REPUBLIC OF TRINIDAD AND TOBAGO

IN THE COURT OF APPEAL

Civil Appeal No. 171 of 2012
H.C.C. No. CV2011-03992

BETWEEN

KENNETH JULIEN
ULRIC MC NICOL
BRIAN COPELAND
RENE MONTEIL
EUGENE TIAH
SONIA NOEL

Appellants/Defendants

AND

EVOLVING TECKNOLOGIES AND ENTERPRISE DEVELOPMENT COMPANY LIMITED

Respondent/Claimant

PANEL: **N. BEREAUX, J.A.**
H. STOLLMEYER, J.A.

APPEARANCES: **D. Mendes SC, J Jeremie SC, M. Quamina, S. Young for the appellants**
V. Nelson QC, I. Khan SC, G Ramdeen for the Respondent

DATE DELIVERED: 11 December 2012

JUDGMENT

Delivered by Bereaux, J.A.

Introduction

[1] This is an appeal against the decision of Rampersad J postponing to trial

the hearing of the appellants' application to strike out the respondent's claim on the ground that it is statue barred. It concerns whether the respondents can rely on section 14(2) of the Limitation of Certain Actions Act Chap 7:09 (the Act) which postpones the limitation period where there has been a concealment of facts or a concealment of a breach of duty relevant to a plaintiff's cause of action. The judge, in an e-mail sent to the parties through his Judicial Support Officer on July 24th 2012, concluded that the *"issue is better suited to be dealt with at the trial since there does not seem to be any unequivocal evidence in the affidavits in support of the appellants' contention which would justify this matter being disposed of summarily"*.

[2] The appellants contend that the judge's finding was wrong in law. There was in fact unequivocal and unchallenged evidence on which the defendant's application is based. They ask that the judge's decision be set aside and that the matter be remitted to Rampersad J to consider and determine the application.

Grounds of Appeal

[3] The appellants contend that the judge failed to take any or any sufficient account of the following -

(i) that the facts on which the appellants rely in their applications were not in dispute

(ii) the time wasted, as well as the expense incurred in going to trial, should the claim be dismissed at trial on the very grounds on which the application is based.

The Pleadings

[4] The respondent brought this action against the appellants who are former directors of the respondent for breach of director's duty, damages for negligence

and breach of duty of care which they purportedly owed to the respondent pursuant to section 99 of the Companies Act Chap 81:01.

[5] The respondent alleged that the appellants had approved board resolutions on 18th January 2005 and 17th May 2005 by which the sum of five million United States dollars (US $5,000,000.00) was ultimately invested in Bamboo Network (Cayman Islands) Limited (BNL). The essence of the respondent's case is that the investment in BNL was a bad one and had the appellants obtained information and ensured that a reasonable due diligence exercise had been carried out into the financial affairs of BNL to determine whether the investment was a prudent one, they would have found that it was not a prudent investment and the investment would not have been made.

[6] In addition to denying that they were in breach of duty, the appellants contend that the action is barred by virtue of section 3(1) of the Act as having been brought after the expiry of four years from the date on which the cause of action accrued. The respondent in its reply, dated 27th April 2012, set out particulars of the appellants' knowledge of the necessity to undertake a due diligence exercise prior to the decision to invest. The respondent asserts that the appellants knew that they were committing a breach of duty and that such a breach occurred in circumstances in which it was unlikely to be discovered by the claimant or the Government of the Republic of Trinidad and Tobago, until new directors were appointed and legal advice obtained as to whether there was a cause of action maintainable against the appellants.

[7] The respondent thus contends that section 14(2) of the Act extends the time for the filing of its claim to four years from the date of discovery of the breach. In this case the respondents date of knowledge was 9th June 2011 after the Cabinet, in July 2010, had authorised the services of legal advisors to conduct an audit into the respondent's operations and after a new board, on 9th June 2011, had considered their advice and resolved to take legal action against the appellants.

The requirements of section 14

[8] Section 14(1) and (2) are the relevant provisions for present purposes. They provide as follows -

"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."

Summary of the Respondent's allegations

[9] (i) The respondent alleges that the appellants were in breach of the duty of care owed to it to ensure that any investment and expenditure made was prudent.

(ii) That whilst the appellants constituted its board of directors, they passed resolutions to make an investment of five million United States dollars (US$5,000,000) in Bamboo Networks Limited ("BNL") and a resolution approving the execution of a cooperation agreement for that investment, without making any due diligence inquiries as to the financial affairs of BNL. That investment was subsequently lost as BNL did not perform any of its obligations set out in the agreement and has failed to return the investment to the respondent. The respondent attributes this loss to the negligence or breach of duty of care of

the appellants as its directors to ensure that any investment and or expenditure the respondent made was a prudent one.

