REPUBLIC OF TRINIDAD AND TOBAGO

IN THE COURT OF APPEAL

Civil Appeal No. P241 of 2013
H.C.C. No. CV2011-03992

Between

KENNETH JULIEN
First Appellant/Defendant
ULRIC MCNICOL
Second Appellant/Defendant
BRIAN COPELAND
Third Appellant/Defendant
RENE MONTEIL
Fourth Appellant/Defendant
EUGENE TIAH
Fifth Appellant/Defendant
SONIA NOEL
Sixth Appellant/Defendant
WENDY FITZWILLIAM
Seventh Defendant
JOHN SOO PING CHOW
Eighth Defendant

And

EVOLVING TECHNOLOGIES AND ENTERPRISE DEVELOPMENT COMPANY LIMITED
Respondent/Claimant

PANEL: **N. Bereaux, J.A.**
M. Rajnauth-Lee, J.A.

APPEARANCES:
Mr. Douglas Mendes S.C. and Mr. John Jeremie S.C. leading Mr. Michael Quamina and Mr. Stuart Young instructed by Ms. Kahaya Nanhu for the Appellants.

Mr. Vincent Nelson Q.C. leading Mr. Gerald Ramdeen instructed by Mr. Varun Debideen for the Respondent**.**

Date Delivered: 11th August, 2014

JUDGMENT

Delivered by Bereaux, J.A.

1. I agree with Rajnauth-Lee J.A. that this appeal should be dismissed for the reasons she has given. I propose to add brief words of my own if only to explain my earlier judgment given in these proceedings. This is the second time that this issue has come before the Court of Appeal. This matter first came up on appeal from the dismissal, by Rampersad J., of the appellants' application to strike the respondents' action on the ground that it was statute barred having been filed more than four years after the cause of action arose.

2. The respondent in its reply pleaded section 14(2) of the **Limitation of Certain Actions Act Chap 7:09** (the Limitation Act). In cases in which the cause of action was deliberately concealed from the claimant, section 14(1) postpones the running of time until the claimant has discovered the concealment or until such time as he could have discovered it with reasonable diligence. Section 14(2) further provides that the 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.

3. The appellants' application to strike out was dismissed by Rampersad J. on the basis that it required a full trial. On appeal, the decision was reversed by a two member panel (of which I was a member) and the matter remitted to Rampersad J. to consider whether the alleged breach was discoverable, pursuant to the proviso in section 14(2) of the Limitation Act. The issue of discoverability was directed to proceed on the assumption that there was in fact a deliberate breach of duty.

4. Rampersad J. has again dismissed the application to strike out the claim and the appeal now stands to be decided on the issue of discoverability under section 14(2) of the Limitation Act. The appellants have sought to rely on my judgment in the first appeal in support of their arguments in this appeal. Mr. Mendes S.C., for the appellants, has relied on several paragraphs of the judgment as having made certain specific findings in the

appellants' favour. His reliance is misplaced and I find it necessary to clarify my comments as set out in the paragraphs on which he relies. I must however refer briefly to the facts which are more fully set out in the judgment of Rajnauth-Lee J.A.

5. The appellants are former directors of the respondent. The respondent is a state enterprise, incorporated under the **Companies Act Chap 81:01** (the Companies Act). As part of its special purpose business it has as one of its objects the exploration of investment opportunities in the non-energy sector for local and foreign business and to develop a new knowledge based economy in Trinidad and Tobago. The respondent has brought this action claiming *"damages in negligence and/or breach of duty of care owed to the respondent pursuant to section 99 of the Companies Act to ensure that any investment and/or expenditure made by the respondent was prudent."* The duty is alleged to have been owed to the respondent by the appellants while they were members of the board of directors of the respondent.

6. The respondent alleges that the breach occurred in the decision of its then board of directors to approve an investment in the amount of five million United States dollars (US$5,000,000.00) in Bamboo Networks Limited (Cayman Islands) (BNL). The respondent contends that the investment was made without any reasonable due diligence inquiry into BNL's financial affairs. Such due diligence was necessary to ascertain whether the investment was a prudent one. Had such a due diligence exercise been carried out it would have discovered that the investment was imprudent, and the full value of the investment would not have been lost.

7. The appellants in their amended defence allege, inter alia, that the claim is statute barred by section 3(1) of the Limitation Act (as having been made more than four years after the cause of action arose) and then applied to strike out the action. The respondent in its reply pleaded section 14(2) of the Limitation Act.

8. Section 14(1) of the Limitation Act provides, inter alia, that in any case for which a limitation period is prescribed by the Act, where any fact relevant to the claimants' right of action was deliberately concealed from it by the defendant, the period of limitation could not run until the claimant has discovered the concealment or could with reasonable diligence have discovered it. Section`14(2) expands on subsection (1) by providing that *"deliberate commission of a breach of duty in circumstances in which it is unlikely to be discovered for sometime amounts to deliberate concealment of the facts involved in t at breach of duty".*

9. The respondent in its reply alleges that the appellants' agreed to the investment and the sum of five million United States dollars (US$5,000,000.00) in the knowledge that a full due diligence exercise had not been carried out. Thus they knew that they were committing a breach of duty within the meaning of section 99 of the Companies Act.

10. The respondent contends further that the appellants, as directors on the board of directors, controlled and directed its affairs. As agents of the company they had control over any decision to obtain legal advice to determine whether they had committed a breach of duty and over any decision as to whether to take action against them. It alleges that they had no power to commit a breach and their knowledge of such a breach was not the knowledge of the respondent. Thus, pursuant to section 14(2) of the Limitation Act, the breach of duty of care *occurred* in circumstances that it "*was unlikely to be discovered"* by the respondent or the Government of Trinidad and Tobago until new directors or a new board of directors was appointed and legal advice obtained.

11. The respondent asserts that the breach was only discovered in the circumstances next described. On 1st July 2010 (after a change of Government), the Cabinet authorized the Attorney General to secure the services of legal advisers to conduct a legal audit into the operation of Evolving Tecknologies and Enterprise Development Company Limited (Eteck). A new board of directors was appointed on 20th October, 2010. On 9th June 2011, at the 82nd meeting of the board of the respondent, the directors considered the conclusion

of the legal advisers appointed by the Attorney General and resolved to take legal action against the appellants in respect of their breach of duty of care. Therefore, the respondent's date of knowledge of the appellant's breach of duty was 9th June, 2011 and the action has been brought within the limitation period.

12. The appellants' case on discoverability relies primarily on the evidence of Eugene Tiah, the fifth appellant, and on the evidence of Ms. Beverley John (the entire evidence is fully explored and analyzed by Rajnauth-Lee J.A. in her judgment. I agree entirely with her analysis.) The thrust of the appellants' evidence is that the Minister of Finance, as the sole shareholder of the respondent and the Cabinet, were kept fully apprised of all the steps taken by the appellants in their decision to investment in BNL.

