IN THE REPUBLIC OF TRINIDAD AND TOBAGO

IN THE HIGH COURT OF JUSTICE

CV 2011 of 03992

BETWEEN

EVOLVING TECKNOLOGIES AND ENTERPRISE DEVELOPMENT COMPANY LIMITED

Claimant

AND

(1) KENNETH JULIEN
(2) ULRIC MCNICOL
(3) BRIAN COPELAND
(4) RENE MONTEIL
(5) EUGENE TIAH
(6) SONIA NOEL
(7) WENDY FITZWILLIAM
(8) JOHN SOO PING CHOW

Defendants

Appearances:

Claimant:	Mr. Vincent Nelson Q.C. and Israel Khan S.C. leading Mr. Gerald Ramdeen and instructed by Mr. Varun Debideen
1st to 6th named Defendant:	Mr. Douglas Mendes S.C. and Mr. John Jeremie S.C. leading Mr. Stuart Young and Mr. Michael Quamina and instructed by Ms. Kahaya Nanhu
7th named Defendant:	Mr. Kerwin Garcia instructed by Ms. Vishma Jaisingh
8th named Defendant:	Mr. Steven Singh instructed by Ms. Shalini R. Rampersad-Campbell

DATE OF DELIVERY: 28th October 2013

Before The Honourable Mr. Justice Devindra Rampersad

RULING ON PRELIMINARY ISSUE

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Introduction

1. This matter was commenced on the 18th of October 2011. This court gave a written ruling on the same matter which is before this court for determination dated the 24th of July 2012 and the court will rely upon the discussion of the pleadings therein in that ruling rather than to rehearse them once again.

The Application for determination

2. On the 2 March 2012, the Attorneys at Law for the first named to sixth named defendants (1st – 6th defendants) filed an application for an order that:

   2.1. Pursuant to Part 26 Rule 2(1) (b) and (c) of the Civil Proceedings Rules 1998(as amended) that the claim form and statement of case dated and filed October 18th 2011 be struck out as an abuse of process of the court and/or on the basis that it discloses no grounds for bringing the claim. The ground cited by these defendants was essentially that the action was statute barred.

   2.2. The costs of this application and defendants' costs of the action to be borne by the claimant.

The Original decision by this court

3. On the 24 July 2012, this court made an order that:

   3.1. The defendant's notice of application for the dismissal of the action on the ground of the matter being statute barred is deferred to be dealt with at the trial due to the fact that there is no unequivocal statement evincing the issue and the court has to hear evidence on the point.

   3.2. Directions for the further progress of the matter were given as it was the court's intention to have dealt with the trial of the matter by April of 2013.

The Appellate decision

4. The court's decision was appealed and the Honourable Mr. Justice Bereaux JA, as part of a unanimous two person panel including the Honourable Stollmeyer JA, on the 11 December 2012, in delivering his judgment on appeal, remitted the matter to this court to decide the preliminary limitation question under section 14(2) of the Act on the basis that, ***assuming that there was a deliberate breach of duty, whether that breach of duty took place in circumstances where it was unlikely to be discovered for some time***. The learned Judges were of the view that the determination of the preliminary point ought not to be deferred to the trial but was capable of being decided earlier.

The Evidence

5. The matter, having been remitted to this court for the determination of the issue as identified by the Court of Appeal, proceeded upon the following affidavits:

   5.1. The affidavit of Michelle Pryce dated 02 March 2012

   5.2. The affidavit of Mario Edwards dated 18 May 2012

   5.3. The affidavit of Mario Edwards dated 09 July 2012

5.4. The affidavit of Beverley John dated 12 June 2012

5.5. The affidavit of Eugene Tiah dated 12 June 2012

5.6. The affidavit of Khalid M. Hassanali dated 28 February 2013

6. By notice of application dated and filed on the 26th March 2013, the attorneys at law for the 1st named to 6th named Defendants raised objections to the affidavit sworn to by Khalid Hassanali on the 28th of February 2013. The parties agreed that they would rely on written submissions in relation to this application and that the court would rule on that application along with the substantive preliminary matter at the same time. Accordingly, the court has given a separate but simultaneous ruling on that application.

The Submissions:

7. On the 17 January 2013 the claimant added the 7th and 8th named defendants and they both have applications pending challenging the validity of their addition. Part of their objection hinges on the preliminary limitation point raised by the other defendants and this court invited them to make submissions in respect of the issue, even though their applications have not yet been heard, as a matter of expedience. These additional defendants chose to rely upon the submissions of the 1st – 6th named defendants' attorney and the 7th named defendant's attorney filed further written submissions pursuant to the court's invitation.

1st – 6th named defendants' submissions:

8. These defendants submitted that the claimant failed to establish that the alleged breach of duty occurred in circumstances in which it was unlikely to be discovered for some time as the Defendants kept the Corporation Sole, the line Ministry, the Cabinet and the Claimant's officers well informed of all steps which were being taken in the course of deciding whether the investment should be made .

9. In support of their written submissions they relied upon:

9.1. ***Cave v Robinson Jarvis & Rolf (a firm)*** [2003] 1 AC 384

7th named defendant's submissions

10. The 7th named defendant submitted on the limitation point in relation to their joinder application and in relation to the striking out application. On the joinder application it was submitted that the court had a discretionary power to permit joinder under Part 19 and that the overriding objective of the CPR is to have matter dealt with justly and expeditiously. On the striking out application it was submitted that to enable the claimant to use section 14(1)(b) to extend the limitation period on the undisputed facts in the case would be a gross abuse.

11. In support of their submission they relied upon:

11.1. ***Cave v Robinson and Ors.*** [2003] 1 A.C. 384

11.2. ***Giles v Rind [2008] EWCA Civ 118***

11.3. ***Williams v Fanshaw Porter & Hazelhurst*** [2004] EWCA (Civ) 157

11.4. ***Julien and Ors. v Evolving Tecknologies and Enterprise Development Company Limited*** C.A.CIV.171/2012

11.5. ***New China Hong Kong Group Ltd v Ernst & Young*** [2008] HKEC 1452

11.6. ***Foss v Harbottle*** (1843) 2 Hare 461

11.7. ***Wallersteiner v Moir (No.2)*** [1975] Q.B. 373 , 390

8th named defendant's submissions

12. It was submitted on behalf of the eight named defendant that the limitation in this regard was four years from the accrual of the course of action and therefore would have been expired by at least June 2009. Further this defendant submitted that at all times the eighth named defendant discharged any duty imposed on him.

