[2024] JMCC Comm 14

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

COMMERCIAL DIVISION

CLAIM NO: SU2020CD00408

BETWEEN	**MERLE BALDWIN**	**CLAIMANT**
AND	**FEATHERBED FARMS LIMITED**	**1st DEFENDANT**
AND	**THE REGISTRAR OF COMPANIES**	**2nd DEFENDANT**
AND	**PATRICIA GORDON**	**3rd DEFENDANT**

IN OPEN COURT

Appearances: Mr. Sean Kinghorn and Ms. Shanese Green instructed by Kinghorn & Kinghorn Attorneys-at-Law for the Claimant

Mrs. Janice Buchanan-McLean & Ms. Sashawah Newby for the 1st and 3rd Defendants

Heard: 2nd, 3rd, 4th October 2023 and 21st March 2024

Company Law – Allotment of Shares – Removal of Director – Oppressive and Unfairly Prejudicial Conduct – Rectification – Laches

BROWN BECKFORD J

INTRODUCTION

[1] A dead man tells no tales. This is the story of a woman who claims to be betrayed by a man she befriended. Together, they formed a Company and establised a business

of poultry rearing. She, being an agronomist, provided the technical expertise while he provided the capital. They owned the business equally, being equal shareholders in, and directors of, the Company. In the beginning, she managed the operation as the man resided overseas. He later joined her in managing the business. After some years, things soured. She, claiming to be undermined and threatened with physical harm by the man, withdrew from the operation, concentrating on other endeavours. In the meantime, the man became an expert in the industry winning many accolades. The business thrived. Then he died. His wife continued the operation. The woman discovered that she was no longer an equal shareholder in the Company or a director. The woman wanted half of the profits and to have the status of the company's affairs returned to its original position. The wife says no, you abandoned the business in its infancy, and this is my husband's doing, of which I am the beneficiary. Unable to settle the matter between themselves, a Court must now cut and distribute the cake. This is the story of Mrs. Merle Baldwin, Mr. Joseph Gordon and Featherbed Farms Limited.

BACKGROUND

[2] Featherbed Farms Limited **("the Company")** is an agriculture and poultry farming business which was incorporated on 7th December 1988 with an authorized share capital of One Thousand Dollars **($1,000.00)** divided into 1000 ordinary shares with a par value of One Dollar **($1.00.00)** per share. The only subscribers for shares were Mr. Joseph Gordon and Mrs. Merle Baldwin. Each was allotted 1 share, with the remaining 998 shares unissued. Mr. Gordon and Mrs. Baldwin were the first directors of the Company, and Mrs. Baldwin was also the Company secretary.

[3] Mrs. Baldwin was an Agronomist with experience in Agriculture and Agronomy. She holds an Associate Degree in Agriculture (Hons) from the School of Agriculture and a Bachelor of Science Degree in Agronomy from the University (of the West Indies) St. Augustine. She managed the day-to-day operations of the Company in its initial stages. Mr. Gordon was the financier, providing all the initial capital for financing the Company. Their equal shareholding apparently reflected the value they placed on their respective

contributions. Shortly after operations began, the Company sought and was granted a loan from the National Commercial Bank. Both Mr. Gordon and Mrs. Baldwin were guarantors of the loan.

[4] In or around 1994, the relationship between the parties deteriorated beyond repair and Mrs. Baldwin no longer participated in the day-to-day management of the business. Mrs. Baldwin's evidence is that after the birth of her second child, having been on maternity leave, Mr. Gordon told her not to return to the farm. At the time Mr. Gordon was residing on the farm. Mrs. Baldwin's further evidence is that out of fear she did not return to the farm. This was in the year 1994. Mr. Gordon died on 22nd May 2019. Mrs. Patricia Gordon, wife of the deceased, received the Grant of Administration in Mr. Gordon's estate.

[5] Mrs. Baldwin claims to have discovered in December 2019, that all the unissued shares in the Company were allotted to Mr. Gordon, and that she had been removed as a director of the Company. In September 2020, Mrs. Baldwin commenced her claim to have the record of the shareholding of the Company rectified, and to be reinstated as a director. Mrs. Baldwin also asserts that Mr. Gordon behaved in a manner that was oppressive or unfairly prejudicial to her interest as a director and shareholder of the Company in breach of **S.213A of the Companies Act of Jamaica**.

[6] In her claim, commmenced by way of Fixed Date Claim Form against Featherbed Farms Limited, The Registrar of Companies and Patricia Gordon, the 1st, 2nd and 3rd Defendants, respectively, Mrs. Baldwin sought the following Orders:

i. A Declaration that the 998 shares allotted to Joseph Gordon were unlawfully and improperly allotted.
ii. A Declaration that the shareholdings in Featherbed Farms Limited remain as 1000 ordinary shares with 1 ordinary share held by the Applicant, Merle Baldwin, and 1 ordinary share held by the estate of Joseph Gordon.

iii. An order that the 2nd Defendant amends the records of Register of Companies to reflect the Order of this Honourable Court in respect to the shareholding of the Company.

iv. The Applicant, Merle Baldwin, be reinstated as a Director of the Company Featherbed Farms Limited.

The Registrar of Companies was removed as a party to the claim by the Order of Wint-Blair J. Reference to 'the Defendants' in this judgment is to the 1st and 3rd Defendants.

[7] Claimant's Counsel in his final submissions asked that the Court grant the following consequential Orders:

1. The register of members of Featherbed Farms Limited (1st Defendant), be rectified by striking out Nine Hundred and Ninety-Eight (998) shares of the share capital of the company purportedly held by the deceased.

2. The 3rd Defendant shall file with the Registrar of Companies a return of allotment reflecting the rectified shareholdings in relation to the 1st Defendant, within ninety (90) days of this order.

3. The 1st and 3rd Defendants shall file with the Registrar of Companies annual returns and all other documents as may be required reflecting the rectified shareholdings, in the aforementioned paragraph, within ninety (90) days of this order.

4. Notice of all such rectifications shall be given to the Registrar of Companies.

5. Notice of appointment/change of Directors filed with the Companies Office of Jamaica is cancelled and the Claimant is duly declared the lawfully appointed secretary and a Director of the 1st Défendant.

6. The 3rd Defendant shall within thirty (30) days of this order take all steps as are necessary to rectify the Register of Directors and Company Secretary and file amended returns or notices as may be necessary to give effect to the order made in at paragraph 38.

7. The appointments of Anthony Francis as Director and/or secretary of the 1st Defendant and any subsequent appointments in the absence of the Claimant were invalid having been effected contrary to the Articles of Association of the company.

SUBMISSIONS ON BEHALF OF THE CLAIMANT

[8] Counsel on behalf of the Claimant, Mr. Sean Kinghorn, contended that the allotment of the 998 shares made by Mr. Gordon to himself was unlawful and therefore invalid, as it was contrary to the Company's Articles of Association. To this end he prayed that the Court revert the shareholding to the original legal position. He relied on **Benkley Northover v Eric Northover** [2014] JMCC Comm 14.

[9] He asserted that the Pre-emptive Right Clause **(Clause 42)** of the Articles of Association was not complied with. Counsel argued that unissued shares in the Company's authorized share capital are new shares and as such attach pre-emptive rights. Therefore, Mrs. Baldwin ought to have been given the right to purchase the unissued shares in order to maintain her proportionate ownership in the Company. This argument he claimed was supported by the cases of **Benkley Northover v Eric Northover**, **John Fitzgerald Peart v Sandra Palmer** [2018] JMSC Civ 186 and **Joni Kamille Young-Torres v Ervin Moo Young and others** 2019 [JMCA] Civ 23.

[10] Counsel also contended that Article 15 of the Articles of Incorporation, though seemingly giving a wide discretion to directors to issue shares, is fettered by the directors' obligation to act in the bona-fide interest of the Company. The directors also had a duty to exercise their powers for a proper purpose and not act for any collateral purposes.

Consequently, in circumstances where Mr. Gordon had allotted the remaining 998 shares to himself, he had in effect breached his fiduciary duty by acting in his own best interests, and thereby, improperly exercising his power. He relied on **Benkley Northover v Eric Northover**. Furthermore, he pointed out, in accordance with **Joni Kamille Young-Torres v Ervin Moo Young and others** *(supra)* the burden of proof is on the directors to show that their actions were proper.

[11] Counsel Mr. Kinghorn further averred that Mrs. Baldwin was not removed as a director of the Company pursuant to the Articles of Incorporation or **The Companies Act**. He maintains that no notice of a meeting was given to Mrs. Baldwin. Moreover, in view of her absence, no quorum could have been formed to constitute a valid meeting. Consequently, Mrs. Baldwin ough to be re-instated as a director. Counsel drew support from **John Fitzgerald Peart v Sandra Palmer** *(supra)*.

[12] In light of the evidence, it was Mr. Kinhgorn's contention that the conduct of the defendants were oppressive and unfairly prejucial to Mrs. Baldwin. Mr. Gordon's actions unlawfully diluted the Mrs. Baldwin's interest in the Company and prevented her from operating as a director.