13. All relevant minutes and documents were forwarded by Ms. John to the Ministry of Finance on a weekly basis. There was therefore the full opportunity for the Minister of Finance as sole shareholder and for the Cabinet to discover any breach of duty; that is to say, any breach of duty (assumed for the purposes of the striking out application) was made in circumstances in which the shareholder and the Cabinet, with reasonable diligence, could have discovered it.

14. Mr. Mendes submitted that the question of discoverability under section 14(2) of the Limitation Act required a purposive construction of the provision. He submitted that the answer to the question *"discoverable by whom?"* means discoverable by that human actor who can cause proceedings to be brought on behalf of the person in whom the cause of action has arisen. In the case of a human victim, that would be the victim himself or his personal representative. In the case of a company, it would be any officer or director or shareholder who is competent to cause an action to be brought.

15. He submitted that this would not include the directors who are culpable and whose knowledge cannot rationally be held to be that of the company. He added however, that since a shareholder may be able to bring a derivative action on behalf of the company

against the errant directors, or in some cases, may be able to remove and replace them with directors who would then be free to act in the interests of the company, there was no reason why *"in principle, knowledge of the shareholder is to be excluded as irrelevant"*.

16. Mr. Mendes submitted that this issue had already been decided in the first appeal in which the Court of Appeal described Mr. Nelson's submission as "unsustainable". He added that the appellants were thus entitled to succeed on this point alone. No such decision was made. I shall reproduce fully the particular passages in that appeal on which Mr. Mendes relied. They are as follows: -

> *"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, 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 Company [1991] 1 Lloyd's Rep 262, 280***.
>
> *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 amount 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.*

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 defendant had to show more than that the breach of duty was discoverable. They must show that the shareholders were fully informed of the breach o 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.

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;"*

Mr. Mendes also criticized the trial judge's finding that the knowledge of the shareholders should be ignored because a shareholder of a company is not its agent and has no power to bind the company nor has any duty to protect it.

17. It may be that I expressed my sentiments too strongly but it seems to be plain that I was speaking of the unsustainability of Mr. Nelson's argument in the context of the term "*deliberate concealment".* What was "unsustainable" given the context of the term

"deliberate concealment" was Mr. Nelson's argument that the appellants had to show more than mere discoverability; that they also had to show approval.

18. What I rejected therefore, was the submission that more than discoverability was required in respect of section 14(2) of the Limitation Act for the purposes of the preliminary objection. My reliance at paragraph 44 of **Cave v Robinson [2002] 2 All ER 641** bears this out. My comments did not affect Mr. Nelson's present argument that knowledge of the shareholder in so far as there may have been the opportunity by the shareholder to discover the breach cannot be imputed to the company.

19. A second misunderstanding arose in the context of paragraph 10 of the judgment in the first appeal. I shall also reproduce it in full: -

> *"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 at all contradictory. Grounds 2 identified 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 to 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 would not rely on section 14(2). There is nothing contradictory about that submission or the ground which buttresses it."

20. Mr. Mendes asserted that by this paragraph the Court of Appeal accepted that the appellants' evidence had in fact established that the shareholder, line ministry and management of the respondent had in fact been kept abreast of all the steps the appellants took in deciding to invest in BNL. That is again a misapprehension.

21. The above paragraph may once again have been stated too strongly. All that the court was expressing in that paragraph were the submissions of the appellants; that is to say, the appellants were submitting that the facts set out in their affidavit in support of their application to strike out were undisputed and not only went to establishing, but did establish, that the relevant stakeholders were kept apprised of all steps in respect of the investment.

Any positive finding in favour of the appellants could only have been made by the trial judge upon remission of the matter to him for consideration of the issue of discoverability.

22. Before concluding, I wish also to address a further submission of Mr. Mendes which though attractive, I am unable to accept. My comments are additional to the reasons given by Rajnauth-Lee J.A. with which I also agree. Mr. Mendes, in submitting that the knowledge of the shareholder is relevant (because he can bring a derivative action in the name of the company) invited us to fashion a special rule of attribution to the respondent. He submitted that the respondent was solely owned by the Government of Trinidad and Tobago, was charged with the user of public funds and falls under the control of a Minister who must account to Parliament, not only for the respondents' performance but also for its use of those funds.

23. He added, moreover, that the Minister of Finance as sole shareholder was kept apprised of all facts relevant to the decision making in respect of the investment. The Ministry of Finance did not initially approve of the investment and the respondent only proceeded after additional information was provided to the Cabinet and after a *"checklist"* provided by the Cabinet was satisfied. He submitted that in the context of this factual scenario, it was wholly artificial to cite company law principles to suggest that the Minister of Finance as sole shareholder had no power to bind the respondent and had no duty to protect the respondent. He added that the appellants and the Minister of Finance behaved throughout as though the Minister was totally in control. The respondent was in effect *"an instrument of Government policy and delivery."*

In those circumstances, the breaches of duty (albeit assumed) were discoverable by the shareholder but it did nothing and allowed the statute of limitation to expire.

24. The submission though attractive cannot succeed. In the first place the evidence does not support the submission. It is not correct to say that the Minister of Finance and the appellants behaved as if the Minister was totally in control. In my judgment, the appellants as a board of directors took an informed decision to make the investment. It was not a question of blindly following directions of the Cabinet. They were advised by professionals including Mr. John Soo Ping Chow. When the Minister in the Ministry of Finance advised that the investment appeared to be a bad one, the appellants endeavoured to persuade the Ministry of Finance and the Cabinet of the viability of the venture. This was not a board mindlessly following the policy of directions of Cabinet. Rather it was a board which took a calculated decision to proceed with the project and to persuade the Cabinet of the viability of the project. It directed an independent mind to the project and then persuaded the Cabinet of its viability.

25. In those circumstances, I cannot agree that the parties behaved as if the Minister of Finance was totally in control. Moreover, to impute the knowledge of the Cabinet to the

knowledge of the company by way of a special rule of attribution is highly undesirable in Trinidad and Tobago at this stage of our economic and political development.

26. It is a matter of great public notoriety that directorships in state enterprises in Trinidad and Tobago are much more a question of political patronage and cronyism, than it is about competence and in which the lines between self interest and the public interest can become blurred. In those circumstances, it is hardly likely that wrong doing by directors will be ferreted out before a change of government. I do not, by any stretch of imagination, suggest that this was necessarily the case in respect of the appellants.

27. I do not consider therefore that any special rule of attribution can be fashioned in this case by which the knowledge of the Minister of Finance as shareholder or even of the Cabinet can be attributed to the company. Far from it, the lines of demarcation must remain clear in the public interest.

28. As Rajnauth-Lee J.A. has emphasized, shareholders owe no duty of care to the company, directors do. Nor are shareholders obliged to take action against directors. In any event, in light of the political patronage that besets the appointment of directors to the boards of state companies it is hardly likely that any derivative action will be taken against directors appointed by a subsisting Government. I am unaware of any such action ever having been taken in Trinidad and Tobago.

