IN THE SUPREME COURT OF BELIZE, A.D. 2014

CLAIM NO. 383 of 2013

BETWEEN:

LOPEZ EQUIPMENT CO. LTD **Claimants**

AND

PASA BELIZE LTD. **Defendant**

Before: Hon. Mde Justice Shona Griffith

Date of Hearing: 27th May, 2014

Appearances: Ms. Naima Barrow of Barrow & Co. for Claimant

Ms. Stevanni Duncan of Barrow & Williams for Defendant

JUDGMENT

Dated 17th June, 2014

[Application for Investigation of Affairs of Company - Section 110, Companies Act, Cap 250 – What is good reason – Standard to be applied by court].

Introduction

1. The Claimant Lopez Equipment Co. Ltd ('the Claimant') filed its claim on 15th July, 2013 against the Defendant Pasa Belize Ltd. ('the Defendant'), seeking a Declaration that the affairs of the latter should be investigated and such further order of the Court granted as deemed fit, to give effect to that Declaration. The Claim was filed on the basis of the Claimant being a shareholder in the Defendant Company and the latter having failed since its incorporation in November, 2011, to have laid any accounts before the Company in general meeting.

2. In addition to the alleged failure to have laid accounts the Claim pleaded the dissatisfaction with the financial operations of the Defendant in respect of moneys borrowed by the Defendant company from its shareholders along with requests made for further financial contributions. Financial information provided by the Defendant was said to be wholly insufficient.

3. By way of Defence filed on 4th September, 2013, the Defendant company amplified the relationship between the parties, as one which arose out of a joint venture between three principals – Promotora Ambiental S.A.B. de C.V., Mitchell Moody & Associates, and the Claimant. From this joint venture the Defendant company was formed for the purpose of carrying out a design, build and operate contract ('dbo contract') in respect of a solid waste transfer and disposal plant in Belize. This contract was entered into between the Solid Waste Management Authority, a statutory corporation; the Defendant; and the parties to the joint venture.

4. The Defendant pleaded that in the furtherance of carrying out its contractual obligations, it naturally incurred certain expenditures sometimes in advance of the payment schedule under the contract, hence the need to seek funds from its shareholders. Additionally, that an audit of the Company had been commissioned for the period from which it commenced business to approximately 18 months thereafter. Further, that the Claimant's request for financial information had been met with provision of an 'in-house' financial statement and thereafter, the Claimant had not indicated its dissatisfaction with the information provided.

5. On the whole, the Defendant pleaded, the Statement of Case failed to describe any reasonable grounds for bringing the claim, that the complaint made was minor, that it was being remedied and that as a result the matter did not fall within section 110 of the Companies Act.

At that stage, the Claimant had not expressly based its claim on section 110 of the Companies Act, but as correctly but it was certainly clear, the action was filed pursuant to the Court's power to order an investigation into the affairs of a company under that section.

6. By Reply filed 26th September, 2013 the Claimant re-asserted its claim regarding its dissatisfaction with the financial information provided by the Defendant and disputed the failure to file accounts as minor. On first case management conference heard on 3rd October, 2013 the Court gave directions regarding the projected time for preparation and provision of audited accounts by the Defendant to the Claimant. Case Management was adjourned to 24th October, 2013.
7. The matter progressed no further until 24th January, 2014 when an Application to Strike Out the claim was filed by the Defendant on the basis that the Statement of Case disclosed no reasonable cause of action. An affidavit was filed in support of the Application to the effect that the audited financials of the Defendant company had been provided to the Claimant, thereby rendering the matter an abuse of the Court's process as the relief sought by the Claimant had already been obtained.
8. On 2nd April, 2014, the Court then differently constituted, gave directions on further Case Management in relation to the filing of affidavits and the hearing of the Application to Strike Out. On the next adjourned hearing on 5th May, 2014, further affidavits having been exchanged by both sides, it was clear that that the Application to Strike Out would in fact involve substantive issues amounting to a full hearing, and be dispositive of the claim. The matter was therefore adjourned for full hearing on 27th May, 2014 and having been so heard, the Court now delivers its written Judgment.

9. At the hearing on 27th May, 2014 the Defendant raised a preliminary objection to paragraph 11 of the Claimant's second affidavit, which had been filed pursuant to the further Case Management Order. In order to embark upon discussion of the matter it is first necessary to set out the factual basis of each party's case. The case for each party that was presented by the time of the Hearing extended beyond the state of affairs which existed at the time of close of pleadings and the respective cases were encapsulated in Affidavits filed pursuant to the Court's further directions on 2nd April, 2014. The growth of the factual basis of the Claimant's case, was the subject matter of argument by Counsel for the Defendant, but this shall be treated at the appropriate juncture further on in the Judgment. It is also to be noted that both parties declined cross examination and were content to rest on the respective affidavits filed as evidence.

Case for the Claimant:-

10. The case for the Claimant was contained in the two affidavits of Wilhelm Lopez, Director of the Claimant company and is summarized as follows:-

    (a) The Defendant company PASA Belize Ltd. was formed on 30th November, 2011 with is primary purpose to construct and operate a solid waste disposal plant in Belize. The shareholders of the Defendant along with their shareholding are (i) Promotora Ambiental S.A.B. de C.V. (PASA) – 5600 shares; Mitchell Moody & Associates – 1700 shares; and Lopez Equipment Co. Ltd – 2699 (ultimately 2700) shares. The Directors of the Defendant company by Amended Resolution dated 23rd January, 2012 were Guillermo Canales Lopez (resident in Mexico); Mario Alberto Garcia Lozano (resident in Mexico); and Ariel Mitchell (resident in Belize). By that Amended Resolution Wilhelm Lopez was no longer a director of the Defendant company.

    (b) According to article 2.1 of the dbo contract, the design and construction phase was for approximately US$8.97 million, to be paid as scheduled under the general conditions of the contract. The contract was of a usual commercial standard form (although the particular type was not stated) with the usual documents – form of contract; general conditions; specific conditions and appendices –all incorporated by article 1.1 of the form of contract. Only the form of contract was appended. [The payment schedule as said to be provided in the general conditions was not before the Court].

