BARBADOS

SUPREME COURT OF BARBADOS

IN THE HIGH COURT OF JUSTICE

CV 1779 of 2017

IN THE MATTER of the Amalgamation of Cable & Wireless (Barbados) Limited and CWB Ltd.;

AND IN THE MATTER of Section 228 and Section 235 of the Companies Act, Chapter 308 of the Laws of Barbados.

BETWEEN

KENNETH WENT	**FIRST CLAIMANT**
OMSTAND INVESTMENTS INC.	**SECOND CLAIMANT**
PHILIP OSBORNE	**THIRD CLAIMANT**

AND

CABLE & WIRELESS (BARBADOS) LIMITED	**FIRST DEFENDANT**
ALLAN C. FIELDS	**SECOND DEFENDANT**
HILARY McD. BECKLES	**THIRD DEFENDANT**
JENSON K. SYLVESTER	**FOURTH DEFENDANT**
GARFIELD H. SINCLAIR	**FIFTH DEFENDANT**
RODERICK GREGOR McNEIL	**SIXTH DEFENDANT**
MAURICE ADRIAN KING	**SEVENTH DEFENDANT**

Before: The Hon. Mr. Justice Alrick Scott, Judge of the High Court (Acting)

2017: December 7, 8, 21

2018: January 12

Mr. Garth Patterson, Q.C., in association with Mr. Bartlett Morgan and Ms. Taylor Laurayne for the Claimants

Mr. Barry Gale, Q.C., in association with Sir Henry Forde, K.A., Q.C., Ms. Wendy Straker and Ms. Laura Harvey-Read for the Defendants.

DECISION

Nature of Application

[1] This is an application by the Claimants for interim relief pending conclusion of the trial of the action. They seek that the Defendants be restrained from:

(i) cancelling the shares held by the Claimants and/or any other minority shareholders of Cable & Wireless (Barbados) Limited ("Company") in the Company;

(ii) causing the Company to be de-listed from the Barbados Stock Exchange ("BSE"); and

(iii) taking any further action that may be inconsistent with or prejudicial to the rights of the Claimants and/or any other minority shareholders of the Company.

[2] The substantive action is for relief under section 228 of the Companies Act Cap. 308 of the Laws of Barbados ("Companies Act"') for relief from oppression and/or a restraining order under section 235 of the Companies Act. The interim relief is sought in the context of an oppression remedy action.

Background

[3] At the centre of the dispute is the amalgamation of Cable & Wireless (Barbados) Limited and CWB Ltd (**NEWCO**). NEWCO was a wholly owned subsidiary of Cable & Wireless (West Indies) Limited (**CWWI**). The amalgamated company (the First Defendant or "**AMALCO**"), retained the name Cable & Wireless (Barbados) Limited. CWWI owned approximately 81.07 per cent of the common shares in the Company,

prior to its amalgamation. Counsel for the Claimants makes a distinction between Cable & Wireless (Barbados) Limited, prior to the amalgamation, referred to in the Claimants' pleadings as the "Company" and the First Defendant, the amalgamated company, AMALCO.

[4] The Claimants were shareholders of the Company prior to its amalgamation. The Second to Seventh Defendants were directors of the Company at the material time.

[5] By a notice, dated 24th July 2017, the Company gave notice of a special meeting of the common shareholders of the Company to be held on 24th August 2017. The notice of special meeting of the common shareholders incorporated a Management Proxy Circular and Directors' Circular issued by the Company and dated 24th July 2017 ("Circular").

[6] The special resolution to be considered at the meeting provided for the approval of the amalgamation of the Company and NEWCO as well as the approval of an amalgamation agreement. The resolution also provided for the directors and officers of the Company to execute and deliver the amalgamation agreement on behalf of the Company.

[7] The Circular provided the terms of the then proposed amalgamation, when accomplished. The Circular provided that upon amalgamation, none of the shareholders of the Company, including CWWI, would receive shares in AMALCO, but would receive $2.86 for each common share held in the Company. Further, that no existing shareholder of the Company would have any ownership of shares in AMALCO or any other interest in AMALCO after the effective date other than the right to receive the consideration for his or her or its shares. The effective date was defined as the

date shown on the Certificate of Amalgamation. The Circular further provided that under the amalgamation agreement, the NEWCO common shares would be converted on a one for one basis into common shares of AMALCO, resulting in CWWI becoming the sole shareholder of AMALCO. The Circular also provided that dissenting shareholders, if any, who have strictly complied with the procedures set forth in the Companies Act, would be entitled to be paid the fair value of the common shares held by such dissenting shareholders.

[8] In addition, the Circular provided that CWWI intended to vote all of its common shares it held in the Company in favour of the amalgamation resolution, and that CWWI's shares were sufficient to approve the resolution. The Circular also informed shareholders that, upon completion of the amalgamation, AMALCO would instruct the BSE to de-list it from the board of the BSE, and that there would be no trading market for the common shares of AMALCO.

[9] The special meeting was convened on 24th August 2017. The resolution approving and authorizing the amalgamation was put to the floor for a vote. It was passed in terms of the amalgamation resolution appended to the Circular, approving the amalgamation of the companies. The minutes of the meeting show that 210 shareholders voted; 133 voted for the resolution representing 126,204,936 shares and 77 voted against the resolution representing 1,568,071 shares. Based on the affidavit of Philip Osborne filed on 22nd November 2017, he and some other minority shareholders submitted formal dissents.

[10] Following the adoption of the resolution, Articles of Amalgamation were filed with the Corporate Affairs and Intellectual Property Office ("Corporate Affairs"). On 1st

September 2017, the Registrar of Corporate Affairs issued a Certificate of Amalgamation dated the same date. After the Certificate of Amalgamation was issued, the First Defendant began paying minority shareholders consideration for their shares. The First Defendant states that it has paid over $61.7 million to minority shareholders as at the time of this application.

[11] It appears also from the affidavit of Philip Osborne that he and others consulted Mr. Garth Patterson, Q.C., on the 10th October 2017, regarding the actions taken by the Company to amalgamate. The Claimants, through their attorneys-at-law, wrote to the First Defendant by pre-action letter dated 30th October 2017, alleging, *inter alia*, oppressive conduct on the part of the Company in effecting the amalgamation transaction. The First Defendant, through its counsel, Sir Henry Forde, K.A., Q.C., by letter dated 13th November 2017, replied stating, in summary, that the amalgamation is lawful and complies with the Companies Act. Sir Henry asserted that the provisions of the Companies Act expressly permit the transaction.

[12] On the 22nd November 2017, the Claimants filed a fixed date claim form ("FDCF") claiming a number of reliefs under section 228 and/or section 235 of the Companies Act. These included a declaration that the amalgamation of the Company with NEWCO, pursuant to the amalgamation agreement dated the 30th day of August 2017, effects a result that the business or affairs of the Company have been carried on or conducted in a manner, and/or that the powers of the directors of the Company have been exercised in a manner, that is oppressive and unduly prejudicial to, and unfairly disregards the interests of the Claimants and the other minority shareholders of the Company. The Claimants also seek an order that the amalgamation of the Company

and NEWCO be set aside in part or in its entirety, or otherwise be varied. The Claimants further seek a number of orders for monetary compensation.

[13] In the action the Claimants alleged, *inter alia*, that they were deliberately misled, were denied full and complete and accurate information regarding the true nature of the transactions and were deprived of their rights and protection afforded to them by the provisions of the Companies Act and the Companies (Take-Over Bid) Regulations 2002 ("Take-over Code").

[14] The Claimants desire to remain shareholders of the First Defendant to take part in its future success and reap rewards from their continuous investment. The Claimants contend, *inter alia,* that the amalgamation was in fact a take-over bid transaction designed as an amalgamation so as to obscure its true character for the purpose of unlawfully circumventing the Take-over Code. The Claimants state further that they were improperly excluded from the Company. Paragraph 44 of the affidavit of Philip Osborne catalogued some 26 complaints with the transaction. The Claimants also state that the de-listing of the First Defendant would eliminate the public market for the shares and make it more difficult for the Claimants to trade their shares.