29. There is one final matter to be addressed. It relates to the pleading by the respondent in its reply invoking section 14(2) of the Limitation Act. The respondent has pleaded in response to the appellant' plea of limitation that the appellants knew they had committed a breach of duty and did so under circumstances in which it was unlikely that the breach could have been discovered for some time. That is a pleading by which it is bound. The fact that the issue of discoverability is now completed does not relieve the respondent from proving that the breach was a deliberate one under section 14(2) of the Limitation Act. That is clearly a matter of evidence for the trial but it remains very much

part of the section 14(2) pleading. Failure so to prove deliberateness would still render the claim statute barred.

Thus even though the issue of discoverability has been disposed of, it still remains for the respondent to show deliberateness in order to complete its case under section 14(2) of the Limitation Act in addition, of course, to proving breach of duty.

I would dismiss the appeal.

Nolan P.G. Bereaux
Justice of Appeal

Delivered by M. Rajnauth-Lee, J.A.

Introduction

30. The appellants are former directors of the respondent. The respondent is a state enterprise, a limited liability company incorporated under the laws of Trinidad and Tobago. The respondent carries on business as a special purpose company and has as one of its objects to explore investment opportunities in the non-energy sector for local and foreign business and to develop a new knowledge-based economy in Trinidad and Tobago.

31. The respondent's sole shareholder is the Minister of Finance functioning as Corporation Sole. The Corporation Sole is established under section 3 of the **Minister of Finance (Incorporation) Act** Chap. 69:03. Section 3 provides that the Minister to whom responsibility for Finance is assigned shall be a corporation sole by the name of the Minister of Finance and all property transferred to and vested in the Minister by this Act or otherwise acquired by the Minister shall be held in trust for the State.

32. The respondent filed a claim against the appellants for negligence and/or breach of a duty of care owed to the respondent pursuant to section 99 of the **Companies Act** to ensure that any investment and/or expenditure made by the respondent was prudent. The appellants filed an application to strike out the respondent's claim on the ground that it was an abuse of process of the court and was statute barred having been brought after the expiry of four years from the date on which the cause of action accrued.

33. This appeal concerns whether the respondent can rely on section 14(2) of the **Limitation Act** which postpones the limitation period where there has been a deliberate commission of a breach of duty in circumstances in which it is unlikely to be discovered for some time.

34. On the 28th October, 2013, the trial judge held *inter alia* that a shareholder's knowledge was irrelevant to the issue of discoverability of a breach of duty and that time did not begin to run against the respondent until the majority of wrongdoing directors (who could authorize an action) changed to allow such proceedings to be brought against them.

Disposition

35. In my judgment, the trial judge was correct but I have come to that conclusion on somewhat different grounds. In my view, the respondent can rely on section 14(2) of the Limitation Act for the following three (3) reasons:

(i) There must be something in the documents disclosed to the Minister of Finance that would trigger a line of inquiry. Having examined the documents and the evidence before the trial judge, I am satisfied that there was no trigger. Accordingly, the respondent has discharged the burden of proving that there was no discoverability pursuant to section 14(2) of the Limitation Act.

(ii) The knowledge of the Minister of Finance could not be attributed to the respondent for the purposes of section 14(2) of the Limitation Act, although the Minister of Finance as sole shareholder of the respondent could have commenced a derivative action pursuant to section 240 of the **Companies Act**. In the circumstances of this case, no special rule of attribution should be fashioned for the purposes of section 14(2). To construe section 14(2) as intending that knowledge of the Minister of Finance of a breach of duty by wrongdoing directors is to be attributed to the respondent for the purposes of section 14(2) in the circumstances of this case would produce an unjust result and would not give effect to the policy and rationale of section 14 of the Limitation Act. Such a construction would also ignore the serious duties of directors set out under the **Companies Act**.

(iii) In addition, I have borne in mind the realities of governance in Trinidad and Tobago where directors of boards of state enterprises are generally appointed by the government in power with a view to carrying out the policies of the government in power. In this context, it would be after a new government is elected and the wrongdoing directors are replaced, that breaches of duty would be discovered by a company such as the respondent and claims for wrongdoing by directors would be commenced against them. To construe section 14(2) otherwise, would allow wrongdoing directors in state enterprises generally to escape liability for their wrongful acts. That would also mean in the context of the realities of governance in Trinidad and Tobago that a company such as the respondent would be left without a remedy.

Background Facts and pleadings

36. As mentioned before, the appellants are former directors of the board of the respondent. In 2005, the first to sixth appellants approved a US$5 million investment in a China-based company called Bamboo Network (Cayman Islands) Limited (“BNL"). The total investment was lost as BNL failed to perform any of its contractual obligations and

refused to return the invested sum of US$5 million despite several requests by the respondent.

37. After the change of government in Trinidad and Tobago in May 2010, the appellants resigned as directors of the respondent. The Cabinet of Trinidad and Tobago in July 2010 authorised the Attorney General to secure the services of legal advisors to conduct a legal audit into the operations of the respondent. On the 9th June, 2011, the new board of directors considered the report of the Attorney General's legal advisors and resolved to take legal action against the appellants for the failed investment.

38. The respondent contended that the appellants approved the investment at a time when, as directors, they did not have any information before them to ascertain whether the investment was a prudent one and that they failed to ensure that any or any reasonable due diligence investigation into the financial affairs of BNL had been carried out.

39. The respondent filed its claim on the 18th October, 2011 after the expiration of the four year limitation period prescribed by section 3(1) of the Limitation Act.

40. Ms. Wendy Fitzwilliam and Mr. John Soo Ping Chow (the seventh and eighth defendants respectively) are former officers of the respondent. Ms. Fitzwilliam was the respondent's Vice-President/General Manager, Business Development, while Mr. Soo Ping Chow was the respondent's Business Development Manager. They were added as defendants on the 17th January, 2013, and they filed applications challenging the validity of their addition. Their applications hinged in part on the contention that the claims against them were statute barred. Although the trial judge allowed them to make submissions on the limitation issue during the hearing of the appellants' application, he made no order against them, and they have not appealed.

41. The respondent in its reply relied on section 14(2) of the Limitation Act. The respondent asserted 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 respondent 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.

42. The respondent contends that in the circumstances of this case, the limitation period did not begin to run until the 9th June, 2011, that is to say, not until after the appellants were replaced as directors of the respondent and the new board discovered their alleged breach of duty based on the report before them.

The requirements of section 14

43. Section 14 sub-sections (1) and (2) are the relevant provisions. 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.*

The previous judgment of the Court of Appeal

44. When the appellants' application to strike out initially went before the trial judge, he concluded that the issue was better suited to be dealt with at the trial since there did not

appear to be any *"unequivocal evidence in the affidavits in support of the appellants' contention"* which would justify the matter being disposed of summarily. The appellants appealed and contended that the judge's finding was wrong in law and that there was in fact unequivocal and unchallenged evidence on which the application was based.

