

**BARBADOS**

**IN THE SUPREME COURT OF JUDICATURE**

**COURT OF APPEAL**

**Civil Appeal No. 21 of 2015**

**BETWEEN:**

**ANSA MCAL (BARBADOS) LIMITED      Appellant**

**AND**

**BANKS HOLDINGS LIMITED      First Respondent**  
**SLU BEVERAGES LTD              Second Respondent**

**Before: The Hon. Andrew D. Burgess, The Hon. Kaye C. Goodridge, Justices of Appeal and The Hon. William J. Chandler, Justice of Appeal (Ag.)**

**2015: December 1; 11**

**2016: June 8**

**Mr. Reginald Armour, S.C, in association with Mr. Patterson Cheltenham, Q.C, and Mr. Alrick Scott for the Appellant**

**Mr. Barry Gale, Q.C, in association with Mr. Roger Forde, Q.C, Ms. Laura Harvey-Read and Ms. Sheena-Ann Ince for the First Respondent**

**Mr. Dale Marshall, Q.C, in association with Mr. Khamaal Collymore for the Second Respondent**

**Mr. Garth Patterson, Q.C, for AM Caribbean Development Ventures Limited**

**Mr. Adrian King for Financial Services Commission**

**Ms. Wendy Straker for the Barbados Stock Exchange**

## **DECISION**

### **INTRODUCTION**

#### **BURGESS JA**

[1] This case before us is as novel as it is complex.

- [2] In 1985, the **Companies Act, Cap. 308 (Cap. 308** or the **Companies Act)** came into force, and introduced into Barbadian company law in **section 228**, for the first time, a remedy called the complainant's oppression remedy. This case involves that remedy. In it, the appellant, Ansa McAL (Barbados) Ltd. (Ansa), instituted in the High Court an oppression remedy action against the first respondent, Banks Holding Ltd. (BHL) challenging the validity of certain provisions in a loan agreement undertaken by the directors of BHL. Ansa's action was brought in the context of a take over-bid of BHL by the second respondent, SLU Beverages Ltd. (SLU).
- [3] The underlying issue in the case is therefore the validity of provisions in the loan agreement mischaracterised by counsel in this case as a poison pill. As becomes obvious from an examination of the loan agreement, it is in fact a poison debt security agreement, a sister of a poison pill defence strategy.
- [4] Since the beginning of the 1990s, poison debt security has been utilised in loan agreements between a borrowing company and a lender. In such an agreement, the borrowing company issues debt security to the lender which includes covenants that grant to the lender a right of conversion of debt to equity at favourable rates, rights to buy notes, and rights to require the borrowing company, in the event of a "fundamental change", as defined in the loan agreement, to buy back notes and/or conversion shares at a

substantial premium to the prevailing market price. The “put” part of the security is the right to require the buy-back of the debt. The “poison” part is the premium which must be paid by the borrowing company on the buy-back.

- [5] Poison debt security strategy started as a legitimate business strategy to protect debt holders from ownership changes in the debtor company. However, poison debt security is widely deployed today as a strategy to forestall hostile take-overs. This is achieved because the poison puts in the debt security make the target company more expensive to take-over bidders and so discourage take-over bidding and destroy marketability of the shares of the lending company to the prejudice of its shareholders. Ever since their genesis, the validity of poison debt security agreements has been a challenge to courts as witnessed in the opinions of the Court of Chancery of the State of Delaware in **San Antonio Fire and Police Pension Fund v Amylin Pharmaceutical Inc et al (CA No 4446-VCL) (Del Ch 12 May 2009)** and **Gerald Kallick v Sandridge Energy Inc et al (CA No 8182-CS) (Del Ch 8 March 2013)**.

- [6] To be sure, the fundamental question in the appeal before us is not the validity of the provisions of the loan agreement undertaken by BHL. It is whether, pending the hearing of the oppression action in respect of those

provisions, the interlocutory injunction granted to Ansa on a without notice application by the Chief Justice, **Sir Marston Gibson, K.A.**, sitting as a judge of the High Court and which was subsequently discharged by him, ought to have been so discharged or ought to have been continued. But in our judgment, a proper understanding of the nature of the underlying issue is of enormous advantage in the adjudication of whether or not Ansa should have been granted a continuation of the interlocutory injunction or whether that interlocutory injunction was properly discharged.

- [7] To begin with, the general law on the grant and discharge of interlocutory injunctions in Barbados is now very well settled. **Section 44 (b)** of the **Supreme Court of Judicature Act, Cap. 117A (Cap. 117A)** confers a general discretionary power on the High Court to “grant a mandatory or other injunction...where it appears to the court to be just or convenient to do so for the purposes of the proceedings before it”. Inherent in this conferment is a discretionary power to discharge or not discharge any injunction so granted. This Court in its decisions in **Williams v Canadian Bank of Commerce Trust Co (Caribbean) Ltd (1979) 36 WIR 111 (Williams v CIBC Trust)** and **Toojays Ltd v Westhaven Ltd [2012] 2 LRC 65 (Toojays)** has accepted the principles laid down by Lord Diplock in the English House of Lords in **American Cyanamid Co v Ethicon Ltd**

[1975] AC 396 (**American Cyanamid**) as establishing the guidelines to be applied in determining whether to grant or to discharge an interlocutory injunction pursuant to **section 44 (b)** of **Cap. 117A**.

- [8] The appeal before us involves a new departure in the law on interim injunctions in Barbados. This appeal raises for the first time in our courts the application of the **American Cyanamid** guidelines in the special case of an interim injunction in aid of an oppression application under **section 228** of **Cap. 308**. This confers upon a complainant the right to apply to the court for relief in the form of “any interim or final order [the court] thinks fit” against a company or its affiliates in respect of oppression as defined in that section.

#### **PRELIMINARY POINT**

- [9] On the morning of the hearing of the appeal, Mr. Marshall QC, counsel for SLU, adduced evidence before this Court that SLU had by then acquired the controlling interest in BHL. Mr. Armour SC, counsel for Ansa, acknowledged that, as contended by Mr. Marshall QC, this meant that, in so far as the purpose of the injunction was to freeze the bidding process until the hearing of the underlying oppression action, that purpose had fallen away and that this Court would be acting in vain, engaging in an academic exercise, in reinstating the injunction for that purpose should this Court find

that that aspect of the injunction was wrongly discharged and that it should be reinstated. This submission finds support in **Ainsbury v Millington [1987] 1 All ER 929** at **930-931**, where Lord Bridge said:

“It has always been a fundamental feature of our judicial system that the courts decide disputes between the parties before them; they do not pronounce on abstract questions of law when there is no dispute to be resolved.”

[10] *Per contra*, Mr. Armour SC maintained that adherence to that principle did not mean that the appeal was not still alive in this case. He reminded that the injunction granted and later discharged by **Sir Marston** also ordered that BHL be restrained from performing the provisions in the loan agreement challenged by Ansa in the oppression remedy action. Mr. Armour SC argued that as a minimum this aspect of **Sir Marston’s** order remained a live issue before this Court.

[11] We agree with that contention. There is no dispute that the oppression action is still subsisting before the High Court. There is similarly no dispute that, whether or not Ansa disposes or has disposed of its shares in BHL, that action can be still pursued by Ansa since by **section 225 (a) (i) of Cap. 308** a former holder of shares has standing as a complainant. Thus the need to determine whether the order that BHL be restrained from performing the provisions in the loan agreement challenged by Ansa in the oppression

remedy action should have been discharged, or should have been continued is one reason why this appeal remains alive.

[12] But there is another reason why the entire appeal remains alive before this Court. It is because of its implication for the award of costs which, as has been argued before us, may not be an insignificant issue. In the Privy Council decision in **Elders Pastoral Ltd v Bank of New Zealand [1990] 3 NZLR 129** at **133-134**, Lord Templeman observed that it appears from the authorities that even where the only effect of a successful appeal between the parties relates to costs, there remains a *lis* or issue between the parties. It is our judgment that determination of the success of this appeal will have significant practical consequences for costs orders in this case. On the authorities, therefore, this is another reason why the fact that SLU has now acquired controlling interests in BHL cannot be regarded as meaning that there is no dispute to be resolved in this case.

[13] Before addressing the dispute in this case, however, we consider it advantageous to provide the factual and procedural background.

## **FACTUAL AND PROCEDURAL BACKGROUND**

### **The Parties**

[14] The appellant, Ansa, is a company incorporated in Barbados under **Cap. 308**. Ansa is a subsidiary of Ansa McAL Ltd (ANSA McAL), a company incorporated

pursuant to the laws of Trinidad and Tobago and which is the holding company of a number of subsidiaries together forming the Ansa McAL group of companies (the Ansa McAL Group). Ansa is the owner of all the shares in A.M Caribbean Development Ventures Ltd (AMCDV), a special purpose entity incorporated in Barbados under **Cap. 308**. As such, AMCDV is a wholly owned subsidiary of Ansa. Ultimately Ansa, AMCDV and Ansa McAL are members of the Ansa McAL Group.

- [15] The first respondent, BHL, is a public company incorporated under **Cap. 308** and its shares are listed on the Barbados Stock Exchange (BSE). BHL is authorized by its articles of amalgamation to issue an unlimited number of shares of one class, designated as common shares. At the time of the filing of Ansa's action against BHL, BHL had issued approximately 64,853,760 shares and there were approximately 3,400 shareholders of which 2 shareholders directly or indirectly held approximately 53% of the issued shares. The remaining 47% of the issued shares were held by companies and individuals some of whom held small numbers of shares. Indeed, in an affidavit sworn by the managing director of BHL, Mr. Richard Cozier (Cozier affidavit), Mr. Cozier deposed that approximately 70% of the shareholders were either Barbadian companies or individuals.

[16] Ansa is a shareholder in BHL. In an affidavit sworn in support of the application by Mr. Nicholas Mouttett (Mouttet affidavit), Mr. Mouttet deposed that, as at 5 May 1999, Ansa held 14,818 common shares in BHL. On 16 October 2015, Ansa also became the indirect owner of an additional 8,446,546 common shares in the capital of BHL when it acquired BWPL Holdings Limited, the registered owner of those shares. This is confirmed in the Cozier affidavit.

[17] The second respondent, SLU Beverages Ltd (SLU), is an international business company which was incorporated in St. Lucia on 21 June 2010. SLU is the holding company of LRE Corp, its only subsidiary. LRE Corp is a Barbados corporation wholly owned by SLU, is a board member of BHL and has no operations or employees. Ambev S.A. (Ambev) is a Brazilian corporation and is one of the largest brewers in the world. Ambev indirectly controls SLU through Cerveceria Nacional Dominicana S.A., a company registered and operating in the Dominican Republic, the direct controlling shareholder of SLU. SLU became a shareholder in BHL in the circumstances explained hereafter.

### **The Convertible Debt Purchase Agreement**

[18] The business of BHL and its subsidiaries is the manufacture and distribution of beverages which includes beer, non-alcoholic beverages, dairy products

and juice products. The brewery operations of BHL commenced with certain plant and machinery sometime in 1961. According to the Cozier affidavit, due to the age of the machinery and the plant operations and in order to become competitive, BHL's directors determined on or about the year 2008/2009 that BHL needed to upgrade its brewery production capabilities. In pursuance of this objective, BHL sought to raise financing and sought and obtained advice from professional consultants to assist BHL in the process.