[13] It was further submitted that in the circumstances there was no delay on part of Mrs. Baldwin. In light of the threat upon her life by Mr. Gordon, Mrs. Baldwin acted with alacrity following her discovery of his death. In accordance with **Joni Kamille Young-Torres v Ervin Moo Young and others** *(supra)* it was asserted that what was important for the Court's consideration was the length of the delay as well as the nature of the acts done during the delay.

[14] Lastly, he argued that the Court should draw an adverse inference from the unexplained absence of the evidence of Mr. Anthony Francis and Mr. Byron Long. This is especially fitting where the defendants' evidence is that during a certain period both individuals played important roles as director and accountant in respect to the operation of the Company. To this end, Counsel relied on **Gerald Reid v United Estates Limited**

(unreported), Supreme Court, Jamaica, Claim No. 2011HCV06065, judgment delivered 22 April 2015.

SUBMISSIONS ON BEHALF OF THE DEFENDANT

[15] Counsel on behalf of the 1st and 3rd defendants, Mrs. Janice Buchanan-McLean, vehemently denied the allegations of Mrs. Baldwin. She argued that the initial agreement between Mrs. Baldwin and Mr. Gordon was that the allotment of a share to her was contingent on Mrs. Baldwin upholding her obligation to provide her expertise to manage the day-to-day operations of the business, and see to its profitability. However, Mrs. Baldwin left the company in all capacities in 1993, therefore she failed to fulfil her obligation pursuant to the agreement and has not established an entitlement to the share allotted. To this end she relied on **Mennillo v Intramodal** [2016] 2 SCR 438;2016 SCC 51.

[16] Further, it was submitted that Mrs. Baldwin's conduct since leaving the Company in or around 1994 has not illustrated that she had regarded herself as a shareholder. She did not request any information in relation to the business, did not request any dividend payments, did not requisition a shareholder's meeting, nor did she perform any actions consistent with her rights as a shareholder. It was also submitted, in the alternative, that Mrs. Baldwin abandoned or waived her rights and privileges as a shareholder of the Company.

[17] In the alternative, Counsel contended that if the Court was minded to accept that Mrs. Baldwin was indeed entitled to the 1 share, then, she submitted, the allotment of the 998 ordinary shares by the directors to Mr. Gordon was lawful, proper and in the best interest of the Company. Mr. Gordon did not allot the shares to himself. Mrs. Baldwin's position that Mr. Gordon unilaterally alotted shares to himself is untenable, as the Company records indicate that the directors at the time, Mr. Anthony Francis and Mr, Gordon, approved the allotment.

[18] Counsel contended that the Return Allotment for the allotment of the 998 shares were not filed with the Registrar of Companies until 18th October 2000, which is contrary to Mrs. Baldwin's claim that the allotment was done in 1989. This fact would have supported the defendant's argument that the Company's affairs needed to be regularized in order to obtain financing.

[19] In the alternative, if it was found that the allotment took place in 1989, it was argued that it was done with Mrs. Baldwin's actual or constructive knowledge and/or consent, or alternatively, with her acquiescence as she was the managing director and company secretary in 1989 until her departure in 1994. Consequently, it was not plausible that the allotment would have been done without her consent.

[20] It was also Counsel's submission Mrs. Baldwin has failed to establish that there was a breach of **The Companies Act** or the Company's Articles of Incorporation. In accordance with the maxim omnia praesumuntur rite esse acta, it is for Mrs. Baldwin to establish the unlawful conduct of Mr. Gordon.

[21] Counsel Mrs. Buchanan-McLean further contended that pursuant to **S.61 of The Companies Act**, pre-emptive was only given to shareholders where the Articles of Incorporation provided for such. She argued that the Articles of Incorporation of the Company were silent on an express procedure for dealing with unissued shares as S. 42 and S.44 of the Articles of Incorporation only attached pre-emptive rights to new shares. Further, unissued shares were not new shares which were created and neither was there an increase to the share capital. Consequently, there was nothing to dictate that any pre-emptive rights were attached to unissued shares or that an extra ordinary general meeting had to be held in order to seek approval to allot said shares. In light of the foregoing, she concluded that Mr. Gordon could not be deemed to have breached the Articles of Association or **The Companies Act**. Reliance was placed on **Joni Kamille Young-Torres v Ervin Moo Young and others** *(supra)*.

[22] Counsel contended that the Articles of Association is a binding contract between Mr. Gordon and Mrs. Baldwin. Therefore, the parties agreed to the specific rules in the

Articles of Incorporation to govern their shareholder relationship as such the Court has no power to rectify it. Counsel relied on **Attorney General of Belize v Belize Telecom Ltd.** [2009] UKPC 10 (18 March 2009).

[23] Alternatively, if the Articles of Incorporation did prescribe a procedure for unissued shares, pre-emptive rights would not apply as the shares were acquired by non-cash consideration. Further, any purported breach of the Articles of Incorporation would not invalidate the allotment of the shares, but instead, entitle Mrs. Baldwin to compensation under a separate compensation claim. In the further alternative, given the informality in which the Company was operated, and the established past practice of non-compliance of the Articles by the parties, it would not be just and equitable for Mrs. Baldwin to insist on strict legal rights.

[24] Counsel further argued that pursuant to Article 15, directors have an unfettered right to allot and dispose of shares in any manner deemed fit, subject to doing so for a proper purpose. The case of **Howard Smith Ltd v Ampol Petroleum Ltd and others** [1974] AC 821 was relied on. Counsel submitted that in these proceedings, Mrs. Baldwin has only challenged the allotment and its procedure and not the purpose of the allotment. Therefore, she submitted, the purpose of the allotment is not an issue before the Court, and the Court has no jurisdiction to embark on such an examination.

[25] Alternatively, she submitted, if the Court is minded to explore the purpose for the allotment, then she argued, the shares were allotted in order to facilitate loan financing which was required for the expansion of the business. Pursuant to the case of **Howard Smith** *(supra)*, this purpose was a legitimate exercise of the directors' powers. It was submitted that there is sufficient evidence of the purpose of the loan, and there was no evidence that the directors exercised the power to allot shares for an improper purpose. Consequently, in accordance with **Howard Smith** *(supra)*, given that this was a management decision within the responsibility of the directors, it is not for the Court to substitute its opinion for management's.

[26] Additionally, Counsel submitted that in **Howard Smith** *(supra)* no notice was given to Ampol and Bulkship of the intended allotment, however, the court found that the allotment was intra vires the directors. Hence, there is no mandatory, legal and procedural requirement for the allotment of unissued shares in the Articles.

[27] It was submitted that the case of **Northover v Eric Northover** *(supra)*, as relied on by Mrs. Baldwin, is distinguishable from the case at bar, as in said case the allotment was done for an improper purpose as it done solely to alter voting power. Similarly so, in **Joni Kamille Young-Torres v Ervin Moo Young and others** *(supra)* the allotment was done in order to circumvent the laws of succession. In the case at bar the allotment was done for the purpose of raising capital.

[28] Further, Counsel submitted that it was accepted that the defendants have the evidential burden to show that Mr. Gordon's actions were proper, however, Mrs. Baldwin has a legal burden to satisfy the Court on a balance of probabilites that the allotment was for an improper purpose.

[29] Counsel disagreed with the findings in **Northover** *(supra)* where the judge concluded that the unsubscribed shares remain new shares until they are issued according to the law and the Articles of Incorporation. Consequently, pre-emptive rights attached to the unissued shares. Further, the judge did not cite any authority to support this view. To that end, it was argued that the decision of **Northover** *(supra)* was from a court of concurrent jurisdiction and is not binding on the Court.

[30] Mrs. Buchanan-McLean also contended that Mrs. Baldwin is barred by laches from challenging the disputed allotment as the filing of the Return Allotment and the several Annual Returns were public record, therefore, Mrs. Baldwin had ample opportunity to challenge the allotment and claim for rectification. This was buttressed by **The Lindsay Petroleum Co. v. Hurd** (1874) LR 5 PC 221 and **Erlanger v New Sombrero Phosphate Co. (1878) 3 App. Cas** 1218 (H.L.).

[31] Alternatively, Mrs. Baldwin, in failing to act within a reasonable time, had waived her right to challenge the allottment and should be barred from advancing her claim. Counsel's submission was that Mrs. Baldwin's claim for the rectification of shares in a Company which she left over twenty-seven **(27)** years ago is unreasonable and unjust given that she did not fulfil her obligations under the agreement to manage the day-to-day operations of the Company.

[32] In the further alternative, Cousel also contended that Mrs. Baldwin has acquiesced the infringmement by taking no steps to assert her purported rights as a shareholder and director. To this end she relied on **Erschbaumer v Wallster** 2014 BCSC 2171.