13. In support of their submission they relied upon:

13.1. ***AG of Zambia for and on behalf of the Republic of Zambia v Meer Care and Desa*** [2007] EWHC 952

Claimants submissions

14. It was submitted on behalf of the claimants that:

14.1. The company had no knowledge of the director's breach of duty because the knowledge of wrongdoing directors is not attributable to the company of which they are directors. The breach is therefore not discoverable until the directors are no longer in control of the management of the company;

14.2. The only individuals able to initiate legal action on behalf of the company were the wrongdoing directors and they prima facie were not going to take actions against themselves;

14.3. The information allegedly sent to the Ministry of Trade & Industry did not disclose information relating to the breach of duty such that the Ministry of Trade and/or the Cabinet should be considered to have been complicit in the directors breach of duty and/or recklessly indifferent to their breach of duty;

14.4. Any knowledge possessed by the 'officers' of the directors breach is not attributable to the company thus giving the company knowledge of the breach within the primary limitation period;

14.5. The directors as fiduciaries as a matter of law had appositive duty to disclose their own and their fellow directors' breach of duty to the company.

15. In support of their submission they relied upon:

15.1. ***Moore Stephens v Stone Rolls Limited*** *[2009] UKHL 39*

15.2. ***Att. General of Zambia for and on behalf of the Republic of Zambia v Meer Care & Desai*** (a firm) [2007] EWHC 952

15.3. ***Meridian Global Funds Management Asia Ltd v Securities Commission*** [1995] 2 AC 500 PC

15.4. ***Stockwell v Society of Lloyds*** [2007] EWCA Civ. 930

15.5. ***Multinational Gas and Petrochemical Company v Multinational Gas and Petrochemical Services Ltd*** 1983 B & LC 461

15.6. ***UBAF Ltd v European American Banking Corporation*** [1984] QB 713; [1984] 1 WLR 508

15.7. ***Breckland Group Holdings Ltd v London and Suffolk Properties*** [1989] BCLC 100

15.8. ***La Generale des carriers et des Mines v F.G. Hemisphere Associates LLC*** [2012] UKPC 27

Section 14 of the Limitation of Certain Actions Act :

16. The essence of the defendants' contention is that the claim is statute barred, having been filed in 2011 – more than 4 years since the cause of action arose in June 2005. On the other hand, the claimant relies upon the provisions of the Limitation of Certain Actions Act Chapter 7:09 section 14 which states:

> ***14.*** *(1) Subject to subsection (3), where in the case of any action for which a period of limitation is prescribed by this Act, either—*
> *(a) the action is based upon the fraud of the defendant;*
> *(b) any fact relevant to the plaintiff's right of action was deliberately concealed from him by the defendant; or*
> *(c) the action is for relief from the consequences of a mistake,*
> *the period of limitation shall not begin to run until the plaintiff has discovered the fraud, concealment or mistake (as the case may be) or could with reasonable diligence have discovered it.*
> *(2) For the purposes of subsection (1), deliberate commission of a breach of duty in circumstances in which it is unlikely to be discovered for some time, amounts to deliberate concealment of the facts involved in that breach of duty.*

17. In ***Cave***[1], Lord Scott gave his analysis of the inter-relationship and applicability of the equivalent English provision in sections 32(1)(b) and 32(2) of the English Limitation Act:

> ***"[60]*** *I hope I have done justice to the argument but, in my opinion, it cannot be accepted. I find it easy to accept that Mr Doctor's submissions as to the meaning of s 32(1)(b) are correct. I agree that deliberate concealment for s 32(1)(b) purposes may be brought about by an act or an omission and that, in either case, the result of the act or omission, i e, the concealment, must be an intended result. But I do not agree that that renders sub-s (2) otiose.* ***A Claimant who proposes to invoke s 32(1)(b) in order to defeat a Limitation Act defence must prove the facts necessary to bring the case within the paragraph. He can do so if he can show that some fact relevant to his right of action has been concealed from him either by a positive act of concealment or by a withholding of relevant information, but, in either case, with the intention of concealing the fact or facts in question****. In many cases the requisite proof of intention might be quite difficult to provide. The standard of proof would be the usual balance of probabilities standard and inferences could of course be drawn from suitable primary facts but, nonetheless, proof of intention, particularly where an omission rather than a positive act is relied on, is often very difficult.* ***Subsection (2), however, provides an alternative route****. The Claimant need not concentrate on the allegedly concealed*

[1] [2002] UKHL 18 at paragraph 60

facts but can instead concentrate on the commission of the breach of duty. ***If the Claimant can show that the Defendant knew he was committing a breach of duty, or intended to commit the breach of duty*** *- I can discern no difference between the two formulations; each would constitute, in my opinion, a deliberate commission of the breach - then,* ***if the circumstances are such that the Claimant is unlikely to discover for some time that the breach of duty has been committed, the facts involved in the breach are taken to have been deliberately concealed for sub-s (1)(b) purposes****.* ***I do not agree with Mr Doctor that the subsection, thus construed, adds nothing. It provides an alternative, and in some cases what may well be an easier, means of establishing the facts necessary to bring the case within s 32(1)(b).”***
[Emphasis mine]

18. The principles to be gleaned from a reading of the above quotation from Lord Scott are as follows. Section 14 (1) (b) provides relief from the application of the limitation period in circumstances where there has been **deliberate concealment**. That finding of deliberate concealment can be arrived at by two routes:

    18.1. The direct route of an act or omission in relation to a concealment in which the fact of the concealment is the intended result. Lord Millet, in ***Cave***, described it as “*active concealment*”. This carries with it the more onerous burden of proving the facts necessary to bring it within the section – establishing, as it were, the actual *mens rea* to conceal.

    18.2. The alternative, and arguably easier route, created by section 14 (2), to show that the breach of duty was committed in circumstances such that it was unlikely to be discovered for some time.

19. It is sufficient for the purposes of sections 14(1)(b) and 14(2) that there was deliberate concealment but the defendant’s behaviour need not have been charged with the added burden of unconscionability[2].

20. Therefore, section 14(2) does not create a new relief. It does not lead to a mutually exclusive end. Instead, it is akin to a “deeming” section which creates a different path to prove the very relief created by section 14 (1)(b), namely, deliberate concealment.

21. The use of the words “*deliberate commission of a breach of duty*” imposes the requirement that the breach must have been ***knowingly*** committed[3].

22. Of course, the relief in respect of deliberate concealment exists in the context of the remainder of section 14 (1), i.e. that the limitation period shall not run until the concealment has been discovered or, with reasonable diligence, could have been discovered.

23. Therefore, the question for the court’s determination on the preliminary issue of discoverability is whether the breach of duty was committed in circumstances such that it was unlikely to be discovered for some time. If so, then the provisions of section 14 (1) would have been made out in so far as has been directed by the Court of Appeal on the preliminary point.

[2] Ibid, paragraph 65

[3] Ibid, paragraph 61; and see Lord Millet at paragraphs 26 and 26.