[19] Consequent upon this advice, BHL entered into a financing agreement referred to as the Convertible Debt Purchase Agreement (CDPA) with an entity called Latin Capital Fund 1, LP (Latin Capital). The CDPA was signed by BHL on 24 June 2010 with the approval of the board of directors of BHL. The CDPA was also signed on that same date by Latin Capital and SLU in its capacity as investor and holder of the convertible notes (as nominee of Latin Capital) under the CDPA.

[20] The CDPA provided in the "Recitals" that Latin Capital would provide financing in the sum of USD \$28,000,000 ("the Loan"). Article 4.4 provided that the financing was to be used for the construction, installation and commissioning by BHL of a new brewery in Barbados. The CDPA further provided in its relevant articles that, as security for the Loan, amongst other things:

1. Under Article 1.1, that BHL would issue and sell to Latin Capital one or more senior secured convertible promissory notes (the “notes”) in an aggregate principal amount of twenty eight million United States Dollars (USD \$28,000,000);
2. Under Article 4.2, that the notes were convertible, in whole or in part, into common shares of BHL at any time after closing through the maturity date, at a conversion price equal to four Barbados Dollars (BBD \$4.00) per share (with the resulting share being referred to as “conversion shares”);
3. Under Article 6.2, that, in the event BHL were to issue additional shares pursuant to stock option plans at any time after the conversion rights under a note had been exercised, the holder of the shares would have the pre-emptive right to purchase additional common shares at the most favourable price and terms on which such common shares are issued to employees under such plans; and
4. Under Article 6.3, that the notes or the conversion shares into which they were converted were entitled to protection against dilutive actions or events and were subject to mandatory conversion, repurchase or redemption by the company at the option of the holders thereof, upon the happening of certain fundamental changes (“the anti-dilution provision”).

[21] Article 8 made provision for “the put option” and is of crucial importance in this case. That Article provided:

1. Under Article 8.1, that the holder for the time being of the notes or the conversion shares was entitled to elect to require BHL, or any successor of BHL, to “(i) convert any or all of the Notes into Common Shares, (ii) to purchase any or all of such Notes, or (iii) to purchase any or all such Conversion Shares” in the event of “a fundamental change”.

2. Under Article 8.3, that if the holder so elected to require BHL to purchase any outstanding notes, “then the purchase price the Company shall pay to the holder of such Notes shall be an amount equal to 2.5 times the outstanding principal amount thereof, plus accrued and unpaid interest”.
3. Under Article 8.4, that if the holder so elected to require BHL to purchase any conversion shares, the holder was entitled to receive “an amount equal to 2.5 times the principal amount thereof, “plus accrued and unpaid dividends”.
4. Under Article 8.5, that a fundamental change was deemed to have taken place in the event of, *inter alia*, any person or group becoming the direct or indirect ultimate owner of the BHL’s common shares representing more than 25% of the total voting power of the common shares.

It is to be noted that, by operation of Article 4.2 and Article 8.4, the effective redemption or repurchase price for each conversion share was BBD\$10 per share, and the contingent liability to BHL under the put option was approximately BBD\$132.5 million.

[22] Article 9.9 provided that the agreement and the transactions contemplated were to be construed in accordance with and governed by the substantive law of the State of New York without regard to its choice of law rules, except to the extent required to be construed in accordance with and governed by the laws of Barbados. The CDPA also included at Article 9.11.1 an arbitration clause which required that, should any challenge be made to the enforceability or validity of the CDPA, that challenge would

have to be determined in arbitration in Miami, Florida under the laws of New York. Finally, the CDPA further provided in Article 9.11.9 that each of the parties irrevocably and unconditionally, for the limited purposes of either enforcing the agreement to arbitrate or applying for any interim relief necessary to preserve a party's rights, submits to the exclusive jurisdiction of the courts for Miami-Dade County, Florida and consents that such action shall be brought in such courts and waives any objection which it may then have or hereafter have to the venue or jurisdiction of such court.

[23] It is to be stressed that those rights and privileges created by the CDPA were given effect solely at the direction of BHL's board. They were never approved by the shareholders of BHL. The reason for this was explained at paragraph 30 of the Cozier affidavit, rather incredulously in this brave new world of corporate governance we would interject, as follows:

“The Board of BHL could not disclose to the shareholders the CDPA given that there was a confidentiality clause within the CDPA which restricted the Board from so disclosing the Agreement.”

[24] It may also be noted here that, on 25 June 2010, SLU, as holder of the convertible notes provided for in the CDPA, exercised its rights to convert 53 of the 56 notes into common shares and as a result of this 13,250,000

shares were issued by BHL to SLU. This represented approximately 20.3% of the aggregate issued and outstanding shares in BHL.

- [25] On 30 June 2010, six days after the signing of the CDPA, BHL sent a circular to all shareholders giving notice that it had entered into a “convertible debt option” through which “the financing entity will forward US\$28m in cash to BHL at low interest rates, in exchange they will have the option to convert any or all of the debt into shares in BHL at BDS\$4 per share”. The circular also notified as follows:

“The model does however have some implications that your Board consider it necessary to share with you; these include the fact that there is a potential for the note holder to acquire just over 20% of Banks Holdings (if full debt converted). This will result in a dilution in shareholders percentage holdings by that percentage: we have discussed this potential outcome with our major shareholders and they have endorsed the Board’s plan to proceed with this method of financing.”

- [26] When BHL sought to list the SLU converted shares with the Barbados Stock Exchange (BSE), the BSE raised questions as to whether Articles 6.2 and 6.3 of the CDPA created rights of pre-emption. The BSE appears not to have pursued the pre-emption matter raised in these questions but required BHL to convene a special meeting of shareholders to obtain shareholder approval of the anti-dilution effect of the CDPA.

[27] On 24 January 2011, as required by the BSE, the board of BHL caused a meeting of shareholders to be convened for the purpose of approving those provisions of the CDPA which pertained to dilution of the shares. The resolution passed at that meeting of shareholders read in its pertinent parts as follows:

“WHEREAS Banks Holdings Limited entered into a Convertible Debt Purchase Agreement with Latin Capital 1. LP and SLU Beverages Ltd (hereinafter together called “the Lenders”) for financing of the acquisition, installation and commissioning of a new Brewery at Newton in Christ Church;

AND WHEREAS on the 25<sup>th</sup> day of June 2010 the Company issued senior secured convertible promissory notes in an aggregate principal amount of Twenty-Eight Million United States Dollars (US\$28,000,000.00) to SLU Beverages Ltd pursuant to the Convertible Debt Purchase Agreement (hereinafter called “the Agreement”);

AND WHEREAS Fifty-three notes dated June 25<sup>th</sup>, 2010 and consecutively numbered 001 through 053 were converted by Banks Holdings Limited into 13,250,000 common shares of the Company and issued to SLU Beverages Ltd. in accordance with the terms of the Agreement;

AND WHEREAS it is a condition of the Agreement that no further shares in Banks Holdings Limited be issued except with the written consent of the Lenders.

BE IT RESOLVED AS FOLLOWS:

Until such time as Latin Capital Fund or any affiliate thereof shall cease to hold shares and/or notes convertible into shares in Banks Holdings Limited there shall be no change made to the number of issued shares in Banks Holdings Limited except with the consent of Latin Capital Fund.”

[28] We pause here to observe that neither in the directors’ circular of 30 June 2010 nor the shareholders’ meeting of 24 January 2011 did BHL notify or

inform its shareholders of the creation, pursuant to the CDPA, of (a) the pre-emptive rights granted to the holders of the conversion shares to purchase additional common shares pursuant to Article 6 of the CDPA; or (b) the put option providing for the mandatory repurchase or redemption of the conversion shares upon certain fundamental changes occurring under Article 8 of the CDPA. Indeed and more importantly, BHL did not seek and/or obtain the approval of its shareholders for the creation of those rights.

### **Offer and Take-Over Bids**

- [29] The CDPA remained dormant and out of sight until the second half of 2015.
- [30] On 17 September 2015, a block trade was announced by SLU that they were buying 13,170,727 shares owned by Massy Ltd at \$4.00 per share. The block trade was put through on 22 September 2015 thereby triggering the take-over bid regulations as, after this purchase, SLU owned 26,420,728 common shares in BHL or approximately 40.7% of the issued and outstanding capital.
- [31] On or about 25 September 2015, the board of directors of BHL, acting on legal advice, according to the Cozier affidavit, formed a special committee of the board to deal with any take-over bids which may be made in relation to BHL.

- [32] On 28 September 2015, SLU submitted an offer and take-over bid circular for all the shares not owned by it in the capital of BHL. The offer price was \$4.00 per share.
- [33] After SLU's take-over bid, BHL sent out a notice to its shareholders on 1 October 2015 that it was obtaining a valuation of the company's shares as well as a "Fairness Opinion" and that it would thereafter send out a Directors' Circular in accordance with its obligations under the take-over bid regulations. A "Fairness Opinion" was sought from KPMG which was received on 13 October 2015. The "Fairness Opinion" opined that \$4.00 was a fair price for BHL's shares and that their fair market value ranged from \$4.90 to \$5.60 with a mid-point of \$5.20 per share. The promised Directors' Circular, which included the "Fairness Opinion", was sent out to shareholders on 16 October 2015.
- [34] In the meantime, ANSA McAL decided that it would compete with SLU for the acquisition of the controlling interest in BHL. After so deciding, and in order to assist ANSA McAL in making a final and informed decision as to the appropriate price to be offered to the shareholders of BHL, ANSA McAL made both oral and written requests of the principals of BHL to have access to BHL's records in order to conduct due diligence.

[35] On 18 October 2015, BHL acceded to the ANSA McAL's request but only after ANSA McAL signed a "Confidentiality Agreement" agreeing that it would not use confidential due diligence information, *inter alia*, for the commencement of legal proceedings against BHL. Due diligence was subsequently conducted by ANSA McAL representatives at the offices of BHL's Attorneys-at-Law, Messrs. Clarke Gittens Farmer between 20 October 2015 and 22 October 2015. It was during the due diligence exercise that the representatives of ANSA McAL learnt of the CDPA and its terms and conditions.

[36] On 20 October 2015, and before the conclusion of the due diligence exercise, AMCDV, as will be remembered, an Ansa's subsidiary, issued a competing offer and take-over bid to purchase all the common shares in BHL at the price of \$5.20 per share. SLU in response on 26 October 2015 increased its offer to \$5.60 per share; and on 3 November 2015 AMCDV increased its offer to \$6.00 per share. The SLU offer was to expire on 9 November 2015, and the last day for shareholders who tendered their shares to that bid to withdraw their shares was 5 November 2015.

### **The Claim in the High Court**

[37] On 3 November 2015, the appellant, Ansa, filed a fixed date claim form as claimant against BHL, the first respondent, as defendant, seeking the following relief:

“1. A declaration that the Convertible Debt Purchase Agreement dated June 24, 2010 and made between Banks Holdings Limited and Latin Capital Fund 1, L.p. (the “CDPA”) effects a result and the powers of the directors of the Defendants in entering into the CDPA without obtaining the approval of shareholders have been exercised in a manner which is prejudicial to and unfair and unfairly disregards the interests of the Claimant and the other shareholders of the Defendant.