[33] Additionally, Counsel denied Mrs. Baldwin's assertion that Mr. Gordon arbitrarily appointed an additional director and company secretary. She averred that Mrs. Baldwin vacated her role as director and company Secretary, hence, in order to acquire assistance to manage the operation of the business ,and to comply with Articles 70 and 110 of the Articles of Incorporation, Mr. Gordon appointed Mr. Anthony Francis as a director and Ms. Maxine Fuller as the company secretary.

[34] Mrs. Baldwin by her own admission had withdrawn herself from the Company, consequently, pursuant to Article 92 of the Articles of Incorporation, she disqualified herself as a Director. It was Counsel's contention that after Mrs. Baldwin left the Company she showed no interest in its management or business affairs. Effectively, Mrs. Baldwin resigned. There was no evidence to support Mrs. Baldwin's contention that her departure was not voluntary. Therefore, it was submitted that Mrs. Baldwin was not removed as a director, and, as such there was no requirement for the notice of any meeting. Consequently, Mr. Gordon was empowered to appoint an additional director pursuant to Articles 91 and 99. Moreover, she submitted, **S.176 of The Companies Act** and Article 102 validate all acts done by Mr. Francis, even if though there was some defect in his appointment.

[35] The case of **John Peart v Sandra Palmer Peart & Ors** [2018] JMSC Civ 186 **("Peart")**, Counsel submitted was distinguishable from the case at bar, as Mr. Peart did

not abandon his office like Mrs. Baldwin. Further, what was contended in **Peart** was that he was given the appropriate notice, hence, the case has no applicability at bar.

[36] It was further argued that Mr. Gordon was within his right to indicate to the Registrar of Companies that Mrs. Baldwin had resigned from the Company, as she had expressed to Mr. Gordon that she had given up her role as director and would not be returning to the Company. Moreover, Mrs. Baldwin absented herself from the management of the Company and had shown no interest in the affairs of the business.

[37] Further, according to Articles 93 and 94, the office of the director is not an office in perpetuity, therefore, Mrs. Baldwin was not entitled to remain a director from the incorporation of the Company to present.

[38] Counsel Mrs. Buchanan-McLean denied that Mr. Gordon's conduct was fradulent, oppressive or unfairly prejudicial to Mrs. Baldwin. No particulars of fraud were specifically pleaded by the Mrs. Baldwin as required by law. Additionally, Mrs. Baldwin has failed to establish that her expectations were reasonable and that said expectations were violated by the defendant's conduct. It was further argued that Mr. Gordon could not have deprived Mrs. Baldwin of any rights which she had not expressed any interest in retaining.

[39] Relying on **BCE Inc v 1976 Debentureholders** 2008 S.C.C 69, [2008], Counsel contended that Mrs. Baldwin must identify the legitimate expectations she purported to have been violated, and further establish that such expectations were reasonably held. It was argued that there must be objective evidence that there had been oppression. Moreover, the fact that a company failed to comply with statutory requirements does not necessarily constitute oppression. To this she relied on **Mennillo v Intramodal** *(supra)*. In this regard it was not reasonable for Mrs. Baldwin to have expected to remain a director and company secretary given her absence from the Company, the relationship and past practice between Mr. Gordon and herself, her conduct during the years of her absence etc.

[40] Counsel for Mrs. Baldwin also denied the contention in Mrs. Baldwin's witness statement that she is entitled to 50% of profits in the business. Alternatively, if she is entitled, she is only entitled to one share. However, this was not pleaded by Mrs. Baldwin in her Particulars of Claim, therefore Counsel submitted that the Court ought not to consider it. It was further contended that the non-payment of dividends was not tantamount to oppression or unfair prejudice. Pursuant **to S. 158 of The Companies Act** and Article 117 of the Articles of Incorporation, dividends could only be paid to shareholders out of the profits of the Company and it was for Mrs. Baldwin to establish that she was entitled to a dividend payment.

ISSUES

[41] There are two broad issues before the Court. They concern the Claimant's entitlement to shares in the Company, and whether the Claimant was removed or remains a director of the Company. Accompanying those issues is whether any remedy to which the Claimant may be entitled is barred by the undue delay in asserting those rights. I have particularized them as follows:

(i) What is Mrs. Baldwin's entitlement, if any, to the shares in the company?

- When and by which director(s) were the unissued shares of the Company allotted?
- Were the shares validly allotted?
- Were the shares issued for an improper purpose?
- Did Mrs. Baldwin abandon/lose her rights as a shareholder?

(ii) Did Mrs. Baldwin resign as a director or abandon her directorship?

(iii) Whether Mr. Gordon and/or any other director act in a manner that was oppressive or unfairly prejudicial to Mrs. Baldwin's interest as a director and shareholder in the Company?

(iv) Whether delay or waiver (laches) acts as a bar to Mrs. Baldwin's claim for the remedy of rectification?

LAW AND ANALYSIS

[42] The **Companies Act 2004** now in effect came into operation on the 1st February 2005. The actions which took place prior to the effective date of the **Act** would have been governed by the **Companies Act 1965**. **("The 1965 Act")**. The appropriate indications will be made in this judgment.

THE ALLOTMENT OF UNISSUED SHARES

[43] The Company, after incorporation, had 998 unsubscribed shares. Article 15 of the Articles of Incorporation stipulates how the unissued share are to be dealt with. It reads:

> *The Shares shall be under the control of the Directors, who may allot and dispose of or grant options over the same to such persons, on such terms, and in such manner as they think fit. Shares may be issued at par or at a premium.*

[44] This seemingly unfettered right is however bound by the directors' fiduciary duty to exercise their powers only for the purposes for which those powers are conferred. In the seminal authority of **Howard Smith Limited v Ampol Petroleum Limited** 1974 AC 821 **("Howard Smith")** the Privy Council considered a situation where shares were allotted which had the effect of reducing the majority shareholders to minority shareholders for the purpose of raising necessary capital. Lord Wilberforce stated:[1]

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[1] 1974 AC 821, pg 834

> *The directors, in deciding to issue shares, forming part of Millers' unissued capital, to Howard Smith, acted under clause 8 of the Company's Articles of Association. This provides, subject to certain qualifications which have not been invoked, that the shares shall be under the control of the directors, who may allot or otherwise dispose of the same to such persons on such terms and conditions and either at a premium or otherwise and at such time as the director's may think fit. Thus, and this is not disputed, the issue is clearly intra vires the directors. But, intra vires though the issue may have been, the* ***director's power under this article is a fiduciary power; and it remains the case that an exercise of such a power though formally valid, may be attacked on the ground that it was not exercised for the purpose for which it was granted****. (Emphasis mine)*

[45] With respect to the duties owed by a director to a company, the **1965 Act** does not identify the specific duties owed. However, it can be gleaned from the cases that at common law, the fiduciary duties of a director include the duty to:

i. To act in good faith and in the best interests of the company;

ii. To exercise reasonable care, skill, and diligence;

iii. To exercise powers for the purpose for which they were conferred;

iv. To avoid conflicts of interest between personal and company matters;

v. To maintain the confidentiality of the company's information;

vi. To act with impartiality towards shareholders;

vii. To declare any interest in a proposed transaction or arrangement with the company;

viii. Not to make secret profits or take advantage of their position for personal gain; and

ix. Not to compete with the company

[46] **The Companies Act of 2004 ("the 2004 Act")** codified common law and imposed a statutory duty of care at **S. 174 of the Act**. It reads:

> *174.—(1) Every director and officer of a company in exercising his powers and discharging his duties shall— (a) act honestly and in good faith with a view to the best interest of the company; and (b) exercise the care, diligence and skill that a reasonably prudent person would exercise in comparable circumstances, including, but not limited to the general knowledge, skill and experience of the director or officer.*

[47] In **Joni Kamille Young-Torres v Ervin Moo-Young and others** [2019] JMCA Civ 23 **("Young-Torres")**, Edwards JA applied **Howard Smith** when considering an allotment of shares which was being challenged. She concluded that the power of the directors to allot shares was not unfettered and was subject to the directors acting for a proper purpose. She stated the following:[2]

> *[114] The case of **Howard Smith Ltd v Ampol Petroleum Ltd and others** [1974] AC 821 (PC), is the leading case on the proper purpose doctrine. In that decision the - Board made it clear that the question whether a power was exercised for a proper purpose was one of law. Whether the directors subjectively thought their actions were proper is not conclusive on the issue.*
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> *[122] The leading speech of Lord Wilberforce in Howard Smith Ltd v Ampol Petroleum Ltd and others provides useful guidance on how to assess whether a director acted for a proper purpose with respect to the allotment of shares. At page 835 he states:*
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>> *"...[I]t is necessary to start with a consideration of the power whose exercise is in question, in this case a power to issue shares. Having ascertained, on a fair view, the nature of this power, and having defined as can best be done in the light of modern conditions the, or some, limits within which it may be exercised, it is then necessary for the court, if a particular exercise of it is challenged, to examine the substantial purpose for which it was exercised, and to reach a conclusion whether that purpose was proper or not. in doing so it will necessarily give credit to the bona fide opinion of the directors, if such is found to exist, and will respect their judgment as to matters of management; having done this, the ultimate conclusion has to be as to the side of a fairly broad line on which the case falls."*
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> *[123] Lord Wilberforce further expounded on this by stating at page 832 that:*

