders in the exercise of their lawful rights.

TCL is also seeking an order for the repayment of the said sum of approximately $2,324,733.00 which Dr Bertrand allegedly caused TCL to

expend as aforesaid and/or damages for breach of duty as aforesaid, interest and costs.

[18] The Claimant's case as advanced in its Statement of Case is grounded on the following alleged breaches and shortcomings of the Defendant:

(1) Dr Bertrand authorised and approved the payment of approximately $2,150,000.00 by TCL to Dr Claude Denbow SC and Mr Darrell Allahar in relation to legal and administrative fees for the institution and conduct of the second shareholder action;

(2) Dr Bertrand, by causing the Claimant to expend the said legal and administrative fees, unlawfully misused his directorial powers for the purpose of perpetuating himself in office and, to that end, for the purpose of obstructing the legitimate and lawful efforts of the majority of shareholders in the exercise of their lawful rights;

(3) Dr Bertrand was driven by self-interest or self-advancement, involved himself in actual and potential conflicts of interest between his duty to TCL and his private interests, acted contrary or without regard for the best interests of TCL's shareholders and employees, engaged in conduct which was unsupported by reasonable or objective criteria, and constituted a breach his fiduciary duty to act honestly and in good faith and his statutory duty to exercise the care, diligence and skill expected from a CEO with his experience and qualifications as well as his contractual duties;

(4) Dr Bertrand and the Board sought and received Legal Advice from Dr Claude Denbow before the initiation of the legal proceedings. However, his decision to cause the commencement of the shareholder action and apply for an injunction to restrain the Special (Compulsory) Meeting from occurring, was not supported by the Legal Advice. This is as the Legal Advice did not advise the Claimant to take legal proceedings to prevent the meeting nor did it advise TCL and its then directors that if they failed to prevent the proceedings they would be in contempt of court; and

(5) Having regard to the conflict of interest between Dr Bertrand's self-interest and TCL and his attempt to obstruct the lawful exercise of the rights of the majority shareholders, he failed to rely in good faith on the Legal Advice in causing TCL to institute the second shareholder action.

The Defence

[19] Dr Bertrand, in his Defence, has denied the motivations attributed to him by TCL. He maintains that the decision to expend money on legal fees was a collective decision of TCL's Board and that he acted as part of a Board that sought legal advice to ensure that any removal of members from the Board was legitimately executed.

[20] Dr Bertrand further asserted that the Board acted based on legal advice, which was sought to protect TCL's interest against action, which the Board was advised, was likely grounded on abuse of power and improper motives.

[21] He contends that all decisions of the Board, particularly in relation to the Shareholder Requisition and the Notice of Special (Compulsory) Meeting and all litigation related thereto were made after careful consideration and discussion; in support of legitimate business of TCL and upon the exercise of the Board of business judgment after a discussion of various matters. Further, legal advice and services provided to the Board by Dr Denbow SC and Mr Darrel Allahar, were supported by invoices and payment of same was approved by the Board.

[22] He averred that the Legal Advice/Opinion received from Dr Denbow in July 2014 provided cogent and compelling grounds upon which TCL and its directors could refuse to enter the requisition, namely, contempt of court, the invalidity of the requisition in its face, and abuse of power and improper purpose on the part of the requisitionists. Moreover, Dr Denbow expressly advised in the conclusion of his opinion that an application to court should be made if the requisitionists sought to pursue a meeting of shareholders in pursuance of **section 133 (4) of the Act**.

[23] Also, concerning TCL's claim regarding the utilization of the said monies, he contended that such payments to Dr Denbow and Mr Allahar were above board and received the Board's approval before payment was facilitated by TCL's Group Finance Manager.

[24] On 24 May 2017, Dr Bertrand initiated his own proceedings against TCL on 24 May 2017 for wrongful dismissal.

[25] TCL, on 30 June 2017, filed a Notice of Application seeking to consolidate the two Claims before this Court on the basis that there was significant overlap of the issues. On 29 May 2018, the Court delivered a written decision on TCL's application for consolidation. In its decision, the Court found that it would be more prudent to consider the application for consolidation first – since, if consolidated, Dr Bertrand could then have his application for summary judgment heard on both Claims before the same Court. The Court concluded that the matters should be consolidated and heard together and therefore directions for the parties to file submissions on the application for summary judgment were subsequently given.

[26] It is against this background that the Court now makes its decision.

III. THE APPLICATION FOR SUMMARY JUDGMENT

[27] Having considered the substance of TCL's claim, Dr Bertrand contended the factual matrix of TCL's case is not substantially in dispute and lacks substantial or material facts that require further interrogation at trial. In this regard, Dr Bertrand argued that TCL's action for recovery of fees cannot be sustained and the Court should grant him summary judgment on this application on the following grounds:

i. All decisions of TCL in relation to the matters raised in the Claim Form and Statement of Case were made by a duly constituted Board of Directors and not by the Claimant individually;
ii. All the said decisions were made after receiving legal advice from the then Claimant's Attorneys and were in support of the legitimate business of the Claimant;
iii. The payment of legal fees was approved by a duly constituted Board and not by the Claimant individually; and
iv. The directors of a board have a collective responsibility and the Claimant has not shown sufficient cause as to why the Defendant has been sued in his personal capacity and not the Board as the collective body.

Defendant's Submissions

[28] It is Dr Bertrand's submission that the undisputed facts of the case do not support any conclusion that his actions were driven by self-interest or that he caused TCL to expend monies on legal fees or utilized said monies for his purposes or acted without the benefit

of legal advice. He surmised that these contentions are not supported by pleaded facts from which these conclusions may be drawn.