(c) Director Lopez further states that since the Defendant company's incorporation it has borrowed US$360,000 (it was not said by the Claimant from whom, but from the Defendant's affidavit evidence, the US$360,000 was borrowed from largest shareholder – PASA (Mexico). Additionally, on 14th April, 2013 the Defendant requested US$500,000 in shareholders' contributions.

(d) Having received that request on the 19th April, 2013 the Claimant sought financial reports from the Defendant, which it said ought to have been prepared in advance of its Annual General Meeting. Additionally, the Claimant alleges on 19th April, 2013 to have requested a formal breakdown of the moneys requested according to expenses and shareholder expectations.

(e) Documentation styled 'internal financial reports' of the company were supplied to the Claimant but the Claimant was not satisfied with the documentation provided and received a further request for contributions in the sum of US$80,970. After receiving this request the Claimant instituted the present action in Court.

(f) Subsequent to the filing of the Claim the Defendant provided audited financial statements to the Claimant. The Claimant describes these audited financials as 'wholly unsatisfactory' and as raising questions which require ventilation in a meeting with directors which the Claimant has been unable to secure.

(g) The Claimant is owed in excess of $300,000 for services rendered to the Defendant company under the contract, meaning to them, that the Defendant is unable to pay its debts. Further, in February of 2014 the Defendant company was issued a Notice of Default under the contract and the Government (as employer) had accepted bids from other companies in relation to the services the Defendant company ought to have been performing under the contract.

(h) The Claimant refuses to accept the explanations put forward by the Defendant in relation to the need for financial contributions as the contract provided for a mobilization fee in the sum of US$897,173.90. This sum was assumed to have been paid as the Claimant had been required to and did provide bank references to facilitate execution of a Performance Bond by the Defendant, the said bond being a prerequisite for obtaining the mobilization payment.

(i) The Claimant also refused to accept explanations from the Defendant that the requested financial contributions were required to enable continuation of works and prevent delays under the contract. This rejection was based on the basis of the contract making provision for payment as works progressed and the Claimant was aware that work was being carried out under the contract as they had performed services.

(j) As further evidence of the deteriorating condition of the company the Claimant points to criminal charges filed against the Defendant for failing to register with the Social Security Board.

(k) The Claimant has been unable to meet with directors of the Defendant to seek answers to its concerns relating to the viability of the company. The viability of the company is in jeopardy due to the facts stated regarding non-payment of debts, default under the contract and criminal charges for failing to register with the Social Security Board.

The Defendant's Case:-

11. The Defendant on the other hand, through the affidavit of Alfonso Gomez, Manager of the Defendant company advanced its factual position as follows:

(a) The existence of the joint venture, parties, relative shareholdings and dbo contract are affirmed.

(b) That in respect of the performance of the contract, payment was phased according to completion in stages but working capital was needed to mobilize, hence the receipt of US$360,000 from the main shareholder. The request for US$500,000 was due to the need for additional funds to continue works and prevent delays under the contract

(c) The Claimant's request for a breakdown of the funds requested was interpreted by the Defendant as a mere formality in light of the fact that the Claimant's response to the request promised full co-operation upon receipt of the breakdown.

(d) A breakdown was provided by the Defendant to the Claimant approximately 10 days after it was requested and the Defendant having heard nothing further regarding the matter, assumed the Claimant's questions to have been put to bed.

(e) The Defendant was never advised as to the Claimant's dissatisfaction with the breakdown provided and requested once more for contributions from the Claimant to continue its operations. In this regard the Claimant offered to offset sums owed by the Defendant to the credit of the contributions requested by the Defendant, furthering the view that nothing was amiss in terms of the Claimant's regard of the Defendant's operations.

(f) Against this background of co-operation and absence of any further word regarding the sufficiency or otherwise of financials, the Defendant was surprised upon receipt of the Claim issued for the appointment of investigator.

(g) After the action was filed the Defendant demonstrated its good faith in co-operating with the Claimant by producing its audited financial statements to the Claimant in respect of year ended December, 2012 and unaudited for the year ended December, 2013.

(h) The Defendant is therefore not concealing any information from the Claimant and the information the Claimants sought had been willingly provided. In respect of meetings, there was lately a meeting scheduled between the Defendant's and Claimant's directors, albeit the meeting was not able to be held.

The Defendant's Preliminary Objection:-

12. As indicated above, the Defendant first made a preliminary objection which sought to strike out paragraph 11 contained in the 2nd Affidavit of Wilhelm Lopez on behalf of the Claimant. This paragraph – averred that there were currently charges against the Defendant Company for failure to render particulars to the Social Security Board. The Information and Complaints laid against the Company were attached.

13. The grounds of objection to the paragraph were (i) these charges were not pleaded in the Statement of Claim; (ii) that only the circumstances as existed at the time of institution of the Claim could be relied upon by the Claimant; (iii) paragraph 11 contained hearsay, being put forward as truth; and (iv) the information in the paragraph would be prejudicial to the Defendant, as the Court would be significantly under informed as to the full details surrounding that which was contained in the paragraph.

14. The Claimant's response to the preliminary objection was that they were fully entitled to refer to other matters pertinent to the claim and that the Defendant had presented no legal authority to the contrary; that the information put forward was a relevant consideration for the Court to take into account in determining whether to order an investigation; that the charges laid were facts within the public domain and the deponent of the Affidavit was present and available to be cross examined.

Additionally, there was no evidence that the charges had been withdrawn or dismissed and as a result of the matter not having been expeditiously dealt with from the time the Claim was filed, further developments had occurred, which the Claimant was entitled to put before the Court.