2. An order pursuant to Sections 228 and/or 235 of the Companies Act, CAP 228 (sic) of the Laws of Barbados that:

a. the CDPA be set aside in part or in its entirety, or otherwise varied;

b. the Defendant do pay the Claimant’s costs of and incidental to this action; and

3. Such further or other relief as this Honourable Court deems fit.”

[38] On that same date, by a without notice application also filed on 3 November 2015, Ansa applied to the court for an order that:

“1. the Defendant herein, **BANKS HOLDINGS LIMITED**, be restrained from performing or otherwise giving effect to the following provisions of the Convertible Debt Purchase Agreement dated June 24, 2010 and made between Banks Holdings Limited, Latin Capital Fund 1, L.P. (“Latin Capital”)

and SLU Beverages, Ltd. (as the sole investor, as that term is defined therein) (the “CDPA”), namely:

- a. Article 6.2(b), which provides for certain pre-emptive rights in respect of the unissued share capital of the Defendant; and
- b. Article 8, which provides for the mandatory repurchase or redemption by the Defendant of the common shares issued pursuant to the CDPA,

until the hearing and determination of the Claimant’s claim for oppression remedies or further order;

2. the status quo with respect to the pending take-over bid transactions being pursued by SLU Beverages, Ltd. (“SLU”) and A.M. Caribbean Development Ventures Ltd. (“AMCDV”) respectively (together, “the bidding parties”) shall be preserved, and more particularly (without prejudice to the generality of the foregoing) that:

- a. all bidding and other activities (including solicitations for or purchases or trades of shares in the capital of the Defendant, whether on the floor of the Barbados Stock Exchange or otherwise) related to the pending offers and take-over bids submitted by the bidding parties shall forthwith cease; and
- b. the bidding parties be restrained from taking up and paying for any shares that may have been tendered to their respective bids and not previously withdrawn,

until the hearing and determination of the Claimant’s claim for oppression remedies or further order;

3. that the closing or expiry date set out in the amended offer and take-over bid circular submitted by each of bidding parties be deemed to have been further amended or extended by adding thereto a number of days equal to the period commencing from the date on which any

injunction or restraining order is granted pursuant to this application and ending on the date on which the said injunction is set aside or removed;

4. the matter be set down for trial on an expedited basis; and

5. such further or alternative reliefs as this Honourable Court may deem fit or just.

An affidavit in support accompanies this application. A draft of the order that the Appellant seeks is attached.”

[39] On the same 3 November 2015, **Sir Marston**, sitting as a judge of the High Court, granted the *ex parte* application for the interim injunction in the terms sought, namely, (i) an order that BHL be restrained from performing or otherwise giving effect to Article 6.2(b) and Article 8 of the CDPA, and (ii) an order freezing the take-over process until the hearing of the underlying oppression action. The return date was set for 11 November 2015.

[40] On 10 November 2015, BHL filed two affidavits by Carl Richard Cozier and Patricia Sylvester respectively, in opposition to the continuation of the interim injunction.

[41] On 11, 12 and 13 November 2015, the *inter partes* hearing took place before **Sir Marston**. At this hearing, SLU applied to be and was joined as a party to the action and on the said 13 November 2015, **Sir Marston** made an order

discharging the interim injunction previously granted on 3 November 2015. At that time, he gave reasons *ex tempore* for his decision with a promise that full reasons would be provided. On 26 November 2015 the full reasons were delivered.

[42] Upon the discharge of the interim injunction on 13 November 2015, the appellant indicated to **Sir Marston** that it intended to appeal and at that time made an oral application to that court for an interim injunction pending appeal. That application was denied.

### **The Appeal**

[43] On 17 November 2015, the appellant filed its notice of appeal as well as an application seeking an interim injunction pending appeal under a certificate of urgency.

[44] The matter came on for case management on 18 November 2015 before **Burgess JA**, sitting as a single judge of the Court of Appeal, and directions were given for the hearing of both the application for an interim injunction pending appeal as well as the substantive appeal against the decision of **Sir Marston** to discharge the interim injunction in the court below.

[45] On 27 November 2015 the appellant filed an amended notice of appeal.

[46] The application came on for hearing on 1 December 2015 and was adjourned to be brought on by notice.

[47] On 7 December 2015 the appellant filed a further amended notice of appeal. It is that appeal which is now before us.

### **THE APPLICATION**

[48] In its application presented before both the High Court and this Court, Ansa's claim of oppression against BHL was that, in entering into the CDPA without obtaining the approval of shareholders, the directors of BHL exercised their directorial powers in a manner which was unfairly prejudicial to, and which unfairly disregarded the interests of Ansa and the other shareholders of BHL and that the CDPA effected similar unfair prejudice and unfair disregard. In supporting this claim, Ansa pointed to various provisions in **Cap. 308** and in the articles of amalgamation of BHL which Ansa argued operated to vest in it and other shareholders of BHL, the interests which Ansa claimed were unfairly prejudiced and unfairly disregarded.

[49] The first such provision is to be found in **section 5(1)** of **Cap. 308** which provides in **5 (1) (b) (i)** that:

“5. (1) Articles of incorporation must follow the prescribed form and set out, in respect of the proposed company

(b) the classes and any maximum number of shares that the company is authorised to issue; and

- (i) if there will be two or more classes of shares, the rights, privileges, restrictions and conditions attaching to each class of shares.”

[50] The next is in the provision in the articles of amalgamation of BHL that:

*“The Company is authorised to issue an unlimited number of shares of 1 class designated as common shares.”*

[51] The third set of provisions are in **sections 27 and 28 of Cap. 308** which provide that:

“27. When a company has only one class of shares, the rights of the holders are equal in all respects, and include

- (a) the right to vote at any meeting of shareholders;
- (b) the right to receive any dividend declared by the company;
- (c) the right to receive the remaining property of the company on dissolution.

28. The articles of a company may provide for more than one class of shares; and, if they so provide

- (a) the rights, privileges, restrictions and conditions attaching to the shares of each class must be set out in the articles; and
- (b) the rights set out in section 27 must be attached to at least one class of shares, but all of those rights need not be attached to the same class of shares. ”

[52] The final provision is in **section 197 of Cap. 308**. This provision is that the articles of a company may be amended by special resolution to create new

classes of shares or to change the designation of all or any of its shares, or add, change or remove any rights, privileges, restrictions and conditions, including rights to accrued dividends, in respect of all or any of its shares, whether issued or unissued. A “special resolution” is defined in **Cap. 308** as a resolution (i) passed by a majority of not less than two-thirds of the votes cast by the shareholders who voted in respect of the resolution, or (ii) signed by all the shareholders entitled to vote on the resolution.

[53] Ansa alleged that both the mandatory redemption or repurchase provisions of the put option in Article 8 and the pre-emptive rights provisions in Article 6 (2) (b) of the CDPA confer on the holders of the conversion shares special rights and privileges not also enjoyed by other holders of common shares in BHL. Consequently, according to Ansa, this has resulted in the holders of the common shares in BHL being treated unequally in violation of **sections 27 and 28 of Cap. 308**.

[54] Ansa further maintained that the challenged provisions of the CDPA amount, in effect, to the creation of a new class of shares that are essentially redeemable shares which also carry pre-emptive rights. As to this, Ansa argued that it was not open to the board of directors of BHL to amend the rights, privileges and obligations attaching to the common shares of BHL as set out in its articles of amalgamation except by using the amending

formulas contained in **section 197** of **Cap. 308** and the articles of amalgamation of BHL. What is more, argued Ansa, those rights and obligations of shareholders in the articles of amalgamation could not be altered by a contract, unless the contract was adopted using an approved amending formula. The creation of these special rights and privileges enjoyed exclusively by the holders of the conversion shares, or alternatively the creation of this new class of shares, could not, therefore, have been lawfully effected by the board of directors without shareholder approval in accordance with **section 197** of **Cap. 308** and/or the articles of amalgamation of BHL.

[55] Ansa also contended that the intended and concomitant effect of the challenged provisions contained in the CDPA, which prior to 28 October 2015 had never been disclosed to the shareholders or the public, was to destroy the value and marketability of the shares in BHL. According to Ansa, this was so because those provisions operate as a deterrent to bidders other than SLU and to the detriment of all the shareholders of BHL since they would be precluded from maximizing the value of their shares through a competitive bidding process.

[56] Ansa alleged that BHL's board of directors had publicly acknowledged the depreciatory effect of the offending provisions of the CDPA. As to this,

Ansa pointed to the fact that in its Second Directors' Circular issued on 28 October 2015, the board recommended the rejection of the AMCDV take-over bid. One of the reasons cited for that recommendation was the negative impact that the CDPA would have on BHL and its shareholders, and potentially also employees, should the AMCDV bid succeed and SLU invoke its rights under the CDPA to force BHL to re-purchase the 13,250,000 conversion shares it owns at the price of \$10 per share.

[57] Ansa concluded by arguing that the acts or omissions of BHL alleged by Ansa effected a result that was unfairly prejudicial to, or that unfairly disregarded the interests of Ansa as contemplated by **section 228(2)(a)** of **Cap. 308**. Ansa's further concluding argument was that, by virtue of those alleged acts or omissions of BHL, the business or affairs of BHL had been carried on or conducted in a manner that was unfairly prejudicial to, or that unfairly disregarded the interests of Ansa as contemplated by **section 228(2)(b)** of **Cap. 308**. Finally, Ansa argued that, by virtue of those alleged acts and omissions, the powers of the directors of BHL had been exercised in a manner that is unfairly prejudicial to, or that unfairly disregarded, the interests of Ansa as contemplated by **section 228(2)(c)** of **Cap. 308**. In light of the foregoing, Ansa sought an interim injunction restraining BHL from

performing or otherwise giving effect to Article 6.2(b) and Article 8 of the CDPA.

[58] Ansa offered as the overarching need for an interim injunction freezing the take-over process until the hearing of the underlying oppression action the proposition that, within the context of the current take-over bids for BHL, the CDPA created an impossible barrier to a fair and transparent competitive bidding process, and an insurmountable obstacle for any bidder other than SLU. The absence of a fair and equitable bidding framework that was conducive to a true competitive bidding process was inimical to the interests of the shareholders and their ability to achieve the maximum take-over value for their shares. Thus, Ansa contended, unless the process was frozen until the hearing, the bids might close and the shareholders might irretrievably have altered their positions to their detriment.

#### **OPPOSITION TO THE APPLICATION**

[59] Ansa's application in support of an interim injunction was opposed by both BHL and SLU.

[60] BHL's opposition was based on a number of grounds.

[61] The first ground advanced by BHL was that Ansa's oppression action against BHL was instituted using confidential information which Ansa had agreed not to use for that purpose. In support of that ground, BHL exhibited

a “Confidentiality Agreement” dated 19 October 2015 expressly stated to be between BHL and “Ansa McAL. Ltd” incorporated in Trinidad and Tobago.

[62] BHL, in advancing its second ground, conceded that it had indeed entered into the CDPA, including the provisions impugned by Ansa as oppressive. However, BHL maintained that it had done so on professional advice and with the approval of the relevant regulatory authorities in Barbados, namely, the BSE, the Barbados Securities Commission (BSC) and the Central Bank of Barbados (the Central Bank).