45. Bereaux J.A. in a judgment delivered on the 11th December, 2012 on behalf of the Court of Appeal concluded that the trial judge was plainly wrong to have deferred consideration of the limitation issue. The application to strike out was therefore remitted to the trial judge.

46. At paragraphs 22-27 of the judgment, Bereaux J.A. reasoned:

> *[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)."

47. At paragraph 47 of the judgment, Bereaux J.A. said:

"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. Bereaux J.A. concluded that the trial judge had asked himself the wrong question. The real question was one of discoverability, that is to say, whether the breach (assuming there was one) had occurred in circumstances in which it was unlikely to be discovered for some time.

The Trial Judge's Ruling

49. The trial judge ruled that the burden of establishing that the breach was unlikely to be discovered for some time had been discharged. At paragraphs 81, 82 and 83 of his judgment, he stated:

"[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 authorize 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 were 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."

The Law and Conclusions

The Burden of Proof

50. The Court of Appeal in its previous judgment has already ruled on the issue of the burden of proof. Bereaux J.A. said at paragraph 20:

[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.

51. The approach of the Court of Appeal accords with the dicta of Lord Scott in the decision of the House of Lords in **Cave v Robinson** [2003] 1 AC 384. That case concerned the interpretation of an identical provision of the English Limitation Act 1980. At paragraph 60, page 403, Lord Scott said:

"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).”

52. Mr. Mendes has submitted that in order to establish the applicability of section 14(2), the burden fell on the respondent not only to establish that the appellants committed a breach of duty and that they knew that they committed it or intended to commit it, but also that the breach was committed in circumstances in which it was unlikely that the respondent would discover the breach for some time. I agree.

53. Having regard to the concession of the appellants that for the purposes of this application it is assumed that there was a deliberate commission of a breach of duty, the issue that remains is whether the circumstances of the breach were such that it was unlikely to be discovered by the respondent for some time. The appellants contend that the knowledge of the Minister of Finance, in these circumstances, should be attributed to the respondent for the purposes of section 14(2).

Whether any trigger on the evidence

54. In his written submissions, Mr. Mendes argued that undisputed evidence established that the Ministry of Finance, the Ministry of Trade and the officers of the respondent had all been kept abreast of all the steps the appellants took in deciding to invest in BNL. According to Mr. Mendes, the knowledge which the Ministry of Finance and the Ministry of Trade had of the process followed by the appellants in making their decision was relevant in the circumstances where the Minister of Finance was the respondent's sole shareholder, and the Minister of Trade, the respondent's line Minister. Accordingly, Mr. Mendes submitted that in the light of the undisputed evidence the respondent had failed to discharge the burden cast on them to establish that the breach had been committed in circumstances in which it was unlikely that the respondent would have discovered it for some time. He further argued that given their state of knowledge, the Minister of Finance and the Minister of Trade and Industry, the line Minister, could have discovered that a breach of duty had been committed.

55. In his oral submissions, however, Mr. Mendes submitted that the question for the determination of the trial judge was whether discoverability by the Minister of Finance was relevant to section 14(2). He submitted that because the Minister of Finance as sole shareholder could have brought a derivative action on the part of the company by suing in the company's name, discoverability by the Minister of Finance was relevant for the purposes of section 14(2).

56. Mr. Nelson on the other hand submitted that the mere fact that there may be evidence of information being sent to a ministry did not mean that the information disclosed any breach of duty. Mr. Nelson submitted that, having regard to the evidence adduced before the trial judge, there was no disclosure of a breach of duty or anything that would trigger a line of inquiry. In addition, Mr. Nelson argued that the mere fact that information was passed on did not amount to discoverability. He contended that there must be a trigger and that the onus was on the appellants to show the court what the trigger was.

57. Mr. Nelson placed reliance on the case of **J D Wetherspoon PLC v Van De Berg & Co Limited and others** [2007] EWHC 1044 (Ch). In his judgment, Lewison J cited the dictum of Millett LJ in the case of **Paragon Finance Plc v D B Thakerar & Co (A Firm)** [1998] EWCA Civ 1249. According to Lewison J, the claim in **Paragon Finance**[1] arose out of mortgage fraud. The claimants were alerted to the fact that there were frauds at the development in question in July 1990 and the *modus operandi* was explained to them by the police in December 1990. What they did not know was that the defendant solicitors were implicated in the fraud, although by January 1991, they had carried out a review of a number of transactions in which the defendants were involved and placed them on a "referral list". The claimants concentrated their efforts in recovering possession of the flats; and it was not until March 1997 that they applied to amend to plead fraud. It was in that context, according to Lewison J, where the trigger for an investigation had already occurred, that it made sense to speak of a reasonable degree of urgency. Lewison J pointed out that where there was no relevant trigger for an investigation, then a period of reasonable diligence did not begin. Adopting the approach of Lewison J, I agree that there must be something in the documents disclosed to the Minister of Finance which would trigger a line of inquiry. Millett L.J. in **Paragon Finance** has observed, however, and I agree, that the burden of proof is on the claimant, in this case the respondent, to establish that there was no trigger.[2]

[1] See paragraph 42 of Wetherspoon.
[2] See paragraph 41 of Wetherspoon.

The affidavit of Eugene Tiah, the fifth appellant

58. I have considered the evidence adduced before the trial judge. The appellants relied *inter alia* on the affidavit of Eugene Tiah, the fifth appellant. His evidence sought to demonstrate that the Cabinet and the Minister of Finance were kept abreast of all steps taken by the appellants in deciding to invest in BNL. Mr. Tiah was appointed a director of the respondent in June 2004. He deposed that the question of investing in BNL first arose on the 1st July, 2004 at the 1st meeting of the Business Development Committee, a sub-committee of the respondent's board. At the 2nd meeting of the Committee, held on the 28th October, 2004, representatives from BNL attended, presented its Trinidad Plan and were subjected to questions on the presentation.

59. The 46th board meeting of the respondent was held on the 23rd November, 2004. The first appellant, Chairman of the board, informed the board of the execution of a memorandum of understanding on the 17th November, 2004 between the respondent and BNL for the purpose of establishing a Business Process Operation Facility at the Wallerfield Industrial and Technology Park. The memorandum was ratified by the board. At this meeting the board decided to involve the Minister of Finance in the approval process and to conduct a due diligence exercise jointly with the Ministry of Finance. The respondent's management was therefore mandated to:

i. Formally correspond with the Ministry of Finance to provide them with all information on the proposed respondent-BNL collaboration;

ii. Seek the approval of the Ministry of Finance for their participation in a physical due diligence exercise on BNL; and

iii. Submit all information received by the respondent as a result of its due diligence exercise to the Ministry of Finance so as to facilitate their participation in (ii) above.