[15] In these proceedings, the Defendants deny that they carried out any improper act which is either oppressive, unduly prejudicial to or unfairly disregards the interest of the minority shareholders of the Company, including the Claimants, either as alleged or at all. The Defendants maintained that their actions and that of the Company are lawful and permitted by the Companies Act.

[16] On the same day that the FDCF was filed, the Claimants also filed a notice of application for interim relief, which came before me on 7th and 8th December 2017.

On the latter date, the First Defendant gave an undertaking which I accepted, and the application for interim relief was adjourned to 20th and 21st December 2017 for hearing. The matter did not come on for hearing on 20th December 2017.

[17] On 21st December 2017, I heard an amended application by the Claimants, for an order that the Claimants be appointed representative claimants on behalf of persons listed in the schedule to the amended notice of application. There were some 148 persons listed in the schedule. The order was granted.

[18] After a lengthy hearing, which stretched late into the evening, the hearing was adjourned for me to give a decision.

Injunctions: Jurisdiction

[19] The High Court's general jurisdiction to grant an injunction is derived from section 44 of the Supreme Court of Judicature Act Cap. 117A of the Laws of Barbados. Section 44 provides that: "*The High Court may, at any stage of any proceedings….. 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….*". Suffice it to say that the powers of the Court under section 44 are wide. The jurisdiction can be exercised where it is "*just and convenient to do so*", taking into account settled guidelines and principles. Although the enactment uses the words "*just and convenient to do so*", it has been observed in several cases that the balance to be attained is more fundamental and weighty than convenience and may be more aptly described as the "*balance of the risk of doing an injustice*" (see: *Cayne and another v Global Natural Resources plc* [1984] 1 All ER 225, per May LJ, at page 237).

General Guidelines

[20] The principles upon which the court exercises its discretion to grant or refuse an interim prohibitory injunction were enunciated in the case of *American Cyanamid v Ethicon Ltd* [1975] AC 396 ("*American Cyanamid"*), which was explained and applied in *Fellows & Son v Fisher* [1975] 2 All ER 829 and in *Toojays Ltd v Westhaven Ltd* [2012] 2 LRC 65 ("*Toojays"*). Sir John Pennycuick in *Fellows & Son v Fisher* [1975] 2 All ER 829 at 843 ("*Fellows v. Fisher*"), summarized the guidelines thus:

> "*Lord Diplock's speech must be read in full. Very summarily, unless I have misunderstood it, he laid down the following procedure as appropriate in principle: (1) Provided that the court is satisfied that there is a serious question to be tried, there is no rule that the party seeking an interlocutory injunction must show a prima facie case. (2) The court must consider whether the balance of convenience lies in favour of granting or refusing interlocutory relief. (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 this 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 ...*" [1975] 1 All ER at 511, [1975] 2 WLR at 324" - emphasis supplied.

[21] In the now well-known and oft-cited case in this jurisdiction of *Toojays,* the Court interpreted the guidelines in *American Cyanamid* as instituting a two-stage inquiry in determining whether an interim injunction should be granted or refused (see: paragraph [42] of *Toojays*). But see the decision of the Caribbean Court of Justice, in CCJ Appeal No CV 001 of 2013, *British Caribbean Bank Limited v. The Attorney General of Belize*,

where the CCJ seems to have interpreted *American Cyanamid* as having laid down a "three-prong test" (see: paragraphs [24] and [28] for the judgment of the CCJ). In this case, the result would be the same whether a two-stage inquiry or three-prong test is applied.

[22] The guidelines enunciated in *American Cyanamid* are of general application. The guidelines set out in *American Cyanamid* are just that, guidelines, and are not to be treated as though they are an Act of Parliament. In *Cayne and another v Global Natural Resources plc* [1984] 1 All ER 225, May LJ, at page 237 observed:

> "*Sir Robert Megarry V-C also reminded us once again that words in a judgment ought not, however eminent the judge, to be construed as if they were an Act of Parliament. Respectfully I entirely agree. I think that one must be very careful to apply the relevant passages from Lord Diplock's familiar speech in the Cyanamid case not as rules but only as guidelines, which is what I am certain Lord Diplock intended them to be*."

[23] The guidelines set out in *American Cyanamid* are not to be applied inflexibly in every case (see: *British Caribbean Bank Limited v. The Attorney General of Belize,* at paragraph [25]). The court should not lose sight of the overriding objective, which is to grant an interim injunction when it is "*just and convenient*".

[24] The grant or refusal of an application for an interim injunction carries the risk of harming the rights of the claimant or the defendant. Where the claimant is granted an interim injunction, there is the risk that, should the claimant fail at trial, the defendant's rights may be harmed. Likewise, where the court refuses to grant an interim injunction, it runs the risk that should the defendant fail at trial, the court would have harmed the claimant's rights. Therefore, a fundamental principle is that the court should take the course which carries the least risk of injustice. This point was made by Hoffmann J., where he

remarked, in *Films Rover International Ltd v Cannon Film Sales Ltd* [1987] 1 WLR 670, 680):

> "*I would respectfully agree that there is no inconsistency between the passage from Megarry J. and what was said in the Cyanamid case. But I think it is important in this area to distinguish between fundamental principles and what are sometimes described as "guidelines," i.e. useful generalisations about the way to deal with the normal run of cases falling within a particular category. The principal dilemma about the grant of interlocutory injunctions, whether prohibitory or mandatory, is that there is by definition a risk that the court may make the "wrong" decision, in the sense of granting an injunction to a party who fails to establish his right at the trial (or would fail if there was a trial) or alternatively, in failing to grant an injunction to a party who succeeds (or would succeed) at trial. A fundamental principle is therefore that the court should take whichever course appears to carry the lower risk of injustice if it should turn out to have been "wrong" in the sense I have described. The guidelines for the grant of both kinds of interlocutory injunctions are derived from this principle."* – emphasis supplied.

[25] That principle was repeated by Lord Hoffman in *National Commercial Bank v Olint Corp Ltd* [2009] 5 LRC 370*,* at paragraph [17]. Lord Hoffman, in the same case, at paragraph [21], deprecated the "box-ticking" approach to whether an injunction should or should not be granted, which he stated does "…*not do justice to the complexity of a decision as to whether or not to grant an interlocutory injunction*."

[26] Lord Hoffman in *National Commercial Bank v Olint Corp Ltd* [2009] 5 LRC 370, succinctly explained the purpose of an injunction at the interlocutory stage and the assessment which must be made as follows:

> *"[16] ... It is often said that the purpose of an interlocutory injunction is to preserve the status quo, but it is of course impossible to stop the world pending trial. The court may order a defendant to do something or not to do something else, but such restrictions on the defendant's freedom of action will have consequences, for him and for others, which a court has to take into account. The purpose of such an injunction is to improve the chances of the court being able to do justice after a determination of the merits at the trial. At the interlocutory stage, the court must therefore assess whether granting or withholding an injunction is more likely to produce a just result. As the House of Lords pointed out in American Cyanamid Co v Ethicon Ltd [1975] 1 All ER 504,*

that means that if damages will be an adequate remedy for the plaintiff, there are no grounds for interference with the defendant's freedom of action by the grant of an injunction. Likewise, if there is a serious issue to be tried and the plaintiff could be prejudiced by the acts or omissions of the defendant pending trial and the cross-undertaking in damages would provide the defendant with an adequate remedy if it turns out that his freedom of action should not have been restrained, then an injunction should ordinarily be granted."

[27] It is always useful for a judge at this stage to remind himself or herself of the caution made by Lord Diplock in *American Cyanamid,* at page 407, that is, that it is not the function of the Court at this stage "…*to resolve conflicts of evidence on affidavit as to facts on which the claims of either party may ultimately depend nor to decide difficult questions of law which call for detailed argument and mature considerations***.**"

Injunction in Oppression Remedy Case

[28] Section 228 (3) of the Companies Act provides that: "*In connection with an application under this section, the court may make any interim or final order it thinks fit*, …". The Court of Appeal considered the grant of interim injunctions in the context of the oppression remedy under section 228 of the Companies Act in *Ansa McAl (Barbados) Limited v. Banks Holdings and SLU Beverages Ltd,* BB 2016 CA13 ("*Ansa McAl"*).