[63] The third ground of opposition by BHL found at paragraph 78 of the Cozier affidavit was that BHL’s directors were aware that “there were certain risks of the Put-option”. Nonetheless, the paragraph continues, “...based on a holistic assessment of the risks and the benefits of the CDPA with Latin Capital was determined to be the best financial option based on the advice available to the Board provided by the BHL’s professional advisors”.

[64] The fourth ground put forward by BHL was that the put option was not an unusual provision contained in financing transactions such as the CDPA. Indeed, it had not been advised by its legal advisors that there was any legal requirement that the put option in Article 8 or the pre-emption right in Article 6.2 be disclosed to or approved by its shareholders. In any event,

BHL contended, the confidentiality clause in the CDPA prevented BHL making such disclosure.

[65] A fifth ground proffered by BHL was that, contrary to Ansa's claim, no new class of shares was created by the CDPA. The rights in the CDPA were in fact contractual rights. As such, neither the approval of BHL's shareholders nor an amendment to BHL's articles of amalgamation was required as alleged by Ansa.

[66] SLU, while associating itself with BHL's grounds of opposition, proposed as another ground of opposition that the arbitration clause in Article 9.11.1 of the CDPA ousted the jurisdiction of our High Court in respect of the CDPA. Consequently, Ansa was thereby precluded from bringing any claim in respect of the CDPA in our High Court.

[67] A second ground of opposition advanced by SLU was that the court could not grant the relief sought by Ansa by way of order setting aside or varying the CDPA. This, according to SLU, was because the effect of **sections 19** and **21** of **Cap. 308** was to save the impugned clauses of the CDPA and to preserve the third party rights purchased by SLU through its investments in BHL. The effect of **section 19** is to render it impossible for the court to set aside the CDPA and the effect of **section 21** is to prevent the court from

either setting aside or varying it. Thus, the injunction must fall by the wayside.

- [68] As a final ground of opposition, both BHL and SLU denied that the provisions of the CDPA operated as a constraint on the take-over bidding process. In support of this, they pointed to the fact that despite knowledge of the CDPA, AMCDV had made offers and revised offers in excess of the fair market value of the shares of BHL in its competition with SLU for the controlling interests in BHL.

#### **THE JUDGMENT OF THE CHIEF JUSTICE**

- [69] As already recited, on 3 November 2015, Ansa applied for and obtained *ex parte* an injunction in terms of the application filed. On 13 November 2015, after a contested hearing on the further consideration of Ansa's application, **Gibson CJ** delivered an *ex tempore* judgment in which he gave "a very short reading of the decision" stating his reasons for dismissing Ansa's application and discharging the interim injunction. At that time also, the Chief Justice indicated that he would present his judgment in a "longer decision". This he did on 26 November 2015 in a written judgment, at which time his written judgment should be treated as superseding his *ex tempore* judgment. However, and as was argued by counsel on all sides, his

written decision must be considered in tandem with his oral decision in understanding the reasons why he discharged the injunction.

[70] In his *ex tempore* decision, **Gibson CJ** read from the “Claimant’s facts” “the facts of the case which are largely undisputed”. In his written decision, he stated at para [6] that “In light of the decision which I made on 4 November 2015, it is essential that all the facts which influenced that decision be clearly understood.” He then proceeded to set out between para [7] and [30] the “facts” as deposed in the Cozier affidavit, without expressly stating that that affidavit was the source of the “facts”.

[71] In both his *ex tempore* and written decisions, the Chief Justice cited **American Cyanamid** as interpreted in **Toojays** as establishing the test to be applied in an application for the grant or discharge of an interlocutory injunction. That test, he stated, in his *ex tempore* decision is “a two-stage or two pronged test”. The first is: “Is there a serious issue to be tried?” And the second: “Where does the balance of justice lie?” As to the second, **Gibson CJ** expressed a preference in the instant case for the formulation of de la Bastide CJ in **East Coast Drilling and Workover Services Ltd v Petroleum Co Of Trinidad and Tobago (2000) 58 WIR 351 at 358**, namely, “where does the risk of injustice lie if the injunction is not granted?” **Gibson CJ** repeated this adumbration of the law in his written decision.

[72] Applying these guidelines in his *ex tempore* decision, **Gibson CJ** expressly stated that: “there is no doubt in my mind that there is a serious issue to be tried”. Accordingly, the Chief Justice held:

“Where this case is to be decided, in my judgment, is on the second criteria (sic) of Cyanamid: “Where does the balance of justice lie? And to resolve that, I ask myself the question: “Is the potential harm that the Claimant contends that it will suffer likely to be visited on the Claimant, as a shareholder, or is the harm likely to be visited on it as a bidder? What harm is it suffering in its capacity as a shareholder as compared to its capacity as a bidder?”

In response to these rhetorical questions, **Gibson CJ** answered that, “on the papers”, the Court did not consider that Ansa would suffer harm as a shareholder, noting that in this capacity Ansa, as a shareholder, receives dividends and that it has never been deprived of that right.

[73] **Gibson CJ** made another consequential finding in his *ex tempore* decision in respect of harm suffered by Ansa “in its capacity as shareholder”. He found that nothing the directors did harmed Ansa “in its capacity as shareholder”, including entering into the CDPA. He held that it is only when Ansa “steps out of the role as shareholder and puts on the hat as bidder, that it now has a problem, because it is in its role of bidder that it stands to suffer the harm of having, perhaps, to pay a premium for shares, which it is not prepared to do”. And so, the Chief Justice found that, based on his reading of the

affidavit evidence before the court, he was not persuaded that if a remedy were to be granted to Ansa based on the harm that it claims that it will have suffered, “it is a remedy which it seeks because of harm visited to it in its capacity as a bidder”.

[74] The Chief Justice then turned to the issue of adequacy of damages. On this he ruled that it is possible to quantify the loss which the appellant will suffer if BHL is compelled under the CDPA to purchase SLU’s shares at 2.5 times their value, holding that any loss which Ansa suffered could be quantified. Referring to this Court’s decision in **Toojays**, the Chief Justice held that if damages can be quantified, there is no question that damages would be an adequate remedy for Ansa and no question that Ansa could be adequately protected by money.

[75] Finally in his *ex tempore* decision, the Chief Justice turned to considering Ansa’s likelihood of success. Here, the Chief Justice held that, when considering the likelihood of success on the papers, he was “not persuaded” that Ansa would succeed on the issue of oppression under **section 228** of **Cap. 308**.

[76] The Chief Justice addressed the issue of Ansa’s allegation of oppression more fully in his written judgment. First, at paras [33], [34] and [56] of that judgment, he classified Ansa’s case as limited to directors’ breach of

fiduciary duty in failing to seek shareholders' approval. Having so classified Ansa's case, the Chief Justice expressed the view at para [56] that the directors' "management mandate" was paramount and could only be overridden by a unanimous shareholders agreement. Indeed, after examining the directors' "management mandate" between para [53] and [57], he concluded at para [57] that Ansa's contention that the CDPA should have been submitted for shareholders' approval "finds no support in either the Companies Act or in the cases construing the statutory provisions".

[77] Second, between para [58] and [67], the written judgment deals with what is headed "**The Oppression Remedy-Derivative Action**". Here, the Chief Justice held at para [63] that the need for an oppression remedy was not established on the papers and that, Ansa's concerns were that of a bidder and not in its status as a shareholder. He also held that Ansa's case for an oppression remedy had no basis in law which could justify the Court granting an interlocutory injunction to cause the cessation of the market activity in the bidding process.

[78] Finally, at para [66], the Chief Justice held that, even assuming that Ansa was successful at trial in establishing its entitlement to the oppression remedy, the Court is fully empowered by **section 228(3)** to direct Ansa to sell its shares to BHL, "thus removing it from the picture and ending the

combat”. In those premises, there could be no basis upon which to grant interlocutory relief to Ansa. In any event, according to the Chief Justice, while any loss suffered by Ansa can be compensated under **section 228(3)**, the loss of a bidding opportunity on the part of the SLU or any other bidder who may enter the bidding fray cannot be compensated.

### **THE ISSUES IN THIS APPEAL**

[79] All the parties to the appeal, Ansa, BHL and SLU, accept that the discharge of the injunction by the Chief Justice could only have been done in pursuance of the discretionary power vested in him sitting as a judge of the High Court by **section 228 (3) of Cap. 308**. This being so, it is agreed on all sides that two entangled issues arise for consideration in determining this appeal against the discharge, and for the continuation, of the injunction by the Chief Justice.

[80] The first of these relates to the power of this Court, an appellate court, to interfere with the exercise by the Chief Justice, sitting as a judge of the High Court, of the discretion to discharge an injunction which is statutorily vested in him. The second relates to the determination of whether there is any basis for this Court to invoke any such power which resides in it and interfere with the exercise by the Chief Justice of his discretion to discharge the interlocutory injunction in this case.

[81] We deal with these two issues *seriatim* hereafter.

### **Appellate Function in the Grant of an Interlocutory Injunction**

[82] The principles applicable to the interference by an appellate court in an appeal against the exercise of the discretion by a trial court to grant or discharge of an interlocutory injunction were expansively enunciated by Lord Diplock in the English House of Lords in **Hadmor Productions Ltd v Hamilton** [1983] 1 AC 191 at 220-221 as follows:

“Before advertent to the evidence that was before the learned judge and the additional evidence that was before the Court of Appeal, it is appropriate to remind your Lordships of the limited function of an appellate court in an appeal of this kind. An interlocutory injunction is a discretionary relief and the discretion whether or not to grant it is vested in the High Court judge by whom the application for it is heard. Upon an appeal from the judge’s grant or refusal of an interlocutory injunction the function of an appellate court, whether it be the Court of Appeal or your Lordship’s House, is not to exercise an independent discretion of its own. It must defer to the judge’s exercise of his discretion and must not interfere with it merely upon the ground that the members of the appellate court would have exercised the discretion differently. The function of the appellate court is initially one of review only. It may set aside the judge’s exercise of his discretion on the ground that it was based upon a misunderstanding of the law or the evidence before him or upon an inference that particular facts existed or did not exist, which, although it was one that might legitimately have been drawn upon the evidence that was before the judge, can be demonstrated to be wrong by further evidence that has become available by the time of the appeal, or upon the ground that there has been a change of circumstances after the judge made his order that would have justified his acceding to an application to vary it. Since reasons given by judges for

granting or refusing interlocutory injunctions may sometimes be sketchy, there may also be occasional cases where even though no erroneous assumption of law or fact can be identified, the judge's decision to grant or refuse the injunction is so aberrant that it must be set aside upon the ground that no reasonable judge regardful of his duty to act judicially could have reached it. It is only if and after the appellate court has reached the conclusion that the judge's exercise of his discretion must be set aside for one or other of these reasons, that it becomes entitled to exercise an original discretion of its own."

- [83] In its numerous decisions, including **Locke v. Bellingdon Limited (Civil Appeals Nos. 31 and 34 of 2001 unreported)**, **Toojays and Cellate Caribbean Ltd et al v Harlequin Property (SVG) Ltd, Civil Appeal No. 3 of 2011**, this Court has accepted that statement of law by Lord Diplock as representing the law in Barbados. Other regional courts of appeals have also embraced this principle. Indeed, de la Bastide CJ in the Trinidad and Tobago Court of Appeal decision in **Jetpak Services Ltd v BWIA International Airways Ltd (1998) 55 WIR 362 at 368** distilled these principles as follows:

"It is only in the circumstances where the exercise of the judge's discretion is based on a misunderstanding or misapplication of either the law or the evidence that an appellate court is entitled to set aside the exercise of the judge's discretion and exercise an independent discretion of its own."