60. Subsequently, by letter dated the 30th December, 2004, Ms. Christine Sahadeo, the Minister in the Ministry of Finance, wrote to Mr. Julien, the first appellant, as board chairman, with reference to the respondent’s request for the Ministry’s participation in the

conduct of a due diligence exercise on BNL. The Ministry's representative had concluded that BNL was in a poor financial state and had recommended that the respondent should not invest in BNL. The Minister attached a copy of the due diligence report done by the Ministry of Finance. The material parts of the letter are set out.

> *"The representative of the Ministry of Finance has concluded that Bamboo Networks Limited is in a poor financial state with the Company being insolvent, the Company has a short track record and lacks a proper management structure.*
> *In this regard, it is recommended that eTeck not invest in Bamboo Networks Limited. You are advised that the Ministry of Finance is awaiting a report from Dunn and Bradstreet on the Company."*

61. Mr. Tiah saw a copy of the Dunn and Bradstreet report which was attached to a memorandum from the Trinidad and Tobago Consulate General in New York to the Permanent Secretary of the Ministry of Finance. Mr. Mario Edwards in his affidavit filed on the 9th July, 2012 deposed that following the receipt of the Dunn and Bradstreet report, *"a Minister in the Ministry of Finance wrote to the [first appellant] outlining the findings of the Dunn and Bradstreet Report and advised the [first appellant] that '**In view of the above, the Ministry of Finance confirms its recommendations that [the respondent] not invest in Bamboo Networks Limited.**[3]'"*

62. At the 48th board meeting held on the 18th January, 2005, Mr. Julien reported on the due diligence exercise which was carried out jointly with the Ministry of Finance, and on the decision of the Ministry of Finance not to support the investment. At Mr. Julien's request, Mr. Soo Ping Chow made a presentation to the board on the due diligence exercise. The presentation was in the format of *"a power-point"* and, according to Mr. Tiah, Mr. Soo Ping Chow elaborated at length during the power-point presentation. Having

[3] A copy of that letter was not placed before the trial judge.

considered the presentation, and after further discussion, the board decided to pursue the investment in BNL. The board agreed that:

i. The investment of US$5M in BNL be pursued with the understanding that US$3.5M will be spent in the establishing of a Bamboo presence in Trinidad and Tobago and subject to the respondent and BNL arriving at a satisfactory Cooperation Agreement.

ii. The management of the respondent provide the Ministry of Finance the same presentation and clarifications as were available to the board in order to remove the doubts raised by the Ministry of Finance.

iii. Seek from the Ministry of Finance any other conditions it wishes to introduce in the proposed Cooperation Agreement.

iv. The respondent shall make a full presentation of the investment to the Minister of Trade and Industry and seek his approval of this investment, on the basis of the board's recommendation.

63. By Cabinet Minute dated the 12th May, 2005, Cabinet agreed in principle that the respondent should proceed with the investment and that the respondent should continue to hold discussions with BNL to address whether the investment was fair value for its shareholding in the company, and any relevant matters of a legal or accounting nature including the latest audited financial statements and information. Cabinet further decided that the shareholders' agreement for implementing the project should be submitted to Cabinet for approval. The contents of the Cabinet Minute were later confirmed by letter dated the 27th June, 2005 from the Permanent Secretary, Ministry of Trade and Industry, to Mr. Khalid Hassanali, the President of the respondent.

64. At the 49th board meeting held on the 17th May, 2005, Mr. Julien gave a brief overview of the presentation made to the Minister of Trade and Industry and to the Finance and General Purposes Committee ("F&GP) on the 9th May, 2005, and of certain conditionalities imposed by F&GP. He also reported that the matter had gone to Cabinet for approval and that Cabinet's unconfirmed decision was that the proposed Shareholders' Agreement be brought before Cabinet for approval. After considering a note of the

proposed investment which was presented to the board by management, the board decided to authorize Mr. Julien to execute the Cooperation Agreement and the Investment/Shareholders' Agreement, subject to the final approval of Cabinet.

65. By letter dated the 18th May, 2005, Mr. Julien provided the Secretary to the Cabinet with 30 copies of the note on the proposed investment along with the Shareholders' Agreement for implementing the project. The Secretary to Cabinet was also informed that the Shareholders' Agreement had taken into consideration all of the expressed concerns of the F&GP and contained the stringent conditions upon which the respondent had insisted, as directed by Cabinet. Mr. Julien also provided the following information:

(a) the project schedule to which BNL was committed;

(b) the status of litigation against BNL, along with the indication that the respondent was given a commitment that none of the new investment capital would be utilized in the settling of any of the matters in litigation; and

(c) a summary of BNL's latest financial projection.

66. By letter dated the 1st June, 2005, addressed to the Permanent Secretary, Ministry of Trade and Industry, Mr. Hassanali addressed Cabinet's concern about the fair value of the investment and concluded that the proposed 19.7% equity stake was fair investment value.

67. By a Note for Cabinet dated the 1st June 2005, the Ministry of Trade and Industry noted that documents and other information submitted by the respondent were in satisfaction of Cabinet's conditionalities. The Minister of Trade and Industry recommended that the investment be approved. Cabinet was also asked to note that the financial indicators pointed to improving investor confidence (in BNL) and that it was anticipated that BNL would have been profitable by 2006. By Cabinet Minute dated the 2nd June, 2005, Cabinet approved the investment in BNL. By letter dated the 2nd June,

2005, the Minister of Finance issued a letter of comfort with respect to a proposed loan to the respondent.

The affidavit of Beverly John

68. The appellants also relied on the affidavit of Ms. Beverly John. She is an attorney-at-law with over 30 years' experience. She was employed with the National Gas Company of Trinidad and Tobago ("NGC") when she was seconded to the respondent in 2003. She held the post of Vice President/General Manager, Legal and Corporate Affairs, and also held the position of Corporate Secretary. In 2009, she separated from NGC and she was appointed on contract with the respondent in the position of Senior Vice President. At around the same time, she was appointed to act as President of the respondent until February, 2011, when, following the appointment of the new board of directors, she was replaced.

69. Ms. John deposed that as Corporate Secretary she was required to facilitate meetings of the board and its various committees and subsidiaries. She was responsible for the preparation of minutes and liaising with the Minister of Finance with respect to any corporate secretarial matters. She ensured that all confirmed minutes were sent under cover of letter signed by her to the Permanent Secretaries in the Ministry of Trade and Industry, and the Ministry of Finance. The respondent held meetings bi-monthly and the minutes were confirmed a couple of months after the meeting.