[29] He argued that the decision to institute the second shareholder action was one that the Board of TCL made and that that decision was made in pursuance of and supported by advice proffered by Senior Counsel. That advice, contained in paragraphs 65 to 82 of a written Opinion of Dr Denbow SC warned of abuse of power and seriously improper motives on the part of the persons bringing the requisition. It further advised that the requisition was invalid on its face and likely to be in violation of Justice Harris' order and TCL could be held in contempt of court if the meeting was held.

[30] Accordingly, Dr Denbow expressly advised in his conclusion at paragraphs 83 and 84 of his Opinion that an application to the court should be made in the event that the requisitionists sought to pursue a meeting of shareholders in pursuance of **Section 133 (4) of the Companies Act**.

[31] Dr Bertrand, therefore, contended that it was incorrect to assert that the Opinion did not advise TCL and its then directors to take legal proceedings to prevent the Special (Compulsory) Meeting.

[32] Moreover, it was eminently reasonable and prudent for the Board to seek legal advice, given the nature of what the requisition sought to do, in order to inform and guide its response to the requisition. **Section 100(4) of the Act** specifically contemplated such situations where the board could take the advice of professionals. Relying on the authorities of **Green v. Walkling & Ors**[1], **Iesini v. Westrip Holdings Ltd**[2] and **Re Continental Assurance Co of London plc (No 4)**[3] it was asserted that the Board was entitled to take the advice of Senior Counsel.

[33] In the given circumstances, Dr Bertrand submitted that it was difficult to see how the Board could have acted otherwise or how he could be said to have caused the Board's decision to expend monies on this legal advice for his purposes and his use. Additionally,

[1] [2008] 2 BCLC 332.
[2] [2011] 1 BCLC 498.
[3] [2007] 2 BCLC 287.

it did not follow on the facts that he acted in breach of his directorial duties or not in good faith for the role that he played in TCL expending monies on legal fees.

[34] Finally, it was advanced that the decision to pay legal fees was one that a duly constituted board of TCL made in the discharge of the duties of the directors to guard the interests of the company.

Claimant's Submissions

[35] TLC's submissions advanced two primary reasons as to why its claim was inappropriate for determination by way of summary judgment or striking out, namely:

i. That it is obvious on the pleadings that there was a conflict, or at the very least, a possible conflict between Dr Bertrand's personal interests and the interests of TCL which gave rise to a *prima facie* breach of his fiduciary duty; and

ii. That the Court could not ascertain Dr Bertrand's state of mind i.e. the motive for his actions on the basis of untested affidavit evidence.

[36] TCL submitted that the circumstances of its pleaded allegations of the possible conflict of interest were as follows:

a. Prior to the decision of the Board to institute proceedings, one of TCL's Directors, Mr. Wayne Yip Choy, suggested that the directors who were the subject matter of the Requisition, should recuse themselves from discussions as to whether TCL should expend monies on the legal proceedings as they may be viewed as trying to protect their position as directors.

b. Directors Mr. Yip Choy, Mr. Alejandro Ramirez and Mr. Jean Michel Allard (directors not submit to the Requisition), all stated that TCL's money should not be used in order to prevent a meeting of a majority of shareholders and should not be spent on determining how the directors who were the subject matter of the Requisition could save their jobs. Mr. Yip Choy further suggested that the six (6) directors should fund any such legal proceedings personally.

c. Dr Bertrand expressed his disagreement with these suggestions and recommended instead that Mr. Yip Choy, Mr. Ramirez and Mr. Allard

should recuse themselves from considering whether TCL should institute legal proceedings.

d. The Board accepted Dr Bertrand's recommendation and excluded Mr. Yip Choy, Mr. Ramirez and Mr. Allard from voting on whether the Claimant should take legal proceedings.

[37] It was asserted that these circumstances indicate that the issue of the improper use of company funds to support Dr Bertrand's personal interests was explicitly raised by Board members, and Dr Bertrand caused the directors who objected to be excluded from deciding the issue. Moreover, this conflict of interest in seeking to use company funds to oppose the wishes of the majority of the shareholders of TCL to remove him was explicitly brought to his attention and he ignored it.

[38] Accordingly, it could not be said that TCL's pleaded case did not contain grounds to support a breach of directorial duties such that its claim had no chance of success. In fact, TCL asserted that the admitted facts suggest a strong *prima facie* case that Dr Bertrand breached his fiduciary duty to act honestly and in good faith, in the best interests of TLC, and to avoid conflicts of interest. He also breached his statutory duties under **Section 99(1)(b) of the Companies Act** as well as his contractual duties to exercise care, diligence and skill reasonably expected from a prudent person in comparable circumstances and his office.

[39] TCL also considered Dr Bertrand's argument that he could not be held personally liable for the collective decision of the Board to institute the second shareholder action as a non-starter. Citing the cases of **Re Faure Electric Accumulator Co**[4] and **Re Duckwari plc**[5]**,** it was asserted that the law provided that the liability of directors for decisions taken collectively as a board is joint and several.

[40] As to Dr Bertrand's argument on reliance on legal advice, it was submitted that the legal advice received was incapable of absolving him from his breaches of duty. It asserted that Dr Bertrand never received or sought any legal advice about his position of a conflict of interest, notwithstanding being warned about it. He also sought no legal advice in

[4] (1888) 40 Ch D 141 at 158
[5] [1999] Ch 253

relation to his fiduciary and statutory duties to the company and whether he could nevertheless take a decision to oppose the decision of the majority of the company's shareholders despite his position of conflict. As such, there was no legal advice on which he would rely to justify his actions.

[41] Furthermore, even if the legal advice he received was correct and reasonable, it was argued that **Section 100 (4) of the Act** stipulates that a director is not liable only if his reliance was in good faith. It was therefore advanced that it is more than arguable that a director could not he held to be acting in good faith, where he acts in his own interests and uses company funds to oppose the actions of shareholders in order to maintain himself in office, in the face of repeated warnings as to his conflict of interest.