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[2] [2019] JMCA Civ 23, paras 114, 122-123

> *"...[W]hen a dispute arises whether directors of a company made a particular decision for one purpose or for another, or whether, there being more than one purpose, one or another purpose was the substantial or primary purpose, the court, in their Lordships' opinion,* ***is entitled to look at the situation objectively in order to estimate how critical or pressing, or substantial or, per contra, insubstantial an alleged requirement may have been. If it finds that a particular requirement, though real, was not urgent, or critical, at the relevant time, it may have reason to doubt, or discount, the assertions of individuals that they acted solely in order to deal with it, particularly when the action they took was unusual or even extreme.****" (Emphasis added)*

[48] In **Howard Smith**, Lord Wilberforce accepted the trial judge's findings that at the time of the allotment of shares by the directors, the company was in need of capital. Notwithstanding, the Board held that it was unconstitutional for the directors to exercise their powers for the purpose of destroying an existing majority shareholding, even if such purpose was not motivated or tainted by self-interest. The Board further espoused that not only should the allotment of the shares be done for the benefit company, but also there are circumstances in which the interest of shareholders must be considered'[3] Edwards JA addressed this issue stating:[4]

> *[124] Although the company's constitution may authorize the directors to issue shares as they see fit, it is clear from the authorities, that the issue of shares for certain purposes will be held to be an improper exercise of that power.* ***Therefore, the exercise of the power to issue shares simply in order to destroy an existing majority, or to create a new majority which did not exist before has been held to be improper*** *(see Punt v Symons & Co Ltd [1903] 2 Ch 506; Piercy v S Mills & Co Limited [1920] 1 Ch 77 - and Hogg v Cramphorn Ltd and others [1967] Ch 254).* ***This is largely because share ownership is within the purview of the shareholders and the power which accompanies majority ownership is a decision for shareholders, not directors****.*
>
> *[125] The case of Howard Smith Ltd v Ampol Petroleum Ltd involved a takeover bid for a company, where the directors showed a preference to a particular bidder and, accordingly, made an allotment of shares to that bidder, with a view to diluting the shareholdings of the potential rival bidders for the company. A challenge was raised as to the validity of the issuing of*

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[3] [1974] 1 All ER 1126, 1134
[4] [2019] JMCA Civ 23, paras 124-125

> *the shares. On appeal to the Privy Council, the Board, in agreeing with the decision of the trial judge, found that* ***although the directors acted honestly and had the requisite power to make the allotment, to alter a majority shareholding was to interfere with that element of the company's constitution which was separate from and set against the directors' powers, and accordingly, it was unconstitutional for the directors to use their fiduciary powers over the shares in the company for the purpose of destroying an existing majority or creating a new majority. The Board further concluded that since the directors' primary objective for the allotment of shares was to alter the majority shareholding, they had improperly exercised their powers and the allotment was invalid.*** *(Emphasis mine).*

[49] The question of proper purpose was more recently considered by the United Kingdom Supreme Court in **Eclairs Group Ltd v JKX Oil & Gas Plc** [2014] 2 ALL ER (Comm) 1018 **("Eclairs")**. The issue that arose was whether the directors of JKX exercised their power under the company's articles to serve restriction notices on certain members in a minority group, (Eclairs and Glengary) who had failed to provide information to the directors, as required by CA 2006 section 793. The question was whether the allotment was for a proper purpose in circumstances where (i) the effect of the notice was to prevent Eclairs and Glengary from voting their shares; (ii) the directors' purpose was to garner an opportunity to pass special resolutions enabling them to dilute the minority's shareholding, which the directors considered to be in the company's interests; and (iii) the minority held sufficient shares, so long as they could vote them, to block any special resolutions which they opposed. Mann J, Briggs LJ (dissenting on appeal) and the Supreme Court (unanimously) held that the directors' purpose was improper, and therefore an abuse of power. In his dissenting judgment in the Court of Appeal, Briggs LJ distinguished between a director's exercise of managerial powers and his exercise of powers capable of affecting the company's constitution at a shareholder level by stating:[5]

> *In relation to purely managerial powers, concerned with the planning and conduct of the company's business, the court will be slow to identify bespoke restrictions, and will afford the greatest respect to the directors' skill and judgment …But where the powers are capable of affecting the company's constitution at shareholder level, as is the case in relation to powers to allot or forfeit shares, and powers to deprive shareholders of*

[5] [2014] 2 ALL ER (Comm) 1018, para 100

> *voting rights, more circumspection is necessary as is in particular demonstrated by the outcome of the Howard Smith case.* ***Although the issue and allotment of shares for the purpose of diluting the holdings of those opposed to a takeover bid was adjudged by the directors to serve the company's best interests, it was nonetheless invalidly exercised because dilution of that kind was an unconstitutional interference with shareholders' rights*** *outwith the capital-raising purpose for which the power had been conferred." (Emphasis Mine)*

[50] In **Young-Torres**, Edwards JA clearly outlined the approach this Court should employ in considering whether the allotment of shares was proper as follows:[6]

> *[127] …*
>
> *a) an identification of the nature and extent of the power in question;*
>
> *b) an identification of the range of purpose for which the power may be exercised;*
>
> *c) an identification of the substantial purpose for which it was actually exercised in the particular case; and*
>
> *d) weighing the actual purpose that was identified in (c) above, against the range of permissible purposes for the exercise of that power as indicated by the articles or determined by the court, in accordance with (b) above.*

[51] This approach requires the Court to take into account the state of mind of the directors, such as can be ascertained, at the time in which the unissued shares were allotted. To this end Edwards JA explained:[7]

> *[145] In addition to examining the situation in the company at the time of the allotment, there would also have been a need to examine the state of mind of the directors at the time the power was exercised. This may reveal that the directors acted bona fide, as well as in the interest of the company or that the director's exercise of their power, although bona fide, was still improper and not in the company's interest. A careful examination of the facts was required to determine what was the purpose or the substantial purpose for the allotment.*
>
> *[146] The analysis that is required is better explained by Lord Wilberforce in Howard Smith Ltd v Ampol Petroleum Ltd at page 834 as follows:*

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[6] Ibid., para 127
[7] Ibid., paras 145-146

> ***… it is correct to say that where the self interest of the directors is involved, they will not be permitted to assert that their action was bona fide thought to be, or was, in the interest of the company; pleas to this effect have invariably been rejected*** *(eg Fraser v Whalley, 2 Hem & M 10 and Hogg v Cramphorn Ltd [1967] Ch 254) - just as trustees who buy trust property are not permitted to assert that they paid a good price. (bold emphasis provided)*
>
> *But it does not follow from this, as the appellants assert, that the absence of any element of self-interest is enough to make an issue valid. Self-interest is only one, though no doubt the commonest, instance of improper motive: and, before one can say that a fiduciary power has been exercised for the purpose for which it was conferred, a wider investigation may have to be made."*

[52] Edwards JA summarized the preceding extract from **Howard Smith** as follows:[8]

> *[150] In circumstances where there is evidence of self-interest or* ***where the director's actions served the purpose of promoting personal interests, instead of that of the company, they will be deemed to have acted for an improper purpose****. This would be the case, notwithstanding any evidence that the director may have believed that they acted honestly and that their action was in the interest of the company. Where there is no evidence of self-interests then the court would be required to undertake a much wider investigation.* (Emphasis mine)

[53] In **Hogg v Cramphorn Ltd** [1967] Ch. 254, another case in which the directors' motives were found not to be nefarious, Mr. Baxter approached the board of directors of Cramphorn Ltd. to make a takeover offer for the company. The directors (including Colonel Cramphorn who was managing director and chairman) believed that the takeover would be bad for the company. To avoid this, they issued 5707 shares with ten votes each to the trustees of the employee's welfare scheme, who included the Colonel. This meant they could out vote Baxter's bid for majority control. A shareholder, Mr. Hogg, sued, alleging the issue of the shares was ultra vires. Cramphorn argued that the directors' actions were all in good faith as it was feared that Mr. Baxter would separate many of the workers. The court found that the new shares issued by the directors were invalid and

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[8] Ibid., para 150

that the directors violated their fiduciary duties as directors by issuing shares for the purpose of preventing the takeover.

[54] Whilst the directors of Featherbed Farms unmistakeably have the power to allot the unissued shares as given by Article 15 of the Articles of Incorporation, it is clear that they cannot allot the shares purely to advance their own position or to consolidate control over the Company. To exercise of their power in such a way would be for an improper purpose.

[55] Counsel for the Defendants, Mrs. Buchanan-McLean, mounted the argument that Mr. Anthony Francis and Mr. Gordon, acting in their capacity as directors of the Company, approved the allotment of the shares to Mr. Gordon. This assertion must be investigated against the documentary evidence as there was no evidence proferred from Mr. Francis, and Mr. Gordon is now deceased. This means there is no evidence of the actual state of mind of the directors at the time the allotment was made.