15. In considering the first two grounds of the preliminary objection which in effect amounted to the same argument, the Court viewed the allegation as to the criminal charges as further evidence upon which the Claimant was entitled to rely, and in respect of which the Court's concern would be whether the Defendant was given adequate opportunity to respond. The Defendant had raised objection to paragraph 11 on the last hearing, the Court then offered the opportunity to file further evidence to address the paragraph and Counsel for the Defendant declined.
16. Further, given that the circumstances from which the matter before the Court arose were continuing, and that the nature of the relief provided by statute required the Court to consider all relevant circumstances, matters that occurred subsequent to the filing of the claim were properly to be taken into consideration.
17. In relation to the ground of the objection that the paragraph contained hearsay which was sought to be tendered as truth, the Court considered that the existence of the charges was a fact…and a fact of public record. The truth of the allegations of the charge would not be within the Court's contemplation, but the charges' existence, would be a relevant consideration to be afforded whatever weight deemed appropriate by the Court, in exercising is discretion whether in favour of, or against the grant of the order sought.
18. In respect of the final ground of the preliminary objection, the Defendant was given the opportunity at the last hearing several weeks prior, to respond to the matter raised in paragraph 11 and having elected not to do so, would stand or fall by that choice. The preliminary objection was accordingly dismissed.

Legal Submissions of the Claimant:

19. Whilst the facts relied upon by the Claimant are fairly lengthy, the legal arguments in support of the application to appoint an investigator are simple: -

The Claimant is required to show:

(i) The precondition of minimum 10% shareholding in order to entitle the Claimant to apply for the order for appointment of an inspector;

(ii) The Court is to be shown and be satisfied that 'good reason' exists for the appointment; and

(iii) The Claimant is not actuated by malicious motive in requiring the investigation.

The Claimant urges that all three of these conditions have been satisfied.

(a) The Claimant holding 2700 out of 10000 shares therefore holds more than the required 10% of issued shares;

(b) The good reason arises from the cumulative effect of the company's apparent financial difficulties evidenced by its continued requests for financial contributions which it ought to have had no need for because of its mobilization payment and entitlement to payment for performance of works under the dbo contract; inability to pay its debts; failure to perform its obligations under the contract resulting in issue of default notice under the contract and re-tender of certain aspects of the contract works; breach of social security regulations resulting in criminal charges laid against the company; its failure or refusal in the first instance to provide audited financial statements and thereafter its provision of financial statements which raise irregularities; and finally, the company's failure or refusal to hold meetings with the Directors as requested by the Claimants.

The submission of the Claimant is that the combined effect of all of these issues is the result that the Claimant as shareholder of more than 10% shares has a right to know the true position of the company and to try to salvage performance of the contract which it was incorporated to perform.

(c) The Claimant is not motivated by malicious motives but rather out of a legitimate concern for the viability of the Defendant company in which it has an interest.

Legal Submissions of the Defendant:-

20. The Court's power under section 110 is discretionary and it being accepted that the Claimant as holds the necessary standing by virtue of his shareholding in excess of 10%, the remaining questions for the Court are (i) what amounts to 'good reason' for ordering the investigation; and (ii) whether the Claimant is motivated by malicious motives.

21. Counsel for the Defendant firstly contextualized the remedy sought as one which requires the court to take into account the need for the court to balance on the one hand, the separate legal personality of the company and the powers of the directors to manage the affairs of their company, as against on the other hand, the interests of the shareholders.

22. Secondly, Counsel reminded the Court of 'general and trite' principles of company law, as relate to the rights and liabilities of shareholders – viz – that such rights and liabilities being derived from and subject to the memorandum and articles of association of a company, the Court should not be used as a means for the shareholder to access that to which he is not entitled. Further, that the separate legal personality of a company should not be compromised (the corporate veil should not be pierced), except in the most exceptional circumstances, for reason that economic and business efficacy of the company is to be preserved.

Following upon these (either general or trite) principles, it was also submitted that the management of a company's affairs is charged to its directors thus again, the Court should not lightly interfere in how these affairs are conducted by the directors.

23. Those general statements aside, Counsel for the Defendant submitted on the whole that section 110 was inapplicable to the case for the following reasons:-

(i) The Claimant is motivated by malice;

(ii) The Claimant has already received the information it requested and that any further information sought means that the Claimant as a minority shareholder is seeking to obtain advantages to which it is not entitled by virtue of the Articles of Association;

(iii) The Claimant has failed to discharge its burden of establishing good reason for the Court to appoint an investigator; and

(iv) The Claimant has not exhausted all other options which would be less invasive to the Company and as such the action was premature.

<u>Ground (i) - Malice</u>

24. The malice alleged arise, the Defendant submits, on the basis that the Claimant is not only a shareholder, but also a creditor thus as section 110 gives the right to shareholders only, the claim as a creditor should be disregarded in its entirety. The status as creditor arises from the monies claimed as owing by the Claimant for construction works performed on behalf of the Defendant under the contract. Additionally, the Claimant being a shareholder and bound by the Memorandum and Association of Articles of the Company, is not entitled to the information sought and is attempting to abuse the Court's process to attain an advantage they are not entitled to. They are entitled to the financials (audited and unaudited accounts) which have already been provided.

25. That the Claimant is a creditor is borne out by several paragraphs in the Claimant's affidavits, namely paragraph 21 of the 1st Affidavit of Wilhelm Lopez wherein the Defendant is stated to owe the Claimant $300,000. Additionally, the information of the Defendant being in default under the contract is known to the Claimant as a creditor – not as a shareholder. Therefore the Claimant is also seeking to gain access to the company not as a shareholder but as a creditor, seeking certain information that would not otherwise be available to them – they are seeking to use section 110 improperly – in order to get this information.

26. Additionally, the Claimant is part and parcel of the dbo contract, being responsible for the construction component of the contract and thus directly involved in the execution of the contract. Therefore, if the Defendant is not executing the contract properly and is in default – the Claimant, being directly involved in the very execution that is in default – the Claimant is misleading the Court when it seeks to put forward the company being in default as further evidence that the Company ought to be investigated.

27. As further evidence of malice, the director of the Claimant Wilhelm Lopez was removed as director of the Defendant, thus rendering questionable, his motives as director of the Claimant, which seeks the order for the Defendant company's affairs to be investigated.

<u>Ground (ii) – Accounts already provided</u>

28. The fact that audited and unaudited accounts have already been provided and this fact not being disputed by the Claimant makes the action an abuse of the Court's process. If as the Claimant says it does not understand the accounts that does not warrant an investigation into the company's affairs. The remedy should be a meeting held to address the concerns of the Claimant and as indicated by the affidavit on behalf of the Claimant, a meeting was to have been held. The order for investigation would be so broad that the shareholders would be given access to documents and information over and above that to which they would be entitled.