[42] It was additionally contended by TCL that as its pleaded case indicated the legal advice (which gave no advice about Dr Bertrand's conflict of interest) did not advise him to take legal proceedings to prevent the meeting from being called by the shareholders. And even if it did, Dr Bertrand's reliance on the legal advice was not in good faith for the aforesaid reasons.

[43] In any event, it was submitted that in order to determine whether Dr Bertrand acted in good faith and for proper motives or abused his powers as a director, the Court will have to consider all the circumstances and it cannot do this on untested affidavit evidence.

[44] It is on these bases that it was asserted that it is impossible to say that TCL's Claim has no realistic prospect of success.

IV. ISSUES

[45] The main issue for the Court's determination on this application is whether TCL has a realistic prospect of success on its Claim. In answering this question, the Court will consider the following questions:

1) **Whether Dr Bertrand could be held personally liable for causing the commencement of the second shareholder action and expending monies in legal fees in the initiation of same?**

2) **Whether the pleaded facts show that there was a possible or actual conflict of interest between the interest of Dr Bertrand and the company to suggest that he breached his common law, statutory and contractual duties to TCL?**

3) **Whether Dr Bertrand's reliance on the legal advice of Dr Denbow SC can absolve him of any liability for causing the commencement of the second shareholder action and expending monies in legal fees in the initiation of same?**

V. LAW AND ANALYSIS

Summary Judgment

[46] This application for summary judgment is governed by **Part 15 of the CPR**. **Part 15.2** provides as follows:

> ***"The court may give summary judgment on the whole or part of a claim or on a particular issue if it considers that—***
> ***(a) on an application by the claimant, the defendant has no realistic prospect of success on his defence to the claim, part of claim or issue; or***
> ***(b) on an application by the defendant, the claimant has no realistic prospect of success on the claim, part of claim or issue."***

[47] The basic principles of summary judgment have been well-established and settled in case law. The authority of **Western United Credit Union Co-operative Society Limited v Corrine Ammon**[6] which referred to the decisions of **Toprise Fashions Ltd v Nik Nak Clothing Co Ltd and Ors**[7] and **Federal Republic of Nigeria v Santolina Investment Corp.**[8] is often cited for its comprehensive outline of the basic principles as follows:

(i) *"The Court must consider whether the defendant has a realistic as opposed to fanciful prospect of success:* ***Swain v Hillman 2001 2 All ER 91****;*

[6] Civ App No 103 of 2006 [3] per judgment of Kangaloo JA
[7] 3 (2009) EWHC 1333 (Comm)
[8] (2007) EWHC 437 (CH) Page 12 of 18

(ii) *A realistic defence is one that carries some degree of conviction. This means a defence that is more than merely arguable:* ***ED & F Man Liquid Products v Patel 2003 E.W.C.A. Civ 472 at 8****;*

(iii) *In reaching its conclusion the court must not conduct a mini trial:* ***Swain v Hillman****;*

(iv) *This does not mean that the court must take at face value and without analysis everything that a defendant says in his statements before the court. In some cases, it may be clear that there is no real substance in factual assertions made, particularly if contradicted by contemporaneous documents:* ***ED & F Man supra at 10****;*

(v) *However, in reaching its conclusion the court must take into account not only the evidence actually placed before it on the application for summary judgment, but also the evidence that can reasonably be expected to be available at trial:* ***Royal Brompton Hospital NHS Trust v Hammond No. 5 2001 E.W.C.A Civ 550****;*

(vi) *Although a case may turn out at trial not to be really complicated, it does not follow that it should be decided without fuller investigation into the facts at trial than is possible or permissible on summary judgment. Thus the court should hesitate about making a final decision without trial, even where there is no obvious conflict of fact at the time of the application, where reasonable grounds exist for believing that a fuller investigation into the facts of the case would add to or alter the evidence to a trial judge and so affect the outcome of the case:* ***Doncaster Pharmaceuticals Group Ltd v Bolton Pharmaceutical Co 100 Ltd 2007 F.S.R. 63."***

[48] In **Three Rivers District Council v Governor and Company and Bank of England No 3**[9] Lord Hope further explained a judge's duty in respect of the test in summary judgment applications in the following way:

> *"he must decide whether to exercise the power to decide the case without a trial and give summary judgment; it is a discretionary power; he must*

[9] [2001] UKHL 16

then carry out the necessary exercise of assessing the prospects of success of the relevant party; the judge is making an assessment not conducting a trial or a fact-finding exercise; it is the assessment of the case as a whole which must be looked at; accordingly, 'the criterion which the judge has to apply under CPR Pt 24 [our Rule 15] is not one of probability; it is the absence of reality."

[49] It must be emphasized that in such an application for summary judgment, the onus is on the Applicant, Dr Bertrand, and not TCL to establish that the claim brought against him has no real prospect of succeeding[10]. In doing so, he must be able to demonstrate to the Court that TCL has (i) no real prospects of success on the basis of the pleaded facts known by the parties at this time and (ii) no additional support for TCL's case through oral evidence at trial is likely to emerge that would affect the Court's assessment of the facts of their case[11].

[50] It is the Claimant's submission that as the test for summary judgment is not merely prospects of success but also an assessment of the need for further investigation, issues of whether directors have breached their fiduciary duty as a general rule are not appropriate for resolution by summary judgment.

[51] For the avoidance of doubt, I must state that I do not accept this general proposition that matters relative to breaches of fiduciary duties of directors are ill-suited for summary judgment. As stated above, in an application for summary judgment the Court is exercising a discretionary power and is primarily concerned with assessing the facts of the case as a whole to determine its prospects of success. Such prospects may only be established if there are sufficient factual assertions in the pleadings and likely evidence to be available at trial to support the claim. Sometimes, the material facts to support a claim for breach of fiduciary duties and evidence may simply not be there on the pleadings to warrant a fuller investigation of the matter at trial. It would assuredly be a waste of judicial time to pursue such a matter to trial on this premise of this general proposition with the knowledge of the absence of reality for success.