[56] The only available evidence of the allotment of the Company's unissued shares is the statutory returns made at the Companies Office, there being no minutes of any meeting between the directors attesting to such a decision in the documentary evidence.

[57] The earliest indication of the allotment was the Return of Allotments dated the 10th November 1989 presented by Heslop and Associates[9] deposited with the Registrar of Companies on October 18, 2000. This document evinced the allotment of 998 shares to Mr. Gordon and is signed by Mr. Gordon as director. The List of Past and Present Members submitted with the Form of Annual Returns made up to the 24th December 1989, the 22nd December 1990, the 21st December 1991, the 23rd December 1995 and the 24th December 1997 all indicated that Mr. Gordon held 999 shares and Mrs. Baldwin held 1 share. These documents, submitted to the Registrar of Companies on the 18th October 2000, were signed by Mr. Gordon and Mr. Francis as directors. There is no evidence

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[9] Claimants Bundle of Documents dated 7th February 2023 – exhibit 1

presented to this Court capable of contradicting the contents of these documents. From the documentary evidence I am satisfied on a balance of probabilities that the allotment of the 998 unissued allotted to Mr. Gordon was done in the year 1989. In coming to this conclusion, I find that there was available evidence that could be presented to the Court if the transaction was indeed in the year 2000, Mr.Francis being then active in the Company. He signed almost all the documents. The act of allotment is said to be in part his act. I draw an adverse inference for his absence for which no reason was proffered.

[58] Counsel for the Defendants also mounted the argument that there was no provision in the Articles which mandated that an allotment of unissued shares had to be done with the consent, approval and agreement of both directors. It is undisuted evidence that Mrs. Baldwin was actively engaged in the operation of the Company up to 1994. It is also undisputed that she did not particpate in any meeting of directors, formally or informally, in which there was a discussion about shares or a decision taken to allot the unissued shares. Any such decision therefore could only have been taken by Mr. Gordon.

[59] Edwards J (as she then was) was presented with a similar argument in **Benkley Northover v Eric Northover** [2014] JMCC Comm 14 **(**"**Northover")**. She made the observation that the wording of the Article was deliberate in employing the use of the words *"Directors"* instead of *"Director"* and *"as they think fit"* as opposed to *"as he thinks fit"*. She also further made the observation that in accordance with the company's Articles of Incorporation, a single director did not constitute the quorum necessary for the transaction of business. Consequently, Edwards J made the finding that it was evident that a decision to allot unissued shares was not meant to be solely within the discretion of one director.

[60] As in the case of **Northover**, pursuant to Article 70(1), the quorum for a director's meeting in the case at bar is two. Edwards JA in the case of **Young-Torres** again addressed the question of a quorum. There the court had before it for consideration Article 47(c) of the company's Articles of incorporation which read:

> *(c) The directors may dispose of any shares not applied for by members in such manner as they think proper PROVIDED NEVERTHLESS that they shall not dispose of any shares in such manner as to cause the Company to cease to be a private company.*

Edwards JA, in determining whether the director exercised his power for the disposition of shares within its limits and for a proper purpose, noted that the *"question whether there was the requisite quorum in order for a decision to have been taken to dispose of the shares in this way"* had to be considered. In light of this, she found that in accordance with Article 99, which provided that the quorum necessary for the transaction of the company's business was two, for a decision to be made to dispose of the unissued shares, at least two directors were necessary to be present at the directors meeting.[10]

[61] On these premises, I find in the present case that a quorum of the two directors, as stipulated by the Company's Articles of Incorporation, was indeed required for a decision to be taken for the unissued shares to be allotted to Mr. Gordon. Mrs. Baldwin as the only other director in 1989 did not participate in such an exercise. Therefore, there could have been no quorum of directors taking a decision to allot the unissued shares to Mr. Gordon. I find that Mr. Gordon's allottment of the 998 unissued shares to himself was invalidly done.

[62] Mrs. Buchanan-McLean had raised the argument that the Court had no jurisdiction to examine whether the allotment was done for the proper purpose, as Mrs. Baldwin's challenge was on the facts and procedure for the allotment and not the purpose of the allotment. I do not agree with Counsel's submission. While it is not necessary to determine this matter on whether the allotment was for a proper purpose, having found that the allotment was invalid, I will nonetheless examine the evidence as it relates to this issue as a secondary ground.

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[10] [2019] JMCA Civ 23, paras 154-155

[63] The Defendants' position that the unissued shares were allotted to Mr. Gordon somewhere in or around the year 2000, after the departure of Mrs. Baldwin from the business, in order to facilitate loan financing which was required to expand the business and make it viable has been rejected. The Forms of Annual Return spanning December 1989 - December 1991 all indicate that the 998 unissued shares were allotted to Mr. Gordon, well prior to the departure of Mrs. Baldwin from the day-to-day operation of the business in 1994. Counsel Mrs. Buchanan-McLean, in response to this observation, proffered the explanation that the dates in question were the dates at which the forms were completed, and said dates were not material as the forms were filed at the Registrar of Companies on October 18th 2000, a date after which Mrs. Baldwin left the Company. Based on this argument, I surmise that Counsel would want the Court to accept that the date of October 18th 2000 was the date in which the allotment of the unissued shares was first effected. However, there can be no merit in this argument.

[64] The allotment of unissued shares is not effected by the filing of Forms of Annual Return. **Sections 121-124 of The 1965 Act** which governed these forms, speak only to the duty of a company to file Forms of Annual Return, and what information said forms ought to contain. These sections in no way provide that an allotment of shares is effected upon the Registrar of Companies being in receipt of the forms. This can be gleaned specifically from **S. 121** section governing annual return forms of companies with a shareholding, which states:

> *121.— (1) Every company having a share capital shall once at least in every year make a return containing a list of all persons who, on the 14th day after the first or only ordinary general meeting in the year,* ***are members of the company, and of all persons who have ceased to be members since the date of the last return****, in the case of the first return, of the incorporation of the company.*
>
> *(2) The list must state the names, addresses and occupations of all the past and present members therein mentioned,* ***the number of shares held by each of the existing members at the date of the return, specifying shares transferred since the date of the last return*** *or, in the case of the first return, of the incorporation of the company by persons who are still members and have ceased to be members respectively and the dates of registration of the transfers…*
>
> *…*

[65] It is evident that the section is simply for the purpose of updating the company's records yearly. The section provides for the form to specify the ***shares transferred since the date of the last return***. To my mind, this means that the drafters of the section had in their contemplation that the transfer or acquisition of a share could have occurred prior to filing the form. Further it is clear that filing the returns is an administrative function, the failure to do so attracting a penalty. It is a reasonable argument that having regard to the relative dates, the records were brought up to date to satisfy the requirements for receiving the loan. However, that is a far cry from asserting that the contents of the returns are erroneous or false. There is no evidence from which that conclusion could be drawn.

[66] In light of the foregoing, the date of October 18th 2000 was simply the date in which the Company filed the Forms of Annual Return, therefore I do not find that date material. Instead, I accept the forms to be written evidence of the Company's state of affairs at the time indicated in the document, which was provided to a government body that was entitled to it. Consequently, by filing these forms with the Registrar of Companies, the Company is bound by the information recorded on the Forms of Annual Return for the years December 1989 - December 1991.

[67] What I find to be significant in the forms for said dates is that Mr. Gordon allotted the remaining 998 unissued shares to himself, whilst Mrs. Baldwin was still an active participant in the day-to-day operation of the business, and more importantly, a director. Not only did Mr. Gordon allot the unissued shares to himself, but he also, as indicated by the Form of Annual Return for the year 1989, purportedly removed Mrs. Baldwin as a director of the Company and appointed Mr. Francis' as a director. Interestingly, the 1989 form was only one year after the inception of the business. During the years 1989-1994, Mrs. Baldwin whilst managing the day-to-day operation of the business would have understandably been completely unassuming of Mr. Gordon's actions. This was a sure indication of Mr. Gordon being actuated by an improper purpose in disposing of the unissued shares. It was a fact, supported by the documentary evidence, that there could be no good reason for Mr. Gordon's allotment of the shares to himself given that approximately two years after allotting the shares to himself in 1989, the Company was

able to secure loan financing from the National Commercial Bank in 1992, having leveraged the property of Mrs. Baldwin as security for the loan in part.[11] Mrs. Baldwin was also a guarantor of the loan, together with Mr Gordon, consistent with her equal ownership of the Company. This allotment of the shares was clearly not made known to Mrs. Baldwin. This shroud of secrecy is indicative of an improper purpose. It also means that at the time in which Mr. Gordon effected this allotment, the raising of financing was not his purpose, much less to make it his substantial purpose.