- [84] In its written submissions to, and oral arguments before, this Court, Ansa accepted these principles but contended that this Court should interfere with

the exercise by the Chief Justice of his discretion to discharge the injunction in this case. In its further amended notice of appeal, Ansa stated twenty five grounds of appeal as the basis on which it asked this Court to interfere with the decision of the Chief Justice. Reduced to their essentials, these grounds are to the effect that the Chief Justice, in exercising his discretion to discharge the interim injunction, acted upon wrong principles of law and/or misunderstood or misapplied the evidence.

[85] BHL and SLU conceded that this was the only basis on which this Court can interfere with the Chief Justice's exercise of his discretion to discharge the injunction. However, they disagreed with Ansa that the Chief Justice acted upon wrong principles of law and/or misunderstood or misapplied the evidence in exercising his discretion to discharge the interim injunction.

[86] By reason of counsel's contentions, the issue which now arises before us is whether the Chief Justice acted upon wrong principles of law and/or misunderstood or misapplied the evidence in exercising his discretion.

**Did the Chief Justice act upon Wrong Principles of Law?**

[87] In seeking to resolve this question, we deem it best to begin with a consideration of whether the governing principles applied by the learned Chief Justice in this case were the correct principles applicable to an interim injunction in aid of oppression relief under **section 228 of Cap. 308.**

### **The governing principles**

[88] The general test which governs the grant or discharge of an interim injunction is now accepted in our courts to be the **American Cyanamid** test as interpreted by this Court in **Toojays**. That test has two limbs, namely: (i) Whether there is a serious issue, in the sense of not being frivolous or vexatious, to be tried; and (ii) Whether the balance of justice lies in favour of granting or refusing interlocutory relief.

[89] The **American Cyanamid** test was developed in the statutory context of an English provision *in pari materia* with **section 44 (b)** of **Cap. 117A**. In **Toojays** at para [43], this Court emphasised the importance of understanding the **American Cyanamid** test against the backdrop of the standard imposed by the statutory provision which conferred injunctive power on the court. Indeed, this Court warned that “a serious danger inheres in divorcing the **American Cyanamid** guidelines from their statutory context”. The clear implication of **Toojays**, then, is that where another statute expressly confers a power to grant an injunction, the **American Cyanamid** test is to be applied against the particular statutory context of that injunctive power: see also **Runnymede BC v Harwood (1994) 68 P & CR 300** and *Jill Martin (1993) 3 Carib LR 76*.

- [90] The observations expressed on statutory context in **Toojays** are particularly relevant in approaching the principles governing the grant of interim injunctions in oppression cases pursuant to **section 228 (3)** of **Cap. 308**. That subsection confers on the court power to “make any interim or final order it thinks fit”. This formulation is undoubtedly an enlargement of the court’s general interlocutory injunctive discretionary power exercisable where it appears to the court “to be just and convenient so to do” under **section 44 (a)** of **Cap. 117A**. It is therefore crucially important that the principles governing the court’s injunctive power under **section 228 (3)** be firmly rooted, and understood, in their statutory context.
- [91] In this regard, this Court’s decision of **Canwest International et al v Atlantic TV Ltd et al (1994) 48 WIR 40** at **p 46 (Canwest)** affords a convenient jump-off point into the statutory context of **section 228 (3)**. There, **Sir Denys Williams CJ** stated that that subsection vests in courts wide-ranging power to grant interim relief under the oppression remedy and to grant any interim order they think fit.
- [92] No doubt, these very wide powers of the court hearing an application for an interim order under **section 228 (3)** provides a statutory indication as to the principles that should govern the grant or discharge of interim injunctions in oppression cases. To be sure, the basic objective of an interim injunction

under **section 228 (3)** is the same as an interlocutory injunction under **section 44 (b)** of **Cap. 117A**. That purpose, as was said by Lord Hoffmann in Privy Council case of **National Commercial Bank Jamaica Ltd v Olint Corp Ltd [2009] 5 LRC 370 at 376 (NCB Jamaica)**, is “to improve the chances of the court being able to do justice after a determination of the merits of the trial”.

[93] *Ex hypothesi*, the **American Cyanamid** injunctive principles remain relevant and ought to be applied in interim injunctions in oppression cases. However, those principles should not be applied to limit the court’s broader discretionary power under the oppression remedy. As was said in the Supreme Court of Canada in **BCE Inc v 1976 Debentureholders [2008] 3 SCR 560 (BCE Inc)**, that power is to enforce not merely what is legal, but what is just. Indeed, given the statutory context of the oppression remedy in **section 228**, the interim injunction should be applied to do justice and equity in the circumstances of a particular case and the **American Cyanamid** injunctive principles may be overridden if the justice and equity of a particular case so requires.

[94] This view of the law finds support, if support be necessary, in Canadian case law on interim injunctions in aid of the oppression remedy in legislative provisions in *pari materia* with **section 228** of **Cap. 308**. For instance, in

the recent Saskatchewan Court of Queen's Bench case of **Rupcich v Mravcak [2013] SJ No. 139**, that court held that the general test applicable to interlocutory injunctions (the **American Cyanamid** test as interpreted by the Canadian courts) should be regarded as the framework in which a court will assess whether an injunction is warranted in any particular oppression case. However, in every such case the ultimate focus of the court must always be on the justice and equity of the situation in issue.

[95] That statement of the law echoes the earlier Saskatchewan Court of Queen's Bench case, **First Choice Capital Fund Ltd. v First Canadian Capital Court [1997] S.J. No. 390** at para [44], where the court said:

“The jurisprudence with respect to the exercise of the Court's equitable jurisdiction to grant injunctive relief provides guiding principles which may be utilised by the court when it determines the appropriateness of the interim relief requested to restrain certain conduct pending the hearing of an application under s. 234 of the Act. However those principles should not be used to limit the broad discretionary power of the statute.”

[96] As noted at para [71] of this judgment, **Gibson CJ** invoked the **American Cyanamid** guidelines as interpreted in **Toojays** in exercising his discretion in favour of discharging the interim injunction. He did not, however, recognise that the injunction before him was an injunction in aid of an oppression application under **section 228** of **Cap. 308** and that the special rules stated in paras [93] to [95] of this judgment had to be applied.

[97] We are therefore in agreement with Mr. Armour SC that the learned Chief Justice consequently fell into serious error in not acknowledging that the **American Cyanamid** guidelines as interpreted in **Toojays** was merely the framework within which the question as to whether or not an injunction is warranted was to be assessed. As the case before him was in respect of an injunction in aid of the oppression remedy, even though the **American Cyanamid** guidelines as interpreted in **Toojays** provided the basic framework for the exercise of his injunctive discretion, his ultimate focus had to be on the justice and equity of the case before him. By not so focussing, the Chief Justice fell into grave error.

#### **Serious Issue to be Tried**

[98] As was seen at para [72] of this judgment, **Gibson CJ** in his *ex tempore* judgment, in relation to the first limb of the **American Cyanamid** guidelines as interpreted in **Toojays**, namely, whether there is a serious issue to be tried, stated that he was “in no doubt that there is a serious issue to be tried”. Despite that statement, and even though he discussed what constitutes a serious issue to be tried at paras [48]-[50] of his written judgment, he offered no view in his written judgment as to whether or not there was a serious issue to be tried.

[99] We make the foregoing observation because there is much in both his *ex tempore* and written judgments which contradicts his statement of his being “in no doubt that there is a serious issue to be tried”. As an example, his persistent categorisation of Ansa as a “bidder” and not a “shareholder” in both his *ex tempore* and his written judgments implies, for one, that Ansa is not a complainant and therefore has no standing in the oppression action. If Ansa had no standing, then no serious case could arise to be tried. For another, such a categorisation denies, by necessary implication, that the rights asserted by Ansa to have been unfairly disregarded by BHL are actionable rights, since those rights could not be shareholder’s rights. This would also have the necessary consequence that there could be no serious case to be tried.

[100] Another example of a finding which contradicted the learned Chief Justice’s statement that there was a serious issue to be tried is found at para [63] of his written judgment where he held that, “examining the papers” there was “no basis for the oppression remedy”. As argued by Ansa, if it were possible to conclude on the papers that there is no basis for the oppression remedy, then this would remove the possibility of a finding of a serious case to be tried.

[101] A final example is to be found at para [52] of his written judgment where the Chief Justice states:

“I thought it best, before embarking on an examination of the principles relating to the oppression remedy, derivative action and the other issues relating to the CDPA, to set out those fundamental principles relating to the grant or discharge of an interlocutory injunction for the simple reason that, even assuming that there was a triable issue...”

It is not obvious why it would be necessary to assume that there was a “triable issue” if, as he claims to have found, there was a serious issue to be tried.

[102] It is apparent from the foregoing that, as Ansa argued, there is some uncertainty as to **Gibson CJ’s** finding on the first limb of the **American Cyanamid** test. It is our judgment that because of this uncertainty it is necessary for us to pronounce on the question of whether there was a serious issue to be tried.

[103] As has been seen, Ansa’s action as presented in its fixed date claim form is for the oppression remedy against BHL pursuant to **section 228** of **Cap. 308**. In deciding whether there is a serious issue to be tried in such an action, it is imperative that, as a first step, the elements of the oppression remedy be identified. Before exploring these elements, however, it is important to note that, on the express language of that section, the oppression remedy is only available to a “complainant”. Thus, an essential preliminary consideration in determining whether there is a serious issue to be tried in an injunction in

aid of an oppression action is whether there was a serious claim that the applicant petitioning for oppression relief is a complainant.

[104] What must be proved by such a complainant to establish entitlement to an oppression remedy under **section 228** is specifically addressed in “*Commonwealth Caribbean Company Law (Routledge: 2013)* by Andrew Burgess. There, the author opines on this question at *p 331* as follows:

“The kernel of the oppression remedy provisions is that the conduct complained of must be actionable conduct, in the sense that is ‘oppressive or unfairly prejudicial, or that unfairly disregards the interests of a shareholder or debenture-holder, creditor, director or officer of the company’. Therefore, the two central foci in determining entitlement to the remedy are the ‘interests’ of the protected category and the conduct that is ‘oppressive’, ‘unfairly prejudicial’ or ‘unfairly disregards’ in light of these ‘interests’.”

We would add that that view of the law finds substantial support in **BCE Inc** where **section 241** of the Canadian Business Corporation Act (CBCA), a section *in pari materia* with **section 228**, was given a similar interpretation by the Supreme Court of Canada.

[105] Thus, in assessing whether there is a serious matter to be tried in a claim for an interim injunction in an oppression action, three questions must be addressed. These are: (1) Does the affidavit evidence establish a serious claim that the claimant is a “complainant”? (2) Does the affidavit evidence support a serious claim in respect of the protected “interests” asserted by the

claimant to have been infringed? And, (3) Does the affidavit evidence establish a serious claim that the asserted “interests” were violated by conduct falling within the terms “unfair prejudice” or “unfair disregard”? In making its assessment of these questions, the court must always have as its ultimate focus the justice and equity of the case before it. We would also remind ourselves here, *en passant*, that, in making its assessment of these questions at that interim stage, the court must avoid conducting a trial on affidavits.