(iii) The respondent alleges that after the Business Development Committee (a sub-committee of the board of directors) considered the proposal regarding the investment of five million United States dollars in BNL on July 1st 2004, the board was advised and directed to carry out inquiries into the financial position of BNL before accepting its investment proposal, as follows :

(a) In or about October 2004 the Team Leader, Business Development at the National Energy Company, Dr. Vernon Paltoo, evaluated the BNL investment proposal on behalf of the respondent and recommended, inter alia, a comprehensive due diligence exercise to evaluate the finances, capability and portfolio of BNL. No such due diligence as recommended was carried out prior to the execution of the agreement or remittance of the investment.

(b) On or about 30th December 2004, the Ministry of Finance, having visited what purported to be the operations of BNL in Hong Kong and mainland China, advised that the claimant should not invest in BNL. They cited the poor financial position of BNL, which was insolvent, BNL's short track record and its lack of proper management structure. In spite of this on the 18th January 2005, the appellants resolved to proceed with the investment in BNL.

(c) The Memorandum of Understanding (the MOU) between the claimant and BNL, which was ratified by the board of directors, set out a series of due diligence inquiries to be carried out by the claimant prior to execution of the cooperation agreement with BNL and remittance of the investment. However, no such due diligence was carried out before the execution of the agreement or remittance of the investment.

(d) On May 12th 2005, the Cabinet directed the appellants to carry out due diligence prior to any investment in BNL. It directed that due diligence should be carried out into whether the investment was fair value for the share in the company receivable for the investment and any relevant

matters of legal or accounting nature including latest audited financial statements and information. No such due diligence was carried out before the execution of the agreement and/or remittance of the investment.

(iv) Finally, the respondent alleges that in accepting BNL's investment terms, the appellants did not have sufficient information which would have enabled them to make a prudent decision; that they relied on a representation (which turned out to be false) from BNL of a valuation by Tiger Technologies (Tiger), without first obtaining proof of the valuation. Further, BNL failed to provide information such as the Tiger share evaluation, documentation on Tiger, unaudited accounts for 2004-2005 and the end of year financials for 2004 prior to the execution of the Agreement or the remittance of the investment. The respondent alleges that if the appellants had this information, they would not have resolved to make the investment and/or execute the agreement and/or remit the funds to BNL.

The application

[10] The application to strike out the claim was filed on 2nd March 2012. It was supported by the affidavits of Michelle Pryce, Eugene Tiah and Beverly John. The main affidavit was provided by Mr. Tiah. In summary, his affidavit alleged as follows -

(i) That at all material times, minutes of Board meetings and sub committees of the board detailing the steps taken with respect to the investment in BNL were prepared and submitted to the Ministry of Trade (which was the line Ministry) and the Ministry of Finance.

(ii) Members of the executive management of the respondent attended all meetings relevant to the decision to invest in BNL.

(iii) That a due diligence exercise was in fact conducted in conjunction with

the Ministry of Finance. The Ministry of Finance was engaged because the board had decided to involve the Corporation Sole (the shareholder) in the approval process.

(iv) That on receiving correspondence from the Ministry of Finance indicating its view that the respondent should not invest in BNL, the appellants discussed the Ministry's concerns at a board meeting in the presence of executive management, viewed a presentation on the due diligence exercise and decided to pursue the investment.

On the instructions of the board, senior managers were mandated to persuade the Ministry of Finance of the viability of the investment by providing the Ministry with a presentation of the same due diligence exercise and to clarify any doubts which the Minister of Finance may have had. In that regard management also sought from the Ministry of Finance, any other conditionalties it may have wished to introduce into the cooperation agreement (by which the decision to invest was made). The board also instructed management to make a full presentation to the Minister of Trade and to obtain his approval for the investment.

(v) That the decision to invest in BNL was put before a sub-committee of the Cabinet and the full Cabinet for its approval.

(vi) That the Secretary to Cabinet was provided with a note in favour of the investment along with the cooperation agreement, the project schedule, the status of litigation against BNL and a summary of BNL's latest financial projections.

(vii) That the Ministry of Trade was provided by the President of the respondent with correspondence addressing the issue of fair value for the proposed investment in BNL and had determined that it is a fair investment value.

(viii) By a cabinet note dated June 1st 2005, the steps taken by the respondent were set out, and the matters provided at (vi) above were discussed, and by

cabinet minute of June 2nd 2005, the investment was approved.

[11] Beverly John, the claimant's then corporate secretary, deposed that during her tenure, there was in place a state enterprise monitoring manual which mandated that board minutes be sent to the Ministry and to the Ministry of Finance. She developed and implemented a policy by which all confirmed minutes of meetings of the board of directors were sent to the Permanent Secretary of the Ministry of Trade (which was the line Ministry) and the Ministry of Finance, investments division. She said that she sent all the confirmed board minutes for the years 2004, 2005 and 2006 to both ministries under cover of letters from her to the respective permanent secretaries.