The Claimant's status

24. It is essential to the resolution of this matter to consider who the claimant in these proceedings is. Not who ought to have been or who could have been but **who the claimant actually is**.

The Companies Act Chapter 81:01 – a history

25. The **Trinidad and Tobago Companies Ordinance Ch 31 No 1** underwent a radical replacement by the **1995 Companies Act Ch 81:01**. This Act has, since then, met with a number of amendments. On March 21st 1997 the House of Representatives of the Trinidad and Tobago Parliament met to debate the then contemplated Companies Amendment Bill. It has long been accepted that the Companies Ordinance was patterned after the 1929 United Kingdom Companies legislation and at that sitting of the Parliament, the then Minister of Legal Affairs, confirmed as much in her debate, labelling the Companies Ordinance 'definitely out of date.' In discussing the history of the 1995 Act that replaced the outdated Ordinance, the Honourable Minister noted that the Act:

> *"... has been in the making since 1987... thereafter a draft bill was submitted to the NAR Government and it was based on the Canadian Business Corporations Act and a document known as a Caricom Working Draft, and a new Barbados Companies Act."*[4]

26. In considering the amendment to the Act in 1997 the Honourable Minister went further to note that the amended Bill in many cases adopted the language of the Canadian Act. She stated that the reason behind adopting the language of the Canadian Act was,

> *"... Because we believed that we would be able to benefit from the jurisprudence that would be available under the Canadian legislation and therefore there would be recourse to that jurisprudence in interpreting and dealing with our legislation."*[5]

27. The Honourable Minister did note however that the substantive Act itself, while based on the Canadian model, in certain instances had its language altered *"merely sometimes for the sake of establishing a difference from the foreign law and sometimes without fully understanding the purpose of the Canadian sections being copied."* In any event she noted quite clearly that in the Bill that amended the Companies Act we *"have reverted to using the precise wording used in the Canadian Business Corporations Act"* as the then Government was advised that this *"would allow the legal practitioners and others who would be using and interpreting the legislation, to have access to Canadian authorities whether in terms of precedents, textbooks and other commentaries which would provide them with some guidance in dealing with questions which would undoubtedly arise."*

28. She stated further on the new Bill:

> *"It is new, not because we are just going to have it passed and proclaimed, but new in the sense that it is based on the jurisprudence of the Canadian legislation largely. We have been accustomed in this jurisdiction to legislation in the area of company law based on the United Kingdom model, so that there is going to be that kind of change and therefore it would be necessary to have as far as possible seminars and public education with respect to that."*[6]

29. It is therefore quite clear from the foregoing that the local Companies' legislation, both the substantive Act and the amendment to follow, is based on the **Canadian Business Corporation Act**

[4] See Hansard March 21st 1991, 2:05pm
[5] See Hansard March 21st 1991, 2:15pm
[6] See Hansard March 21st 1991, 2:25pm

and the intention of Parliament at the time was that the Canadian jurisprudence would be a guide in dealing with any issues that may arise out of the same.

30. The court must therefore pay particular regard to the Canadian jurisprudence in interpreting issues which arise under the Act.

The Claimant in these proceedings

31. There is no issue as to who is the claimant in these proceedings. It is the claimant company itself. However, a considerable proportion of the 1st – 6th named Defendants' submissions, both before this court and the court of appeal, have centred on certain information provided to persons both inside and outside of the claimant company. The claimant's attorney puts it like this in his submissions:

> *"Defendants' case on the preliminary issue*
> *5. When considering this question it is important to have in mind the Defendants' submissions to the Court of Appeal in respect of the preliminary issue to be tried. At paragraph 18 of their written submission to the Court of Appeal the Defendants advance their case in the following way:*
>
> > *"On the face of it, [the evidence set out at paragraph 9] establishes broadly speaking that the Defendants kept the Corporation Sole, the line Ministry, the Cabinet and the Claimant's officers well informed of all steps which were being taken in the course of deciding whether the investment should be made. It is respectfully submitted that such evidence raises the question whether, assuming a breach of duty occurred, such breach took place in circumstances in which it was unlikely to be discovered for some time. If the judge was persuaded that on the undisputed evidence this pre-condition had not been satisfied he would have been obliged to reject the section 14(2) defence to the limitation point and dismiss the claim, even if because of the conflict of evidence he felt unable to decide whether there was a deliberate breach of duty."*

32. The fact is, no action was commenced until 2011, and that was done by the claimant company itself. There is no suggestion of any action instituted by the shareholder. The question then arises as to whether this court should consider whether it should take into account the knowledge allegedly ascribed to the shareholder by the suggested transparent flow of information and whether that knowledge should be attributed to the claimant company in these proceedings for the purpose of determining the circumstances prescribed in section 14 (2)?

33. It is of note that there has been no authority relied upon by the defendants for that proposition that the knowledge of a shareholder should be attributed to the company of which he/she is a member.

Breach of duty – section 99

34. The breach of duty, for the purpose of this preliminary issue, has been assumed. The duty is defined at section 99 of the Companies Act which provides:

> *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.*

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

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

To whom is the duty owed?

35. The Act quite expressly states to whom the duty is owed.

36. Swinfen Eady J established the notion in ***Percival v. Wright*** [7] that a director does not owe a duty of care to the shareholders. This notion is in furtherance of what this court refers to as the Salomon principle[8] which recognises a company's separate identity. The learned Judge stated:

> *"It was strenuously urged that, though incorporation affected the relations of the shareholders to the external world, the company thereby becoming a distinct entity, the position of the shareholders inter se was not affected, and was the same as that of partners or shareholders in an unincorporated company. I am unable to adopt that view. I am therefore of opinion that the purchasing directors were under no obligation to disclose to their vendor shareholders the negotiations which ultimately proved abortive. The contrary view would place directors in a most invidious position, as they could not buy or sell shares without disclosing negotiations, a premature disclosure of which might well be against the best interests of the company. I am of opinion that directors are not in that position."*

37. This notion has since been codified in section 99 which is set out above.

38. This is a duty which is owed to the company itself so that it goes without saying that a breach of this duty by a director is actionable by the company itself without more. This of course does not preclude the right of a shareholder to seek the leave of the court under section 240 of the Companies Act to bring a derivative action. By that very provision, however, the action must be brought ***in the name of the company***. Clearly, therefore, the director's duty is owed to the company and whereas a shareholder has the capacity to seek derivative action, it is to be pursued, not for his/her own benefit, but in the best interest of the company and the company itself is the vehicle for the claim.

39. Derivative actions or an action by the corporation itself both flow from dissatisfaction with the conduct of the officers or directors and both expose the directors or officers to scrutiny for their conduct.