[10] Zuckerman on Civil Procedure: Principles of Practice at paragraph 9.51
[11] Ibid, at paragraph 9.55 and 9.56

[52] Accordingly, in deciding on whether there is no realistic prospect of success on the claim or if there is a need for a fuller investigation, the Court will have regard to the pleaded case of the parties and the affidavit evidence on the Application, including any contemporaneous documents that can reasonably be expected to be available at trial to determine if it meets the required threshold.

Liability of Directors

[53] On the question of Dr Bertrand's liability for the decision taken by the Board, I found the case of **Re Faure Electric Accumulator Co (supra)** cited in the submissions of TCL to be particularly useful. In this case, the directors of the company were found to be joint and severally liable for applying the capital of the company to the payment of a commission to a stockbroker for placing the company's shares. The payment of the commission on the shares was held to be ultra vires as it contravened an Act of Parliament and was in contravention with the company's memorandum of association. According to Kay J. at page 152 of the judgment,

> "*If directors apply money of the company for purposes so outside its powers that the company could not sanction such application, they may be made personally liable as for breach of trust."*

[54] In his affidavit in support of this application, Dr Bertrand asserted in paragraph 17 that the decisions taken by TCL during the period of his employ and directorship were that of the Board and he was not acting alone or in his individual capacity.

[55] On the other hand, Ms Davidson stated at paragraph 7 of her affidavit that "*the liability of directors of a company under section 99 (1) (a) and (b) of the Companies Act. Chap. 88:01, for breaches of trust and fiduciary duty are joint and several. Accordingly, notwithstanding that Dr Bertrand was a member of the board of directors that made the decisions which are the subject of this Claim, Dr Bertrand is liable to repay TCL the monies paid away in breach of the said duties and TCL acted properly and lawfully in bringing these proceedings against Dr Bertrand*."

[56] It is the pleaded case of TCL that its money was expended by the then Board which necessarily included Dr Bertrand to initiate litigation to oppose the wishes of its majority

shareholders to remove him from office. Assuming this allegation to be true, it can be emphatically stated that it is highly unlikely that TCL's memorandum of association would empower the company to utilize its finances to protect the interests and position of its sitting directors when challenged by shareholders. An assertion to this effect is highly improbable as it is likely to cloak directors with an unwarranted sense of inviolability that cannot be said to be in keeping with the law or the best interests of a company.

[57] In this regard, if the decision of the Board (by extension Dr Bertrand) to initiate proceedings to prevent the requisitioned meeting of shareholders is found to be motivated by such an intention to protect the directorships of its members, such decisions would fall outside of its powers and beyond the sanction and best interests of TCL. Accordingly, as a member of the Board, Dr Bertrand could be held jointly and severally liable for that decision and can be made personally liable for repayment of money expended by the company for pursing same given his approval of the transaction: provided of course, that no defences are available to him to absolve him of liability.

[58] However, for such liability to arise, it must be shown that TCL's case discloses sufficient facts that suggest a *prima facie* breach of trust or duty by Dr Bertrand to the company.

Breach of Director's Duties

[59] It is accepted that due to Dr Bertrand's capacity as a director of TCL, he owed the company the common law and statutory duties set out in **Section 99 of the Companies Act ("CA")**. **Section 99(1) of the CA** provides as follows:

> *"99. (1) Every director and officer of a company shall in exercising his powers and discharging his duties—*
>
> *(a) act honestly and in good faith with a view to the best interests of the company; and*
>
> *(b) exercise the care, diligence and skill that a reasonably prudent person would exercise in comparable circumstances."*

[60] It is trite law that these above-mentioned duties are owed primarily to the company.

[61] In the recent decision of **BCE Inc v. 1976 Debentureholders**[12] the Supreme Court of Canada provided guidance on the nature and extent of the duty to act honestly and in good faith in the best interests of the company. They stated as follows:

> *"37 The fiduciary duty of the directors to the corporation originated in the common law. It is a duty to act in the best interests of the corporation. Often the interests of shareholders and stakeholders are co-extensive with the interests of the corporation. But if they conflict, the directors' duty is clear - it is to the corporation:* ***Peoples Department Stores****.*
>
> *38 The fiduciary duty of the directors to the corporation is a broad, contextual concept. It is not confined to short- term profit or share value. Where the corporation is an ongoing concern, it looks to the long-term interests of the corporation. The content of this duty varies with the situation at hand. At a minimum, it requires the directors to ensure that the corporation meets its statutory obligations. But, depending on the context, there may also be other requirements. In any event, the fiduciary duty owed by directors is mandatory; directors must look to what is in the best interests of the corporation.*
>
> *39 In Peoples Department Stores, this Court found that although directors must consider the best interests of the corporation, it may also be appropriate, although not mandatory, to consider the impact of corporate decisions on shareholders or particular groups of stakeholders….*
>
> *40 In considering what is in the best interests of the corporation, directors may look to the interests of, inter alia, shareholders, employees, creditors, consumers, governments and the environment to inform their decisions. Courts should give appropriate deference to the business judgment of directors who take into account these ancillary interests, as reflected by the business judgment rule. The 'business judgment rule' accords deference to a business decision, so long as it lies within a range of*

[12] [2008] SCJ No 37at paras 37-40

reasonable alternatives: see Maple Leaf Foods Inc. v. Schneider Corp. (1998), 42 O.R. (3d) 177 (C.A.); Kerr v. Daniel Leather Inc., [2007] 3 S.C.R. 331, 2007 SCC 44. It reflects the reality that directors, who are mandated under s. 102(1) of the CBCA to manage the corporation's business and affairs, are often better suited to determine what is in the best interests of the corporation. This applies to decisions on stakeholders' interests, as much as other directorial decisions."