[12] She added that, as to the respondent's investment in BNL, Mr. John Soo Ping Chow, Manager, Business Development/Consultant, presented the results of a due diligence exercise he performed on BNL to the board and later to the Finance and General Purpose Committee of Cabinet (F & GP). She deposed that *"on each occasion Mr. Soo Ping Chow was asked a number of questions by members of the Board and by Ministries of Government"*.

[13] Mario Edwards filed two affidavits in opposition to the application. At paragraphs 4, 5 and 6 of his affidavit of 9 July 2012, he said -

"4. I am informed by the attorney for the [respondent] and verily believe that at the Case Management Conference on 29th May 2012, Counsel for the [appellant] requested an opportunity to file a further affidavit which he asserted would "indisputably" show that the Ministry of Finance was informed regarding the due diligence that was and was not done in respect of the investment by e-Teck in Bamboo Network (Cayman Islands) Limited. Far from showing this to be the case, the affidavits clearly show that there is an issue to be tried."

"5. I am advised by the attorney for the [respondent] and verily believe that the issue in the claim is (a) was there any or any proper due diligence carried out

by e-Teck prior to the investment of US $5 million in Bamboo Networks Limited (Cayman Islands) Limited and (b) if there was no such diligence was the Corporation Sole (the Ministry of Finance) ***fully informed*** *by Directors of e-Teck of that failure so that the Ministry of Finance can be said to have given its* ***fully informed*** *consent to the investment without any, or any proper due diligence, having been carried out by e-Teck. If the latter issue is resolved against the Directors of e-Teck section 14(2) of the Limitation Act would apply, on the [respondent's] case, so that the limitation period would not start until the [respondent] discovered the Directors' failure to exercise care, skill and diligence."*

"6. I am advised by the attorney for the [respondent] and verily believe with due respect to both Beverley John and Eugene Tiah, their affidavits appear to fail to address these issues with any clarity, or at all."

[14] Mr. Edwards then went to examine the affidavit of Ms. John and Mr. Tiah. With respect to Ms. John, he said -

"7. Ms. John asserts that all the Board Minutes were sent to the Ministry of Trade and Finance. I am advised by the [respondent's] attorney and verily believe that this does not of itself show that those Ministries were aware of the lack of any or any proper due diligence. There is now produced and shown to me and exhibited hereto and marked "ME 1" a document entitled "Bamboo Networks LTD/e Teck Course of Dealings Report". This document was produced by Wendy Fitzwilliam, who was the Vice-President Business/General Manager Business Development at the relevant time. This document demonstrates the failure to obtain any of the relevant documents, which would have comprised proper due diligence, prior to the investment being made. None of these matters appear in any of the Board Minutes purportedly sent by Ms. John to the Ministries. If it were to be asserted that the Ministries were fully informed regarding the failure to conduct any or any proper due diligence it would be necessary to show that these matters were specifically brought to the attention of

the relevant decision maker in those Ministries by e-Teck."

"8. Ms. John also states that Mr. John Soo Ping Chow presented to the Finance and General Purpose Committee of Cabinet (F&GP) the results of his due diligence "performed on BNL (which included a physical visit to Hong Kong to see BNL's operations)."

"9. I am advised by the [respondent's] attorneys and verily believe that this statement hides more than it reveals and should thus be placed in the context of what actually occurred. First, in December, 2004, Mr. Soo Ping Chow, along Mr. Jaggernauth Soom, the Permanent Secretary in the Ministry of Finance, visited what purported to be the operations of BNL's principal subsidiary in China. As a result of that visit the Ministry of Finance advised eTeck that it should not invest in BNL. The grounds stated were (a) the poor financial state of BNL, which was insolvent, (b) the short track record of the company and (c) the company's lack of property management structure."

"10. At an e-Teck Board meeting held on 18th January, 2005, Mr. Soo Ping Chow made a presentation regarding BNL's finances. This was based on BNL's unaudited accounts for the period 2nd January 2004 to 4th August 2004. Prior to the investment being made on 23 June 2005, Mr. Soo Ping Chow was not in possession of BNL's audited accounts for any period since its establishment. Secondly, there is nothing to indicate that e-Teck, following the visit to Hong Kong, carried out any due diligence to assure themselves that the facilities that they saw in Hong Kong legally belonged to BNL (Cayman Islands) Limited."

"11. When Mr. Soo Ping Chow went before the F&GP on 9th May 2005, it follows from the foregoing that the information regarding due diligence that Mr. Soo Ping Chow could have given to the F&GP was very limited. That is why the Cabinet, at its meeting on 12th May 2005, instructed e-Teck "to address certain concerns including: (i) whether the US $5 million is a fair value for its share in the company; (ii) any relevant matters of a legal or accounting nature including

the latest financial statements and information..” : a copy of a letter dated 27 June, 2005, from the Ministry of Trade and Industry is now produced and shown to me and exhibited hereto and marked “ME 2” .”