[106] In relation to the first question, whether there is a triable case that Ansa is a “complainant”, **section 225 (b)** provides a list of those persons who fall within the definition of “complainant”. All that was necessary to answer that question in this case, therefore, was for there to be affidavit evidence that Ansa was one of those persons listed in **section 225 (b)**. A “shareholder” is a person so listed. That said, it is to be noted that Canadian cases such as **Michalak v Biotech Electronics Ltd (1986) 35 BLR 1 (Que SC)** and **Royal Trust Corp of Canada v Hordo (1993) 10 BLR (2d) 86 (Ont Gen Div)** establish that despite the express inclusion of “shareholder” in the definition of complainant, it does not necessarily follow that a person who is a shareholder in that he owns or formerly owned shares in the company automatically has standing as a “complainant”. According to these

cases, the court retains a discretion to deny such status to a “shareholder” in any case where the interests of equity and justice so requires.

[107] In this case, there was evidence before **Gibson CJ** in both the Mouttet affidavit and the Cozier affidavit that, at the time of the application, Ansa was a substantial shareholder in BHL. That evidence raised without more a serious triable issue as to whether Ansa was a complainant.

[108] It is not clear from either the *ex tempore* judgment or the written judgment whether **Gibson CJ** found that there was, or was not, on the evidence before him a serious claim that Ansa was a complainant. In both these judgments, **Gibson CJ** made numerous references to Ansa suing as “bidder” and not “shareholder”. It is also not clear whether by this he meant that Ansa was not a complainant, even though a shareholder. The Chief Justice could only so hold if, on the evidence before him, this was warranted because the interests of equity and justice required it. However, he did not advert to any evidence that the interests of equity and justice required that Ansa, being indisputably a shareholder and a substantial one at that, should not be treated as a complainant. If therefore the categorisation of Ansa as “bidder” and not “shareholder” by the Chief Justice was meant to deny that Ansa was a complainant, we agree with Mr. Armour SC that the learned Chief Justice fell into grave error.

[109] Recognising that we should try as far as possible to avoid saying anything that may prejudice the issues at trial, we feel bound to say that there was no evidence before **Gibson CJ** that Ansa was either in law or in fact a “bidder”. It may very well be that at trial evidence may be adduced to show that Ansa was a “bidder”, but the undisputed evidence on the papers was that AMCDV, the wholly owned subsidiary of Ansa, was in fact the “bidder”.

[110] In law, AMCDV was a separate legal personality and so was therefore the “bidder”. The fact that AMCDV was the wholly owned subsidiary of Ansa did not in any way subsume AMCDV within Ansa thereby transmogrifying Ansa into a “bidder”: **Adams v Cape Industries plc [1990] Ch 433 (Eng CA)**; **Woolfson v Strathclyde Regional Council [1978] SLT 159 (SC HL)**; **Prest v Petrodel Resources Ltd [2013] 4 All ER 673 (UKSC)**; **International Hotels (Jamaica) Ltd v Proprietors Strata Plan No. 461 (unreported) Civ App No 135 of 2008 (J’ca CA)**. There can be no dispute that, in law, Ansa always enjoyed a separate legal personality distinct and apart from AMCDV and there were no facts to suggest otherwise. Accordingly, Ansa’s claim that its status as a shareholder in BHL constituted it a complainant within the meaning of **section 225 (b)** cannot be regarded as frivolous and vexatious.

[111] In respect of the second question, namely, whether the affidavit evidence supported a serious issue to be tried in respect of the protected “interests” asserted by Ansa, it is explained at p 332 of *Commonwealth Caribbean Company Law* as follows:

“There can be little doubt that the ‘interests’ sought to be protected in the oppression provisions must be interpreted in light of the purpose of the oppression remedy itself. The purpose of this remedy is to give relief for thwarted expectations of persons in the protected category. Thus, determination of the ‘interests’ of the protected category is essentially a determination of the reasonable expectations of the persons in the protected category.”

Canadian case law supports this view of the law. That case law also recognises that it is impossible to catalogue exhaustively the situations where a reasonable expectation may arise. Despite this caveat, it is not in doubt that the reasonable expectation of the protected category includes expectations embedded in their strict legal rights, including statutory rights, but may also include other expectations.

[112] In this case, there was ample evidence to support a serious case of the protected “interests” asserted by Ansa. Ansa’s claim was that various provisions in **Cap. 308** and in the articles of amalgamation of BHL operated to vest the relevant interests in it as a shareholder, and in other BHL shareholders. In particular, as has been seen, Ansa listed **sections 5 (1) (b)**

(i), 27, 28, and 197 as such provisions in **Cap. 308** and the provision in the articles of amalgamation of BHL that that company is authorised to issue an unlimited number of shares of one class designated as common shares as the provision in the articles of amalgamation.

[113] We are of the view that it is far from frivolous and vexatious to claim that **sections 5 (1) (b) (i), 27 and 28** operate to create a reasonable expectation in shareholders in general, and shareholders in BHL in particular, that their company would adhere to the fundamental principle of equality of shareholders of the same class. In the same vein, it is not frivolous and vexatious to claim that the provision in the articles of amalgamation of BHL expressly stipulating that BHL was authorised to issue an unlimited number of shares of one class designated as common shares engendered the reasonable expectation that, barring a change in this provision, BHL's shares would be limited to one class of shares designated common shares. Likewise, it is not frivolous and vexatious to claim that **section 197** created a reasonable expectation in BHL shareholders that their approval by a special majority would be sought by BHL in granting special rights and privileges to any holder of common shares not otherwise enjoyed by other holders of common shares. In sum, therefore, there was affidavit evidence to support a serious case of the existence of the protected "interests" asserted by Ansa.

[114] Ansa's contention is that **Gibson CJ** did not properly consider or answer the question of the protected "interests" asserted by it. Ansa's further contention is that, to the extent that the Chief Justice did not deal with that question, he misapprehended and misapplied the law. In support of that argument, Ansa pointed to his *ex tempore* decision where he said:

"It is not clear to the court on the papers what harm it is suffering as a shareholder. If as a shareholder the Claimant simply seeks to, as shareholders ordinarily do, receive dividends, have the right to attend general meetings, it has never been deprived of any of those rights. There is nothing that the directors have done, including entering the CDPA which harms the Claimant as a shareholder."

For the reasons outlined at paras [111] to [113] above, we respectfully agree with Ansa that this finding does not make contact with, and is irrelevant to, the protected interests asserted by Ansa.

[115] Finally, in relation to the third question, Ansa must present a serious case that the failure to meet the reasonable expectations created by the asserted protected interests involved unfair conduct and prejudicial consequences under **section 228**. On the express words of that section, there are three categories of conduct that can give rise to the oppression remedy. These are "oppressive" conduct, "unfairly prejudicial" conduct and conduct which "unfairly disregards" the interests of a complainant. As observed by Jamadar J in the Trinidad and Tobago High Court case of **Lalla v Trinidad**

**Cement Ltd et al (unreported) HCA no Cv S-852/98**, each of these categories introduces a separate category of conduct, which may overlap in any case, but each of which, if proven, can constitute oppression as encoded in **section 228**.

[116] In the Manitoba Court of Appeal case of **Cohen v Jonco Holdings Ltd (2005) 4 BLR (4th) 232 (Man CA)**, oppressive conduct was defined as burdensome, harsh and wrongful conduct involving an invasion of a legal right. This case which was cited with approval in the St. Lucian High Court case of **Joan Devaux v Duboulay Holdings Ltd (unreported) SLUHCV 0424 of 2003 (St LHC)**, in our judgment, is a correct interpretation of that expression in **section 228**.

[117] Unfair prejudice is a less stringent concept than oppression. Thus, in the Canadian case of **Miller v F Mendel Holdings Ltd (1984) 26 BLR 85 Sask QB**, it was held that conduct complained of which may not be burdensome, harsh and wrongful and therefore oppressive may nevertheless be unfairly prejudicial. In approaching unfair prejudice, the courts have held that the conduct complained of must be prejudicial in the sense of causing prejudice or harm to the relevant interests of the shareholder (or, presumably, other complainant) and that as such both unfairness and prejudice must be proved.

[118] Even less stringent conduct that may constitute oppression than unfairly prejudicial conduct is conduct that “unfairly disregards” the interests of shareholders, and others with interests, in the company. In **Stech v Davies (1987), 53 Alta LR (2d) 373 Alta QB** “unfairly disregards” was interpreted to mean “unjustly or without cause pay no attention to, ignore or treat as of no importance the interests of [a complainant]”.

[119] In the case before **Gibson CJ**, Ansa’s claim was that the act of the directors of BHL in entering into the offending provisions of the CDPA effected a result that was unfairly prejudicial to, or that unfairly disregarded the interests of Ansa and other shareholders of BHL embedded in **sections 5 (1) (b) (i), 27, 28, and 197** and the articles of amalgamation of BHL. In the alternative, Ansa claimed that those directors exercised their powers in a manner that was unfairly prejudicial to, or unfairly disregarded those same interests.

[120] Significantly, it was no part of Ansa’s claim that the directors of BHL did not have a statutory mandate to manage the business and affairs of their company and to enter into contracts deemed by them as being in BHL’s best interests. Ansa’s claim was that the exercise by the directors of their mandate in entering the challenged articles of the CDPA was unfairly prejudicial to and unfairly disregarded the asserted interests of BHL’s

shareholders. Ansa contended that it was therefore surprising to see the extended discussion on **section 58 (1)** between paras [53] and [57] of the written judgment of **Gibson CJ** and ending at para [57] with the following conclusion:

“For the above reasons, the contention that the CDPA should have been submitted for approval by shareholders’ resolution finds no support in either the Companies Act or in the cases construing the statutory provisions.”

[121] We agree with Mr. Armour SC that this is demonstrably a wrong statement of the law. **Section 197** as argued by Mr. Armour SC and as is discussed at para [52] of this judgment, is such a statutory provision. Also, contrary to the assertion of the learned Chief Justice, there is an abundance of case law supporting Ansa’s contention.

[122] In our judgment, there was evidence before **Gibson CJ** which showed that there was a serious case to be tried as to whether BHL failed to meet the reasonable expectations of its shareholders, including Ansa, and that that failure involved unfair conduct and prejudicial consequences within the meaning of **section 228**. The undisputed affidavit evidence was that the mandatory redemption or buy-back provisions of the put option and the preemptive rights provisions in the CDPA conferred on the holders of the conversion shares special rights and privileges not otherwise enjoyed by

other holders of common shares in BHL. This inevitably raised a serious question to be tried as to whether, legally and/or factually, those provisions resulted in the holders of the common shares in BHL being treated unequally in violation of the reasonable expectations engendered by **section 27**.

[123] Further, if the impugned provisions conferred the rights alleged by Ansa, BHL could only confer such rights by amending its articles of amalgamation. As was said in the Alberta Court of Queen's Bench case of **Richardson v Mission Oil & Gas Inc. [2008] 40 BLR (4th) 62 at para 21**:

“When a corporation chooses to treat shareholders within the same class differently, that differential treatment again needs to be authorized by the articles.”

Ergo, another serious question to be tried arose in respect of the legality of the impugned provisions of the CDPA.