[62] Moreover, inextricably bound up in the exercise of this fiduciary duty is the concomitant duty of directors to avoid conflicts between their self-interests and the interests of the company. They must not utilize their position for their personal benefit[13]. The operation of this duty is succinctly captured in the words of Lord Cranworth LC in the locus classicus case of **Aberdeen Rail Co v Blaikie Brothers**[14]**.** The learned Judge stated:

"The directors are a body to whom is delegated the duty of managing the general affairs of the company. A corporate body can only act by agents, and it is, of course, the duty of those agents so to act as best to promote the interests of the corporation whose affairs they are conducting. Such an agent has duties to discharge of a fiduciary character towards his principal, and it is a rule of universal application that no one having such duties to discharge shall be allowed to enter into engagements in which he has or can have a personal interest conflicting or which possibly may conflict with the interests of those whom he is bound to protect. So strictly is this principle adhered to that no question is allowed to be raised as to the fairness or unfairness of a contract so entered into."

[63] It is clear from the learning of Lord Cranworth LC, that the operation of this no-conflict rule is not limited to actual conflicts of interest rather, it is only necessary to establish that the reasonable man looking at the relevant facts and circumstances would think that there was a real possibility for conflict[15]. Accordingly, in **Aberdeen Rail Co** (supra) the mere fact the chairman of the board of directors of Aberdeen was a partner in the Blaikie Brothers

[13] Peoples Department Stores Inc. (Trustee of) v. Wise [2004] 3 S.C.R. 461 at [35]
[14] [1843-60] All ER Rep 249, 253; [1854] 1 Paterson 394
[15] **Boardman v Phipps** [1967] 2 AC 46 Eng HL at page 125

partnership was enough to constitute a conflict of interest to necessitate the setting aside of a transaction between the parties for the purchase of chairs by the company.

[64] So strict is this rule that there can be no argument of fairness or unfairness of a contract or a decision so entered into. In fact, a director may only place himself in a position where his interests conflict with that of the company where the company's constitution permits or the company gives its consent by approving or ratifying it. This was affirmed in the Privy Council case of **North-West Transportation Company Limited v. James Hughes Beatty (1887) 12 App. Cas 587 at 593** cited by TCL, wherein the Board stated:

> *"…a director of a company is precluded from dealing, on behalf of the company, with himself, and from entering into engagements in which he has a personal interest conflicting, or which possibly may conflict, with the interests of those whom he is bound by fiduciary duty to protect; and this rule is as applicable to the case of one of several directors as to a managing or sole director. Any such dealing or engagement may, however, be affirmed or adopted by the company, provided such affirmance or adoption is not brought about by unfair or improper means, and is not illegal or fraudulent or oppressive towards those shareholders who oppose it."*

[65] Upon this learning, it can be surmised that Dr Bertrand, in exercising his fiduciary duty was obliged to consider the best interests of the company in determining how to respond to the Requisition. In doing so, he was required to take the interests of shareholders into account. He also had an obligation to guard against any actual or possible conflicts of his interests between himself and TCL and if such conflicts arose, he had to obtain the consent of the company to absolve himself of any breach of duty.

[66] It was asserted by TCL that the determination of whether a director has breached his or her fiduciary duty is the "*subjective motivation of the director or officer*" according to **Peoples Department Stores (supra)**. In **Dockside Brewing Co Ltd. v Strata**[16] it was stated that "*evidence of "fraud or dishonesty" (para. 40) or of "a personal interest or*

[16] 2007 BCCA 183 at [

improper purpose" (para. 41) is relevant to the determination of whether the statutory fiduciary duty has been breached."

[67] As such, the Court must examine the evidence "*collecting from the surrounding circumstances all the materials which genuinely throw light upon that question of the state of mind of the directors so as to show whether they were honestly acting in discharge of their powers in the interests of the company or were acting from some bye-motive, possibly of personal advantage, or for any other reason. That is a subject that must be enquired into*…" as per Viscount **Finlay Hindle v. John Cotton Ltd**[17].

[68] The admitted facts and the allegations before the Court suggest the existence of at least two of the factors upon which a breach of the statutory fiduciary duty could be demonstrated, namely, personal interest or improper purpose. Given the limited evidence available to the Court at this time, I find that the Court cannot conclude at this stage that there is no real prospect of TCL showing that Dr. Bertrand was motivated by his own personal interests in taking the decision to expend over $2 million of company monies on legal proceedings to maintain himself in office.

[69] Having considered circumstances averred in the Claimant's Statement of Case and submissions discussed at paragraph 32 above, it is this Court's opinion that there are sufficient material facts to suggest that Dr Bertrand also had personal interests at stake and did not avoid possible or actual conflict of interests.

[70] The undisputed facts of the case are that Dr Bertrand was the CEO and a director of the Board of TCL and all of its subsidiaries. He had over twenty years of experience in senior management and was serving at a time when the company was undergoing financial distress. The actions of the shareholders through the shareholder proposal and then the Requisition intimate that the support and confidence in his employ and directorship were waning.

[71] Faced with such harsh requests by the shareholders, a meeting was held by the Board which discussed how they ought to proceed having regard to the Requisition and its intent. In Dr Bertrand's Defence, he admitted that Director Wayne Yip Choy suggested the recusal

[17] (1919) 56 Sc. L.R. 625, 630-631,

of the six (6) directors, the subjects of the requisition from Board discussions relating thereto. However, he denied any recollection of the statements made by the three (3) dissenting directors that the money of shareholders should not be used to fund how the six directors subject to the requisition saved their jobs or that they should personally fund any such legal proceedings[18]. He also denied making a recommendation which was accepted by the other directors that these three directors recuse themselves from voting on whether legal proceedings should be taken to prevent the holding of the Special (Compulsory) Meeting of the shareholders.