[68] It is quite obvious to this Court that Mr. Gordon's actions were for the purposes of eliminating the equal share distribution between himself and Mrs. Baldwin and make himself the majority shareholder in the Company. He, by himself, sought to advance his own position, to the detriment of the shareholding of Ms. Baldwin. This, while they were operating as agreed and Ms. Balwin was solely responsible for managing the day to day operations of the Company. It is therefore without any dificulty at all that the Court concludes that the purported allotment was made for an improper purpose.

[69] On these premises, the Court declines to delve into a discussion on pre-emptive rights which allows the existing shareholders to maintain the proportional distribution of shares in a company. However, I would be prepared to agree with the Claimant's submissions that the pre-emption rights attach to the unissued shares as much as new shares created.

REMOVAL OF MRS. BALDWIN AS A DIRECTOR & THE APPOINTMENT OF ADDITIONAL DIRECTORS

[70] **The 1965 Act** has little to say on the appointment of directors. The Act only prescribes the minimum number of directors a company ought to have **(S. 169)**, and that the appointment of directors in a public company shall be voted on individually **(S. 174)**.

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[11] The Affidavit of Mere Baldwin in support of Fixed Date Claim Form filed 21st September 2020, exhibit M.B.2.

The manner of appointment of directors is left to the Articles of Incorporation of a company. Articles 70, 92 and 96 which treat with the number of directors, the disqualification of directors and the retiring of directors respectively are relevant to this issue. They are set out as follows:

> ***70.*** *(1) Until otherwise determined by the company in general meeting the number of the directors shall not be less than two or more than seven. The first two Directors shall be:*
>
> *JOSEPH GORDON AND MERLE LEWIS*
>
> ***70.*** *(2) the number of Directors may at any time thereafter be increased or reduced as the Company in general meeting shall determine.*
>
> *…*
>
> ***92. DISQUALIFICATION OF DIRECTORS***
>
> *The office of a Director shall be vacated if-*
>
> *a) he becomes bankrupt or makes an arrangement or composition with his creditors generally:*
>
> *b) he becomes of unsound mind;*
>
> *c) he absents himself from the meetings of Directors for a period of six months without special leave of absence from the Board of Directors;*
>
> *d) he resigns his office by notice in writing to the Company: or*
>
> *e) he ceases to be or becomes prohibited from being Director by reason of any provision in or any order made under the Act.*
>
> *…*
>
> ***96.*** *If at any general meeting at which an election of Directors ought to take place, the place, the place of any retiring Director be not filled up, such retiring Director shall (unless a resolution for his re-election shall have been put to the meeting and lost) continue in office until the annual general meeting in the next year, and so on from time to time until his place has been filled up, unless at any such meeting it shall be determined to reduce the number of Directors in office.*

[71] In **Re Baker & Metson Ltd Metson v Metson and others** [2022] EWHC 1988 (Ch) **("Re Baker")**, the company originally had two directors who were brothers, Messrs Samuel and David Metson. One issue which arose for determination was the validity of

the appointment of an additional director, Mrs. Diana Metson, wife of David. The claimant, Samuel, alleged that David and another embarked on a course of action which sought to seize control of the company by, inter alia, the invalid appointment of Mrs. Metson. The company's Articles of Incorporation contained a similar provision for the appointment of a director (regulation 95 of Table A) to that of Featherbed Farms. Additionally, much like the evidence suggests Featherbed Farms did, the court observed that the company conducted business on an informal basis and had dispensed with many of the formalities of corporate governance such as: *"no formal notice was given in advance of meetings, no resolutions were formally put to directors, and no minutes were kept."*

[72] The court found that at the meeting on 3rd February 2020, though the directors would have discussed matters concerning the company, there was no agreement at that meeting that Mrs. Metson should be appointed as a director. In light of this, the court noted that she was not validly appointed by the directors at that meeting in accordance with regulation 95 of Table A and that David was therefore not entitled to register Diana as a director on 19th February 2020. Notwithstanding this, the court however held that Mrs. Metson was a director of the company on the basis that at the company's general meeting on 22nd July 2020, Mrs. Metson's appointment was confirmed by shareholders at that meeting. The tribunal noted that irrespective of the invalidity of Diana's appointment, the shareholders had rights under the Articles of Incorporation and under company law to remove her as a director, however, they did not exercise them. It is clear that had Mrs. Metson's appointment not been confirmed by shareholders in the general meeting on 22nd July 2020, Mrs. Metson would not have been found to be a director by way of her appointment on 19th February 2020.

[73] The Notice of change of Directors lodged 7th September 2000 indicated to the Registrar of Companies that Mrs. Baldwin resigned as a director effective November 1989. A similar document filed 25th May 2004 asserted that she resigned 16th September 1994. This was the year Mrs. Baldwin says she ceased participation in the operation of the business. (As an aside, the year 1989 on this document, gives support to the earlier

finding that Mr. Gordon's actions were to improperly give him controlling interest in the company.)

[74] In light of the foregoing, it would stand to reason that the spirit of articles such as Article 70 (2) of the Articles of Incorporation of Featherbed Farms Limited and regulation 95 of Table A in **Re Baker**, served to ensure that the decision to appoint a new or additional director was to be decided amongst shareholders in a general meeting.

[75] There is no evidence that the number of directors was increased or reduced in a general meeting. There is no evidence of the disqualification criteria being met. There is also no evidence that any resignation in writing was proffered by Mrs. Baldwin. There is also no evidence of any general meeting at which an election of officers should have taken place. In that event, the determination of the retiring of one director (which should be drawn by lot as they were appointed at the same time) could not have taken place. The retiring director would continue in office until a general meeting was held. There is no evidence that any of the above actions took place in an informal way. There was therefore no change in the directorship as stated in the Article of Incorporation, and I so find. The purported appointment of any other or additional directors must therefore be invalid.

OPPRESSION OR UNFAIRLY PREJUDICIAL CONDUCT

[76] Counsel Mr. Kinghorn submitted that the facts which illustrate Mr. Gordon's improper allotment of shares to himself and unilaterally removing Mrs. Baldwin as a director, also demonstrate oppressive and unfairly prejudicial conduct on his part.

[77] **S. 213A of the Companies Act** empowers shareholders to seek relief under this section if:

> *(a) any act or omission of the company or any of its affiliates effects a result;*
>
> *(b) the business or affairs of the company or any of its affiliates are or have been carried on or conducted in a manner;*

> *(c) the powers of the directors of the company or any of its affiliates are or have been exercised in a manner,*
>
> *that is oppressive or unfairly prejudicial to or unfairly disregard the interests of any shareholder or debenture holder, creditor, director or officer of the company, the Court may make an order to rectify the matters complained of.*

[78] An oppression remedy is an equitable remedy which gives the court the jurisdiction to guard against the abuse of corporate power. In the leading case of **Scottish Co-Operative Wholesale Society Ltd v Meyer and Another** [1958] 3 All ER 66 **("Scottish Co-Operative")**, Lord Viscount Simmonds denoted oppressive conduct as *"burdensome, harsh and wrongful conduct"*. His Lordship further enunciated that oppressive conduct indicated a *"lack of probity and fair dealing in the affairs of a company to the prejudice of some portion of its members."*[12] The Court of Appeal in In **Re Jermyn Street Turkish Baths Ltd.** [1971] 1 WLR 1042 accepted the definition of oppressive conduct as proffered by Lord Viscount Simmonds but also acknowledged that this definition may not be as comprehensive considering the unknown variables of life. In light of this the court espoused, *"Oppression must, we think, import that the oppressed are being constrained to submit to something which is unfair to them as the result of some overbearing act or attitude on the part of the oppressor."*

[79] Unfairly prejudicial conduct is a less onerous to make out than oppressive conduct. Therefore, wrongs which fall short of oppressive conduct are frequently considered unfairly prejudicial. In **Re Baker**, the Court, in discussing the scope of unfair conduct, cited the decision of the House of Lords in **O'Neill v. Phillips** [1999] 1 WLR 1092 which stated:[13]

> *(3) As to … the requirement of unfairness:*
>
> *(i) the concept of unfairness, although objective in its focus, is not to be considered in a vacuum. An assessment that conduct is unfair has to be made against the legal background of the corporate structure under*

[12] [1958] 3 All ER 66, pg 364
[13] [2022] EWHC 1988 (Ch), para 195

consideration. This will usually take the form of the articles of association and any collateral agreements and understandings between shareholders which identify their rights and obligations as members of the company;

(ii) these are the terms upon which the parties agreed to do business together, which include applicable rights conferred by statute. The starting point therefore is to ask whether the exercise of the power or rights in question would involve a breach of these terms;

(iii) these terms include, by implication, an agreement that any party who is a director will perform his duties as a director;

(iv) these terms are subject to established equitable principles which may moderate the exercise of strict legal rights when insistence on the enforcement of such rights would be unconscionable;

(v) agreements and understandings do not have to be contractually binding in order to be enforceable in equity;

(vi) it follows that it will not ordinarily be unfair for the affairs of a company to be conducted in accordance with the provisions of its articles or any other relevant and legally enforceable agreement, unless it would be inequitable for those agreements to be enforced in the particular circumstances under consideration. Unfairness may, to use Lord Hoffmann's words, 'consist in a breach of the rules or in using rules in a manner which equity would regard as contrary to good faith': see O'Neill v Phillips [1999] 1 W.L.R. 1092 HL at 1099A; the conduct need not therefore be unlawful, but it must be inequitable. Although it is impossible to provide an exhaustive definition of the circumstances in which the application of equitable principles would render it unjust for a party to insist on his strict legal rights, those principles are to be applied according to settled and established equitable rules and not by reference to some indefinite notion of fairness;

…

(viii) it is not enough merely to show that the relationship between the parties has irretrievably broken down. There is no right of unilateral withdrawal for a shareholder when trust and confidence between shareholders no longer exist. It is, however, different if that breakdown in relations then causes the majority to exclude the petitioner from the management of the company or otherwise to cause him prejudice in his capacity as a shareholder.”