[29] In *Ansa McAl*, the Court held that while the guidelines enunciated in *American Cyanamid* are relevant to interim injunctions in oppression actions, they should not be applied to limit the court's broader discretionary power under the oppression remedy and that the focus under section 228 of the Companies Act should always be on the justice and equity of the case. The Court observed that the power to grant interim injunctions under section 228 (3) of the Companies Act is an enlargement of the Court's general interlocutory injunctive power under section 44 of the Supreme Court of Judicature Act

Cap. 117A. In *Ansa McAl*, the Court considered, from paragraph [89] to [95] the grant of an interim injunction under section 228 (3) of the Companies Act.

[30] The judgment of the Court in *Ansa McAl,* from paragraph [89] to [95], and the cases referred to in those paragraphs, reveal that the traditional considerations set out in *American Cyanamid* and other cases following it, such as adequacy of damages/irreparable harm and other matters considered as part of the balance of convenience, which usually inform the grant or refusal of an injunction in a general civil action, are still relevant and still form a part of the analysis as to whether an interim injunction should be granted or refused. The traditional considerations in a general civil action are the framework within which to analyse the merits of the application for injunctive relief in an oppression remedy case. However, the traditional considerations should not be applied in an "*inflexible straightjacket*", as Richards J.A., in *Potash Corp. of Saskatchewan Inc. v. Mosaic Potash Esterhazy Limited Partnership*, [2011] S.J. No 627, 377 Sask. R. 78, at paragraph [26], described it, to limit the court's broad discretionary powers to grant relief in an oppression remedy case. Though the court considers the traditional considerations which inform the grant or refusal of an injunction, the ultimate focus is on the justice and equity of granting or refusing the relief sought in the circumstances of the case. The nature of the oppression remedy is so broad, that where equity and justice so dictate, the court may appropriately dispense with one or more of the matters considered on the balance of convenience, such as adequacy of damages/irreparable harm or the requirement for an undertaking in damages.

[31] Notwithstanding that the court's discretionary powers are broad, exercise of the discretion to grant or refuse an interim injunction in an oppression remedy action must

still be informed by pertinent judicial principles and corporate law: *"[t]he discretion must be exercised in accordance with judicial principles, of course, and within the overall parameters of corporate law*" (See Blair J.A., at page 149, *Deluce Holdings Inc. v. Air Canada*, (1992), 12 O.R. (3d) 131, [1992] O.J. No. 2382). So that a claimant's case would still fail if it does not meet the threshold requirement of a serious question to be tried.

Serious issue to be tried

[32] The requirement that there be a serious question to be tried does not require a claimant to meet a high threshold. A claimant meets the threshold once his case is not frivolous or vexatious. In *Ansa McAl*, the Court observed that this issue involves the consideration of three questions, in the context of an oppression remedy action (see: paragraph [105]). However, a consideration of these questions in relation to the application is not necessary, given the Defendants' concession, for the purpose of this application, that the Claimants' claim raises a serious question to be tried.

Balance of Justice

[33] The factors which may be considered in determining wherein lies the balance of justice are innumerable, and will vary from case to case. The point was made by Lord Diplock in *American Cyanamid* thus, at page 408F:

> "*It would be unwise even to attempt to list all the various matters which may need to be taken into consideration in deciding wherein the balance lies, let alone to suggest the relative weight to be attached to them. These will vary from case to case*."

It must be stressed that each case turns on its own facts.

[34] The adequacy of damages is to be considered as a significant factor in determining wherein lies the balance of justice (see: *Toojays* at paragraph [54]). In the later case of *Ansa McAl*, after citing dicta in *Fellows v. Fisher*, the Court observed, at paragraph [137], that: "*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*."

Adequacy of Damages

[35] There are two approaches to damages: (i) the narrow or general approach and (ii) the "exceptional circumstances" approach. The narrow approach focuses on whether damages are available or legally recoverable and quantifiable. With the second approach, the focus is whether it is just in all the circumstances to confine the claimant to his remedy in damages. This was explained by the Court in *Toojays* more fully from paragraph [54] to [61]. In *Ansa McAl*, the Court opined that the exceptional circumstances approach to damages should invariably be adopted in oppression remedy cases (see: paragraph [150]).

[36] Determining whether damages are an adequate remedy is not always straightforward. Judges in the same case have differed as to whether damages are available and adequate. This was the case in *Garden Cottage Foods Ltd v. Milk Marketing Board [1984] AC 130*, at pages 143 and 152 respectively, where Lord Diplock and Lord Wilberforce, in a dissenting judgment, differed as to whether damages were adequate; the former holding that there could not be a clearer case of damages being an adequate remedy, while Lord Wilberforce taking the view that the claimant would not be adequately compensated in damages.

[37] The contention of the Claimants is that damages are not an adequate remedy in this case. The crux of the Claimants' argument is that the loss of the Claimants' status as shareholders of the Company is simply incalculable in money terms. The Defendants disagreed and argued otherwise.

[38] The Company invoked the amalgamation provisions of the Companies Act to achieve its stated objectives set out in the Circular. The Claimants and the Defendants concur that, where the shares in an amalgamating company are not being converted into shares in the amalgamated company, the amalgamation agreement may provide the amount of money which is to be paid to the holders of the shares instead of shares. Section 207 (1) of the Companies Act provides as follows:

> *"207. (1) Each company proposing to amalgamate must enter into an agreement setting out the terms and means of effecting the amalgamation, and, in particular, setting out*
> *(a) …….*
> *(b)……...*
> *(c) ……..*
> *(d) if any shares of an amalgamating company are not to be converted into shares or debentures of the amalgamated company, the amount of money or shares or debentures of any body corporate that the holders of those shares are to receive instead of shares or debentures of the amalgamated company".*

[39] Section 207(1) (d) permits the rights of shareholders to be transformed or converted, pursuant to an amalgamation agreement approved by the amalgamating companies, into a mere right to compensation.

[40] Section 213 of the Companies Act provides certain rights for shareholders who dissent to an amalgamation. The shareholders are not given a right to obstruct or impede the amalgamation. The protection which the Companies Act gives the shareholder who does not agree with an amalgamation is a right to dissent and obtain payment for his

shares at the fair value. The bundle of rights which the shareholder has in the shares is converted to a right to be paid the fair value, in addition to any other right which he may have. So that, in addition to the right to demand the fair value, the dissenting shareholder may also seek relief under the oppression remedy. In *Jepson v. Canadian Salt Co,* 7 B.L.R. 181, 193 Laycraft, J. echoed the same point: "……*Under the new statute, however, the dissident shareholder cannot impede corporate operations. His right is converted to a simple right to be paid the fair value of the shares.*….." The Claimants' submissions, at paragraph 25, are consistent with this position.

[41] The Claimants argued that CWWI ought to have invoked the Take-over Code if it desired to acquire all the common shares in the Company. By section 186 of the Companies Act, a party that makes a takeover bid, and has acquired not less than 90 per cent of the shares to which the take-over bid related, has the right to compulsorily acquire the remaining shares of the shareholders who did not tender their shares, on terms upon which the bidder acquired the shares from other shareholders or upon the fair value if demanded. Where a bidder is entitled to compulsorily acquire the remaining shares, the loss of status as a shareholder or the loss of the bundle of rights comprised in the shares is transformed or converted to a right to monetary compensation.

[42] One of the exceptional circumstances where equity may still grant an injunction notwithstanding that compensation in damages would otherwise be adequate is where there is a cynical breach of a contract by a party who would prefer to pay damages for the breach rather than perform the terms of the contract. The Claimants sought to persuade me that there was a cynical violation of the bundle of rights comprised in the shares held by the minority shareholders and that an injunction should be granted to

thwart the cynical breach of those rights by the ruthless majority shareholder who, for commercial or other reasons, preferred to pay damages for those violations rather than eat at the same table with the minority.