[72] Despite these pleadings, it is notable that the affidavit of Dr Bertrand in support of this application stay miles clear of any discussion of the circumstances of the alleged conflict of interest even though it forms the main thrust of the Claimant's case against him. In fact, his submissions and affidavit advance a position of a purely collective approach of the Board and no mention is made of the fact that there was dissent amongst the Board of Directors regarding the obtaining of legal advice or pursuing or funding legal proceedings in the company's name to prevent the meeting of the shareholders.

[73] In this regard, it is not fully clear in the Court's mind what was Dr Bertrand's subjective motivation in considering the requisition and making a decision to pursue legal action to stop the meeting. As such, I am minded to agree with TCL that the facts of this case require further investigation into the surrounding circumstances to ascertain Dr Bertrand's state of mind at the time the decision was made, and whether he considered the best interests of the company and its shareholders or if he abused his powers in deciding to engage in discussion and a subsequent decision.

[74] It is also this Court's view that since the requisitioned meeting of the shareholders dealt quite specifically with Dr Bertrand's fate as director of the company, it was likely that the reasonable man would conclude that there was a real possibility that he might have a personal interest to maintain his position at TCL which could conflict with what was in the best interests of the company. It appears on the facts submitted by TCL that objections raising this possible conflict of interest were brought to his attention by at least one other director and he ignored it and remained a party to the discussions and subsequently voted

[18] See paragraphs 15 to 17 of Dr Bertrand's Defence

in favour of the decision to prevent the meeting. In fact, he agreed with the Board to recuse and exclude the three dissenting directors who were the only ones not named in the requisition on the basis of a conflict of interest. Also, there was no unanimous consent from amongst the Board to ratify this conflict and such approval was certainly not obtained from the shareholders.

[75] There is therefore very little evidence before the Court from Dr Bertrand to properly rebut his alleged conflict of interest, throw light on his state of mind to controvert the allegations of TCL that he was acting from some improper motive, possibly of personal advantage, or for any other reason. In this regard, the Court cannot conclude in this respect that TCL has no realistic prospects of succeeding on this point. It would be prudent for the court to conduct a fuller investigation into the facts of the case before making a final determination on the issue as to whether the Claimant breached his fiduciary duty to act honestly and in the best interests of the company.

Reliance on Legal Advice

[76] Notwithstanding the findings above, it is still relevant to consider whether Dr Bertrand is likely to benefit from the statutory defence of good faith reliance to avoid liability for the alleged breaches of duty.

[77] In **Peoples Department Stores (supra)** the Court acknowledged that the law recognizes the reality that directors cannot be experts in all aspects of the corporations they manage or supervise. Accordingly, it makes provisions for directors to take the advice of experts and professionals in exercising the management powers vested in them.

[78] **Section 100 (4) of the CA** provides as follows:

> *"100. (4) A director is not liable under section 87, 88 or 99 if he relies* ***in good faith upon****—*
> *(a) financial statements of the company represented to him by an officer of the company; or*
> ***(b) a report of an Attorney-at-law, accountant, engineer, appraiser or other person whose profession lends credibility to a statement made by him."*** **(Emphasis mine)**

[79] In **Green v. Walkling & Ors** cited by Dr Bertrand in his submissions, the court observed that where specialist areas fell for consideration, if a director seeks appropriate advice from solicitors and acts upon such advice, believing it to be correct, he will have *prima facie* fulfilled his duty. I found the following paragraphs of the judgment to be particularly helpful:

> *"[36] …The fact that a director has taken advice will be a relevant and important factor to be taken into account when determining the validity of an allegation against him that he has acted in breach of his duty.*
> *[37] In my judgment a director who did take advice from a solicitor and acted upon the advice to the best of his ability, would prima facie have fulfilled his duty.*
> *[38] …The advice might be right or wrong; it may be that a different solicitor might have given different, possibly even better advice (perhaps, for example, because another solicitor might have had greater expertise in the area of director's duties). The important thing in my judgment however is that, faced with a difficulty as to how he should discharge his conflicting duties, the director has taken care to seek appropriate advice as to how he should act and, believing that advice to be correct, has followed it. This is exactly what Mr Walkling did and by doing so it seems to me that he acted in conformity with his duty as a director to the company."*

[80] However, the case law is clear that mere *de facto* reliance on the advice of a professional will not guarantee a defence to liability: **Blair v. Consolidated Enfield Corp**[19]. The Court in **Blair** established that what must be shown is *"reliance that is reasonable and in good faith"* to establish that a director or officer acted *"honestly and in good faith with a view to the best interests of the corporation"*.

[19] [1995] 4 S.C.R. 5

[81] The facts of **Blair** were that Mr Blair was a shareholder, president, and director of Consolidated Enfield Corp. ("Enfield") acted as chair of a shareholders' meeting at which the board of directors was to be elected. He was on the slate proposed for election by management, but another shareholder, Canadian Express Limited, nominated a candidate from the floor. Canadian Express held sufficient proxies to elect its candidate, and Mr. Blair was not elected. Mr. Blair consulted with Enfield's corporate lawyers, six of whom deliberated for an hour-and-a-half while the meeting was held in abeyance. The lawyers concluded that the proxies could not be used to elect the candidate proposed from the floor of the meeting. Mr. Blair read a statement prepared by the lawyers to the meeting, declaring that the alternate candidate had received no votes, and that the management slate, including Mr. Blair, had been elected.