[80] Further, the Court in **Re Baker** also cited a passage from the case of **Re Coroin (No. 2**) [2012] EWHC 2343 (Ch) where David Richards J stated:[14]

> *630. Prejudice will certainly encompass damage to the financial position of a member. The prejudice may be damage to the value of his shares but may also extend to other financial damage which in the circumstances of the case is bound up with his position as a member. So, for example, removal from participation in the management of a company and the resulting loss of income or profits from the company in the form of remuneration will constitute prejudice in those cases where the members have rights recognised in equity if not at law, to participate in that way. Similarly, damage to the financial position of a member in relation to a debt due to him from the company can in the appropriate circumstances amount to prejudice. The prejudice must be to the petitioner in his capacity as a member but this is not to be strictly confined to damage to the value of his shareholding. Moreover, prejudice need not be financial in character. A disregard of the rights of a member as such, without any financial consequences, may amount to prejudice falling within the section.*
>
> *631. Where the acts complained of have no adverse financial consequence, it may be more difficult to establish relevant prejudice. This may particularly be the case where the acts or omissions are breaches of duty owed to the company rather than to shareholders individually. If it is said that the directors or some of them had been in breach of duty to the company but no loss to the company has resulted, the company would not have a claim against those directors. It may therefore be difficult for a shareholder to show that nonetheless as a member he has suffered prejudice.*

It was gleaned from the authorities reviewed, that in claims for oppression or unfairly prejudicial conduct, no one shoe fits all. Further, the claimant has the burden of proof to establish the elements of oppression or unfairly prejudicial conduct on a balance of probabilities.

[81] **BCE INC, v Bell Canada [2008] 3 S.C.R. 560 ("BCE")** though not binding on this Court, is useful as a persuasive authority in circumstances where **S. 241 of the Canada Business Corporation Act ("CBCA")** mirrors **S. 213A of the Companies Act 2004**. In this case **BCE Inc.** was the subject of a leveraged buyout. The arrangement contemplated the addition of substantial amount of debt for Bell Canada, a subsidiary of

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[14] Ibid., para 198

BCE. The plan was approved by over 90% of BCE's shareholders but opposed by a group of debenture holders which sought relief pursuant to the oppression remedy under **S. 241 of the CBCA**. Their main complaint was that the short-term trading value of the debentures would decline by an average of 20 percent and could lose investment grade status upon the completion of the arrangement. The Court found that the arrangement was done out of necessity and for a valid business purpose. Moreover, it was a well-known commercial phenomenon for debentures' market value to fluctuate as a response to changes to the debt load. The arrangement did not fundamentally alter the debenture holders' rights. It was a foreseeable risk that the trading value of debentures stood to be diminished in an arrangement involving additional debt.

[82] In those circumstances the Supreme Court adopted a two-fold test which required the court to determine:[15]

(a) Whether the applicant established a reasonable expectation; and

(b) Whether the breach of the reasonable expectation amounts to oppression.

Applying this test, there could be no argument that as an existing equal shareholder Mrs. Baldwin had the legitimate expectation that the unissued shares would be allotted in a manner that preserved her status as an equal "partner" in the Company. This certainly would be the case at least until 1994. Likewise, she would have a legitimate expectation that she would be retired as a director in the manner provided in the Articles.

[83] Having accepted that Mr. Gordon allotted the unissued shares, during the period in which she was still actively participating in the business, the question is whether this act amounts to oppressive conduct. Mrs. Baldwin's evidence of the actions of Mr. Gordon to undermine her and threaten her to not to return to the farm therefore carry great weight as it demonstrated the animus of Mr. Gordon. The allotment of shares which deprived

[15] [2008] 3 S.C.R. 560, para 56

Mrs. Baldwin of the benefits of her equal shareholding was done in clandestine manner and lacked probity. I therefore find that this conduct in the circumstances was oppressive.

[84] It is also indisputable that Mrs. Baldwin, as a shareholder in the Company, had a reasonable expectation to be retired in keeping with the Articles and to cast a vote in appointing a director to the board of the Company. This is enshrined in Article 70(2) of the Company's Articles of Association, and is a right based on ownership of a share, which lest we forget is property forming part of an individual's personal estate. Mr. Gordon stripped Mrs. Baldwin of her legal rights when he, without first consulting Mrs. Baldwin, appointed Mr. Francis, (again, whilst Mrs. Baldwin was still participating in the business), and other individuals as directors of the Company. This infringement continued even after Mr. Gordon had passed away and his affairs were being handled by his estate. Though Mrs. Baldwin had not actively participated in the business for approximately twenty **(20)** years, her stake in the Company as a shareholder would not have dissipated over time. Therefore, even if the Court had accepted the Defendants' argument that Mrs. Baldwin was only entitled to one share, that one share would have been enough to entitle Mrs. Baldwin to a vote in appointing a Director. This conduct was prejudicial to the interest of Mrs. Baldwin.

[85] Finally, I will address the submission that Mrs. Baldwin abandoned or waived her rights and privileges as a shareholder. This argument I am afraid is based on a wholly misconceived notion as to the nature of a share. The authors of **Words and Phrases Legally Defined, 3rd Ed.** defines a share as:

> *…a right to a specified amount of the share capital of a company, carrying with it certain rights and liabilities while the company is a going concern and in its winding up. The shares or other interest of any member in a company are personal estate, transferable in the manner provided by its articles...*

Shares can be bought, sold, hypothecated and bequeathed.

[86] The only provision made for the loss of shares in the Articles otherwise than by transfer or transmission is by forfeiture. Article 35 provides that a shareholder may forfeit his shares if he fails to pay any call or instalment of a call when required to do so. There

is no evidence of any call. Mrs. Baldwin therefore remains the owner of the 1 share subscribed by her.

DELAY AS A BAR TO RECTIFICATION

[87] Mrs. Baldwin is entitled to seek the remedies of rectification and reinstatement, the Court having found that the allotment of shares was invalid and that she was invalidly removed as a director. Rectification is an equitable remedy subject to the various maxims developed around the grant of equitable relief. One such maxim is that delay defeats equity, formally known as laches. It is contended that the lengthy delay from the time the invalid acts were done to the time this action was instituted was undue and should bar Mrs. Baldwin from any relief.

[88] The Doctrine of Laches is an equitable defence which arose from the maxim *"equity aids the vigilant, not those who slumber on their rights."* It is rooted in the principle that a party who fails to assert their legal rights within a reasonable time may be barred from doing so if the delay has prejudiced the opposing party. It is important to note that the burden of proof is on the party asserting laches. In **Halsbury Laws of England (4th Ed,)**, the learned authors posited that *"a claimant in equity is bound to prosecute his claim without undue delay…".* It was further concluded that there is no fixed time limit for equity, instead, each case is considered on its own merits.[16] To this end, the authors define the defence of laches as:[17]

> *In determining whether there has been such delay as to amount to laches the chief points to be considered are (1) acquiescence on the plaintiff's part and (2) any change of position that has occurred on the defendant's part. Acquiescence in this sense does not mean standing by while the violation of the right is in progress, but assent, after the violation has been completed and the plaintiff has become aware of it. It is unjust to give the plaintiff a remedy where he has by his conduct done what might fairly be regarded as equivalent to a waiver of it; or where the conduct done has, though not waiving the remedy, put the other party in a position in which it would not be reasonable to place him if the remedy were afterwards asserted.*

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[16] Vol 16, para 911
[17] Ibid., para 910

The authors further posited that as equity does not fix a specific time limit, each case is considered on its own merit.