70. Ms. John deposed that she sent all confirmed minutes for the years 2004, 2005 and 2006 to the Ministry of Trade and the Ministry of Finance under cover of letters from her to the Permanent Secretaries of the ministries. With respect to the respondent's investment in BNL, she deposed that Mr. Soo Ping Chow presented the results of a due diligence report which he performed on BNL (which included a physical visit to Hong Kong to see BNL's operations) to the board and later to the F&GP. She was present at both presentations where Mr. Soo Ping Chow was asked a number of questions by board

members and Government Ministers. According to Ms. John, the meeting of the F&GP was chaired by Minister Lenny Saith. Minister Christine Sahadeo (Minister in the Ministry of Finance) was in attendance. The presentation to the F&GP was done sometime in early May 2005.

The affidavits of Mr. Mario Edwards

71. The respondent relied *inter alia* on two (2) affidavits of Mr. Mario Edwards filed in opposition to the appellants' application. In his affidavit filed on the 9th July, 2012, Mr. Edwards examined Ms. John's affidavit and deposed at paragraph 7 as follows:

> *"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."*

Analysis of the evidence

72. It is undisputed that the board minutes were supplied to the Ministry of Finance and the Ministry of Trade and Industry through their respective Permanent Secretaries. Mr. Soo Ping Chow's power-point presentation was made to the Minister of Trade and Industry and to the F&GP. The note on the proposed investment prepared by the respondent's management along with the Cooperation/Shareholders' Agreement were forwarded to Cabinet under cover of letter dated the 18th May, 2005. The note on the proposed investment and the Cooperation/Shareholders' Agreement were also forwarded to the Ministry of Trade and Industry and were included in that Ministry's Note for Cabinet dated the 1st June, 2005.

73. What is in issue in the context of the section 14(2), is whether those documents and any other document which would act as a trigger, were disclosed to the Minister of Finance. From the evidence before the trial judge, there is no indication that any of the documents referred to above were sent specifically to the Minister of Finance. As a member of the Cabinet, however, the Minister of Finance would have received the documents which had been provided to the Cabinet. I wish to add that it does not appear from the evidence that the Ministry of Trade and Industry and the Cabinet had notice/knowledge of the letter dated the 30th December, 2004, from the Minister in the Ministry of Finance to the respondent recommending that the respondent not invest in BNL. There is also nothing in the evidence to suggest that the documents which were made available to the Minister in the Ministry of Finance at the meetings of the F&GP would have been disclosed to the Minister of Finance. The question that remains therefore is whether the documents provided to the Cabinet contained a sufficient trigger for the Minister of Finance.

74. I have considered the note on the proposed investment prepared by the respondent's management. The note stated that for the consideration of US$5 million the respondent would receive *inter alia* 19% ownership of BNL and the set-up of a business

process operation at Wallerfield. The note examined risks mitigating factors and the possibility of a failed investment. In such a case, the respondent would recover its investment sum and the share allotment would be revoked. The note also highlighted the salient features of the Cooperation Agreement. The note further dealt with the specific conditionalities of the F&GP and contained a detailed project rollout schedule and the status of litigation across the Bamboo Group of Companies. Bamboo's maximum exposure at that time was USD$42,000.00. In my view, the note does not constitute a trigger that would have put the Minister of Finance on notice that a breach was being or was about to be committed. Indeed, the note was presented to Cabinet as one of the documents that satisfied the conditions imposed by Cabinet in its Minute dated the 12th May, 2005. I am also of the view that there was nothing in the Cooperation/Shareholders' Agreement to act as a trigger.

75. I am also of the view that there was no trigger in the letter dated the 18th May, 2005 from the first appellant to the Secretary to Cabinet. The first appellant drew to the attention of the Secretary that:

- The proposed agreement took into consideration all the expressed conditions of the F&GP and included stringent conditions that the respondent had insisted upon, as directed by the Cabinet.
- The matter had been reviewed by the board at its meeting on the 17th May, 2005, and subject to the final approval of the Cabinet, would be executed.
- The agreement had been legally vetted.

76. I have also examined the Note for Cabinet prepared by the Ministry of Trade and Industry. The Note summarized the respondent's note on the proposed investment and concluded that the respondent had satisfied Cabinet's conditionalities. The Minister recommended that Cabinet approve the investment. I am of the view that there was no discernible trigger in this Note. The Minster had concluded that BNL would be profitable by 2006.

77. I wish to add that the minutes of the 46th, 48th and 49th board meetings were indisputably supplied to the Ministry of Finance through its Permanent Secretary. The board minutes contain no triggers.

78. I have also considered Mr. Edwards' affidavit filed on the 9th July 2012 which referred to a undated document entitled *"Bamboo Networks Ltd/e-Teck Course of Dealings Report 2005-2007"* prepared by Ms Fitzwilliam.[4] Mr. Edwards deposed that this report demonstrated the failure to obtain any of the relevant documents which would have comprised proper due diligence prior to the investment being made. He also deposed that none of these matters appeared in any of the board minutes purportedly sent by Ms. John to the ministries. His evidence has not been contradicted in this application. There is nothing in the evidence to suggest that this report was disclosed to the Cabinet or the Minister of Finance. Mr. Edwards also made reference to the Baker Tilly Auditors Draft Report dated December, 2006 in respect of BNL Audited Consolidated Financial Statements for the year ended the 31st March, 2005. There is nothing to suggest that the auditors' report was disclosed to the Cabinet or the Minister of Finance.

79. Having examined the documents referred to above and the evidence before the trial judge, there being no trigger, I am satisfied that the respondent has discharged the burden of proving that there was no discoverability pursuant to section 14(2) of the Limitation Act. This should bring an end to this appeal. I will nevertheless go on to consider the key issue raised by the parties, that is, whether, if the breach was discoverable by the Minister of Finance, his knowledge could be attributed to the respondent for the purposes of section 14(2) of the Limitation Act.

The Derivative Action and the Rules of Attribution

80. In his oral submissions, Mr. Mendes argued that the question of law for determination was whether the shareholder's knowledge could be attributed to the

[4] See paragraph 42 above.

respondent. He submitted that in interpreting section 14(2), the court had to determine the appropriate rules of attribution for the purposes of section 14(2). He contended that the question could not be answered by applying the normal rules of attribution since these did not assist. He argued that for the purposes of section 14(2), the knowledge of the shareholder was relevant in the circumstances where the shareholder could bring a derivative action in the name of the company. According to Mr. Mendes, returning to the question originally posed by him, that is, by whom were the alleged breaches discoverable, the answer would be *discoverable by those persons who could bring an action on behalf of the company.*

81. Mr. Mendes relied on section 240 of the **Companies Act** which provides for derivative actions. A derivative action is the mechanism whereby a shareholder may bring proceedings for and on behalf of a company. Pursuant to section 240, a complainant may, for the purpose of prosecuting, defending or discontinuing an action on behalf of a company, apply to the court for leave to bring an action in the name and on behalf of the company. Under section 239 "complainant" means *inter alia* a shareholder or debenture holder, or a former holder of a share or debenture of a company or any of its affiliates. An "action" means an action under the **Companies Act**.