[43] Counsel for the Claimants submitted that a squeeze-out is not common and that the conduct is treated with contempt and opprobrium. He referred me to the cases of *Alexander et al v. Westeel-Rose Ltd. et al* [1978] O.J. No 3643, 22 O.R. (2d) 211, 93 D.L.R. (3rd) 116 ("*Westeel*") and *Carlton Realty Co. Ltd. v. Maple Leaf Mills Ltd.* [1978] O.J. No. 3641, 22 O.R. (2d) 198, 93 D.L.R. (3d) 106 ("*Maple Leaf*"). He submitted that there are parallels between *Westeel*, *Maple Leaf* and the case at hand. In both *Westeel* and *Maple Leaf*, the amalgamation provisions were being used to eliminate minority shareholders following a take-over bid. In both cases, the court restrained the holding of the shareholders meeting to approve the amalgamation. He relied on the cases of *Westeel* and *Maple Leaf* as demonstrating that minority shareholders may not be eliminated against their will and that the Company's use of the amalgamation provisions of the Companies Act to squeeze-out the minority shareholders is unlawful and oppressive. He urged me to go further and categorize the conduct as a cynical violation of the Claimants' rights.

[44] In some cases, at the interlocutory stage, it may be apparent or plain that the breach of contract or violation of rights is cynical, and made for commercial or other reasons by a party who would prefer to pay damages for its breach rather than perform the contract. In other cases, it may be less apparent. To view a defendant's conduct as a cynical breach or a cynical violation of rights, a court must first be satisfied that there is a breach of contract or a violation of rights by the defendant.

[45] The transaction effected by the Company is sometimes described as a squeeze-out or amalgamation squeeze-out. The term "squeeze-out" has been used to cover "…..*the elimination of the ownership interest of shareholders through any one of a variety of creative corporate transactions*" (see: Dennis H. Peterson, *Shareholder Remedies in Canada*, loose-leaf at 2008, paragraph 18.108). One such corporate transaction which has been used is the amalgamation provisions of corporate enactments to eliminate minority shareholders. The same author writes (18.109): "*Whether or not a squeeze-out is permissible in corporate law is a vexed question. The common law is unclear on the issue, and mixed results have been obtained under the oppression remedy; nevertheless, both can be rationalized to suggest that a squeeze-out is permissible in certain circumstances*." And later, at paragraph 18.112, the same author again remarked: "*The oppression remedy cases dealing with squeeze-outs have not been entirely clear as to whether a squeeze-out is oppressive*." The authorities do not suggest that an amalgamation squeeze-out is either inherently unlawful or inherently oppressive (see: *Stern v Imasco Ltd* (1999) 1 B.L.R. (3d) 198, 38 C.P.C (4^{th}) 347 and *General Accident Assurance Co. of Canada v. Lornex Mining Corp* (1988) 66 O.R. (2d.) 783 (Ont H.C.)) or inherently lawful and permissible (see: *Alexander v Westeel-Rosco Ltd* [1978] O.J. No. 3643 and *Carlton Realty Co. v. Maple Leaf Mills Ltd*. [1978] O.J. No. 3641). These cases support the view of Dennis H. Peterson that the issue as to whether a squeeze-out is lawful or oppressive is a vexed question.

[46] Here, the issues in this case are novel and no doubt complex. Not all the evidence is before me. The arguments on the substantive issues have not been made before me. The authorities are mixed on the question of whether an amalgamation squeeze-out is oppressive or not. It would be unwise for me at this stage, in an area of the law which

has been described as vexed, to categorise the Company's conduct as a violation of the rights of the Claimants, far less characterise the violation a*s c*ynical. This is not one of those cases where the Court can state at the interlocutory stage that there has been a cynical or any violation of rights.

[47] It seems to me in this case that the loss of shareholder status or loss of the bundle of rights comprised in shares is compensable by monetary compensation. The provisions of the Companies Act relating to amalgamation, which the Company invoked, treat the loss of shareholder rights or loss of shareholder status as calculable in terms of money and/or transformed the right into a right to payment of monetary compensation. It would therefore seem reasonable to infer that the Companies Act takes the position that there is justice in allowing rights comprised in shares to be converted to a right to compensation. It therefore seems reasonable to conclude that damages could properly be regarded as an adequate remedy for the loss of the bundle of rights comprised in shares or the loss of the status of a shareholder in the circumstances which have occurred, should the injunction be refused and the Claimants are successful at the trial.

[48] I am acutely mindful that I should not focus exclusively on whether damages are adequate in the narrow sense as explained by the Court in *Toojays*. I must consider whether it is just in all the circumstances of the case that the Claimants should be confined to their remedy in damages. This I consider below, after discussing other circumstances in the case.

Undertaking in Damages

[49] The Claimants have not given an undertaking in damages and are unwilling to give any. None of the Claimants deposes to the Claimants' ability to meet an undertaking in damages. Counsel for the Claimants argued that, in the context of an oppression remedy action, which seeks to vindicate the rights of shareholders, it is not necessary that an undertaking in damages be given and that an undertaking in damages would be useless. In addition, he stated that the First Defendant's likely damages would be *de minimis* and that an undertaking in damages is reduced or de-emphasized in oppression remedy cases. Counsel for the Claimants further argued that it is neither practicable nor feasible for representative claimants to give an undertaking in damages. I was not referred to any authorities in support of these arguments.

[50] On the other hand, counsel for the Defendants argued that, save in exceptional cases, a claimant is required to give an undertaking in damages in respect to loss which a defendant may suffer by reason of the grant of an interim injunction, and that such an undertaking in damages is the price a claimant must pay for an interim injunction.

[51] Part 17 of the Supreme Court (Civil Procedure) Rules, 2008 ("CPR 2008") governs the procedure for applying for interim orders, including interim injunctions. Rule 17.4 (3) of CPR 2008 requires an undertaking in damages to be given where interim relief is being given. The last-mentioned rule provides: "*Unless the court otherwise directs, a party applying for an interim order under this rule must undertake to abide by any order as to damages caused by the granting, continuance or extension of the order*". One of the orders provided for under rule 17.4 of CPR 2008, is the grant of an interim injunction (rule 17.4 (1) (a)). The authors of *The Caribbean Civil Court Practice*, 2011, write, at Note 14.12, with respect to CPR 17.4 (2), that: "*[t]he giving of such undertaking is effectively mandatory*." However, the words, "*Unless the court otherwise directs*" would

seem to give the court a discretion to dispense with the requirement for an undertaking in damages in appropriate cases.

[52] Jessel MR, in *Smith v Day* (1882) 21 Ch.D. 421, p. 424, traced the granting of an interim injunction subject to an undertaking in damages to Knight Bruce L.J.. But it seems not to be universally accepted that the undertaking in damages was invented by Knight Bruce L.J.. Steven Gee Q.C., *Commercial Injunctions*, 5th edition, at page 285 to 286, writes: "*It appears, however, that the practice of requiring an undertaking in damages or making express provision in an order for a defendant to be protected from loss caused by the making of an interlocutory injunction which is subsequently found to be unjustified pre-dates 1841, when Knight-Bruce L.J. became Vice-Chancellor, and therefore was not originated by him*."