“12. I am advised by the [respondent’s] attorney and verily believe that both items set out by the Cabinet required further due diligence. The first item required an independent valuation of BNL’s share. The evidence shows that e-Teck relied on what it was told by …. was a valuation of BNL. The [respondent] asserts that this valuation was fictitious and would have been discovered to have been so if any reasonably diligent due diligence had been carried out.”

[15] Mr. Edwards’ criticism of Mr. Soo Ping Chow’s (and the appellants’) professional competence continues at paragraphs 13 and 14. He concludes at paragraph 15 as follows -

“15. I am advised by the [respondent’s] attorney and verily believe that in summary, therefore, the Cabinet requirement set out at paragraph 11 was completely disregarded and/or the Board failed to ensure that its terms were fulfilled. The result was that e-Teck invested in a straw company and lost the total sum of the investment without any returns. There is no evidence in any of the e-Teck Minutes or any document produced by Ms. Johns demonstrating that the Ministry of Trade, Ministry of Finance or the Cabinet was fully informed of these facts. I am informed by e-Teck’s attorney and verily believe that based upon a recent decision by the Caribbean Court of Justice, on appeal from Belize, that there would be grounds for an action of misfeasance in public office against the relevant Ministers if they were aware of such facts but nevertheless approved this investment.”

[16] As to Mr. Tiah’s affidavit Mr. Edwards stated at paragraph 16 -

“16. The facts and matters set out in paragraphs 7 to 15 equally apply to Mr. Tiah’s affidavit. I am advised by the [respondent’s] attorney and verily believe

that he fails to provide evidence in the form of his substantive affidavit or the exhibits thereto that the Ministry of Trade and Industry, the Ministry of Finance and the F&GP were fully informed and that they approved the investment in the full knowledge that no or no proper due diligence was made prior to the investment."

[17] It is evident from his criticisms of Mr. Soo Ping Chow and Mr. Tiah, that Mr. Edwards' evidence is directed at the substantive allegations (not the issue of discoverability, to which I will come) raised against the appellants in the claim form and statement of case.

Law and Conclusion

[18] The decision of the House of Lords in **Cave v. Robinson** [2003] 1 AC 384 (cited and relied upon by Mr. Mendes) is of assistance. That was a case which concerned the interpretation of an identical provision in the English Limitation Act 1980. It was held that deliberate concealment for the purposes of section 32(1)(b) and (2) of the Limitation Act 1980 (which corresponds to sections 14(1)(b) and (2) of the Act) included a deliberate breach of duty either concealed or undisclosed and committed in circumstances such that it was unlikely to be discovered for some time. Deliberate concealment also included the taking of active steps to conceal a breach of duty after becoming aware of it but it did not include failure to disclose a negligent breach of duty which the actor was not aware of committing. Lord Millett, in his concurring judgment with that of Lord Scott, said at page 394 paragraph 25,

"25. In my opinion, section 32 deprives a defendant of a limitation defence in two situations: (i) where he takes active steps to conceal his own breach of duty after he has become aware of it; and (ii) where he is guilty of deliberate wrongdoing and conceals or fails to disclose in it circumstances where it is unlikely to be discovered for some time. But it does not deprive a defendant of a limitation defence where he is charged with negligence if, being

unaware of his error or that he has failed to take proper care, there has been nothing for him to disclose."

"26. That this is the meaning of section 32(2) is supported by the text. In the first place, the subsection itself distinguishes between the breach of duty and the facts involved in the breach of duty. In the second place, where a defendant is charged with negligence, his breach of duty consists of his failure to take reasonable care. The tax adviser who inadvertently fails to take account of a provision in the latest Finance Act may well incur liability for negligence. But his breach of duty does not consist of giving the advice (which is deliberate and of which he is aware) or even of giving erroneous advice (which is not deliberate and of which he is unaware). It consists of his failure to take reasonable care, which is unlikely to be deliberate and of which he is unlikely to be aware. If he afterwards discovers the error and deliberately conceals it from the plaintiff, his conduct may come within section 32(1)(b); but while he remains ignorant of the error of his own inadvertent breach of duty, there is nothing for him to disclose. In my opinion such conduct cannot be brought within section 32(2):"

[19] Delivering the main judgment said Lord Scott at paragraph 60, page 403:

"60. I agree that deliberate concealment for section 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 subsection (2) otiose. A claimant who proposes to invoke section 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, none the less, 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 facts but can instead concentrate on the commission of the breach of duty. If the claimants 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 subsection (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 section 32(1)(b).”