40. This principle of the separate identity of a company was relied upon by the claimant company but was not addressed by the defendants. The 7th named defendant did refer to the decision in ***Wallersteiner v Moir (No.2)*** [9] and quoted the words of Denning M.R.[10] which are most relevant to the concept of the company's separate identity. However, respectfully, the 7th named defendant's attorney focused his

[7] [1901] P 1375; [1902] 2 Ch. 421

[8] A company, once legally incorporated, "*must be treated like any other independent person with its rights and liabilities appropriate to itself*": ***Salomon v Salomon[1897] AC 22, 30 per Lord Halsbury LC***

[9] [1975] Q.B. 373

[10] At page 390 thereof

submission in this regard on the application of a derivative action, as that case of ***Wallersteiner*** was, whereas this matter for this court's determination is not.

41. One of the questions for this court to determine is not whether this should have been a derivative action but, rather, in light of who the claimant is (not should have been), whether the breach of duty was committed in circumstances such that it was unlikely to be discovered for some time **by this claimant. In fact, the action which this court has before it may be conveniently stated to be one *in personam* rather than *in rem* per se.**

Who is authorised to bring this action?

The Articles of Association

42. The claimant's attorney has submitted[11] that:

> *"The Articles of Association of the claimant company, at Article 85, gives the Directors overarching powers to manage the business of the company: see First Affidavit of Khalid Hassanali. This reflects the powers given by section 60 of the Companies Act. At Article 86(g) the directors are given the power:*
>
> > *"To institute, conduct, defend, compound, or abandon any legal or other proceedings by or against the Company, or its officers, or otherwise concerning the affairs of the Company, and also to compound and allow time for payment or satisfaction of any debts due, and of any claims or demands by or against the Company".*

43. Without a doubt therefore, the primary means of attack envisioned by the incorporators and members of the company in relation to litigation, including in relation to the affairs of the company which would, to my mind, include breaches of duties owed to it by its directors, is by the company itself. This, of course is in accordance with the established authority in this area – ***Foss v Harbottle***[12].

The Rule in *Foss v Harbottle*

44. Born out of the case of the same name, this rule was stated by Sir James Wigram VC that in respect of wrongs done to the company

> *'.... the corporation should sue in its own name and in its corporate character, or in the name of someone whom the law has appointed to be its representative'*[13].

45. However, the classic statement of the rule was not in the case itself, but by Jenkins LJ in ***Edwards v Halliwell***[14]:

> *"The rule in Foss v Harbottle, as I understand it, comes to no more than this. First, the proper plaintiff in an action in respect of a wrong alleged to be done to a company or association of persons is prima facie the company or the association of persons itself. Secondly, where the alleged wrong is a transaction which might be made binding on the company or association and on all its members by a simple majority of the members, no individual member of the company is allowed to maintain an action in respect of that matter*

[11] At paragraph 54 of the claimant's submissions
[12] [1843] 67 ER 189
[13] (1843) 2 Hare 461, 491; 67 ER 189.
[14] [1950] 2 All ER 1064 at 1066

for the simple reason that, if a mere majority of the members of the company or association is in favour of what has been done, then cadit quaestio."

46. The learned Judge went on to identify four exceptions[15] to the rule which, for the purposes of this case, are not relevant. The introduction of section 240 of the Companies Act has virtually removed the need to refer to these common law exceptions and gives a shareholder the statutory right to pursue a derivative action once the shareholder satisfies the requirements of section 240(2)[16].

47. Ramsay and Saunders stated[17], quite correctly in this court's view having regard to the state of the authorities, that:

> "*The rule in Foss v Harbottle, then, comprises two principles. The first limb is known as the "proper plaintiff" rule and is based upon the principle that a company is a separate legal entity, distinct from its shareholders. A wrong done to the company is not a wrong done to the shareholders, and should be redressed by the company itself, taking action in its own name. The second limb is known as the "internal management" principle. The courts will not interfere with the internal management of companies where those acting in management do so acting within their powers".*

48. The rule has attained international recognition and acceptance and has been endorsed by the Supreme Court of Canada in ***Hercules Managements Ltd. v. Ernst & Young*** [1997] 2 S.C.R. 165 [1997] S.C.J. No. 51

49. The Companies Act makes no separate distinction in respect of State companies such as the claimant company and no authority has been provided to suggest that the ***Foss v Harbottle*** principle does not apply to State companies.

The Directors' liability

50. Section 60 of the Companies Act provides:

> *"60. Subject to the articles and any unanimous shareholder agreement, the directors of a company shall—*
>
> *(a) exercise the powers of the company directly or indirectly through the employees and agents of the company; and*
>
> *(b) direct the management of the business and affairs of the company.*

51. At section 97, the following provisions are set out allowing the directors of a company to also appoint company officers:

> *97. Subject to this Act and to the articles or Bye-laws of a company or any unanimous shareholder agreement—*
>
> *(a) the directors of the company may designate the offices of the company, appoint as officers persons of full capacity, specify their duties and delegate to them powers to*

[15] Ibid, at 1067 et al

[16] See "***Litigation By Shareholders And Directors: An Empirical Study Of The Statutory Derivative Action***", (2006) Ramsay & Saunders, University of Melbourne Legal Studies research Paper No. 250

[17] Ibid at page 9

manage the business and affairs of the company, except powers to do anything referred to in section 84(2);

(b) a director may be appointed to any office of the company; and

(c) two or more offices of the company may be held by the same person.

52. In ***Lennard's Carrying Co. v. Asiatic Petroleum Co.,*** [1915] A.C. 705, the Lord Chancellor, Viscount Haldane, laid down the general principle of corporate liability which is still the guiding principle in United Kingdom law, (at pp. 713-14):

> *... a corporation is an abstraction. It has no mind of its own any more than it has a body of its own; its active and directing will must consequently be sought in the person of somebody who for some purposes may be called an agent, but who is really the directing mind and will of the corporation, the very ego and centre of the personality of the corporation. That person may be under the direction of the shareholders in general meeting; that person may be the board of directors itself, or it may be, and in some companies it is so, that that person has an authority co-ordinate with the board of directors given to him under the articles of association, and is appointed by the general meeting of the company, and can only be removed by the general meeting of the company ... .*
> *It has not been contended at the Bar, and it could not have been successfully contended, that s. 502 is so worded as to exempt a corporation altogether which happens to be the owner of a ship, merely because it happens to be a corporation. It must be upon the true construction of that section in such a case as the present one that the fault or privity of somebody who is not merely a servant or agent for whom the company is liable upon the footing respondeat superior, but somebody for whom the company is liable because his action is the very action of the company itself."*

53. In considering the breach of duty alleged against the defendants, which for the purposes of this application, have been assumed to exist, the court must look at the principles involved in ascertaining when the knowledge of this breach would have become known to the claimant. This, logically, leads to a consideration of the rules of attribution pertinent to company law.