[82] Following an application by Canada Express to declare that his decision on the proxies was incorrect, Mr Blair sought an order for indemnification for his legal costs in defending the application. In order to qualify for indemnification, there was a statutory requirement that directors show that they acted honestly and in good faith with a view to the best interests of the corporation.

[83] In considering the issue of good faith, Mr Blair sought legal advice and the Supreme Court noted that implicit in his enquiry as to whether the proxies should be allowed was the question, whether Blair should step down as chair or whether he was in any position at all to make a decision. Having received the advice, it was reasonable for Blair to believe that reliance on the advice was the only course open to him. The Court thus found that Mr Blair in the circumstances had acted reasonably and in good faith in relying on the advice of his counsel. He was shown to have reasonably believed that it was his duty as the chair, acting in the best interests of the company to ensure that the proxies were properly voted (paras 58- 70).

[84] The case of **Dockside Brewing Co Ltd. v Strata**[20] considered **Blair** and applied the principles therein. **Dockside** concerns a dispute between two groups of owners of lots in a strata corporation. One group, represented by the appellants, took control of the strata council, and approved expenditures for legal expenses to support litigation in circumstances where the statutorily required approvals for the litigation could not be obtained. The other

[20] 2007 BCCA 183

group, which included the respondents, continuously objected to the strata council's actions on the basis that the strata council was acting in conflict of interest and contrary to the best interests of the strata corporation.

[85] The appellants claimed that the chambers judge erred in finding that they had a conflict of interest in a "contract or transaction with the strata corporation", and in any event, they acted in good faith, on the advice of legal counsel. The Court, however, found that although they had sought legal advice, they failed to receive legal advice concerning their statutory duties to the strata council and corporation and the consequences of not adhering to those duties. There was also overwhelming evidence that they were warned time and again by their opponents of their conflict of interest. In this regard, the court concluded that the appellants could not claim good faith reliance on the advice of their lawyers. The Court stated at paragraph 73 as follows:

> "*But as members of a strata council, which is charged with the responsibility to manage and supervise the affairs of the strata corporation in the best interests of the strata corporation, they cannot be excused from ignoring all of the contrary arguments, advice, and court orders that demonstrated that they and their lawyers were acting in a conflict of interest between that plan, which was for their own personal gain, and those of the strata corporation, in which more than 25 per cent of the owners not only disagreed with, but actively opposed, the plan. In the face of the opposition to the actions of the appellants as members of the strata council, it was not reasonable for them to proceed as they did, and then claim that their lawyers told them to do it. A member of a strata council must be held to the statutory duty to act in good faith in the interests of the strata corporation. Where their lawyers are found to be in a conflict of interest, the members of the strata council cannot reasonably claim that they acted "honestly and in good faith" in relying on the advice of those same lawyers to defend the claim against them that they acted in a conflict of interest."*

[86] Having considered the law cited above and the material facts of this case, what is clear is that given the legal implications the requisition raised, it was prudent for the Board and

Dr Bertrand to seek out the advice of the learned Senior Counsel to determine if and how they should respond to it. They were also entitled to rely on it in discharging their duties in the best interests of the company, whether or not those interests aligned with that of the shareholders.

[87] It was on this basis that Dr Bertrand advanced that the decision to institute the second shareholder action was one that the Board of TCL made and that that decision was made in reliance on advice proffered by Dr Denbow Senior Counsel. That advice warned of seriously improper motives on the part of the persons bringing the requisition and that the objectives of the requisition were likely to be to the serious disadvantage of TCL. Dr Denbow SC thus posited that while TCL could decline to entertain the requisition in accordance with **Section 133 (3) (c) of the Companies Act** on the basis that the requisition sought to further personal grievances against TCL's directors, a refusal to entertain the requisition would only delay the requisitionists who could yet proceed under **Section 133 (4) of the Act**. He therefore, advanced three additional grounds upon which TCL and its directors could rely to refuse the Requisition, namely, (i) contempt of Court, (ii) the invalidity of the requisition on its face; and (iii) abuse of process and improper purpose on the part of the requisitionists. I refer to the submissions of Dr Bertrand at paragraph 48 which succinctly set out Dr Denbow's advice on each point:

> *"As regards contempt of court, he referenced the first shareholder action brought by 10 of the 18 requisitionists and expressed the view that those 10 requisitionists would be acting in violation of the very injunction which they obtained and that the 8 other requisitionists would be guilty of aiding and abetting the violation of the order, although they were not directly covered by the order. He was also of the view that TCL would be acting in violation of the said order by entertaining the requisition (paragraphs 48 to 51 and 57 to 58 of the opinion).*
>
> *As regards the requisition itself, Dr. Denbow SC considered it deficient in that it lacked information about the proposed new directors which was relevant to the business of the requisition, namely, the placement of those new directors on the board of TCL. He went on to cite case law to support that point but also observed that that deficiency could be addressed by the*

presentation of a fresh requisition with the relevant information (paragraph 61 of the opinion).

Dr. Denbow SC considered that there was reason to be concerned that the new directors might seek to withdraw complaints which TCL had made to the SEC and CBTT in relation to some of the requisitionists and that that might be their real purpose in seeking to have particular persons placed on the board which would constitute abuse of power and improper purposes (paragraphs 65 to 82 of the opinion)."

[88] In conclusion of his opinion Dr Denbow stated at paragraphs 83 and 84 the following advice:

> *"83. Having regard to the foregoing private purposes to be served among the leading requisitionists, I consider that there is enough material to make out a credible case that the Requisition of the compulsory meeting is a process which has been resorted to for ulterior purposes and is tainted by improper motives. Hence the holding of any meeting by the requisitionists should be restrained.*
>
> *84. It should be emphasized that recourse to the approach set out in the preceding paragraph can only be made by TCL at a later stage in support of an injunction to restrain the holding of a meeting by a requisitioning shareholder pursuant to Section 133 (4) of the CA. It is therefore a weapon of last resort."*

[89] Having received this advice that the motives of the requisitionists were improper and abusive and not in the interests of the company, it was submitted by Dr Bertrand that the Board was hard-pressed not to act on the advice to avoid the consequences identified.