82. Mr. Mendes submitted that the sole shareholder, namely, the Minister of Finance, could have brought a derivative action in the name and on behalf of the respondent and for the respondent's benefit. The action would not have been for the shareholder's benefit and would not have been the shareholder's personal action. Mr. Mendes posed the question: "*How do we translate that right to act on behalf of the company to the rules of attribution applicable to section 14(2)?"*

83. As to the rules of attribution, the case of **Meridian Global Funds Management Asia Ltd v Securities Commission** [1995] 2 AC 500 at 507 [P.C.] is instructive. In that case, the chief investment officer and the senior portfolio manager of an investment management company with the company's authority, but unknown to the board of directors

and managing director, used funds managed by the company to acquire shares in a public issuer. The Securities Commission instituted proceedings against the company for failing to give notice that it became a substantial security holder in that public issuer. The judge made a declaration that the company was in breach of its duty to give notice and the Court of Appeal of New Zealand upheld that decision on the basis that the chief investment officer was the directing mind and will of the company and so his knowledge was attributable to the company.

84. On appeal to the Privy Council, the Board held that having regard to the policy of the substantive law, the appropriate rule of attribution to be implied was that a corporate security holder knew that it was a substantial security holder in a public issuer when that was known to the person who had acquired the relevant interest with the company's authority. Accordingly, the chief investment manager's knowledge of the transaction was attributable to the company irrespective of whether he could be described in a general sense as its directing mind and will.

85. Lord Hoffmann delivering the judgment of the Board made the point[5] that any proposition about a company necessarily involved a reference to a set of rules. It was a necessary part of corporate personality that there should be rules by which acts were attributed to the company. These were called as *"the rules of attribution"*. He observed that the company's primary rules of attribution would generally be found in its constitution, typically the articles of association. In addition, there were also primary rules of attribution which were not expressly stated in the articles but implied by company law. He added that the primary rules of attribution were obviously not enough to enable a company to go out into the world and do business. Not every act on behalf of the company could be expected to be the subject of a resolution of the board or the unanimous decision of the shareholders. The company therefore built upon its primary rules of attribution by using general rules of attribution which were equally available to natural persons such as the principles of agency.

[5] See page 506

86. As to special rules of attribution, Lord Hoffmann observed at page 507:

> *"The company's primary rules of attribution together with the general principles of agency, vicarious liability and so forth are usually sufficient to enable one to determine its rights and obligations.* ***In exceptional cases, however, they will not provide an answer****....* ***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****."* [Emphasis added]

87. Having concluded that the chief investment manager was the person who with the authority of the company acquired the relevant interest, Lord Hoffmann cautioned (at page 511):

> *"It was therefore not necessary in this case to inquire whether [the investment manager] could have been described in some more general sense as the 'directing mind and will' of the company. But their Lordships would wish to guard themselves against being understood to mean that whenever a servant of a company has authority to do an act on its behalf, knowledge of that act will for all purposes be attributed to the company.* ***It is a question of construction in each case as to whether the particular rule requires that the knowledge that an act has been done, should be attributed to the company.*** *Sometimes as in* ***In re Supply of Ready Mixed Concrete*** *(No. 2) [1995] 1 A.C. 456 and this case, it will be appropriate. Likewise in a case in which a company was required to make a return for revenue purposes and the statute made it an offence to make a false return with intent to deceive, the Divisional Court held that the mens rea of the servant authorised to*

discharge the duty to make the return should be attributed to the company: see ***Moore v I. Bresler Ltd*** *[1944] 2 All E.R. 515. On the other hand, the fact that a company's employee is authorised to drive a lorry does not in itself lead itself to the conclusion that if he kills someone by reckless driving, the company will be guilty of manslaughter. There is no inconsistency.* ***Each is an example of an attribution rule for a particular purpose, tailored as it always must be to the terms and policies of the substantive rule****."* [Emphasis added]

88. Mr. Mendes has accepted that the knowledge of the appellants could not be attributed to the respondent. That cannot be in dispute. In addition, I agree with Mr. Mendes that the primary rules of attribution do not provide an answer in this case as shareholders are generally not agents of the company. Mr. Mendes pointed out that the facts of this case presented a situation where the respondent was solely owned by the Government of Trinidad and Tobago, was charged with the use of public funds and came under the control of a Minister who had to account to Parliament. He argued that it was therefore wholly artificial to cite company law principles to suggest that the Minister of Finance was not the agent of the respondent for the purposes of section 14(2). The question that remains to be answered therefore, in the circumstances of this case, is what special rule of attribution, if any, should be tailored or fashioned for the purposes of section 14(2) of the Limitation Act, adopting the approach of Lord Hoffmann in **Meridian Global** and taking into account the usual canons of interpretation, the language of the section and its content and policy.

89. The parties relied on various authorities on the approach of the courts to the issue of attribution. Mr. Mendes criticized the trial judge's reliance on the article **"The Limits of Derivative Actions: The Application of Limitation Periods to Derivative Actions"** (2012) 49:3 Alta. L. Rev. 603-633 (Canada) [Authors: Robert W. Thompson QC, Scott T. Jeffers and Codie L. Chisholm] and *"the Adverse Domination Doctrine"* propounded in a number of American cases. That doctrine, according to Mr. Mendes, was premised upon

the notion that knowledge was not to be imputed to a corporation if the agent was acting in a manner adverse to the interests of its principal. Mr. Mendes added that under the American doctrine, the limitation period did not begin to run in relation to a cause of action against directors of a company, so long as the majority of the board was comprised of the wrongdoers or was otherwise under the control of those wrongdoers. Mr. Mendes also pointed out that the trial judge did not refer to or give any consideration to *"the Complete Domination Test"* in which the plaintiff bore the burden of proving that there was no informed shareholder or director or officer who could have induced the corporation to sue. He went on to submit that under *"the Complete Domination Test"* or under *"the Disinterested Majority Test"*[6], shareholder knowledge was not irrelevant and that the trial judge appeared to have missed that point.

90. Mr. Mendes submitted further that the American authorities and the Canadian authors [relied on by the trial judge] were of limited use only. He argued that the American *"Adverse Domination Doctrine"* was an equitable principle developed to mitigate the harshness of the strict application of the statute of limitations where wrongdoers were in a position to prevent proceedings from being commenced against themselves. He added that there was a raging debate as to the extent of the relevance of shareholder knowledge and as to whether that doctrine should be applied to claims in negligence. Mr. Mendes therefore concluded that the key issue raised in the appellants' application could only be resolved by a proper interpretation of section 14(2).