54. This point was not addressed by the attorneys at law for the 1st - 6th named defendants or for the 7th named defendant in their written submissions but the rules of attribution were accepted by them in their oral submissions. However, attorneys for these defendants relied on the information provided by the 1st – 6th named defendants to the shareholder and other officers to buttress their submission that circumstances existed in which the 1st – 6th named defendants were fully transparent and as a result of which the breaches were likely to have been known..

55. On the other hand, the claimant has sought to establish corporate identity and rely on the same and to deny that the 1st – 6th named defendants' or the claimant's officers' knowledge can be attributed to the claimant for the purpose of bringing an action against the 1st – 6th named defendants for breach of duty and the section 14 limitation point discussion. In support of that contention, the claimant relied upon the decisions in ***Meridian Global Funds Management Asia Limited v. Securities Commission*** and ***Stone Rolls Limited v. Moore Stephens.***

The principles of attribution

56. The latter decision was a decision of the House of Lords while the former was a decision of the Privy Council. The latter involved the duty of care owed to the claimant company by the defendant

auditors where the sole directing mind and will of the claimant company, along with the company, was successfully sued for deceit by the company's bank. By a narrow majority of 3 to 2, the House of Lords held that the defence of ex turpi causa non oritur actio applied. What is helpful in this case is the House's discussion of the attribution principle in determining, on the facts of that case, whether the knowledge of the company's sole directing mind – Mr. Stojevic – could be attributed to the company.

Stone Rolls Limited v. Moore Stephens

57. Lord Phillips gave the first reported decision. He discussed "Attribution and Hampshire Land"[18]. His discussion started with the approval of Lord Hoffmann's analysis of attribution in ***Meridian*** where Lord Hoffman categorized 3 rules of attribution applicable to companies. Those were described as:

57.1. The primary rules which "*will generally be found in its constitution, typically the articles of association, and will say things such as 'for the purpose of appointing members of the board, a majority decision of the shareholder shall be a decision of the company' or 'the decisions of the board in managing the company's business shall be the decisions of the company'. There are also primary rules of attribution which are not expressly stated in the articles but implied by company law, such as 'the unanimous decision of all the shareholders in a solvent company about anything which the company under its memorandum of association has power to do shall be the decision of the company': see Multinational Gas and Petrochemical Co v Multinational Gas and Petrochemical Services Ltd [1983] 2 All ER 563, [1983] Ch 258.*"[19]

57.1. The secondary rules which "*builds upon the primary rules of attribution by using general rules of attribution which are equally available to natural persons, namely, the principles of agency. It will appoint servants and agents whose acts, by a combination of the general principles of agency and the company's primary rules of attribution, count as the acts of the company. And having done so, it will also make itself subject to the general rules by which liability for the acts of others can be attributed to natural persons, such as estoppel or ostensible authority in contract and vicarious liability in tort.*"[20]

57.2. The special rule which applies when "*neither of these solutions is satisfactory; in which the court considers that the law was intended to apply to companies and that, although it excludes ordinary vicarious liability, insistence on the primary rules of attribution would in practice defeat that intention. In such a case, the court must fashion a special rule of attribution for the particular substantive rule. This is always a matter of interpretation: given that it was intended to apply to a company, how was it intended to apply? Whose act (or knowledge, or state of mind) was for this purpose intended to count as the act etc of the company? One finds the answer to this question by applying the usual canons of interpretation, taking into account the language of the rule (if it is a statute) and its content and policy.*"[21]

[18] At paragraph 39 et al. in (2010) 2 LRC at 793
[19] At page 506 paragraph D
[20] At page 506 paragraph F
[21] At page 507 paragraph F

58. Consequently, words and actions of a company's agents may generally be attributed to the company under an application of the foregoing rules. The 1st – 6th defendants' attorney submitted that the very fact that Lord Hoffman said that a majority decision of the shareholders can a decision of the company renders the shareholder's knowledge relevant.

59. As far as this court is concerned, these rules of attribution as set out in the ***Meridian*** case and approved in ***Stone Rolls*** accords with the general common law of agency which is applicable in the UK, the Canadian jurisdiction and in our local jurisdiction.

60. To these rules of attribution, however, there are exceptions.

The Hampshire Land principle

61. During the course of his judgment, Lord Phillips spoke of the Hampshire Land principle[22]. This principle is an exception to the normal rules of attribution. As he put it:

> *"The effect of Hampshire Land is that* ***knowledge*** *of the agent will not be attributed to the principal when the knowledge relates to the* ***agent's own*** ***breach of duty to his principal****. The rationale for Hampshire Land has been said to be that it is contrary to common sense and justice to attribute to a principal knowledge of something that his agent would be anxious to conceal from him."*
> [Emphasis mine]

62. This principle was discussed and endorsed by the rest of the Learned Law Lords in the House, though not necessarily applying it to the facts of the case.

63. Lord Scott stated[23]:

> *"In particular, if the director in breach of duty has an adverse interest to that of the company, the knowledge of the breach of duty will not be imputed to the company: see JC Houghton & Co v Nothard Lowe & Wills Ltd [1928] AC 1, 19 where Viscount Sumner said that it would be "contrary to justice and common sense to treat the knowledge of such persons as that of their company, as if one were to assume that they would make a clean breast of their delinquency".*

64. Lord Walker indicated that the principle extended beyond fraud by the delinquent director to breach of duty[24] and then went on[25] to give further examples of the application of the principle over the years and said [26]:

> *"In all these cases there was a company which was the victim of fraud or serious breach of duty, and the court held that it was not to be prejudiced by the guilty knowledge of an individual officer who could not be expected to disclose his own fault."*

65. Lord Brown was less definite about the extension of the principle to breach of duty but did not deny its applicability when he said:[27]

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[22] At paragraph 42 et al in (2010) 2 LRC at 795.
[23] See para 107 at 813
[24] Paragraph 137 at 821
[25] See paragraphs 137 – 145, in (2010) 2 LRC at 821
[26] At paragraph 144, in (2010) 2 LRC at 823
[27] In paragraph 198 at 843

"The Hampshire Land exception recognises that in reality agents will not disclose to their principals the fact that they are committing fraud, least of all when they are defrauding the principals themselves, and that it would be contrary to common sense and justice for the law to presume otherwise. Indeed, the Hampshire Land principle may well go wider than this and extend also to breaches of duty by the agent short of fraud--consider, for example, Vaughan Williams J's judgment in Hampshire Land itself and Rix J's judgment in Arab Bank plc v Zurich Insurance Co [1999] 1 Lloyd's Rep 262--and to agents' frauds even if committed against others than their principals, and perhaps irrespective of whether the principal is to be regarded as "a secondary victim"--see again Rix J's judgment in Arab Bank."