Ground (iii) – Good Reason

29. The areas raised by the Claimant as cause for concern do not amount to good reason within the context of the legislation which requires that exceptional circumstances be shown to warrant the exercise of the Court's discretion. In relation to the accounts – these have been provided and the Claimant's understanding or lack thereof does not warrant an investigation.

Ground (iv) – The Application is Premature

30. The Claimant has not exhausted all remedies prior to seeking the order for investigation. For example the Claimant could have requisitioned a meeting or engaged the Defendant in dialogue. In respect of these other avenues Counsel referred to the case of **Rosemont Enterprises v Mercury Industrial et al 2005 BCSC 1339**, a case based on legislation similar to that of Belize. The petitioners for the order for inspection in this case (86% of the shareholders) firstly requested records and information by letter and after not being provided with same requisitioned a general meeting. After same was not called by the Defendant company in that case, the shareholders set down an annual general meeting as they were entitled to do under the Act. The shareholders filed the action for appointment of an inspector in between the time the parties were engaged in discourse regarding the setting down of an extraordinary meeting called by the majority shareholders. An extraordinary general meeting was planned within a short time, there was to have been arbitration on the issues between the two companies involved. The petition for appointment of the inspector was heard before this time arrived. The availability of other remedies in this case were the option of calling the extraordinary general meeting and the option to simply wait to allow more time for the respondents to comply with the shareholders' request and the application to appoint an inspector to investigate the affairs of the company was refused.

31. In this case the combined shareholders who brought the application amounted to 86% and the application was still refused, whilst the Claimant in the instant case is just one shareholder with far less percentage shareholding. This fact it was submitted, underscores how the remedy is viewed - that the remedy should be sought as a final resort and the Applicant should establish that there was no other remedy available outside the Court. The alternative remedies available to the Claimants in this case – to requisition a meeting or engage the directors in dialogue, were not sufficiently explored prior to the claim being filed before the Court.
32. Counsel also relied upon the case of **John Shaw & Sons v Peter Shaw and John Shaw [1935] 2K.B. 113** as authority for the proposition that the shareholders cannot seek to obtain or exercise rights over and above those to which they are entitled as shareholders.

Claimant's Reply to Defendant's Submissions:-

33. In relation to the claim being premature Counsel for the Claimant replied that from the inception the claim was based on the request for accounts which the Defendants refused to provide until the Court intervened.
34. In relation to other remedies which ought to have been pursued, that the Defendant has was not forthcoming in fulfilling its statutory duties that exist under the Articles of Association. For example calling the Annual General Meeting and laying the accounts before the meeting. Further, that the Defendant company has provided no excuse for failing to fulfill its statutory duties so it is no answer for the Defendant to say that the Claimant ought to have requisitioned for something that the Defendant was obliged to and already had refused to do.
35. It was further submitted in reply that the **Rosemont** case is not applicable as the provisions of the statute in section 248, place the threshold for what the Court must be satisfied higher than that in Belize.

Additionally, the facts of that case were that for the several years the company operated, the members of the company which was family owned, were always kept informed as to the affairs of the company for the greater part of the company's operations. Further the information when requested, was instead of being provided within the statutory period of 21 days was provided within 27 days. This it is argued, is not the situation in this case. The Claimants have done all that they could have done to have their questions answered and the directors have failed to attend to the affairs by meeting with the shareholders or providing proper accounts.

36. The Claimant's director Wilhelm Lopez was not removed as a director – he resigned. There is no evidence from the Defendant to the effect that Mr. Lopez was removed but the Claimant's evidence is that he resigned. In relation to the claim that good reason to order the investigation has not been established this matter was initiated because of financial concerns of the company and since the claim arose, further concerns over the management.

37. The shareholders have no other means of finding out the cause of these concerns hence the reason why the Claimant as shareholder has come to the Court. The Defendant has not been able to say that the concerns raised have been answered or are untrue.

The Court's Consideration

Issues

38. The main issues for determination are:-

    (a) Whether the Claimant has established a good reason for the Court to exercise its discretion to order an investigation into the affairs of the Defendant company; and

    (b) Whether the Claimant is motivated by malice in bringing the action.

Good Reason

39. Section 110 of the Companies Act, Cap. 250 (under heading 'Inspection and Audit') reads as follows:-

> *(1) "The Court may appoint one or more competent inspectors to investigate the affairs of any company and to report thereon in such manner as the court directs:-*
>
> *(a) in the case of a banking company having share capital, on the application of members holding not less than one third of the shares issued;*
>
> *(b) in the case of any other company having a share capital, on the application of members holding not less than one-tenth of the shares issued;*
>
> *(c) in the case of a company not having share capital, on the application of not less than one fifth in number of the persons on the company's register of members.*
>
> *(2) The application shall be supported by such evidence as the court may require for the purpose of showing that the applicants have good reason for, and are not actuated by malicious motives in requiring the investigation, and the court may, before appointing an inspector, require the applicants to give security for payment of the costs of the inquiry.*
>
> *(3)…"*

The subsections following after subsection (2) provide for the mechanics of the inspection and the preparation and submission of the report of the Inspector. Section 111 provides for appointment of investigator by special resolution of the Company, but no question of any such appointment by the Company arises in this matter.

40. As was acknowledged by both Counsels, section 110 does not define 'good reason' thus one must look towards interpretation from authorities decided on similarly worded statutes. Both Counsels provided authority to the Court, albeit Counsel for the Claimant's authority was not referred to in argument. Counsel for the Defendant did refer to the authorities provided during her submissions to the Court.

The authorities provided by both Counsel will be considered, however the Court is of the view that before the respective authorities can be accepted as relevant, the legislation upon which they are based, must firstly be examined and found by content, to be capable of analogy to the Belize legislation.