[20] In order to succeed under section 14, the respondent must show that the appellants committed a breach of duty, that they knew that they committed it and they had deliberately concealed the breach (or failed to disclose it) from the respondent (section 14(1)) Alternatively, they can also show, pursuant to section 14(2), that the appellants knew they were committing, or intended to commit a breach of duty, (or failed to disclose having discovered it) in circumstances in which it was unlikely that the respondent would discover the breach for some time. In such circumstances, the facts involved in the breach are deemed to have been deliberately concealed.

[21] Mr. Mendes submitted that the evidence relied on by the respondent in opposition to the application addressed only the first pre-condition of section 14(2) i.e. that the appellants knew that they had to carry out a due diligence exercise, had failed to do so and had failed to fully disclose to the Ministry of Finance and the Cabinet that they had fallen short in the discharge of their duties. He added that if there were a trial of this claim, the appellants will contend that

they did not breach any duty they owed to the respondent, but if it is found that they did, that they were not aware that they had committed any such breach. They will show that they were presented with a due diligence exercise with which they were satisfied and attempted to meet all of the requirements imposed by Cabinet. As far as they were concerned, they had discharged their duties fully.

[22] For the purposes of the application to strike out the claim however, Mr. Mendes conceded that the evidence before the judge, with respect to whether the appellants deliberately breached the duties they owed to the respondent, was not unequivocal. The judge could not resolve this issue of fact on the strike out application and would ordinarily have been justified in reserving the limitation point for the trial if the pre-condition of deliberate intention was the only condition which the respondent was required to satisfy. He added however, that the respondent must also establish that the breach was committed in circumstances in which it was unlikely that the respondent would discover the breach for some time and with respect to this latter requirement the evidence before the judge was undisputed and unequivocal.

[23] The appellants had kept the Ministry of Finance, the line Ministry, the Cabinet and the respondents officers well informed of all steps which were being taken in the deciding whether the investment should be made. Such evidence raises the question whether, assuming a breach of duty occurred, it took place in circumstances in which it was unlikely to be discovered for some time.

[24] If the judge were 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 defence and to dismiss the claim, even if he felt unable to decide whether there had been a deliberate breach of duty, because of the conflict of evidence.

[25] He added that the judge wrongly postponed the hearing of the appellants' application by asking himself the wrong question. The issue was not *"whether*

and when the Minister of Finance and the Minister of Trade and Industry were made fully aware and were fully informed of the failure to perform the due diligence and to meet the requirements referred to in the letter dated 27 June 2005." The real question was whether the alleged breached had occurred in circumstances in which it was unlikely to be discovered for some. He submitted that Section 14(2) does not turn upon actual discovery but on deemed concealment. However there is no need to establish actual discovery to disprove deemed concealment. If the circumstances were such that the breach was discoverable, section 14(2) would be inapplicable.

[26] I agree. Mr. Mendes submissions are consistent with the ratio of the House of Lords in **Cave v. Robinson** (supra). The respondent relies on section 14(2) as a defence to the limitation plea. The issue turns on whether the appellants deliberately breached their duty in circumstances in which the breach was unlikely to be discovered for some time. Two questions thus arise -

(i) Did the appellants deliberately breach their duty ?

(ii) Were the circumstances of the breach such that it was unlikely to be discovered by the respondent for some time ?

[27] In my judgment and with due respect to Mr. Nelson's submissions, as to the first question, it was not necessary for purposes of section 14(2) and the application to strike out, that a finding of breach of duty be made. It was sufficient to assume such a breach and to proceed to the second and more fundamental question of discoverability. If the judge found that the breach was discoverable, then the respondent could not rely on 14(2).

[28] In this regard the judge did ask himself the wrong question. It was not a question of *"whether and when the Minister of Finance and the Minister of Trade and Industry were made fully aware and were fully informed of the failure to perform the due diligence and to meet the requirements referred to in the letter dated 27 June 2005."* The real question was one of discoverability i.e. whether the breach (assuming there was one) had occurred in circumstances in which it

was unlikely to be discovered for some time.

[29] The question the judge asked himself went to the substantive issue of the appellants' alleged negligence in the execution of their duties as directors; and to whether the Cabinet approved the actions or decisions such as to make the appellants' acts, the acts of the Cabinet (I shall return to this question of approval). In this regard the evidence of Mario Edwards also missed the point. His evidence, also went to the substantive question of breach of duty, rather than to the issue of discoverability of the alleged breach of duty.

[30] It follows therefore that in so far as Mr. Tiah's evidence went to the issue of the opportunities for the shareholder (Minister of Finance) and the Cabinet to discover the breach, that evidence was in fact unchallenged and undisputed.