The Adverse Interest principle

66. Lord Phillips went on to define "the adverse interest rule"[28] which he stated tended to be confused with the Hampshire Land principle[29] and which was developed by the courts of the United States.

> *"Under the adverse interest rule the **knowledge** and **conduct** of an agent will not be attributed to the principal where the **agent's actions are adverse to the interests of his principal**. In some states the agent's conduct must be targeted against the principal if the rule is to apply. In others, the rule applies more widely, in circumstances where the agent's conduct is done for his personal benefit and is adverse to the interests of his principal, but is not aimed against his principal."*
> [Emphasis mine]

67. He described the decision of the Supreme Court of Canada in ***Canadian Dredge & Dock Co Ltd v The Queen***[30] as the "*operation of a similar principle in the context of the criminal liability of a company for the acts of its directing mind and will*"[31] which was "*a principle of attribution that I would accept as applicable under English common law.*"

68. This court prefers the nomenclature of the adverse interest rule. The current English provisions describes the duty[32], amongst the general common law duties and others mentioned in that Act, as the duty to:

> *"…act in the way he considers, in good faith, would be **most likely to promote the success of the company for the benefit of its members as a whole**, and in doing so have regard (amongst other matters) to—*
> *(a) the likely consequences of any decision in the long term,*
> *(b) the interests of the company's employees,*
> *(c) the need to foster the company's business relationships with suppliers, customers and others,*
> *(d) the impact of the company's operations on the community and the environment,*
> *(e) the desirability of the company maintaining a reputation for high standards of business conduct, and*
> *(f) the need to act fairly as between members of the company.*
> [Emphasis mine]

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[28] At paragraph 45, in (2010) 2 LRC at 795.
[29] Lord Walker, however, identified them as the same – see paragraph 144 in (2010) 2 LRC at 823 – as did Lord Brown – see paragraph 198 at 843
[30] (1985) 19 DLR (4th) 314
[31] At paragraph 47, ibid.
[32] S. 172 of the Companies Act 2006

69. The local provision[33], however, states it as the duty to:

> *"(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"*
> [Emphasis mine]

70. The local Act also provides[34]:

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

71. Therefore, to my mind, the adverse interest rule seems the more appropriate label to be applied in our jurisdiction where our statute provides for a company's director to focus on what is in the "*best interests of the company*". Notwithstanding this labelling, however, there is no doubt that eminent legal minds have expressed in no lesser place than the House of Lords that they see no major difference between these 2 applications as exceptions of the rules of attribution.

Attribution and the limitation period

72. Having established the exception of the types of knowledge/conduct which may not be attributed to a company, the court will now apply the rules set out above to section 14(2) of the Limitation Act. For ease of reference, that section is reproduced once again:

> *"(2) For the purposes of subsection (1), deliberate commission of a breach of duty in circumstances in which it is unlikely to be discovered for some time, amounts to deliberate concealment of the facts involved in that breach of duty."*

73. During the course of the hearing on this preliminary point, the question was raised – by whom was this breach of duty to be discovered? The defendants have opined that the answer to that question is the relevance of the knowledge of the shareholder – Corporation sole. The claimant submits that the answer has to be the company itself.

74. It has been suggested in "***The Limits of Derivative Actions: The Application of Limitation Periods to Derivative Actions***" [35]:

> *"75. Corporate legislation outlines what corporate powers can be exercised by the directors and which can be exercised by the shareholders. This division of power prevails in the absence of a unanimous shareholders agreement. Under such legislation, shareholders are entitled to elect and remove directors[36], can attend annual meetings, and review the corporation's financial information[37]. They do not, however, gain any proprietary rights in the corporation by virtue of being a shareholder[38]. The corporation owns its assets and in*

[33] S. 99 (1), see above
[34] S. 99 (2)
[35] Robert W. Thompson, QC, Scott T. Jeffers and Codie L.Chisholm (2012) 49:3 Alta L Rev 603 – 633 at paragraphs 75 and 76.
[36] See e.g. ABCA, ss 106, 109; Ontario Business Corporations Act, RSO 1990, c B.16, ss 119, 122 [OBCA]; Canada Business Corporations Act, RSC 1985, c C-44, ss 106, 109 [CBCA].
[37] See e.g. ABCA, ibid, Parts 11, 13; OBCA, ibid, Part VII; CBCA, ibid, Parts XII, XIV
[38] Teck Corp Ltd v Millar (1972), 33 DLR (3d) 288 at 307 (BCSC) [Teck].

> *general, the shareholders have no right to call for the property of the corporation*[39]*. Additionally, the share itself consists of a bundle of rights which include, subject to the articles, the right to a dividend, the right to a portion of the assets upon winding up, and the right to vote*[40]*.*
>
> *76. The majority of corporate power, including the power of managing and carrying on the corporation's business, is vested in the directors*[41]*. The directors' power to manage the corporation is complete until the director is removed from office and is not fettered by the shareholders*[42]*. As a result, shareholders have no general power to bind the corporation through a general meeting*[43]*. Similarly, shareholders are not agents of the corporation and cannot bind the corporation through agency principles*[44]*. Further, shareholders do not owe the corporation any fiduciary duties and are not obligated to account for profits made at the expense of the corporation or its other shareholders*[45]*.* ***Comparable to the American jurisprudence, these principles suggest that the shareholder's knowledge is similarly irrelevant in Canadian law for the purposes of calculating the corporation's limitation period."***
> [Emphasis mine]

75. It is this court's respectful view that this statement is applicable to our jurisdiction and this court agrees with the statement in the context of an action being brought by the company. The writers of the article postulate that, even for a derivative action, it is the company's knowledge and not the shareholder's knowledge which is relevant. That is not a question to be determined by the court in these proceedings as it is not a derivative action.

76. The article is a paper recommending the adoption of the US company law principle known as the "adverse domination doctrine" to derivative actions to avoid the possibility of actions commenced by companies as opposed to actions commenced by shareholders having different limitation periods. Of course, this is not a derivative action so that situation does not arise. However, the article is helpful in establishing and understanding of the "adverse domination doctrine" and this court is of the view that the discussion is extremely relevant to the issue for determination.