The Legislation:-

41. In this respect, one firstly notes that the Companies Act of Belize is not a modern act. It was first enacted on 23rd April, 1914. Going back to the English legislation therefore, the Belize version would have come from whichever earlier Act is reflected in the UK Companies (Consolidation) Act, 1908. In fact, when one looks at that Act, the provisions of section 110 are almost verbatim, against those of section 109 of the UK Act. Section 109 UK reads (under caption 'Inspection and Audit'):-

"109 Investigation of affairs of company by Board of Trade inspectors

(1) The Board of Trade may appoint one or more competent inspectors to investigate the affairs of any company and to report thereon in such manner as the Board direct—

(i) In the case of a banking company having a share capital, on the application of members holding not less than one third of the shares issued:

(ii) In the case of any other company having a share capital, on the application of members holding not less than one tenth of the shares issued:

(iii) In the case of a company not having a share capital, on the application of not less than one fifth in number of the persons on the company's register of members.

(2) The application shall be supported by such evidence as the Board of Trade may require for the purpose of showing that the applicants have good reason for, and are not actuated by malicious motives in requiring, the investigation; and the Board of Trade may, before

appointing an inspector, require the applicants to give security for payment of the costs of the inquiry.
(3)…."

42. With the exception of the Board of Trade, to whom the power is granted, the sections are identical. The subsections that follow, like the Belize legislation, provide for the gathering of documents by Inspectors and preparation and submission of the Inspector's report, as well as in section 110, an appointment of an investigation by special resolution of the Company. Thereafter, the next major Act is the UK Companies Act, 1948 where the provisions relating to inspection were substantially expanded. Under the heading 'Inspection', this Act provides"

164 Investigation of company's affairs on application of members

(*1*) *The Board of Trade may appoint one or more competent inspectors to investigate the affairs of a company and to report thereon in such manner as the Board, direct—*

(a) in the case of a company having a share capital, on the application either of not less than two hundred members or of members holding not less than one tenth of the shares issued;

(b) in the case of a company not having a share capital, on the application of not less than one fifth in number of the persons on the company's register of members.

(2) The application shall be supported by such evidence as the Board Of Trade may require for the purpose of showing that the applicants have good reason for requiring the investigation, and the Board may, before appointing an inspector, require the applicants to give security, to an amount not exceeding one hundred pounds, for payment of the costs of the investigation.

165 Investigation of company's affairs in other cases

Without prejudice to their powers under the last foregoing section, the Board of Trade—

(a) shall appoint one or more competent inspectors to investigate the affairs of a company and to report thereon in such manner as the Board direct, if—

(i) the company by special resolution; or

(ii) the court by order;

declares that its affairs ought to be investigated by an inspector appointed by the Board; and

(b) may do so if it appears to the Board that there are circumstances suggesting—

(i) that its business is being conducted with intent to defraud its creditors or the creditors of any other person or otherwise for a fraudulent or unlawful purpose or in a manner oppressive of any part of its members or that it was formed for any fraudulent or unlawful purpose; or

(ii) that persons concerned with its formation or the management of its affairs have in connection therewith been guilty of fraud, misfeasance or other misconduct towards it or towards its members; or

(iii) that its members have not been given all the information with respect to its affairs which they might reasonably expect

43. Thereafter, the sections that follow concern the preparation of the Inspectors' report with expanded powers and obligations in relation to gathering and submission of documents. These UK provisions have been extracted to show that differences exist in what remains the current legislation in Belize and what evolved since 1948 in the UK. It is believed, as a cursory comparison will show, that unlike Belize, other jurisdictions in the Commonwealth Caribbean…(and Canada, as Counsel for the Defendant has relied upon Canadian authority) their legislation has either been patterned off of, or have evolved along with, the 1948 and following legislation in the UK.

44. The question that has first to be answered, is whether and what if any significant difference exists in the powers of the Court to appoint an Inspector between the UK 1908 /Belize Acts and UK1948 Act. The answer to this question would determine to what extent the authorities provided or otherwise in existence, are relevant and applicable when considering the Belize provisions.

Is there a material difference between the two Acts?

45. The first difference is that the power to appoint the inspector was conferred in the UK upon the Board of Trade (wherein it was not a judicial power) but in Belize the power was conferred upon the Court.

46. The Belize/UK 1908 Act provides for only a members' application to the Court/Board and that application has to be based on good reason and be without malicious motive. The UK 1948 Act provided for the members' application (now section 164), removed banking company from the mix (presumably by that time subsumed under its own legislation) and also removed the need to show absence of malice. In addition to the members' application however, the UK 1948 Act also created two other instances in which the Board of Trade was given power to appoint inspectors to investigate a company's affairs.

47. By virtue of section 165(a) as extracted above, the Board was granted power to appoint inspectors in two circumstances – (i) where there was a special resolution by the company; and (ii) where there was an order of court. In any of these two circumstances the Board actually has no discretion – the Board must. The reason why the power is mandatory in these two circumstances is clear – by a special resolution, the heart of the company has spoken and that is what the company wants. Where by order of the court – the Board of Trade obviously has no choice but to obey the Court's order.

48. But in addition to the section 165(a), the Board also is empowered by section 165(b) to appoint an Inspector in three defined circumstances provided in the Act as stated in paragraph 42. There is no provision limiting or defining any class of persons who may apply under 165(b) as there is under section 164; nor is there any stipulation as to at whose behest the order for appointment must be made as is the case under section 165(a).

49. It is therefore concluded, that under section 165(b) any class of person, outside of shareholders, or other person who has obtained an order of court, may seek the appointment of an Inspector. The person or class or persons seeking such an order however, would have establish their case on one or more of the three sets of circumstances provided in section 165(b). According to those circumstances therefore, for example a creditor; less than 10% shareholders who allege concealment of information to which they are entitled; or someone alleging fraud on the part of incorporators can all seek appointment of an Inspector by the Board of Trade.

50. In reconciling the circumstances under which the Board of Trade can appoint an Inspector the following classification is the sum effect of sections 164 and 165:-

- **Members only**:

(a) Discretionary appointment of Inspector to be exercised upon establishing good reason (section 164)

(b) Mandatory appointment of Inspector to be carried out where special resolution of company so provides (section 165(a))

- **By the Court**

(a) Mandatory appointment of Inspector where Court so orders (section 165(a))

- **Members and other persons with relevant standing**

Discretionary appointment of Inspector where

(a) it is apparent to the Board that the business of the company is being used to defraud its creditors; other creditors; or the business is being used for some other unlawful purpose; or in a manner oppressive to its members; or that the company was formed for some unlawful purpose.