[124] Alternatively, serious issues are raised as to whether the provisions of the CDPA amounted in effect to the creation of a new class of shares that are essentially redeemable shares which carry pre-emptive rights. Because, if so, serious questions arise as to whether their creation involved a fundamental change, within the meaning of **section 197** to the class of shares authorised by the articles of amalgamation.

[125] True, the purpose of **section 197** is to establish a statutory regime to facilitate fundamental changes which a modern company in Barbados may wish to

make to its corporate structure. But the section imposes procedural and substantive constraints on a company wishing to make such changes. The most crucial procedural constraint is the requirement that such changes must be by “special resolution”, or in other words, with shareholder approval. This being so, the board of directors of BHL could only amend the rights, privileges and obligations attaching to the common shares of BHL as set out in the articles of amalgamation of BHL by using the amending formulas contained in **section 197** and in the constitutional documents of BHL. By the same token, the rights and obligations of BHL’s shareholders could not be altered by the CDPA contract, unless that contract was adopted using an approved amending formula specified in **section 197**. These are undeniably issues which are far from being frivolous and vexatious.

[126] What is more, companies such as BHL, incorporated or continued under **Cap. 308**, are doubtlessly governed according to what is called in Canadian jurisprudence “a statutory division of powers model”. In **Richardson**, this model and its implications were described in relation to the Alberta Business Corporation Act (ABCA), (an Act in *pari materia* with **Cap. 308**) as follows:

“The statutory division of powers model dictates that the relationships between different "status holders" in a corporation are regulated by the ABCA and by the constitutional documents

of the corporation, including its articles. It is not open to the parties to amend their rights and obligations as set out in the constitutional documents except by using the amending formulas contained in the ABCA and the constitutional documents. The rights and obligations of status holders cannot be altered by a contract, unless the contract was adopted using an approved amending formula.

This approach is reasonable. If shareholders, officers or directors could alter their rights and obligations through side contracts that were not properly approved, the other status holders would be robbed of any certainty in conducting the business of the corporation and could be severely prejudiced by the unapproved amendments.

Section 26(5) of the ABCA reads:

26 (5): subject to section 29, if a corporation has more than one class of shares, the rights of the holders of those shares of any class are equal in all respects.

If a shareholder is able, through collateral contracts, to alter the corporate articles as they apply to him individually, then the equality of shareholders within a class would have very little meaning. It is true that the ABCA recognizes that equality of shareholders has limits. Within a class of shares there can be two or more series of shares, with each series having different rights and obligations. Nevertheless, when a corporation chooses to treat shareholders within the same class differently, that differential treatment again needs to be authorized by the articles.”

[127] We recall here what **Williams CJ** said in **Canwest** in adopting dicta from a Canadian case as representing the law in Barbados. He said there: “It is common knowledge that the Barbados Companies Act borrowed heavily from Canadian precedents and I do not think it amiss to refer to the

judgment of [a Canadian judge]”. In our view, it is not amiss for us to assert that the adumbration in **Richardson** correctly represents the law under **Cap. 308**.

[128] Clearly then, under **Cap. 308**, shareholders have a reasonable expectation that amendments to their rights as set out in the constitutional documents will only be made by using the amending formula contained in **section 197** and the constitutional documents. As a consequence, the creation of the special rights and privileges enjoyed exclusively by the holders of the conversion shares, or alternatively the creation of this new class of shares, without a “special resolution” raised a serious triable issue as to whether such failure to meet the reasonable expectation of Ansa and the other shareholders of BHL involved unfair conduct and prejudicial consequences under **section 228**.

[129] For all of the foregoing reasons, there can be little doubt that there exists a serious issue to be tried in this case. First, being a shareholder in BHL, Ansa’s claim to be a complainant within the meaning of **section 225(b)(i)** cannot be viewed as frivolous or vexatious. Second, the affidavit evidence supports a conclusion that the protected ‘interests’ and reasonable expectations asserted by Ansa are not frivolous and vexatious. Third, there is affidavit evidence to support a finding that Ansa’s claim that the powers

of the company have been exercised in a manner that is unfairly prejudicial to and unfairly disregards the interests of Ansa and the other shareholders of BHL is not frivolous or vexatious.

[130] Before concluding our assessment of whether there was a serious issue to be tried in this case, we think it incumbent on us to examine an argument raised by SLU, mentioned by **Gibson CJ** at para [39] of his written judgment but not considered by him, which has the effect of denying that there was a serious issue to be tried because the High Court in Barbados had no jurisdiction to hear the claim made by Ansa. SLU's argument here was that the arbitration clause in Article 9.11.1 of the CDPA ousted the jurisdiction of our High Court and that Ansa was thereby precluded from bringing any claim in respect of the CDPA in our High Court. For this reason, argued SLU, there could be no serious issue to be tried in the High Court.

[131] In our judgment, this argument by SLU must fail for three compelling reasons.

[132] The first is that, on the express words of **section 228**, and indeed **section 235** on which Ansa also relied in its action in the High Court, the jurisdiction to grant relief for oppression and non-compliance with **Cap. 308** or the articles of the company by directors is expressly conferred on "the court" and not an arbitrator. In fact, no proper interpretation of these provisions presents any

opportunity for an argument that the jurisdiction conferred on the court by these sections can be ousted by an arbitration agreement or other contract. The jurisdiction conferred on the court in respect of the oppression remedy, and the **section 235** remedy, is outside of the scope of an agreement to resolve disputes between parties by way of arbitration. There can be no contracting out of that jurisdiction.

[133] The second is that, even if contracting out of **sections 228** and **235** were possible, surely it could not be done by an agreement or contract to which a complainant was not a party. The fundamental basis of enforcement of arbitration agreements is the consent of the parties to the agreement to submit disputes to an arbitrator and to exclude the courts. But basic principles of privity of contract apply to prevent enforcement of the agreement by or against a party, like Ansa, who is not a party to the agreement. Thus, while BHL, who is a party to the CDPA, may be bound by the arbitration clause and other provisions, Ansa, a shareholder/complainant, did not consent to that agreement, was not a party to that agreement and therefore cannot be bound by it.

[134] The third and final reason is that the right of Ansa to bring an action for oppression as a complainant does not arise under any contract, including the CDPA, but exists independently of any contract. The right is derived

from its status as a complainant and the provisions of **Cap. 308** which expressly confer rights in that regard. Clearly, then, the oppression action brought by Ansa is outside the remit of the arbitrators contemplated by the CDPA.

[135] In sum, the arbitration provisions in the CDPA did not oust the jurisdiction of our High Court to hear the **section 228** and **section 235** actions instituted by Ansa. The High Court had every jurisdiction to try that action. Consequently, the argument that there could not be a serious issue to be tried because the High Court in Barbados had no jurisdiction to hear the claim made by Ansa is entirely destitute.

### **Balancing Justice**

[136] Any doubt as to whether or not the learned Chief Justice held that there was a serious issue to be tried aside, in his *ex tempore* judgment, (but not in his written judgment), he turned to the second limb of the **American Cyanamid** test as explained in **Toojays**, namely, where does the balance of justice lie? Here, it is important to recall that, since this Court's decision in **Williams v CIBC Trust**, the settled law is that the principles which should guide our courts in approaching the second limb of the **American Cyanamid** test are those stated by Sir John Pennycuick in **Fellows & Sons v Fisher [1975] 2 All ER 829** at **843**. He said there of the balance of justice (convenience):

“(3) ‘As to that’ the court should first consider whether, if the plaintiff succeeds he would be adequately compensated by damages for the loss sustained between the application and the trial, in which case no interlocutory injunction should normally be granted. (4) If damages would not provide an adequate remedy the court should then consider whether if the plaintiff fails the defendant would be adequately compensated under the plaintiff’s undertaking in damages, in which case there would be no reason on this ground to refuse an interlocutory injunction. (5) Then one goes on to consider all other matters relevant to the balance of convenience, an important factor in the balance, should otherwise be even, being preservation of the *status quo*. By the expression ‘*status quo*’ I understand to be meant the position prevailing when the defendant embarked on the activity sought to be restrained. Different considerations might apply if the plaintiff delays unduly his application for relief. (6) Finally, and apparently only when the balance still appears even, it may not be improper to take into account in tipping the balance the relative strength of each party’s case as revealed by the affidavit evidence....”

[137] In our judgment, it emerges very plainly from this statement of the law that there is a certain order in which factors relevant to deciding where the balance of justice lies should be taken into account by the court. We do not mean to be taken as suggesting, what was called in **NCB v Olint** at para [21], a “box-ticking approach” “to the complexity of a decision as to whether or not to grant an interlocutory injunction”. However, the order set out in **Fellows & Sons v Fisher** flows logically from the intrinsic nature of the interlocutory injunction and is always followed in applying the **American Cyanamid** test.

[138] Despite the settled state of the law, **Gibson CJ** did not follow the **Fellows & Sons v Fisher** order. Instead of addressing the issue of adequacy of damages first in deciding the balance of justice, he considered the question whether, as he put it, “the harm which the Claimant contends that it stands to suffer likely to be visited on the Claimant, as a shareholder, or is the harm likely to be visited on it as a bidder?”. We have already commented that there was no basis on the affidavit evidence or in law for this question. In any event, dealing with this factor before addressing the issue of adequacy of damages was impermissible and palpably wrong in law.

[139] The learned Chief Justice further stated on the principles applicable to the balance of justice as follows:

“Burgess JA made it very clear in **Toojays** that in considering the balance of convenience, or the balance of justice as he called it, that there are a number of considerations which are subsumed under the balance of justice. One, is the adequacy of damages; second, is the likelihood of success, all of which are based on the papers.”

[140] That, in our judgment is also a wrong statement of the law. It is very clear from **Fellows & Sons v Fisher** that “the likelihood of success”, as **Gibson CJ** put it, may only be considered as a last resort. Before embarking on any such consideration, the court should first take into account factors such as the plaintiff’s undertaking in damages, if any, all other matters relevant to

the balance of convenience, including, if necessary, the preservation of the *status quo*. In **American Cyanamid**, Lord Diplock cautioned on pronouncing on the “likelihood of success” at the interlocutory stage as follows:

“In view of the fact that there are serious questions to be tried upon which the available evidence is incomplete, conflicting and untested, to express an opinion now as to the prospect of success of either party would only be embarrassing to the judge who will eventually try the case.”

[141] With the foregoing caveat in mind, we turn to **Gibson CJ**’s consideration of

(i) “the adequacy of damages”, and (ii) “the likelihood of success”.

*(i) Adequacy of damages*

[142] **Gibson CJ** identified adequacy of damages as a significant factor in assessing the balance of justice. Of this he said in the *ex tempore* judgment:

“Is it possible to quantify the loss which ANSA will suffer if it is compelled to purchase the shares under the CDPA at 2.5 times the value of the shares? And my answer is yes, it is clear that any loss which ANSA suffers can be quantified and as Burgess J (sic) said in **Toojays**, the issue of adequacy really boils down to whether or not damages could be quantified. If damages could be quantified, then there is no question that damages will be adequate and the Claimant can be adequately protected by money.”