The Adverse Domination Doctrine

77. The above mentioned article went on to suggest[46] that, in the situation of a consideration of the relevant limitation period for bringing an action:

> *"Specifically, Canadian courts should adopt the majority test of the "adverse domination doctrine" in calculating the limitation periods for derivate actions. Under this approach, it is the knowledge of the corporation that is relevant for determining limitation periods and, the limitation period would not begin to run in respect to the corporation's claim against the*

[39] United Fuel Investments Ltd v Union Gas Company of Canada Ltd, [1966] 1 OR 165 (CA).
[40] Bradbury v English Sewing Cotton Co Ltd, [1923] AC 744 at 753 (HL (Eng)).
[41] See e.g. ABCA, supra note 10, s 101; OBCA, supra note 135, s 115; CBCA, supra note 135, s 102
[42] Teck, supra, at 307
[43] Kevin P McGuinness, Canadian Business Corporations Law, 2d ed (Markham, Ont: LexisNexis Canada, 2007) at s. 2.13; see Grundt v Great Boulder Proprietary Mines Ltd, [1948] Ch 145 at 157 (CA).
[44] McGuinness, ibid, s. 2.122.
[45] See William B Sweet & Associates Ltd v Copper Beach Estates Ltd (1993), 108 DLR (4th) 85 (BCCA); McGuinness, supra note 7 at 1170, n 401
[46] At paragraph 5 and discussed in greater detail in the article later on.

wrongdoers so long as the majority of the board is comprised of wrongdoers or the board is otherwise subject to the control of those wrongdoers. This doctrine is consistent with the identification theory and general agency principles, which hold that a corporation is not imputed with the knowledge of the directors' and officers' own wrongdoing. Rather, it is not until a majority of the board is comprised of non-wrongdoers that the corporation is in a meaningful position to protect its interests and it is at this time that the corporation is imputed the knowledge of such wrongdoing. Accordingly, it is at this time that the limitation period should begin to run."

78. In certifying the application of the doctrine for the United States Bankruptcy Court for the Western District of Kentucky, Justice Cunningham, in ***Wilson v. Paine*** 288 S.W.3d 284 (2009), said[47]:

> *"The doctrine of adverse domination shares the same theoretical underpinnings as the discovery rule. Michael E. Baughman, Defining the Boundaries of the Adverse Domination Doctrine: Is There Any Repose for Corporate Directors?, 143 U. Pa. L.Rev. 1065, 1093 (1995). It has been described as "merely a corollary of ... [the] discovery rule, applied in the corporate context." Resolution Trust Corp. v. Farmer, 865 F.Supp. 1143, 1154 n. 11 (E.D.Pa.1994) (citing In re Lloyd Securities, 153 B.R. 677, 685 (E.D.Pa.1993)).*
>
> > *It is the `inherently unknowable' character of the injury that is the critical factor that governs the applicability of the discovery rule. A corporate plaintiff does not have `knowledge' of an injury to itself until those individuals who control it know of the injury and* ***<u>are willing to act on that knowledge</u>****. (Emphasis added.)*
> > *Id. at 1155.*
>
> *Moreover, "a corporate plaintiff cannot `discover' injuries to the corporation caused by those who control the corporation." Clark v. Milam, 192 W.Va. 398, 452 S.E.2d 714, 718 (1994). Therefore, adverse domination provides that the "cause of action will be tolled during the period that a plaintiff corporation is controlled by wrongdoers." Resolution Trust Corp. v. Gardner, 798 F.Supp. 790, 795 (D.D.C.1992).*
>
> *The doctrine of adverse domination has not heretofore been considered by this Court, but has been widely applied by federal courts in cases involving corporate causes of action against directors and officers.[1] See, e.g., Farmers & Merchants Nat. Bank v. Bryan, 902 F.2d 1520 (10th Cir.1990); IIT, an Intern. Inv. Trust v. Cornfeld, 619 F.2d 909 (2d Cir.1980); International Railways of Central America v. United Fruit Co., 373 F.2d 408 (2d Cir.1967), cert. denied, 387 U.S. 921, 87 S.Ct. 2031, 18 L.Ed.2d 975 (1967); Resolution Trust Corp. v. Kerr, 804 F.Supp. 1091 (W.D.Ark.1992); Resolution Trust Corp. v. Gallagher, 800 F.Supp. 595(N.D.Ill.1992); Resolution Trust Corp. v. Gardner, 798 F.Supp. 790 (D.D.C.1992); Federal Deposit Ins. Corp. v. Howse, 736 F.Supp. 1437 (S.D.Tex.1990); Federal Deposit Ins. Corp. v. Greenwood, 739 F.Supp. 450 (C.D.Ill. 1989); Federal Deposit Ins. Corp. v. Carlson, 698 F.Supp. 178 (D.Minn.1988); Federal Sav. and Loan Ins. Corp. v. Burdette, 696 F.Supp. 1196 (E.D.Tenn.1988); Federal Deposit Ins. Corp. v. Hudson,673 F.Supp. 1039 (D.Kan.1987); Federal Sav. and Loan Ins. Corp. v. Williams, 599 F.Supp. 1184(D.Md.1984); Federal Deposit Ins. Corp. v. Bird, 516 F.Supp. 647 (D.P.R.1981); Saylor v. Lindsley, 302 F.Supp. 1174 (S.D.N.Y.1969).*
>
> *The doctrine is rooted in the long-established principles of agency law.* ***<u>Adverse domination is premised on the notion that knowledge is not imputed if the agent is acting in a manner adverse to the interests of the principal</u>****. This rule is consistent with Kentucky agency*

[47] The report of this case which this court has relied upon has no identifiers for its page layout or paragraphs. That report was found by this court at http://www.leagle.com/decision/In%20KYCO%2020090706128

law. Owsley County Deposit Bank v. Burns, 196 Ky. 359, 244 S.W. 755 (1922). Thus, "[t]he knowledge of the agent is the knowledge of the corporation he serves when the knowledge relates to some matter over which the agent has control and with which his duties are connected and when they relate to matters over which he has authority...."Warfield Natural Gas Co. v. Anderson, 249 Ky. 586, 61 S.W.2d 27, 28 (1933). In the corporate context, the corporation is the principal and the board of directors as a whole is the agent. When the board of directors is accused of breaching its duty to the corporation, it necessarily is accused of acting adversely to the principal's interests. See Resolution Trust Corp. v. Farmer, 865 F.Supp. at 1155-56.

"Because, in most cases, defendants' control of the corporation will make it impossible for the corporate plaintiff independently to acquire the knowledge and resources necessary to bring suit," the adverse domination rule "presumes that actual notice will not be available until the corporate plaintiff is no longer under the control of the erring directors." Hecht v. Resolution Trust Corp., 333 Md. 324, 635 A.2d 394, 405 (1994). "This prevents the culpable directors from benefiting from their lack of action on behalf of the corporation." Id. at 408.