[31] Mr. Nelson made a number of submissions in response to Mr. Mendes. He took issue with what was argued before the judge by Mr. Mendes in relation to whether the facts set out in Mr. Tiah's affidavit were indisputable and, if the judge found that the facts were not indisputable, how he should proceed. The judge stated his understanding of counsel's submissions at paragraphs 5 and 6 of his judgment :

"5. On 29th May 2012, it was agreed that the defendants would be allowed to put in a further affidavit in order to provide 'evidence that is indisputable'. Counsel for the defendants went on to state:

'If it turns out that they find a way to dispute it, it will then be a matter for my lord to determine how you case manage the application in that point of time but we can't get to that stage of you determining whether or how you are to case manage the issue until we are in a position to put that evidence before you.' "

"As far as this court is concerned, the understanding is that unless that evidence was in fact indisputable, then this court would proceed to trial since the court

would not engage in a mini-trial at this stage and would require full evidence at trail."

[32] Mr. Nelson submitted that the appellants should not be permitted to resile from this position. But I do not see any resiling here by the appellants. Their submission remains that the facts as put forward by Mr. Tiah were undisputed and to that extent are indisputable. The judge seems to have concluded however those facts were not indisputable, but he came to that conclusion by asking the wrong question.

[33] Mr. Nelson next submitted that the judge did not ask himself the wrong question. The full statement of the judge was as follows -

"Having reviewed the exhibits to the defendant's affidavits, and Mr. Tiah's affidavit in particular, it seems to this court that the issue of whether and when the Minister of Finance and the Minister of Trade and Industry were made fully aware and were fully informed of the failure to perform the due diligence and to meet the requirements referred to in the letter dated 27 June 2005 is far from equivocally decided. Definitely, this date is not indubitably set out in the defence."

[34] Mr. Nelson added that the judge did not ask himself the wrong question because -

(a) he was addressing the defendant's specific assertion that Mr. Tiah's evidence was indisputable

(b) he had clearly in mind the defendants' submission on that issue.

[35] Mr. Nelson relied on paragraph 37 of the judgment. For the sake of context I shall reproduce paragraphs 34 to 40 -

"34. Having reviewed the exhibits to the defendants' affidavits, and Mr. Tiah's affidavit in particular, it seems to this court that the issue of whether and when

the Minister of Finance and the Minster of Trade and Industry were made fully aware and were fully informed of the failure to perform the due diligence and to meet the requirements referred to in the letter dated 27 June 2005 is far from unequivocally decided. Definitely, this date is not indubitably set out in the defence.

35. It seems necessary for this matter to proceed to trial for the determination of the factual matrix including, amongst other things, what was known to whom and when in respect of this investment in Bamboo Networks Limited. On the face of it without more and without further explanation, the correspondence does not seem to clearly decide the issue either way. For instance, emphasis is placed by the defendants upon a valuation which is referred to in the letter dated 1 July 2005 written by the claimant's president at the time which confirms reliance upon the purported valuation by Tiger Technologies. As mentioned before, that issue seems to be crucial in that Cabinet was concerned, as it should be, that the share price was fair. The fact of the existence of the said valuation would, to my mind, be a crucial cog in the wheel of the Cabinet approval process in light of the unanswered allegations with respect to the veracity of the information contained in the said letter of 1 July 2005. Specifically, as mentioned above, there is no direct response in the defence or in the affidavits, for that matter, in respect of the legal existence of Tiger Technologies post-2000. Nor is there any evidence of the production of all of the required <u>audited</u> accounts for BNL as requested by Cabinet. Nor is there any immediately identifiable correspondence from the claimant confirming that the audited accounts were not available or were not relied upon or that comprehensive due diligence reports were not done.

36. On the face of it, there is no unequivocal evidence confirming that all of the concerns raised by Cabinet were fully and properly addressed. It may very well be that they were. It may very well be that the parties' understanding was that all requirements were met. There seems to be a suggestion of that when Cabinet authorised the raising of the $5 million US but, respectfully this court cannot say that that is definitively so.

37. In those circumstances, it is only after informed and deliberate cross examination pointed toward that issue, along with the others raised in the pleadings, that the court would then be in a position to properly understand the respective assertions of the parties in light of a tested factual matrix. The line and flow of communication and information to the respective parties would then become clearly and brightly defined without the need for assumptions. Only then would it become clear whether the defendants are entitled to rely upon the provisions of the Limitation of Certain Actions Act in support of their allegation that this action is statute barred against them. Had there been a piece of correspondence or communication which unequivocally stated that despite Cabinet's concerns, no order to the accounts were prepared or secured, no detailed due diligence was presented and had the valuation from Tiger Technologies been provided, then the bright line definition of what was known to whom at the relevant time may have become clearer. But, as it stands, this court is of the respectful view that the presentation of evidence at a trial is necessary.