[53] The undertaking as to damages was first required in respect to applications for *ex parte* orders for injunctions, but was extended to all cases of interim injunctions (see: Jessel M.R., *Smith v Day* (1882) 21 Ch.D. 421, page 424). From very early, the practice emerged that an undertaking in damages will invariably be required, save in exceptional circumstances (see: *Attorney General v. Albany Hotel*, [1896 A. 873], page 700). In more recent times, in *American Cyanamid*, Lord Diplock acknowledged that the practice is and has been since the middle of the nineteenth century, that an applicant to whom an interim injunction is granted is usually required to give an undertaking in damages (see: *American Cyanamid,* page 406)

[54] In *University Hospital Board of Management v Williams-Phillips*, JM 2014 SC-32, Simmons J. summarized the principles with respect to requiring an undertaking in damages thus:

> *"[12] The usual practice where the court is granting an interlocutory injunction is to require the claimant to give an undertaking as to damages. It is to be noted that this undertaking is given to the court and is intended to provide a method of compensating the other party if at some later date it appears that the injunction was wrongly granted. It has therefore been described as "the price which the person asking for an interlocutory injunction has to pay for its grant". The effect of the undertaking is that the party who obtains the injunction undertakes to pay any damages sustained by the other party as assessed by the court.*
>
> *"[13] The purpose of the undertaking, according to Jessell, M.R. in Smith v. Day (1882) 21 Ch.D. 421, is to protect the Court and the defendant from improper applications for injunctions. By way of explanation the learned judge said:-*
>
> *"If the evidence in support of the application suppressed or misrepresented facts, the Court was enabled not only to punish the plaintiff but to compensate the defendant. By degrees the practice was extended to all cases of interlocutory injunction. The reason for this extension was, that though when the application was disposed of upon notice, there was not the same opportunity for concealment or misrepresentation, still, owing to the shortness of the time allowed, it was often difficult for the defendant to get up his case properly, and as the evidence was taken by affidavit, and generally without cross-examination, it was impossible to be certain on which side the truth lay. The Court therefore required the undertaking in order that it might be able to do justice if it had been induced to grant the injunction by false statement or suppression. I am of opinion that the undertaking was not intended to apply where the injunction was wrongly granted, owing to the mistake of the Court, as for instance, if the judge was wrong in his law. I think this is shown by the fact that such an undertaking is never inserted in a final order for an injunction".*
>
> *"[14] In Cheltenham & Gloucester Building Society v. Ricketts and others [1993] 4 All E.R. 276 at 281, Neill, L.J. listed the following points as being applicable in respect of undertakings as to damages:-*
>
> > *"(1) Save in special cases an undertaking as to damages is the price which the person asking for an interlocutory injunction has to pay for its grant. The court cannot compel an applicant to give an undertaking but it can refuse to grant an injunction unless he does.*
> > *"(2) The undertaking, though described as an undertaking as to damages, does not found any cause of action. It does, however, enable the party enjoined to apply to the court for compensation if it is subsequently established that the interlocutory injunction should not have been granted.*
> > *"(3) The undertaking is not given to the party enjoined but to the court.*

[55] The court is not only concerned with the willingness of a claimant to give an undertaking in damages, but also with the claimant's ability to pay. The claimant should depose in his affidavit to his willingness to give an undertaking and his ability to satisfy the

undertaking in damages (see: Iain Goldrien, *Commercial Litigation: Pre-Emptive Remedies*, loose-leaf at February 2012, at page A1-232).

[56] However, it appears that, in general, the court will not deny an applicant an interim injunction to which he would otherwise be entitled, merely because his undertaking in damages would be of limited value (see: *Allen v. Jambo Holdings* [1980] 1 WLR. 1252, a case involving a Mareva Injunction, but which is nonetheless applicable). Where a claimant's undertaking is or is likely to be of no or little value, it does not follow that, ipso facto, that an interim injunction will be refused. Rather, the claimant's inability to provide a valuable undertaking in damages is a factor to be taken into account in determining wherein lies the balance of justice.

[57] I. C. F. Spry, in *Equitable Remedies*, 8th edition, usefully summarizes the nature of the discretion which a court is called to exercise when determining whether to require an undertaking in damages. He writes, at page 487:

> "*Indeed, the power of the court, whether in its exclusive or auxiliary jurisdiction, to require an undertaking of any kind from the plaintiff or to impose any condition before granting an interlocutory injunction is very wide, and it is not limited to particular classes of undertakings or conditions. As has been seen already here, it may be exercised, not only whenever the balance of justice at that time would otherwise be found to incline against the grant of relief, but also if the giving of an undertaking or the imposing of a condition of the kind in question is desirable in order to enable the court more easily to achieve justice between the parties in the subsequent course of the proceedings. Hence, what are the precise conditions or undertakings that are appropriate in any particular case depends upon the circumstances in question and, especially, on prospective hardship or prejudice to the parties and such other discretionary considerations as arise*."

The authorities establish that whether to require an undertaking in damages or not is in the discretion of the court.

[58] This is, I remind myself, an oppression remedy action, where the discretion is broad. The principles enunciated above are apposite to an oppression remedy case. In an oppression remedy action, whether the court should require an undertaking in damages is in the discretion of the court. In an oppression remedy action, the requirement for an undertaking in damages should not be applied inflexibly to limit the broad discretionary powers under the oppression remedy. Fairness and justice in a particular case may require the court to dispense with an undertaking in damages (see *Le Maitre Ltd v Segeren* [2007] O.J. No 2047; 33 B.L.R. (4th) 224., at paragraph 30). It certainly is not the case that undertakings in damages are never required on an application for interim injunctive relief in an oppression remedy case. In *Carlton Realty*, cited by counsel for the Claimants, an undertaking in damages was given. Steele J remarked, at para. 26: "*The plaintiffs having agreed to be bound by any order as to damages which may be made at trial by reason of the granting of the injunction, an order will therefore go restraining the Defendants from proceeding with the meeting of the shareholders of the Corporation, …….*" It would appear that the interim order was given subject to the usual undertaking in damages.

[59] The Second Defendant deposed to the prejudice which the First Defendant would likely suffer if the interim reliefs sought are granted, and it should turn out at the trial that the interim reliefs were wrongly granted. The nature of the prejudice is set out below at paragraphs [99] and [100] of this decision. Cases in our jurisdiction are tried and settled after some delay. If this case takes the usual course, the annual loss which the First Defendant states it would likely suffer will be multiplied by the years of delay. I disagree that the prejudice which the First Defendant would likely suffer can be categorized as *de minimis*.

[60] The rights of the Claimants as shareholders are at stake, and in particular, their rights to remain or be restored as shareholders, with the attendant rights of being a shareholder. It is not an individual shareholder, but the rights of collective shareholders at stake. This has given me difficulty and pause. However, on balance, I have come to the conclusion that this would ordinarily be a proper case where the Claimants should be required to give an undertaking in damages, having regard to the prejudice the First Defendant is likely to suffer and the delay in the matter which suggests that the interim reliefs sought are not really urgent. Further, the Claimants have not shown why an undertaking in damages would be unreasonable or would operate unjustly against them. The refusal to give an undertaking in damages is a refusal to accept responsibility for the First Defendant's likely losses as an exchange for interim relief, in the event that the First Defendant should prevail at the trial.

[61] I do not consider that justice and equity dictate that I dispense with an undertaking in damages in this case. The course I consider most just, in all the circumstances of this case, is that it would be proper and appropriate that an undertaking in damages be given to enable the court more easily to do justice between the Claimants and the First Defendant in the proceedings ahead should it be found at the trial that any interim injunction sought was wrongly granted. I consider that this is a case, where I have the option of either treating the Claimants' unwillingness to give an undertaking in damages as a basis to refuse the application for interim relief, on that basis alone. Or, to treat the Claimants' unwillingness to give an undertaking in damages as one of the matters to be taken into account in determining wherein lies the balance of justice. I have opted for the latter course.

Availability of Reliefs at Trial

[62] The Claimants are seeking, amongst other reliefs, a declaration under section 228(2) and an order that the amalgamation be set aside pursuant to section 228(3)(h). The Claimants' objective by this action is to seek the Court's intervention in declaring that their status as shareholders remains unaltered, or, if it has been lost, that they be restored to that status. The Claimants argued further that for the reliefs in the FDCF to remain available to them, the injunctions sought herein restraining the First Defendant from cancelling the minority shareholders' shares in the Company and from de-listing from the BSE are essential. It is an argument which the Defendants contested.

[63] It is useful to set out the reliefs claimed in the FDCF, which are as follows:

1. A declaration that:

a. the amalgamation of the Company and NEWCO pursuant to an amalgamation agreement dated the 30th day of August 2017 (the "Amalgamation Agreement") effects a result; and/or

b. the business or affairs of the Company have been carried on or conducted in a manner; and/or

c. the powers of the directors of the Company have been exercised in a manner,

that is oppressive and unduly prejudicial to, and unfairly disregards the interests of, the Claimants and the other minority shareholders of the Company.