While courts which have been confronted with the question have almost uniformly embraced adverse domination,[2] there still exists some variation in its application. Notably, courts have differed on the degree of domination of the board required in order for the corporation to claim protection of the doctrine, as well as the degree of culpability that the plaintiff must allege against the directors."
[Emphasis mine]

79. The learned Judge went on to say:

> *"The doctrine of adverse domination recognizes the reality of situations involving wrongdoing by controlling directors and officers of a corporation and the corporation's inability to institute suit to protect it. It is applied to toll statutes of limitations or to delay accrual of causes of action in situations when those in power control the information necessary to institute suit on behalf of an injured corporation. These parties cannot be expected to sue themselves or to initiate an action contrary to their own interests. Today, we hold that the doctrine of adverse domination may operate to toll the statute of limitations under KRS §§ 271B.8-330(3) and 271B.6-400 while directors, who are guilty of alleged misconduct, exercise control over a corporation."*

80. To my mind, this is a sound principle of company law which is applicable to Trinidad and Tobago. If, as referred to above, knowledge of the assumed breach of duty by a delinquent director cannot be attributed to the company under the exceptions of the laws of agency applicable to company law and expressed as the Hampshire Land or adverse interest principles, then that breach of duty will not be actionable by the company until it can be prosecuted by one of the company's agents with the authority vested in them to do so either by statute or by the Articles of Association or shareholder agreement or in some other legitimate and effective manner. That is, of course, in the absence of a derivative action. In the case, such as the one before this court in these proceedings, there is no allegation whatsoever that the 1st – 6th named defendants did not constitute the majority of the board of directors. Considering the case before this court, therefore, the "adverse domination principle" is of great appeal especially if the integrity of the fundamental pillar of the separate identity of the company is to be maintained.

The Resolution of the Application

81. Much was made of the fact that minutes of meetings and documents and information and records were sent to the Honourable Minister of Finance as Corporation Sole to keep the Minister apprised of the decisions and machinations of the claimant company. There is no doubt in my mind that had the claimant been the shareholder in this matter, then the defendants' contentions may have been more pertinent.

82. The fact that action could have been brought by the shareholder does not preclude an action being brought by the company itself. No authority has been produced for that proposition. In fact, the authorities stated above advocate the company itself to be the prima facie protagonist in claims brought to protect itself from loss and damage caused to it, as in this case. In such an instance as this is, the power to decide whether or not to commence proceedings is defined in the Articles of Association and such a decision could not have been taken by any other agent of the company but the directors. Therefore, the company's right of action, following on from the adverse domination doctrine, could only arise when the majority of the directors, who can authorise an action, change to allow the same to be done.

83. The circumstances referred to in the section 14(2) relates, to my mind, to the discoverability of the directors' breaches of duties **by the company** and not the shareholder – the latter not being entitled to the benefit of any duty by the directors under section 99 of the Act. In a case such as this where the assumed breaches relate to the entirety of the board of directors, the circumstances which exist make it highly unlikely, and most improbable, for the assumed breaches to have been discovered by the claimant until the alleged wrong doers relinquish or are removed from their positions, for whatever reason. This position goes back to the fundamental question – by whom was the breaches to have been discovered? The answer is – by the company and until the majority is removed, it is unlikely that the company would have discovered the breaches bearing in mind the exceptions to the attribution principles.

84. The attorney for the 1st – 6th named defendants' attorney has suggested at paragraph 20 of his submissions that:

> *"It would be grossly unfair to interpret section 14(2) in such a way as to subject directors who have acted with transparency to legal proceedings some ten years after a decision was made, when they are in no way responsible either for the fact that their directorships were not determined earlier or for the fact that their breach of duty was not discovered and acted on earlier. Were the court to adopt such an interpretation, there would be a great disincentive for anyone to put herself forward for public service on the board (of) a state enterprise, particularly in the politically charged climate which is so endemic in Trinidad and Tobago. They would fear that they may be exposed to legal action many years later, once the government changes, for any decision which went wrong, even though they kept their relevant principals fully informed of their decision making process."*

85. Respectfully, that is not the appropriate test. The suggestion of the possibility of there being a disincentive ought not to arise. Any job carries the potential of legal proceedings if there is a failure to act properly. The potential subjection of any director to legal proceedings is a reality which hovers over every board to ensure that decisions made and conduct carried out are properly done to the appropriate standard and can be policed and remedied if appropriate. The burden lies on the claimant, however, to show that such a breach did occur and that it was deliberate. If the breach is proven after a full trial then there is no justification in trying to introduce a public policy element, as seems to be

the purpose behind the submission, to insulate wrongdoers. Especially in the case of State companies where public funds are at stake. If, however, the director has abided by his/her duty under the common law and under part 99 of the Act, then any such legal proceedings brought would be dismissed and the director would be vindicated appropriately. Political victimisation, as alluded to, as real as it may be, does not feature in the court's mind in the exercise of its function as the determiner of facts relating to deliberate breaches of duty. Public scrutiny of public posts must exist to secure public funds. It is, to my mind, no answer to that scrutiny that persons would be dissuaded from public office if the courts were to impose sanctions based on accepted international legal principles in determining whether breaches of duty have occurred. If the court were to accept this submission, then the court would be creating a public policy of immunity from scrutiny which could not have been the intention of Parliament, especially in relation to State funds. The submission is based on an assumption of fact yet to be determined at trial - i.e. that there was full transparency and no deliberate breach and it is this court's respectful view that, until fully canvassed, those assumptions are yet to be established as true or untrue. The submission is also based on a further submission that their principal is the shareholder and, in the court's respectful view, that is a mistaken approach for the reasons referred to above in relation to corporate identity.

86. The 7th named defendant's attorney has submitted:

> *"3.16 It follows that the very same breach of duty claim that the Claimant now seeks to assert in this action is the very same breach of duty claim that lay open, since June 23, 2005, for the bringing by its shareholders.*
>
> *3.17 It having been open to the Claimant's shareholders to have done so all along, the Claimant cannot have been entitled to wait for a new board of directors to be appointed to resolve to do so.*
>
> *3.18 To enable the Claimant to use section 14(1) (b) to extend the limitation period on the undisputed facts in this case would be a gross abuse. The Claimant is not entitled to use the Act to improve its position in relation to limitation by reliance on any facts that occurred after the Claimant's board had changed."*

87. This court respectfully disagrees with that submission on the case before it. It is for the very reason of corporate identity which is essential to company law that this court is of the view that section 14 (2) applies in favour of the claimant company in these circumstances.

The Order

88. Consequently, the Notice of Application filed by the 1st – 6th named defendants on the 2nd of March 2012 is dismissed and they shall pay the claimant's costs of the application to be assessed pursuant to Part 67.11 of the Civil Proceedings Rules.

.....

DEVINDRA RAMPERSAD J

Assisted by:
Krystal Richardson,
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Judicial Research Assistant