91. The case of **Attorney General of Zambia (for and on behalf of the Republic of Zambia) v Meer Care & Desai (a firm) and others** [2007] EWHC 952 (Ch) relied on by Mr. Nelson was of assistance. Briefly, this case concerned a claim brought against several defendants, including the former President of Zambia, to recover monies diverted away for various private purposes of the defendants. Mr. Nelson submitted that in this case the court

[6] This test requires that there must be a change in control of the company from a majority of wrong-doing directors to a majority of non-culpable directors before notice of the claim is imputed to the company. The claimant is required to show that there existed on the board a majority of culpable directors during the period which he seeks to have the statute of limitations suspended.

had firmly in mind the underlying rationale of the Limitation Act (U.K.) when reaching its decision. At paragraphs 385 and 386 of the judgment of Peter Smith J, he observed that the primary purpose of the Limitation Act was to provide for a claim to be brought within a reasonable period; or put another way to avoid people having stale actions brought against them. When a party was aware of a claim, it was not inappropriate that there be a reasonable time limit within which such a claim was brought. Peter Smith J went on to consider the counterpart to that purpose, where parties were the subject matter of dishonest conduct. The balancing exercise as against stale claims is that when parties were defrauded or were the subjects of dishonest conduct, they were not to be disadvantaged until they had an opportunity to discover the wrongful acts. Peter Smith J considered that the rationale for such an approach was that it would be an unsatisfactory state of the law if people who had behaved dishonestly could escape liability by successfully hiding their wrongdoings for the period of the primary limitation period.

92. Mr. Nelson submitted that the fact that the respondent was a state enterprise did not affect its separate and distinct legal personality from the Government of the Republic of Trinidad and Tobago. As a state enterprise it was not to be assimilated to the State or treated as one with it. The decision of the Privy Council in **La Générale des Carrières et des Mines v F.C. Hemisphere Associates LLC** [2012] UKPC 27 (*"the Gécamine case"*) relied on by Mr. Nelson was also instructive.

93. In that case, there was a claim to hold a state-owned corporation liable for the state's debts. The appeal before the Privy Council raised important issues regarding the position of state-owned corporations and, the circumstances, if any, in which they and their assets might be equated with the state and its assets. Lord Mance who delivered the judgment of the Board stated at paragraph 29:

> *"Separate juridical status is not however conclusive. An entity's constitution, control and functions remain relevant… But constitutional and factual control and the exercise of sovereign functions do not without more convert a*

separate entity into an organ of the State. Especially where a separate juridical entity is formed by the State for what are on the face of it commercial or industrial purposes, with its own management and budget, the strong presumption is that its separate corporate status should be respected, and that it and the State forming it should not have to bear each other's liabilities. It will in the Board's view take quite extreme circumstances to displace this presumption. The presumption will be displaced if in fact the entity has, despite its juridical personality, no effective separate existence. But for the two to be assimilated generally, an examination of the relevant constitutional arrangements, as applied in practice, as well as of the State's control exercised over the entity and of the entity's activities and functions would have to justify the conclusion that the affairs of the entity and the State were so closely intertwined and confused that the entity could not properly be regarded for any significant purpose as distinct from the State and vice versa…."

94. Mr. Nelson has further argued that the policy of the legislature was to give the shareholder and the company separate causes of action. He submitted that the derivative action had its own limitation period. If therefore a shareholder had knowledge which would lead it to bring an action on behalf of the company and the shareholder delayed and did not use that knowledge, he contended that the shareholder's derivative action, and not the company's action, would be statute-barred.

Conclusions

95. I have adopted the approach of Peter Smith J in the case of the **Attorney General of Zambia** and have considered the policy and rationale of section 14(2) of the Limitation Act. It is settled that the policy of the Limitation Act is to provide for a claim to be brought within a reasonable period. In other words, the rationale of the Limitation Act is to avoid people having stale actions brought against them. Where a party is aware of a claim, it is

appropriate that there should be a reasonable time limit within which such a claim is brought. On the other hand, I am of the view that where there has been a deliberate commission of a breach of duty in circumstances in which it is unlikely that the breach would be discovered for some time, the legislature has seen it fit pursuant to section 14, to have time begin to run for the purpose of bringing an action against the wrongdoer from the time when the plaintiff has discovered the wrong or could with reasonable diligence have discovered it. The deliberate commission of a breach of duty in the circumstances provided for in section 14(2) is deemed to be a deliberate concealment of the facts involved in the breach of duty and falls under the protection of section 14(1)(b).

96. Having regard to the policy and rationale of section 14 of the Limitation Act considered above, I am of the view that the court, in construing section 14(2) should take into account that the respondent, albeit a state enterprise, has a separate legal personality distinct from the Minister of Finance, the sole shareholder [See Lord Mance's guidance in the **Gécamine** case]. Further, the court ought also to bear in mind that the derivative action that can be brought by the shareholder pursuant to section 240 of the **Companies Act** is distinct from the action which a company can commence against wrongdoing directors. Such an approach gives effect to the doctrine of the separate legal personality of a corporation and the rule in **Foss v Harbottle**.[7]

97. I have also considered that generally shareholders owe no duty of care to the company. Although they have the power to bring a derivative action, they are not obligated to do so. In my view, therefore, to construe section 14(2) of the Limitation Act as intending that knowledge of the Minister of Finance of a breach of duty by wrongdoing directors is to be attributed to the respondent for the purposes of section 14(2), would produce an unjust result and would not give effect to the policy and rationale of section 14 of the Limitation Act. Such a construction would also ignore the serious duties of directors set out under the **Companies Act**.

[7](1843) 2 Hare 461.

98. In my judgment, therefore, the knowledge of the Minister of Finance could not be attributed to the respondent for the purposes of section 14(2) of the Limitation Act, although the Minister of Finance as sole shareholder of the respondent could have commenced a derivative action pursuant to section 240 of the **Companies Act**. In the circumstances of this case, no special rule of attribution should therefore be fashioned for the purposes of section 14(2) of the Limitation Act.

99. I wish to add that to construe section 14(2) as proposed by Mr. Mendes in the circumstances of this case would also lead to an absurd result. I have borne in mind the realities of governance in Trinidad and Tobago where directors of boards of state enterprises are generally chosen by the government in power with a view to carrying out the policies of the government in power. In this context, it is unlikely that the Minister of Finance would bring a derivative action for breach of duty against directors chosen by his government. It would be after a new government is elected and the wrongdoing directors are replaced, that breaches of duty would be discovered by a company such as the respondent and claims for wrongdoing by directors would be commenced against them. To construe section 14(2) otherwise, would allow wrongdoing directors in state enterprises generally to escape liability for their wrongful acts. That would also mean in the context of the realities of governance in Trinidad and Tobago that a company such as the respondent would be left without a remedy.

100. I have read the judgment of Bereaux J.A. I wish to say that I agree with the conclusions drawn in paragraph 29 as to the issue of deliberate breach of duty.

ORDER

101. The appeal is dismissed. The appellants shall pay the respondent's costs of the appeal determined at two-thirds of the costs assessed below.

……...
M. Rajnauth-Lee, J.A.