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

a. the amalgamation of the Company and NEWCO be set aside in part or in its entirety, or otherwise be varied;

b. further or alternatively, the First Defendant take such immediate steps as are necessary to place each of the Claimants and the other minority shareholders of the Company in the position he/she/it would have been in if the said amalgamation had not occurred and, instead, the offer by

Cable and Wireless (West Indies) Limited ("CWWI") to acquire all the shares of the minority shareholders of the Company had proceeded regularly and in accordance with the letter and spirit of the Companies (Take-Over Bid) Regulations, 2002, including, but not limited to, in the sole discretion of the minority shareholders of the Company (including the Claimants), either:

i. *issuing the appropriate number of shares in the First Defendant to each minority shareholder of the Company so as to restore the proportionate shareholding that such shareholder held in the Company prior to the amalgamation; or*

ii. *making such payment for the Common Shares held by any such minority shareholder as is consistent with the fair value for the shares, regardless of whether or not the minority shareholder submitted a formal notice of dissent in accordance with section 213 of the Companies Act;*

c. *the First Defendant and/or the Second to Seventh Defendants do pay to each of the minority shareholders of the Company, including the Claimants, compensation in damages for the violation of their rights as shareholders;*

d. *the Second to Seventh Defendants do jointly and severally pay to each of the minority shareholders of the Company, including the Claimants, compensation in damages for the breach of fiduciary duties owed by them to the minority shareholders of the Company; and*

e. *the First Defendant do pay to the shareholders of the Company the dividends that would otherwise have been distributed to them out of the profits of the Company but for the wrongful use of the retained earnings of the Company for the purposes of purchasing the shares of the minority shareholders of the Company on behalf of CWWI, and/or the diversion of those funds for the unlawful purpose of financing the acquisition by CWWI of the shares held by the minority shareholders in the capital of the Company.*

3. *Further or alternatively, an order, pursuant to Sections 228 and/or 235 of the Companies Act:*

a. *fixing the fair value of all the shares of the minority shareholders of the Company, including the Claimants, as at the date of the amalgamation, and*

b. *compelling the First Defendant to pay to each of the minority shareholders the fair value of the shares of the minority shareholders of the Company as fixed by this Court.*

4. *An order that the Defendants do pay the Claimants' costs of and incidental to this action; and*

5. *Such further or other relief as this Honourable Court deems fit.*

[64] The nonmonetary reliefs sought are for: (i) a declaration that the amalgamation effects a result that is oppressive, (ii) an order setting aside the amalgamation, and (iii) an order issuing shares in the First Defendant to the Claimants, which would restore them their status as shareholders.

[65] In my judgment, the injunctions sought are not necessary to preserve the declaration sought or the setting aside or variation of the amalgamation, which has occurred some months ago. The injunctions sought are not necessary to ensure that the remedy at 2 b. i., that is, for shares to be issued to the Claimants in the First Defendant, is available at the trial. Even if the injunctive reliefs sought are refused, the court could still make the declaration prayed for, set aside or vary the amalgamation and make an order issuing shares in the First Defendant to the Claimants, in addition to the other remedies in damages sought.

C. Laches, Delay

[66] The Defendants have raised the Claimants' delay as a bar to the interim relief sought. The Defendants underlined the delay in the matter and submitted that the delay on the part of the Claimants is an abuse, wrongful, reprehensible and is at the very minimum evidence of unnecessary delay and acquiescence. Counsel for the Defendants argued that the Claimants' delay in the matter, on its own, should bar them from the equitable relief sought.

[67] Counsel for the Claimants sought to explain the delay. He noted that the action involves several persons and that concerted effort on the part of several persons is more difficult in bringing such an action. It took time to get parties together to get the action started. He cited the case of *Leggs & Others v. Iunner London Education Authority* [1972] 1 WLR 1245, which suggests that laches will less readily be imputed to parties where many persons are involved, and concerted action is more difficult.

[68] There seems to be consensus on the part of several authors of various legal treatises that delay may deprive a claimant of interim injunctive relief (see Iain Goldrien, *Commercial Litigation: Pre-Emptive Remedies*, loose-leaf at February 2012, at paragraph A1-190; *Halsbury's Laws of England*, Civil Procedure, Volume 11 (2015), paragraph 590; *Blackstone's Civil Practice 2016*, paragraph 37.62; and John McGhee, Q. C., *Snell's Equity*, 31st edition, paragraph 16-25). They are *ad idem* on the point. But the principles which operate to deprive a claimant of an interim injunction because of delay are not generally stated in full in these treatises.

[69] Laches is the term given to the equitable doctrine by which delay may bar a claim for equitable relief (see: *Fisher v. Brooker and another* [2009] 1 WLR 1764, paragraph 64). The most often cited statement on the doctrine of laches is that of Lord Selborne in *Lindsay Petroleum Co. v Hurd* (1874) L. R. 5 P.C. 221, 239-240:

> ''*Now the doctrine of laches in Courts of Equity is not an arbitrary or a technical doctrine. Where it would be practically unjust to give a remedy, either because the party has, by his conduct, done that which might fairly be regarded as equivalent to a waiver of it, or where by his conduct and neglect he has, though perhaps not waiving that remedy, yet put the other party in a situation in which it would not be reasonable to place him if the remedy were afterwards to be asserted, in either of these cases, lapse of time and delay are most material. But in every case, if an argument against relief, which otherwise would be just, is founded upon mere delay, that delay of course not amounting to a bar by any statute of limitations, the validity of that defence must be tried upon principles*

substantially equitable. Two circumstances, always important in such cases, are, the length of the delay and the nature of the acts done during the interval, which might affect either party and cause a balance of justice or injustice in taking the one course or the other, so far as relates to the remedy."

[70] Lord Blackburn, in *Erlanger v. New Sombrero Phosphate Co*, [1878] 3 App. Cas. 1218, at page 1279, after referring to the above extract approvingly, added as follows:

"I have looked in vain for any authority which gives a more distinct and definite rule than this; and I think, from the nature of the inquiry, it must always be a question of more or less, depending on the degree of diligence which might reasonably be required, and the degree of change, which has occurred, whether the balance of justice or injustice is in favour of granting the remedy or withholding it. The determination of such a question must largely depend on the turn of mind of those who have to decide, and must therefore be subject to uncertainty; but that, I think, is inherent in the nature of the inquiry." – emphasis supplied.

[71] Laches in more recent times has come to take the meaning of unreasonable delay which renders granting the equitable relief sought unjust. The authors of *Halsbury's Law of England, Equitable Jurisdiction*, (2014) Volume 47, at paragraph 254, suggest that the modern approach is to look to see whether the delay makes it unjust to grant the relief sought:

"The modern approach to laches or acquiescence does not require an exhaustive inquiry into whether the circumstances could fit within the principles established in previous cases; a broader approach should be adopted, namely whether it is unconscionable for the party concerned to be permitted to assert his beneficial rights."

[72] I. C. F. Spry, the author of *Equitable Remedies*, 8th edition, at page 431, similarly writes:

"*The defence of laches arises if two conditions are satisfied: first, there must be unreasonable delay on the part of the plaintiff in commencement of proceedings, and secondly, in view of the nature and consequences of that delay it must be unjust in all the circumstances to grant the specific relief that is in question, whether absolutely or on appropriate terms or condition*."

Later at page 434, he added:

> "*But it is not sufficient that the defendant should be able to show merely that the plaintiff has been guilty of unreasonable delay. It must be shown further that the delay in question has rendered unjust the grant of the particular relief that is sought*."

[73] In *Frawley v Neill* (1999) Times, 5 April, Aldous L.J. also proposed a more modern approach to laches thus:

> "*A modern approach to laches or acquiescence should not require an exhaustive inquiry into whether the circumstances could fit within the principles established in previous cases.*
>
> *"Instead, a broader approach should be adopted, namely whether it was unconscionable for the party concerned to be permitted to assert his beneficial rights: see Taylor Fashions Ltd v Liverpool Victoria Trustees Co Ltd ([1982] QB 133, 151), a case on estoppel by acquiescence, and Habib Bank Ltd v Habib Bank AG Zurich ([1981] 1 WLR 1265, 1285) a case on acquiescence, laches and estoppel in relation to passing-off*."

[74] The more modern approach was adopted by the court in *Leggs and Others v. Inner London Education Authority* [1972] 1 WLR 1245 at page 1259 to page 1260, cited by counsel for the Claimants. In that case, the court considered whether the delay would have made it unjust to grant the injunction sought.