38. The court also has to bear in mind the allegation raised in the reply that all of the information in relation to the process reposed in the hands of the defendants until they were dismissed in 2010 and that it was not until 2011 that an audited report, conducted after the defendants were no longer in office, that certain concerns were discovered and raised. Quite obviously, the claimant, which was being managed by the defendants until 2010, would not have pursued any claim(s) against the defendants since it is quite unlikely that the defendants would have directed claims to be filed against themselves.

39. At present, to rely only upon the untested evidence on affidavits which are before this court - exhibiting several documents which are prima facie inadmissible hearsay documents e.g. the 1 July 2005 letter from Mr. Hassanali, the uncertified Cabinet notes - should be an unsafe step. It may very well be at the end of the day that deficiencies, if any, were well known and yet the whole process was approved. In that case, the assertion of the claim being statute barred may be well-founded.

40. In essence, this court is not of the view at this time that the claim is certain to fail based only upon the untested and unofficial evidence before it on affidavit.

[36] I do not accept that paragraph 37 expressly addresses Mr. Tiah's evidence. Even if it does address Mr. Tiah's evidence, the judge does not appear to have directed his mind to the specific requirements of section 14(2) and to whether any breach committed may have occurred in circumstances which made it unlikely to be discovered for some time. At paragraph 38 of his judgment he does appear to address that question but concerns himself with the fact that the appellants managed the claimant until 2010 rather than with the evidence put forward by Mr. Tiah that the shareholder and Cabinet were kept fully informed of all matters of decision making.

[37] Mr. Nelson also submitted that the appellants have only before us conceded that the evidence of breach of duty was not unequivocal and issue of breach could not then have been resolved by the judge on the affidavits in respect of the striking out application. He added that the judge was therefore faced with having to decide not only whether the breach was discoverable but also whether there was a breach of duty within the meaning of section 99 of the Companies Act. To do so the judge would first have had to decide whether there was a beach of duty, then if there was, whether it was deliberate breach for the purposes of section 14(2).

[38] He added that, as a consequence, trial of the preliminary issue would have involved all the issues that would engage a substantive trial. That would necessarily have had to have been on affidavit evidence before disclosure, witness statements and oral evidence. Any such decision would usurp the trial judge's function and result in issue estoppel. As an example, Mr. Nelson, submitted that a finding by the judge that section 14(2), applied it would effectively be holding that the appellants had wrongfully committed a breach of duty and the appellants would then be estopped from alleging at the substantive trial that they were not in

breach of duty.

[39] The argument, though attractive, is without merit. A decision by the judge on 14(2) is not dependent upon any finding of breach of duty per se. The section 14(2) question turns on the discoverability; whether the breach, if it did occur, was discoverable by the respondent having regard to the circumstances under which it occurred. That decision requires no initial finding of an actual breach. The judge can proceed on the assumption that there is and decide the discoverability issue. The judge can be careful enough to make such a proviso before rendering his decision on the section 14(2) question. In **Cave v. Robinson** (supra) the limitation question proceeded as a preliminary issue at first instance before Newman J on the assumption that a breach of duty had occurred (See Lord Scott's judgment at paragraph 55, page 402) and continued all the way to the House of Lords which held the action to be statute barred.

[40] Mr. Nelson also submitted that when ground 2(1) of the notice of appeal is compared with paragraph 19 of the skeleton argument, it is clear that the appellants were criticising the judge for deciding an issue which the appellants conceded they had urged him to decide and their arguments were therefore contradictory. I had some difficulty in following this submission. Indeed, I do not find the appellants arguments at all contradictory. Grounds 2 identifies what the judge felt he needed to know and then it states that he failed to sufficiently note that the facts on which the appellants based their application were not disputed. My understanding of the appellants' ground of appeal and their arguments is that they asserted certain facts on affidavit in support of the application to strike. Those facts were not disputed by the respondent. They go to establishing and do establish, that the Ministry of Finance, the Ministry of Trade and the management of the respondent were kept abreast of all the steps the board took in deciding to invest in BNL. Since those facts were not disputed, the judge had before him undisputed facts which went to deciding whether, assuming a breach occurred, that breach was discoverable by the respondent. If the judge answered that question in the affirmative the respondents could not rely on section 14(2). There

is nothing contradictory about that submission or the ground which buttresses it.

[41] Finally Mr. Nelson submitted that the question whether the Minister of Finance and Minister of Trade were made aware and were fully informed of the failure to perform due diligence and if so, when they were so informed, were important questions in the context of this case. He submitted that the fact that the directors may have authorised the breach of duty, did not make it the act of the company. Nor was the knowledge of the directors of their breach of duty the knowledge of the company. The policy is to make those who have been negligent compensate the company. He relied on **Arab Bank v. Zurich Insurance Co**. [1991] 1 Lloyd's Rep 262, 280.