[90] Upon consideration of this Legal Advice, I am of the opinion that the Legal Advice rendered by Dr Denbow SC did advise TCL and its then directors, including Dr Bertrand, that it should take legal proceedings to restrain the Special (Compulsory) Meeting despite TCL's submissions to the contrary. It is to be noted, though, that he did assert that it was to be used as a weapon of last resort.

[91] The fact that TCL's then directors and Dr Bertrand took that advice and acted upon it to commence the second shareholder action, is an important factor to be taken into account in determining the validity of the alleged breaches of duty even though the advice did not receive the Court's approval upon the action. However, this reliance is not the only factor necessary to absolve him of the alleged breaches of duty to bring a close to the case. Indeed, Dr Bertrand also has to establish that there are sufficient material facts and evidence before the Court to indicate that he acted in good faith.

[92] Accordingly, he has to show that he took the advice and in his capacity as a director had acted on it to the best of his ability. He also had to show that he sought the appropriate advice on how he should act in dissolving his conflicting duties and he had to believe that it was correct and followed it. He also had to give due consideration to any possible or actual conflicts and warnings he received from others in respect of same.

[93] Having examined the affidavit evidence of Dr Bertrand there is very little available to assist in the Court's assessment of this point beyond a statement by him that he relied in good faith upon the legal opinion of Dr Denbow and the decision to initiate legal proceedings was taken by the Board of TCL after considering the advice of Senior Counsel[21].

[94] Moreover, it is TCL's contention that Dr Bertrand did not receive the appropriate legal advice that was capable of absolving him from his breaches of duty. It was asserted that Dr Bertrand never received or sought any legal advice about his position of a conflict of interest, notwithstanding being warned about it. He also sought no legal advice concerning his fiduciary and statutory duties to the company and whether he could nevertheless take a decision to oppose the wishes of the majority of the company's shareholders to maintain his position in office despite his position of conflict. It was thus surmised that there is no legal advice on which Dr Bertrand may rely to justify his decision.

[95] Counsel for Dr Bertrand, however, took issue with this point in his Submissions in Reply. It was submitted that there is no assertion in the pleadings relating to any failure on the part of Dr Bertrand to seek legal advice on the issue of conflict of interest. It was argued

[21] See Affidavit in Rollin Clifton Bertrand dated 5th February 2021.

that both the pre-action correspondence and pleadings advanced a case of breach of duty on Dr Bertrand's part on the basis that he incurred expense in initiating the second shareholder action, without the benefit of any legal advice advising it so to do.

[96] While I do accept that there were no specific pleadings in TCL's case that Dr Bertrand did not receive legal advice relative to his conflict of interest I find that the point is nevertheless worthy of further explanation. It is this Court's view that the issue as to whether legal advice was sought and relied on by Dr Bertrand on any conflicts of interest on his part arises by necessary implication. Due to the existence of alleged facts of possible or actual conflicts of interest, there was an onus on him to consider whether he should step back from engaging in the discussions or voting or whether he was in any position at all to make a decision. Curiously, the Court noted the admitted fact in Dr Bertrand's Defence that the Board received legal advice relative to the conflict of interests of the three dissenting directors[22] who opposed the use of TCL's funds to prevent the requisitioned meeting of the shareholders. These directors were not the subjects of the requisition, yet advice was sought with respect to them on an existence of conflict. The question thus arises, did Dr Bertrand and other Board members who were subjects to be removed under the requisition seek advice on whether they should be involved in discussions to restrain the action of the shareholders? And if not, why not? I consider these facts and questions to be part of the surrounding circumstances that the Court is entitled to take into account when considering the state of mind of Dr Bertrand and whether he acted in good faith, for a proper purpose and in the best interests of the company. Accordingly, further probing of this issue must be ventilated before a final determination on the claim can be made.

[97] Given the Court's finding that there is insufficient evidence or facts before it to determine the state of mind and motivations of Dr Bertrand it would be remiss of me to conclude at this stage that his reliance on the legal advice of Dr Denbow SC and subsequent pursuit of legal proceedings was done in good faith. I find that there is a need for a fuller investigation of the facts and evidence at trial to determine whether Dr Bertrand is entitled to benefit from the statutory defence set out under **Section 100(4) of the CA**.

[22] See paragraph 10(ii) of Dr Bertrand Defence and the Minute Extract dated 4th July 2014 in TCL's Statement of Case

VI. DISPOSITION

[98] Having considered the Defendant's Application, the parties' pleadings, and submissions and affidavits in support, I find that Dr Bertrand has not convinced me that on the pleaded facts and evidence that TCL no has a realistic prospect of success on its claim.

[99] Accordingly, the order of the Court is as follows:

VII. ORDER:

1. **The Defendant's Notice of Application filed on 4th September, 2017 for striking out and/or summary judgment of the Claimant's claim for breach of fiduciary, statutory and contractual duties be and is hereby dismissed.**

2. **The Defendant shall pay to the Claimant costs of the said Application fit for Senior and Junior Counsel to be assessed in accordance with CPR Part 67.11, in default of agreement.**

3. **In the event that there is no agreement on costs, the Claimant to file and serve a Statement of Costs on or before 30 June 2022.**

4. **The Defendant to file Objections thereto, if any, on or before 29 July 2022.**

5. **The matter is fixed for a case management conference on 28th June 2022 at 2:30pm via MS Teams Virtual Platform.**

_____

Robin N Mohammed
Judge