[75] I distill the following principles from the various cases and treatises. Delay by itself would not suffice to bar equitable relief of an interim injunction. The delay must render it unjust to grant the injunctive relief sought. Whether delay makes it unjust to grant the injunction sought depends upon a consideration of all material matters (Iain Goldrien, *Commercial Litigation: Pre-Emptive Remedies*, loose-leaf at 2012, at paragraph A1-191). The material matters to be considered include, the length of any delay, the nature

of acts done during the period of that delay, whether the plaintiff had sufficient knowledge to justify the commencement of proceedings, whether there has been prejudice to the defendant or others as a result of the delay, and the nature of the relief claimed. Whether the delay is justified is also a relevant consideration. Delay which is explained satisfactorily will not be a bar. *Prima facie*, delay is determined from the time the claimant learnt of facts giving rise to relief; but the claimant need not know that he is entitled to relief (I.C.F. Spry, *Equitable Remedies*, 8th edition, at page 226). Delay is a more significant factor on an application for interim relief than where the relief sought is final. Each case is to be decided on its own facts. The court exercising its discretion should not overly rely on the facts in a previously decided case.

[76] Lord Upjohn in *Jarvis (deceased); Edge v Jarvis* - [1958] 2 All ER 336, emphasized sharply the need to consider each case on its own facts. At page 341 to page 342, he wrote:

> "*I have been referred to a number of text-books and authorities on this question of laches, acquiescence and delay, but I forbear from referring to them, for in this realm of law each case depends so much on its own facts that the citation of other cases having some points of similarity and some of difference does not really assist. I do not overlook the circumstance that the plaintiff has said that she could not afford a solicitor; but I have to try to do justice to both sides. In my judgment, in the whole of the circumstances of this case in relation to the business, the plaintiff, by waiting until 1951, has not been sufficiently prompt in asking her remedy, and this part of the action fails*.

[77] Even though delay may not be fatal in a case, in the sense that it would result in the refusal of the interim injunction sought, it may still be material to the court's exercise of its discretion, that is, along with all other relevant factors. This is necessarily so since the court is exercising a discretion, and the exercise of a discretion by nature requires the court to take account of all relevant facts and circumstances.

[78] The periods of delay are set out in the below table. The exact date when the Claimants received the notice of meeting of shareholders was not given. The Claimants have not alleged that they were not served in time. I have assumed a time of service which allows for the minimum statutory time for serving a notice of special meeting of shareholders, namely 21 days, excluding the date of service and the date of the meeting.

NO.	**ACTION**	**DATE**	**TIME ELAPSED** (APPROXIMATE)
1	Notice of special meeting of Common Shareholders incorporating Circular	24th July 2017	
2	Service of Notice of Special Meeting	2nd August 2017 (Assumed Date of Service)	
3	Meeting of Common Shareholders	24th August 2017	**21 days** after Assumed Date of Service
4	Certificate of Amalgamation	1st September 2017	**7 days**, after meeting of shareholders excluding date of meeting and date of certificate **29 days** after Assumed Date of Service
5	Claimants consulted Mr. Garth Patterson, Q.C.	10th October 2017	**38 days** after amalgamation: **68 days** after Assumed Date of Service
6	Pre-action letter	30th October 2017	**88 days** after Assumed Date of Service **58 days** after Amalgamation
7	Response to pre-action letter	13th October 2017	**13 days** after Pre-action letter
8	Commencement of action, notice of application for interim relief	22nd November 2017	**111 days** after Assumed Date of Service **81 days** after Amalgamation

[79] The information in the Circular put every shareholder on notice that his or her or its status as a shareholder was at stake. The Circular informed the Claimants that on the effective date the shares would be cancelled and that each shareholder of the Company would receive $2.86 for every share it held and a dissenting shareholder, if any, would be entitled to be paid the fair value of its shares as determined by the Court. The shareholders were also informed of the Company's intention to de-list once the amalgamation was achieved. Neither the First Claimant nor Douglas Skeete on behalf of the Second Claimant was able to attend the meeting of the shareholders. The First Claimant was out of the Island and Douglas Skeete had prior commitments. Philip

Osborne attended the meeting. He resolved to vote against the resolution. And in the ensuing days and weeks after the meeting, Philip Osborne met with shareholders. Kenneth Went wrote two letters to the First Defendant. These are dated 7th September 2017 and 13th October 2017. The First Defendant responded by way of letters dated 4th October 2017 and 16th October 2017 respectively. Kenneth Went was making suggestions to the First Defendant after the amalgamation. I do not criticize the non-attendance at the meeting. I treat as legitimate the reasons for not attending the meeting. But there is an absence of any attempt prior to the meeting to protect their interest. The actions of the claimants suggest neither diligence nor urgency in circumstances where they were put on notice that their status as shareholders was at stake.

[80] The authorities make an important point with respect to delay which is relevant in this case: it is, that delay may be evidence that the relief sought is not really urgent (see: Steven Gee, Q.C., *Commercial Injunctions*, 5th edition, at paragraph 2.019 and John McGhee, Q.C., *Snell's Equity*, 31st edition, at paragraph 16-25). Counsel for the Claimants wrote a lengthy pre-action letter to the First Defendant. In that letter, the Claimants were seeking to have shares in the First Defendant issued to them along with other monetary claims. There was no indication then that any rights were threatened which necessitated urgent injunctive relief. I think this is a case where the Claimants' delay is some evidence of an absence of any real urgency for interim relief.

[81] In my view, no good reason has been given for not consulting an attorney earlier. More importantly, no good reason has been given for failing to seek to restrain the holding of the meeting or the carrying into effect of the resolution and ultimately the amalgamation.

I do not think that a collective effort was necessary to commence an action, despite the David and Goliath picture painted by counsel for the Claimants. Even if collective effort was required, it could have been achieved between the service of the notice of meeting and the holding of the meeting. In urgent cases with legal implication for rights, or where a person treats the circumstance as urgent, a person can act within days to seek to protect his or her interest. This case is no different.

[82] In the case before me, during the period of delay, substantial steps were taken by the Company to achieve what it had proposed, whether those steps are lawful or not. The Company or the First Defendant has gone a long way. The meeting was held, resolutions passed, articles of amalgamation delivered to the Registrar of Corporate Affairs, Certificate of Amalgamation obtained, payments made to shareholders, register of members cancelled, and BCSDI maintaining only a list of former shareholders and shares not being traded or negotiated. The First Defendant has paid $61.7 m. to minority shareholders already. The Company or the First Defendant has significantly altered its position during the period of delay.

[83] The transaction was no doubt substantial. It involved 2,223 minority shareholders. The amount of money payable to minority shareholders is substantial, as seen from the amount already paid out. In addition, the Claimants' status as shareholders was at stake. I think it behoved the Claimants, in these circumstances, where their rights as shareholders were at stake, that if they intended to challenge the transaction by way interim injunctive relief, then, that they should have done so earlier. I think too that the Claimants' delay is unreasonable and extreme in the circumstances of this case. The Claimants' delay has not been satisfactorily explained, in my view, in the circumstances.

[84] Again, I am conscious that this is an oppression remedy action, and that the discretion under the oppression remedy is broad. And perhaps that laches would be less readily imputed to parties seeking relief under the oppression remedy action. Or, put differently, that delay should not be given the same weight in this case where the relief sought is under section 228, as in other cases. Delay must be decided ultimately as a matter of justice between the parties. And the facts may be such that the justice and equity of the case require that the equitable relief sought be refused even in an oppression remedy case.

[85] The delay in this matter has troubled me greatly. Taking into account that laches ought not to be as readily imputed to the Claimants, the delay is still extreme in the circumstances. Further, there has been material change or alteration of position by the Company or the First Defendant during the period of delay.

[86] I consider that I have options here as well. I think the circumstances of this case are such to conclude that it would be unjust to grant the interim relief sought and that I would be entitled to refuse the interim relief on that basis alone. Alternatively, I could treat the delay as one of the discretionary factors in determining wherein lies the balance of justice. Again I have chosen the latter.