(b) Persons concerned with the formation of the company have been guilty of fraud or misfeasance towards the company or its members.

(c) The members have not been provided with information they ought to have been.

51. This category under 165(b) can therefore include creditors; persons defrauded; regulatory bodies; law enforcement – or members with less than the percentage required under the members only application, but who can establish a complaint within the circumstances delimited in either a, b or c of subsection (b). Where there is one tenth or more membership, the reasons need not be restricted to those specially listed under 165(b), but good reason must nonetheless still be established.

52. Having concluded this exercise – is the Court any further along in determining what is good reason according to the Belize legislation? The answer would be yes – good reason has not yet been defined (by illustration to authorities), but the Court is clear, that good reason, would not be as narrowly interpreted and thus limited to the circumstances defined in section 165(b) which provision does not exist in the Belize Act. Under the Belize Act, only members holding more than 10% shareholding can apply, but the good reason that must be established is wider than the circumstances provided in the additional sections, introduced by section 165 of the UK Companies Act, 1948.

53. In examining any authorities therefore, one must be careful to ascertain, whether the legislation upon which those cases are based is that of the general 'good reason' which would be available to members being more than 10% shareholding; or the more specifically defined grounds under section 165(b), but applicable to a wider class of applicants.

The authorities and good reason:-

54. Counsel for the Claimant submitted an authority from the OECS - DOMHCV 2004/454 which concerned an application for appointment of an Inspector to investigate the affairs of the National Bank of Dominica. The Application therein was made pursuant to section 518 of the Companies Act No. 21 of 1994 of Dominica, which the Judge and Counsel therein agreed was based on Canadian precedent, thus the decision was considered against Canadian authorities.

55. Counsel for the Defendant submitted the Canadian authority of **Rosemont Enterprises v Mercury Industrial et al, 2005 BCSC 1339.** This case was based on **section 248 the Business Corporations Act of British Columbia, SBC 2002, c. 57**. In light of the fact that both authorities submitted by both Counsel were based on the Canadian legislation, it is necessary to examine that legislation in order to determine the relevance or otherwise of the cases.

56. Section 248 of the Canadian Act is extracted as follows:

Appointment of inspector by court

248 (1) Subject to subsection (3), on the application of one or more shareholders who, in the aggregate, hold at least 1/5 of the issued shares of a company, the court may

(a) appoint an inspector to conduct an investigation of the company, and

(b) determine the manner and extent of the investigation.

(2) An inspector appointed under this section has the powers set out in section 251 and any additional powers provided by the order by which the inspector is appointed.

(3) The court may make an order under this section if it appears to the court that there are reasonable grounds for believing that

(a) the affairs of the company are being or have been conducted, or the powers of the directors are being or have been exercised, in a manner that is oppressive or unfairly prejudicial to one or more shareholders, within the meaning of section 227 (1), including the applicant,

(b) the business of the company is being or has been carried on with intent to defraud any person,

(c) the company was formed for a fraudulent or unlawful purpose or is to be dissolved for a fraudulent or unlawful purpose,

(d) persons concerned with the formation, business or affairs of the company have, in connection with it, acted fraudulently or dishonestly, or

(e) ....”

As may be seen, the Canadian legislation (section 248(3) is the operative section). contains only narrowly defined grounds upon which the Court's power to appoint an inspector can be exercised. Of note is that there also exists the power of the company to appoint by special resolution, but not the stand alone power for the members to apply for the appointment 'for good reason'.

57. In the circumstances, it is also found that authorities based upon the Canadian legislation (at least the 2002 legislation) would be decided on narrower grounds than that which would obtain in Belize. This does not mean that the Court can nonetheless find the authorities useful – some learning is necessary to put the nature and function of the remedy (as distinct from the grounds) in context.

58. The Court firstly considers the excerpt of the text provided by Counsel for the Defendant – Commonwealth Caribbean Company Law by Andrew Burgess @ pg 345-346. Learned Counsel was relying on the discourse on the nature and function of the investigation specifically with respect to the following passage:

> "*Finally it must be further emphasized that an investigation is an extraordinary remedy which is generally speaking applicable only in limited circumstances. For instance, to justify court ordered investigation on application of the shareholders, the cases have insisted there must be reason, on substantive grounds, to believe that material information regarding the affairs or management of the company is being concealed or withheld from the shareholders whose interests entitle them to the disclosure. In any event before the court will order an investigation, the investigation must be shown prima facie in the interest of the company or its shareholders or debenture holders. Merely to show a difference of opinion as to how the affairs of the company are being managed is not enough. It is only where there is evidence of serious mismanagement or bad faith that an investigation may be ordered."*

59. This entire passage was annotated with footnotes referring to UK and Canadian cases which would be based on the expanded version of the legislation in the UK 1948 Act and narrow grounds of the Canadian legislation. Additionally, the following reference in the discourse 'Court ordered investigations' – the discussion turns to the application for the investigation order. There it is seen that the legislation considered in the discourse is clearly the expanded provisions highlighted above UK 1948 and Canadian provisions, where it is stated that '*the circumstances in which the Court may make such an order are statutorily stipulated'*. Again, the Court finds that the statutory grounds are rooted in legislation which came into existence after the UK1908 Act, and the 'good reason' ground having remained and the statutory circumstances providing additional grounds in specified circumstances, thus these grounds do not define and thus limit, but if they exist can certainly fulfill the requirement for 'good reason' under the Belize legislation.

60. The Court nonetheless accepts that the remedy should not be one which is granted lightly. The Court also accepts that a difference of opinion as to how the affairs of the company are being managed would not be sufficient to ground the exercise of its discretion, and without being constrained to the limits of statutory grounds expressed in more modern versions of the legislation, accepts that a standard of serious mismanagement or bad faith however manifested according to the peculiar facts of any case, is the appropriate standard against which to interpret 'good reason'.

Good reason and the case before the Court:-

61. Now attempting to apply the law to the instant case, any question of good reason must transcend a difference of opinion in how the company is run and instead lean towards the existence of serious mismanagement or bad faith in the affairs of the company.