[143] This Court considers that the question as raised by the learned Chief Justice in respect of quantification of possible loss to Ansa is a false question as it is

not immediately apparent why Ansa would be “compelled to purchase the shares under the CDPA at 2.5 times the value of the shares”. As already seen, Ansa’s claim was for relief from the alleged oppressive conduct of the directors of BHL in entering certain provisions of CDPA. Ansa brought this claim as a shareholder in BHL and at no time sought to purchase the shares of BHL. It is therefore not evident on what basis they could be “compelled” to purchase the shares of BHL or how such an eventuality could be the basis of determining the issue of adequacy of damages in assessing the balance of justice in this case.

[144] Furthermore, this Court is of the respectful view that **Sir Marston’s** assertion that the law from **Toojays** is that “the issue of adequacy boils down to whether or not damages could be quantified” is an incomplete statement of what was said in **Toojays**. As was correctly noted by **Reifer J** in the recent High Court decision of **Commissioner of Police Darwin Dottin v Sir Elliot Fitzroy Belgrave and The Police Service Commission (No. 1077 of 2013 dated 18<sup>th</sup> September 2013, unreported)** in **Toojays**, this Court identified in the case law two different approaches to determining the question of adequacy of damages. The first is what de la Bastide CJ in **Jetpak Services** called “the narrow approach” and this Court in **Toojays** called “the general approach”. The second approach is what

Buckley LJ in the English Court of Appeal decision in **Polaroid Corporation v Eastman Kodak Co. Ltd [1977] RPC 379** at 395 termed “the exceptional circumstances” approach.

[145] As regards the first, the narrow or general approach, this Court opined in **Toojays** as follows:

“[57] This approach views “damages” as referring to those damages which are legally recoverable in the action, and “adequate” as being synonymous with quantifiable. It proposes that as a general rule, the object of best enabling the trial judge to do justice between the parties, whichever way the decision goes at trial requires that, in the words of Buckley LJ in the English Court of Appeal decision in *Polaroid Corporation v Eastman Kodak Co. Ltd [1977] RPC 379 at 395*, “if the plaintiff can be compensated in damages for anything he may wrongfully suffer between the date of the application and the trial, the defendant should not be restrained save in exceptional circumstance.”

[58] Of course, this general rule is wholly consistent with the notion of justice in our common law system expressed in the maxim that equity follows the law. Since justice is achieved at law by the award of damages, it follows therefore that equity can only in exceptional circumstances grant an injunction where compensation in damages would be otherwise adequate.”

[146] As to the exceptional circumstances approach, the second approach,

**Toojays** explained as follows:

“[I]t appears from the cases that what constitute “exceptional circumstances” are those circumstances where the interest of justice renders the general approach inapplicable. Thus, Sachs LJ in the English Court of Appeal decision of *Evans Marshall & Co. Ltd v Bertla SA [1973] 1 ALL ER 992* said at page 1005:

“The standard question in relation to the grant of an injunction, “are damages an adequate remedy?” might perhaps in light of authorities of recent years, be written: “Is it just in all the circumstances that a plaintiff should be confined to his remedy in damages?”

Sachs LJ went on to identify examples of exceptional circumstances where the general approach would be inapposite. He said at *page 1005*:

“The courts have repeatedly recognized that there can be claims under contracts in which...it is unjust to confine a plaintiff to his damages for their breach. Great difficulty in estimating these damages is one factor that can be and has been taken into account. Another factor is the creation of certain areas of damages which cannot be taken into monetary account in a common law action for breach of contract: loss of goodwill and trade reputation are examples...”

[60] Another example cited by Sachs LJ where the “exceptional circumstances” approach may be justified is to thwart the cynical breach of contracts by parties who for commercial or other reasons would prefer to pay damages for its breach rather than perform the contract. Sachs LJ said at 1008:

“The grant of these injunctions would be in conformity with the trend of recent decisions that the court, in using its discretion, is disposed to set its face against those who seek abruptly to break contracts in circumstances such as obtains in this case. The trend works in the interest of justice and also in the interest of the proper conduct of commercial relations.”

[61] To the same effect is the observation of Hoffman J in *Films International Ltd v Cannon Film Sales Ltd [1987] 1 WLR 670 at 688* that: “Denial of the injunction may enable a party to achieve a commercial objective by a calculated disregard of the

basic principle of a civil society that ‘Men perform their covenants made’.”

[147] It is manifest from the foregoing that **Gibson CJ** did not fully represent the law as stated in **Toojays**. If he had, he would have been forced to ask the question whether the general approach was apposite in the application for relief from oppression under **section 228** sought by Ansa, or whether the exceptional circumstances approach was the applicable approach.

[148] It is important to remember here the relief which was being sought by Ansa. It is (i) a declaration that the CDPA “effects a result and the powers of the directors of [BHL] in entering into the CDPA without obtaining the approval of shareholders” and (ii) an order that “the CDPA be set aside in part or in its entirety, or otherwise be varied”. These are two remedies available under the oppression remedy **section 228 (2)** and **section 228 (3) (h)** respectively. The relief sought by Ansa was therefore not in respect of a cause of action in which the injury suffered was compensable by a monetary award as in a common law action for breach of contract or in a tort action.

[149] The remedies sought by Ansa were to vindicate shareholders’ right to equality enshrined in **Cap. 308** and the shareholders’ right to vote on fundamental changes in their company’s articles. In our judgment, neither of these remedies admits of any quantifiable or compensable loss in a

common law sense. The correct approach to the adequacy of damages factor should therefore have been the exceptional circumstances approach. To paraphrase Sachs LJ in **Evans Marshall & Co. Ltd v Bertola SA** at 1005, the judge should have asked the question: Is it just in all the circumstances that Ansa should be confined to its remedy in damages? In not so approaching the adequacy of damages consideration, the learned Chief Justice fell into error.

[150] One further observation, we would wish to underline that even if compensation and quantification are somehow thought to be possible in an oppression case, the exceptional circumstances approach is still invariably to be adopted. This is so since the object of the oppression remedy is to ensure fairness using the broad equitable jurisdiction in **section 228** to enforce not only what is legal, but what is just and equitable. Thus, even where compensation under **section 228** is considered quantifiable, an injunction may not be denied if the court thinks that doing so would enable oppression and unfairness.

**(ii) “Likelihood of Success”**

[151] In both his *ex tempore* and written judgments, **Gibson CJ** proceeded on the basis that the issue of what he called “likelihood of success” depended upon determination of whether or not Ansa was, as stated by him at para [52] of

the written judgment, “entitled to the oppression remedy”. In his *ex tempore* judgment he held that he was “not persuaded that the Claimant [Ansa] is likely to succeed on the issue of oppression under **section 228**”. The reason for his so holding was that oppression cannot be defined but that you know it when you see it and, apparently, that he did not see it “on the papers”.

[152] In his written judgment, **Gibson CJ** held that there was “no basis for the oppression remedy”. Here, he gave two reasons for so holding. The first is that the directors entered the CDPA in pursuance of their management mandate, namely, the mandate conferred on them by **section 58 (1) (b)** to “direct the management of the business and affairs of [their] company”. The second is that, as he stated at para [63]:

“...any prejudice which may be suffered by AML [Ansa] by the CDPA provisions occurs because it is involved in a competitive bidding contest with SLU and not because the company has failed to, for example, pay it a fair share of the profits distributed as dividends, or because of any conduct which is unfairly prejudicial to AML or, indeed, any other shareholder.”

[153] In framing this factor as a stress test of Ansa’s case for the oppression remedy, the learned Chief Justice was plainly wrong. The correct way of proceeding was to assess the relative strength of each party’s case as revealed by the affidavit evidence. This way of proceeding required the learned Chief Justice to assess, not only the relative strength of Ansa’ claim,

but also the relative strength of BHL's and SLU's defences to that claim. These defences include (i) that **section 19** prevents the pre-emption rights and the put option from being varied or set aside by reason only that they may have been entered into contrary to BHL's articles of amalgamation or **Cap. 308**; (ii) that **section 21** prevents BHL itself from asserting as against SLU that its articles were not complied with; and (iii) that the High Court does not have jurisdiction because of the arbitration clause in the CDPA. In not balancing the relative strength of these defences against the relative strength of Ansa's claim of oppression, **Gibson CJ** failed to take into account an important feature that he ought to have taken into consideration in assessing the relative strength of each party's case.

*(iii) Other Matters Relevant to the Balance of Justice*

[154] According to **Fellows & Sons v Fisher** as accepted in **Williams v CIBC Trust**, after consideration of adequacy of damages, and adequacy of the plaintiff's undertaking in damages, consideration of all other matters relevant to the balance of justice, including the preservation of the *status quo*, is required in approaching the second limb of the **American Cyanamid** test. Indeed, it bears emphasis that such a consideration is especially important in the exercise of injunctive power under **section 228 (3)** given

that, as has been explained in this judgment, the ultimate focus of the exercise of that power is the justice and equity of the case.

[155] Two “other matters” relevant to the balance of justice were raised before the Chief Justice for consideration in deciding whether to continue or discharge the injunction. These are the question of the relative prejudice that would attend the continuation or discharge of the interim injunctive relief and that of the preservation of the *status quo*. He however did not consider these matters and in not doing so fell into grave error.

### **RESOLVING THIS CASE**

[156] Given all of the foregoing, it is our view that the Chief Justice did not apply or correctly interpret either the law or the evidence. It therefore becomes necessary for us to do so.

[157] We have already in this judgment expressed our view that, on the affidavit evidence, there is no doubt that there is a serious case to be tried. The bane of this case resides in the question: wherein does the balance of justice lie?

[158] On the evidence, we find that the balance of justice lay in favour of continuing the interim injunction as it relates to the order restraining BHL from performing Article 6.2 (b) and Article 8 of the CDPA so as to avoid irreparable prejudice to the shareholders of BHL while the question of enforceability of those provisions is being determined. We are satisfied that

the evidence adduced by Ansa shows that the consequences of discharging the injunction could, at the lowest, be extremely inconvenient for Ansa and shareholders other than SLU. Indeed, discharge of the injunction would leave it open to the new shareholders of BHL to ratify the then Directors' action in entering the CDPA *ex post* and this could have the potential of denying Ansa and shareholders like Ansa a meaningful opportunity of effective relief in their oppression action. On the other hand, neither BHL nor SL

U is unlikely to suffer any significant damage as a result of the continuation of this part of the injunction.

[159] With respect to the order freezing the take-over process until the hearing of the underlying oppression action, we are of the view that there would be no practical point in continuing the injunction. SLU has acquired the controlling interests in BHL. So that, even though we have already held that this part of the injunction was discharged on wrong principles, that reality renders futile an order by us to reinstate the injunction to freeze the bidding process.

### **DISPOSAL**

[160] In view of the foregoing:

1. The appeal against the discharge of the injunction is allowed.

2. Part 1 of the order made on 3 November 2015, namely that BHL be restrained from performing or otherwise giving effect to Article 6.2(b) and Article 8 of the CDPA is restored.
3. In light of the supervening events, no order is made in relation to the injunction freezing the take over process.
4. The appellant shall have their costs in this appeal and in the court below, to be assessed if not agreed.

[161] It would be remiss of us not to repeat here what we said at the conclusion of the oral argument. This Court is very grateful for the outstandingly thorough and helpful written submissions and admirably skilful oral arguments of counsel in this extremely difficult case.

Justice of Appeal

Justice of Appeal

Justice of Appeal (Ag.)