[42] He said that the law presumes that the agent conceals or fails to disclose to his principal his breach of duty. In circumstances in which the directors control the Board and the management of the company, it is highly unlikely that the deliberate breach of duty will be discovered for some time unless the directors initiate legal action against themselves or a new board of directors as appointed. If, however, the board of directors, having been fully informed of the breach of duty, approves the actions or decisions which account to a breach of duty, then, the acts of the directors would become the acts of the company and binding on it, such that the company could not thereafter sue the directors.

[43] Discoverability alone by the shareholders was insufficient. The directors must approve. The judge's question was therefore a relevant question to the real issue which was not discoverability but approval. The defendants had to show more than that the breach of duty was discoverable. They must show that the shareholders were fully informed of the breach of duty **and** approved of the breach, so as to make the breach, the claimant's act. The judge would therefore have been right in looking at the defendant's evidence to focus on the existence of evidence showing that the ministers knew of the breach and that they approved it and therefore he was not plainly wrong in his conclusion.

[44] I consider the submission to be unsustainable. As Lord Scott and Lord Millett both made plain in **Cave v. Robinson**, there is no ambiguity in section 14(1)(b) and (2). Both subsections speak of "*deliberate concealment*". Approval by the shareholder does not arise. Indeed *deliberate concealment* is totally inconsistent with approval of any acts of breach which may have been committed by the appellants. If the respondent alleges that it could not discover the breach because of the circumstances of its commission, how then could it have approved the acts of breach ? It is inconceivable that the question of approval of the breach can arise on the issue of limitation under section 14(1)(b) and (2). It can only arise on the substantive question of breach of duty.

[45] Lord Millett's dictum in **Cave v. Robinson** at page 390 encompasses the legal philosophy which informs the enactment of a statute of limitation as well as the philosophy which dictates its postponement in certain cases ;

"The limitation of actions is entirely statutory. The first statute was the Limitation Act 1623 (21 Jac 1, C 16). For almost four centuries, therefore, it has been the policy of the legislature that legal proceedings should be brought, if at all, within a prescribed period from the accrual of the cause of action. The statues of limitation have been described as "statutes of peace". They are regarded as beneficial enactments and are construed liberally.

6 The underlying policy to which they give effect is that a defendant should be spared the injustice of having to face a stale claim, that is to say one with which he never expected to have to deal: see Donovan v. Gwentoys Ltd. [1990] 1 WLR 472, 479A per Lord Griffiths. As Best CJ observed nearly 200 years ago, long dormant claims have often more of cruelty than of justice in them: see A'Court v Cross (1825) 3 Bing 329, 332-333. With the passage of time cases become more difficult to try and the evidence which might have enabled the defendant to rebut the claim may no longer be available. It is in the public interest that a person with a good cause of action should pursue it within a reasonable period.

7 But this assumes that the plaintiff knows or ought to know that he has a cause of action. In common justice a plaintiff ought not to find that his action is statue-barred before he has had a reasonable opportunity to bring it. To this end the Limitation Acts contain provisions which extend, suspend or postpone the commencement of the limitation period in prescribed circumstances. This particular provision with which your Lordships are concerned is contained in section 32(2) of the Limitation Act 1980.

8 Section 32(1)(b) of the 1980 Act postpones the commencement of the limitation period where "any fact relevant to the plaintiff's right of action has been deliberately concealed from him by the defendant". In such a case the period of limitation does not begin to run until the plaintiff discovers the concealment or could with reasonable diligence discover it. The rationale for this provision is plain: if the defendant is not sued earlier, he has only himself to blame."

[46] I consider that the judge was plainly wrong to have deferred consideration of the limitation question. The matter must be referred to him to consider it. At paragraph 39 of his judgment the judge was concerned that to proceed on the affidavits before the court, untested by cross-examination would be unsafe. He also was concerned that there were several documents which were prima facie inadmissible. Those are issues which can be resolved when addressing the limitation issue. But in my judgment, to proceed to trial and hear the entire evidence is effectively to deprive the appellants of the benefit of the limitation provisions which are intended to liberate a litigant from the oppression of defending a stale and dated claim.

[47] It is fair that the entire question of limitation under section 14(2) be addressed first. If the appellants succeed it will save costs and even if they do not then it eliminates one major issue and the trial proceeds on the pure question of breach of duty. The judge did not have the benefit of submissions on behalf of the parties (as this Court did) and it is right that he should. That apart, it will be

for him to decide the manner in which he will hear and determine the application of 2nd March 2012. The matter is therefore remitted to Rampersad J to decide the preliminary question under section 14(2) of the Act.

[48] We will hear arguments on costs.

Nolan P.G. Bereaux
Justice of Appeal

I agree with the judgment of Bereaux, J.A. I see no good reason why the determination of the application should await a full trial.

H. Stollmeyer
Justice of Appeal