The sum total of the case for the Claimant is of a company having been formed to execute a major contract worth almost $BZ19 million. The shareholders to the company, of which the Claimant is one, would obviously stand to benefit from the company's operations which include not just the design and construction, but thereafter the operation of the plant. The contract is phased and payment under the contract is based upon phased completion. The conditions of contract and the appendixes which would specify the work and payment schedules were not provided to the Court so there was no evidence to indicate at what level the contract should have been at, and correspondingly how much monies ought to have been received under the contract. Be that as it may, the Claimant produced evidence (unchallenged) that a notice of default was issued, not remedied and the employer accepted new bids for certain portions of the contract works. In effect, the Defendant company was kicked off of certain aspects of the contract works.

62. Additionally, the Claimant's case is that the Defendant on several occasions requested sums of money through shareholder contributions and this raised concerns in light of the fact that no account had been given of how the monies were being spent, how the monies were intended to be spent, nor the need for the monies to be provided, as there was a mobilization fee under the contract almost in the of the sum of $BZ1.8 million. When the Claimant requested financial statements or breakdowns, none was provided, then what was provided was inadequate, then what was further provided in the form of audited and unaudited yearly financial statements were found to contain irregularities when having been reviewed by qualified accountants.

63. The Claimant's case goes on further to say that added to the above, the Claimant itself is owed money by the Defendant for works performed under the contract in the sum of approximately $BZ300,000. Also that the Defendant appears not to be properly carrying out its statutory obligations as social security requirements have not been complied with. Whether they have or have not in actual fact, the Claimant says, something is sufficiently amiss for the Defendant company to have been criminally charged for failure to comply with social security requirements.

64. Finally, the Claimant's case is that the Defendant company has failed to carry out its statutory duties to hold its Annual General Meeting and consequently to lay accounts before its members. In this regard, the provision of the accounts (which was done after the matter was filed in Court) does not discharge its statutory duty, as the opportunity to subject the accounts to scrutiny and challenge with answers from the directors of the company has not been provided as no AGMs have been held. Finally, that even the Claimant's attempts to secure a meeting with the Directors of the Defendant have failed as despite arrangements having been made, no meeting has yet been held.

65. In light of the above, the Court has no difficulty concluding that the Claimant's concerns regarding the viability and management of the affairs of the company are valid. The contract is a lucrative one and forms the basis of the company's at least initial existence. The Court also is in a position to accept that the Claimant, as shareholder, has been unable through the absence of the opportunity, to properly take the directors to task through the accounts in the statutorily provided forum of the AGM.

66. These views notwithstanding – do the circumstances amount merely to a disagreement on how the company is being managed? This answer is found in the negative. The concerns expressed go beyond any question of a difference of opinion on how the company is being managed. These concerns lean towards a question of whether the company is being mismanaged and the integrity and accountability of the directors in carrying out their functions. In the latter concern however, the submissions of the Defendant in answer to the Claim must be properly examined.

67. The Defendant's answer is perhaps most importantly that the accounts have been provided…and if the Claimant has difficulty understanding them the Claimant ought to engage the directors in a meeting or to have requisitioned such a meeting. As submitted in reply by the Claimant and supported by evidence accepted by the Defendant – a meeting with the directors has been attempted and unsuccessful. The Court also looks at the length of time from when the Claim was filed to the hearing of the claim – some 10 months – during and up to which time there has been no meeting facilitated by the Directors nor AGM held. Against this situation, the Court must be able to conclude that the Directors are unwilling or have simply failed to make the effort.

68. As to requisitioning a meeting, the same minimum 10% shareholding is required to requisition a meeting.

The end result of this process as contained in sections 68-69 of the Act, is that the shareholders would ultimately have been defeated by their minority holding in terms of any action demanded at such a meeting. In the circumstances, the actual effect of what is put forward as an alternative remedy that ought to have been utilized is doubtful.

69. Additionally, the Defendant says that the claim is motivated by malice as the Claimants, also being creditors, are seeking to gain access to information to which they would not otherwise be entitled. The Court acknowledges the fact that the Claimants are also creditors, but cannot accept that this status affects their rights as shareholders. As creditor, it would have to be assumed, that the primary concern would be a return of one's money – access to information or otherwise, a creditor's primary concern is its outstanding debt and as creditor the Claimant possessed the remedy to sue its outstanding payments. The Court does not accept the submission of malice in this regard.

70. The Defendant also asserts malice in another regard - that since the Claimant is that part of the joint venture responsible for construction, they are not at liberty to put forward the default under the contract as a circumstance necessitating the appointment of an inspector. In other words, whatever the default under the contract is, the Claimant is responsible for that default. On a practical level, there can be merit to this submission, except that the evidence also is that the Claimants have performed work for which they have not yet been paid. Thus in a very important respect, the issue of why the Claimants have not been paid, hence not able to perform services, hence the default under the contract, is still directly referable back to the question of the management of the company's finances, the answer to which the Claimants have been unable to obtain within the usual course of remedies available to them as shareholders.

71. On the whole the Defendant says the directors are charged with the management of the company and this charge should not be lightly interfered with as to do so runs contra to the principle of the separate legal personality of the company and against the best interests of the company. Learned Counsel provided authority in support of this proposition, with which the Court has no difficulty in respect of the fact that the ultimate management of the affairs of a company rests with its directors. The Court is however not of the view that the instant case is one concerned with the directors' business decisions per se – it is a question of accountability. What has become of the monies that were to have been received under the contract; why is it necessary, when the Company is engaged in a paid concern, for shareholders to be repeatedly asked for contributions to carry out operations under the contract? For the record, the court does not accept the affidavit evidence that contributions were required to mobilize and to bridge operations whilst work was being carried out. Certainly not in relation to a contract worth the amount contracted. Even if as Counsel for the Defendant suggested, it is not known that the mobilization fee was actually paid, if the contract was being executed as it ought to have been, that mobilization fee ought to have been paid and if not, a question arises to be answered, as to why not. The Claimant's position is that no opportunity has been afforded by which such questions can be answered.