[89] In essence the Doctrine of Laches enables the court to deny relief in cases where it would be unjust to grant. This was emphasized by the Privy Council in the oft-cited case of **The Lindsay Petroleum Co. v. Hurd** (1874) LR 5 PC 221 **("Lindsay")**, where Lord Selborne enunciated:[18]

> *Now the doctrine of laches in Courts of Equity is not an arbitrary or a technical doctrine. Where it would be practically unjust to give a remedy, either because the party has, by his conduct, done that which might fairly be regarded as equivalent to a waiver of it, or where by his conduct and neglect he has, though perhaps not waiving that remedy, yet put the other party in a situation in which it would not be reasonable to place him if the remedy were afterwards to be asserted, in either of these cases, lapse of time and delay are most material. But in every case, if an argument against relief, which otherwise would be just, is founded upon mere delay, that delay of course not amounting to a bar by any statute of limitations, the validity of that defence must be tried upon principles substantially equitable. Two circumstances, always important in such cases, are, the length of the delay and the nature of the acts done during the interval, which might affect either party and cause a balance of justice or injustice in taking the one course or the other, so far as relates to the remedy... In order that the remedy should be lost by laches or delay, it is, if not universally, at all events, ordinarily—and certainly when the delay has been only such as in the present case— necessary that there should be sufficient knowledge of the facts constituting the title to relief."*
>
> *(3) Laches 30. … the equitable doctrine of laches may provide the answer: inaccurately summed up in the Latin tag, vigilantibus, non dormientibus, jura subvenient (the law supports the watchful not the sleeping). Sullivan LJ's reference to sleeping on his rights comes from the words of Lord Camden LC in Smith v Clay (1767) 3 Bro CC 639n, at 640n: "A Court of Equity has always refused its aid to stale demands, where a party has slept upon his right and acquiesced for a great length of time. Nothing can call forth this Court into activity, but conscience, good faith, and reasonable diligence; where these are wanting, the Court is passive, and does nothing." 31. According to Snell's Equity (32nd Edn, para 5.016)* ***mere delay, however lengthy, is not sufficient to bar a remedy*** *(referencing Burroughs v Abbott [1922] 1 Ch 86 and Weld v Petrie [1929] 1 Ch 33). Mr George disputes this (but referencing Wright v Vanderplank (1856) 2 K & J 1, 8 De GM & G 133, where there was an express finding of acquiescence,*

[18] (1874) LR 5 PC 221, pg 239-240

> *and RB Policies at Lloyd's v Butler [1950] 1 KB 76, which was a limitation case turning on the date when the cause of action accrued, so scarcely giving strong support for his position). This is not the place definitively to resolve that debate, as we are concerned with analogies rather than the direct application of the doctrine. Nevertheless,* ***the general principle is that there must be something which makes it inequitable to enforce the claim. This might be reasonable and detrimental reliance by others on, or some sort of prejudice arising from, the fact that no remedy has been sought for a period of time; or it might be evidence of acquiescence*** *by the landowner in the current state of affairs 32. Lord Neuberger cited this passage in Fisher v Brooker [2009] UKHL 41, [2009] 1 WLR 1764, in support of his observation that "Although I would not suggest that it is an immutable requirement, some sort of detrimental reliance is usually an essential ingredient of laches, in my opinion" (para 64). Later in Lindsay Petroleum (p 241) Lord Selbourne said this: "In order that the remedy should be lost by laches or delay, it is, if not universally at all events ordinarily . . . necessary that there should be sufficient knowledge of the facts constituting the title to relief." (p 241) It is for this reason that Mr George accepts that there must be knowledge of the facts before delay can constitute a bar to relief.*

In light of the foregoing authorities, it is clear that the factors which the Court ought to consider in determining whether the claimant should be allowed to vindicate his particular legal right are: (1) the length of the delay, (2) acquiescence on part of plaintiff and (3) where there has been a change in the defendant's position as a result of the delay which would make it unjust to award the remedy.

[90] This approach was evidenced in **Young-Torres** where one issue concerned whether the claimant's delay acts as a bar to the remedy of rectification. In **Young-Torres**, the dispute concerned the validity of the allotment of unissued shares. Karl Young and Ervin Moo-Young were the directors and only shareholders in a company with a share capital of 500,000 ordinary shares with each individual having a shareholding of 1. Chad Young was the son of Karl Young and a director in the company. Subsequent to Karl Young's death, Ervin Moo-Young and Chad Young purportedly called a general meeting of the directors and members of the company, and it was agreed that 490,000 of the unissued shares in the company were to be allotted to Chad Young. Subsequently, the claimant sought rectification of the register.

[91] The 2nd respondent asked for the application for the rectification of the share register to be refused on the basis that over five years had elapsed since the allotment of the shares, therefore, such a delay was fatal to the claim. Edwards JA found that this argument was without merit. She stated as follows:[19]

> *[169] Joni Torres stated that at the time of her father's death, she resided in the United States of America and that Chad Young was the only beneficiary to the estate who resided in Jamaica and who had any knowledge of their father's business affairs, finances and corporate shareholdings. It was on this basis that she assumed he would see to the settling of their father's estate. She stated that up until the death of Chad Young, neither she nor her siblings were aware that their father had died intestate and that nothing had been done to administer his estate. Upon becoming aware sometime in February 2014, that nothing had been done, she immediately sought to ascertain the whereabouts of all surviving children, as well as obtained legal advice in March of that same year. Subsequently, letters of administration of the estate of Karl Young was applied for by her on 17 July 2015 and obtained on 28 August 2015.*
>
> *[170] In the interim years, it appears Chad Young ran the company, along with Debbian Dewar, who was not a shareholder. It is unclear what part Ervin Moo-Young played, his shareholding having been diluted***. However, C'had Young, having moved expeditiously, after the death of his father, to create a super majority in himself and, in so doing, acted with impropriety, cannot now complain of delay. Debbian Dewar also cannot complain of prejudice from any delay, since any benefit she derived was entirely as a result of the wrongdoing of Chad Young.** *She was not a purchaser for value without notice. (Emphasis mine)*

Mrs. Baldwin's evidence indicated that she became aware of the changes in the shareholding, and of directors, when she attended on the Companies office sometime in December 2019 to make checks. She commenced this action in September 2020. Based on her actual knowledge, the delay was a matter of months. The question is whether she could have ascertained this information earlier with due diligence, in other words, whether she should be fixed with constructive knowledge for the purpose of determining the length of delay. Of course the earliest she could have known of the actions of Mr. Gordon was October 2000 when the returns were filed with the Registrar of Companies. There was a period of nearly 20 years before any checks were made with the Companies Office. In

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[19] 2019 [JMCA] Civ 23, paras 169-170

view of her acrimonious parting from the Company, I find that inquiry could have been made at an earlier stage. However, even a lengthy delay in and of itself will not be a bar to the Claimant getting equitable relief.[20] Accepting that there was delay, the final question is whether in all the circumstances it is unconscionable to disturb the current shareholding. Despite the undoubted prejudice to Mrs. Gordon, who's deceased husband and herself were responsible for the development of the Company since Mrs. Baldwin's departure, it would be unjust for Mrs. Gordon to receive such a windfall based on the underhand and improper actions of her husband. I am mindful that in the proper exercise of their powers in allotting the unissued shares, the directors may consider the activities of all parties in relation to the Company. That in my estimation would serve to redress any potential imbalance.

[92] The situation is a bit different with respect to the directorship. Though the manner of Mrs. Baldwin's removal as a director was as improper and invalid as the allotment of shares, the question of prejudice and the balance of justice would not favour the same outcome. It would not be reasonable for Mrs. Baldwin to hold the belief, after 20 years of non-participation in the Company, that she remained a director as she had never resigned nor was removed in accordance with the Articles of Association. Mrs. Baldwin as a director owed a fiduciary duty to the Company to act in its best interest, and for 20 years Mrs. Baldwin neglected to execute her duty to the Company by failing to show any interest in its affairs and proper operation. It would certainly be unfair and prejudicial to the

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[20] Fisher v Brooker and others [2009] UKHL 41, para 78 - *Be that as it may, the position in this jurisdiction is that the mere passage of time cannot of itself undermine claims such as those raised by Mr Fisher (claim for a share of the musical copyright) in the current proceedings.*

interests of the Company and other shareholder for that to be the case. For this reason, the Court finds it would be unjust to reinstate Mrs. Baldwin as a director of the Company.

ORDERS

The Court declares and Orders that:

1. Only two of the 1000 shares in the 1st Defendant, Featherbed Farms Limited, have been lawfully issued.

2. The allotment of 998 shares to Joseph Gordon was invalid.

3. The shareholdings in Featherbed Farms Limited remains as 1000 ordinary shares with 1 ordinary share held by the Claimant, Merle Baldwin, and 1 ordinary share held by the estate of Joseph Gordon.

4. The 3rd Defendant shall file with the Registrar of Companies a return of allotment and amended annual returns reflecting the rectified shareholdings within 90 days of this Order.

5. The Notice of Rectification shall be given to the Registrar of Companies and the Registry at the Companies Office is to be rectified to reflect the same.

6. The register of members of Featherbed Farms Limited (1st Defendant), be rectified by striking out Nine Hundred and Ninety-Eight (998) shares of the share capital of the Company purportedly held by the deceased.

7. The Claimant is to have 75% of the cost of the Claim.

8. Claimant's Attorney-at-Law to prepare, file and serve formal Order.

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Judge