72. As a final consideration put forward by the Defendant - that the remedy is said to be invasive and an order for inspection against the best interests of the company. Well it is the legislation that provides for this invasive remedy, to be exercised upon application of shareholders comprising not less than 10%. The Canadian case of Rosemont, supplied by Counsel for the Defendant illustrates an instance where a total of 86% of the shareholders applied for the remedy, and an inspection was not ordered.

73. The Court restates its position in relation to the difference in the grounds - good reason in the Belize legislation, is found to be wider than the statutorily defined grounds in the Canadian and more recent UK legislation. Were they on even keel however, Counsel for the Claimant distinguished the case very easily on the particular facts, as against the facts of the instant case. In **Rosemont**, the applicable statutory ground would have been concealment of information from the shareholders. The facts revealed that for the greater part of the company's operations information as to the company's affairs had been readily supplied to its members; and that the failure to provide information occurred as a result of tardy delivery of same – a matter of days outside the statutory requirement. This is not the situation in the instant case.

74. As stated earlier, Counsel for the Claimant submitted OECS authority from the Commonwealth of Dominica wherein the relevant section in the Companies Act, Dominica was under consideration. Also stated earlier was the fact that both Judge and Counsel agreed that the Dominica legislation followed most closely Canadian precedent thus Canadian authorities would be reviewed. The case nonetheless provides insight into the nature of the remedy in terms of its utility and consequence (as distinct from the standard to which the Court must be satisfied in order to exercise its discretion).

75. In this case, the Application to appoint a receiver was refused. The Applicant was a former director of the National Bank of Dominica. There had been certain irregularities and bad practices revealed in respect of the grant of loans, mostly attributable to a former managing director of the Bank. The state of affairs regarding the misdeeds of the managing director systemically audited by the Bank's Board of Directors, placed before the shareholders and recommendations arising from the systemic audit put in place to strengthen practices at the Bank.

Whilst the effect of the misdeeds of the managing director were not cured by the actions of the Board, Belle J found that in those circumstances, an inspection would be pointless, as the state of affairs was already known to shareholders, had already been addressed by directors (whether to the satisfaction or not of the shareholders) and also, given that the nature of the investigation would not determine any rights nor result in consequences without further action. There was already information in the hands of the shareholders, upon which they could elect or not elect to take legal action.

76. Further authority in relation to the nature of the order for appointment of inspectors, is found in **Re Pergamon Press Ltd. [1971] Ch. 388 @ 399 per Lord Denning MR- "***The inspectors are not a court of law. Their proceedings are not judicial proceedings. They are not even quasi-judicial, for they decide nothing; they determine nothing. They only investigate and report"*. In considering this stated function of the inspectors against the instant case, the court must ask itself, what benefit would ordering an investigation into the company's affairs yield to the Claimant? In the Court's view, an investigation would provide information (which in usual circumstances shareholders would not be entitled to have for reason as Counsel for the Defendant submitted and the Court accepts) that directors are charged with managing the affairs of a company. However, in circumstances of the directors' apparent failure to properly manage and attend to the company's affairs and failure to properly account for the finances of the company, an investigation into the affairs of the company, would properly serve the purpose of providing necessary information, to assess the viability and well being of the company and inform the basis of whatever action the shareholders might then find it necessary to pursue.

Conclusion

77. The legislative basis of the Court's power under section 110 to appoint an inspector to investigate into the affairs of a company for good reason originates and remains unchanged from older UK legislation as contained in the Companies (Consolidation) Act, 1908 – section 109. The UK legislation developed and the powers of appointment of inspectors were further defined and expanded, with the result that in addition to the good reason basis, additional classes of persons were empowered to make application for appointment of inspectors but on certain specified grounds. The Belize Companies Act, did not develop further than the original stand alone 'good reason' ground, thus the additional more specified grounds which developed in the UK alongside the stand alone 'good reason' ground, should not be applied with their resultant effect of narrowing construction of good reason.

78. This view notwithstanding, 'good reason' still requires the existence of substantive grounds – being greater than a disagreement on the management of the company - and more along the lines of mismanagement or bad faith. If there exists evidence of any of the grounds defined by statute as was developed from the 1948 Act and onward, the Court's job is easier, however, the absence of any of the statutorily defined grounds, does not preclude the Court from finding good reason.

79. In the instant case, the Court notes the value of the contract; the fact that the Defendant company was formed for the purpose of executing the contract; the fact that parts of the contract works have been removed from the Defendant and re-tendered by the employer; the repeated requests for capital from shareholders when the company ought to be obtaining payment under the contract; no evidence having been provided from the Defendants of legitimate difficulties or failures created by the employer under the contract; the fact that irregularities have been raised

upon qualified examination of the audited and unaudited accounts finally provided by the Defendants; that no opportunity to question the accounts has been made available to the Claimants in accordance with the statutorily provided means of redress available to shareholders; by virtue of criminal charges that the Defendant company has been accused of failing in its obligations to properly comply with social security laws (no evidence to the contrary having been provided) which can have financial implications for the company; the Directors, despite the claim having been filed for at least 10 months having failed to make it a priority to address any of the concerns of the Claimant.

80. Against the background of all that stated in paragraph 78 above, the Court considers that good reason is established for the appointment of an Inspector to investigate the affairs of the Company and provide a report to the Court upon conclusion of their investigation. For reasons stated at paragraphs 69-70, it is not found that the Claimants have been motivated by malice.

<u>The Court's Ruling</u> is therefore as follows:

1. It is declared that the affairs of the Defendant company ought to be investigated;
2. As a consequence of this Declaration, the Court orders that an investigation into the affairs of the Defendant Company is to be carried out and for this purpose a single Inspector be appointed to carry out such investigation;
3. That on the conclusion of the investigation the Inspector shall prepare a Report on his findings and a copy of such Report submitted to the Court;
4. Costs are awarded to the Claimant.

5. The Parties are to return to the Court **1st July, 2014** for oral submissions and settlement of the order of Court in relation to the following:-

   (a) the terms and conditions of appointment of the Inspector;

   (b) payment of expenses of the investigation;

   (c) the preparation and submission of the Inspector's Report and

   (d) costs.

_____

Shona O. Griffith
High Court Judge.