Futility of Injunction: Cancellation of Shares

[87] The Claimants state that they are entitled to retain the status of shareholders. To do so, the Defendants should be restrained from cancelling the Claimants' shares. The Claimants argued that the affidavits filed on behalf of the First Defendant disclose no

facts supporting the assertion that the shares have been cancelled. He submitted to me that it is far from clear whether the shares have been cancelled and referred me to various provisions of the Companies Act.

[88] The First Defendant's case is that the cancellation of the shares is a *fait accompli* and that it was accomplished on the date of the amalgamation, 1st September 2017. The Defendants state that there is nothing more to be done to effect the cancellation of the shares. Further, that the new share capital in the amalgamated company is $2,000, representing the 1,000 shares issued previously in NEWCO. The Claimants have no shares in the capital in the amalgamated company, the First Defendant. The Defendants state that there is no threat of injury to the Claimants' rights or interest between the date of any order and the trial with respect to the cancellation of the shares. The effect of the Defendants' argument is that if there were any violations of rights (which is a matter to be determined at trial) they have already occurred and are at an end.

[89] The Defendants also pointed to the letter dated 12th December 2017 from the Barbados Central Securities Depository Inc ("BCSDI"), which reads:

> "*The BCSDI advises that there is no register of member as at September 2nd 2017. By letter dated September 27th, 2017, and received on September 29th, 2017, the BCSDI was instructed by Resolution of the Board of Cable & Wireless (Barbados) Limited to cancel and remove from the register of members all outstanding common shares. The effective date of removal was given as the date the Amalgamation Certificate was issued, September 1st, 2017.*
>
> *"BCSDI has maintained a list of former shareholders only to satisfy its obligation of securing the collateral of lending institutions that had existing pledge arrangements. Accordingly, there are no shares to be traded or negotiated.*"

[90] There are two practical realities flowing from BCSDI's letter: one is that the BCSDI no longer maintains a register of members and another is that shares are not being traded

or negotiated. This is not a finding of fact or a determination of the issue as to whether the shares have been cancelled, but the practical realities which it would be unreasonable to ignore.

[91] The Claimants acknowledged that if the First Defendant is indeed correct that the shares have already been cancelled, then there is nothing on which the injunction could attach. The Court would, in such circumstances, be acting in vain. The order would be futile.

[92] It was not clear to me what the Claimants were contending that the Defendants could, at this stage, do to injure their rights or interests between the hearing of this application and the trial with respect to the shares. I sought clarification from counsel for the Claimants. He did not directly respond to the question during his address, but during his reply he stated that the Company should have issued a share certificate to the BCSDI in the name of the BCSDI. Further, that to effectively cancel the shares of shareholders, the BCSDI must return the share certificate to the Company for cancellation. Counsel for the Claimants could not say whether such a certificate exists or ever existed. Counsel for the Claimants objected to counsel for the Defendants stating from the Bar table that there is no such certificate in existence. Ms. Valerie Williams, the First Defendant's corporate secretary, gave sworn evidence on the issue. It was agreed by counsel for both parties that her evidence should be struck from the record. It is sufficient to say that there is no agreement between the parties that such course suggested by counsel for the Claimants needs to be taken to cancel the shares.

[93] I was concerned with the timing of the revelation that the Company should have issued a share certificate to BCSDI, which now requires cancellation, namely during the reply,

when I had earlier sought clarification from counsel for the Claimants during his submissions to the Court. It raises questions of fairness given the objection by counsel for the Claimants, to counsel for the Defendants giving evidence from the Bar table.

[94] Following the hearing on 21st December 2017, counsel for the Claimants sent me by email, which was copied to Mr. Gale, Q.C., a BCSDI Nominee Transfer Form. I did not hear any of the parties on the significance of the form. In fairness to the Defendants, it is not a document to which I can or have attached any weight and is not dispositive of the issue raised here one way or the other for me.

[95] Counsel for the Claimants made the attractive argument that if the shares have in fact been cancelled, then making the order enjoining the First Defendant from cancelling the shares does not prejudice the Defendants. This may be true, but it ignores the fact that the Court would be acting in vain, and that the claimant for an injunction must demonstrate that there is some right to be protected by the interim injunction (see: *Stern v. Ismasco Ltd* (1999) 1 B.L.R. (3d) 198, 38 C.P.C (4th) 347, at paragraph [36] and *Yim v. Ink Research Corp* (2007) 31 B.L.R. (4th) 218, at paragraph [15]). Counsel for the Claimants also contended that implicit in a refusal to make the interim order enjoining the cancellation of the shares is an acceptance by the Court that the shares have been cancelled. But it could equally be argued that, making an order enjoining the Defendants from cancelling the shares, would be an implicit admission that the shares have not been cancelled. I do not think that this is the way to resolve the matter legally or fairly.

[96] This is a conundrum. It is rare, but there is some guidance. If the court is satisfied that the harm has already been done, and there is no further conduct to be restrained, then

the injunction to restrain the cancellation of shares should be refused since there is no risk of injury to the Claimants. That was the position taken by Adam J., in *H C Sleigh Ltd v. Blight* [1969] VicRp 113; [1969] VR 931, cited by counsel for the Defendants. In that case, where an application was made for an interlocutory injunction, but the evidence pointed to the damage already having been done, at page 3, Adams J. remarked:

> "*So far as relates to the Blights, the damage has already been done. There is no further conduct on their part to be restrained unless perhaps they still have it in their power to stop registration of their transfer to the Bishops. No ground for this has been suggested unless per chance the Titles Office, as a condition of registration, should make some requisition which only the Blights could comply with. But as none has been indicated, I consider I could not for this reason alone properly grant such an injunction against them, apart altogether from difficulties arising from interference with the rights of the other defendants. In the event which have happened, I would consider that the only remedy now available against the Blights is for damages for breach of contract*."

The Defendants urged me to take this position on the basis that the shares have been cancelled.

[97] Whether granting the injunction restraining the cancellation of the shares would be futile depends on the unresolved issue as to whether the shares have been cancelled, which is an issue on which there is great divide between the parties. The issue has not been argued before me by both parties. I should therefore not make any pronouncements on the issue. The proper course is to treat this as one of doubt. In this case, where I entertain doubt as to whether there is something which the Defendants can do to cancel the shares in the circumstance, the appropriate approach is that suggested by I. C. F. Spry, in *Equitable Remedies*, 8th edition, at page 493, where he writes:

> "*It has already been seen that a perpetual injunction will not issue if its effect would be to require the defendant to do something that it is beyond his power to do. Again, a perpetual injunction will not issue if it would be futile, although it has been seen also that it is only in most exceptional circumstances*

that futility in the relevant sense arises. <u>But if the impossibility or futility that is in question is not clearly established, and is hence a matter of doubt, then that doubt is regarded simply as one of the matters to be taken into account in deciding on the balance of justice either to grant or to withhold relief</u>; and, if necessary, any injunction that is granted may be specially limited or made conditional in order that the defendant will not be found to be in default, should compliance subsequently be seen to be impossible.

"Precisely the same considerations apply where what is in question is an application for an interlocutory, as opposed to a perpetual, injunction. So on one occasion a plaintiff was refused an interlocutory injunction restraining the defendants from committing certain breaches when it appeared that at the time of the application the breaches had already been completed. Here also where the impossibility or futility that is alleged is not established clearly, but there is simply a greater or lesser probability that any interlocutory injunction will be effective, the matters that are taken into account in deciding the balance of justice include the precise degree of that probability and any hardship or prejudice that may be caused to the defendant or plaintiff through the grant or refusal of relief, whether in an absolute or limited or conditional form."

[98] Even if the Claimants' position is taken at its highest, that there is a certificate to be cancelled, the question still arises as to whether the cancellation of the certificate can cause the Claimants harm at this stage which cannot be reversed or which would be irreparable. It would seem to me that any purported cancellation of any such share certificate, if it exists, at this time, can be set aside. The action of the Defendants would be reversible, and would not cause any prejudice to the Claimants in any event. Counsel for the Claimants argued that the Court has broad powers to set aside the amalgamation, which was accomplished months ago. Certainly it must also have the power to set aside a purported cancellation of any certificate at this stage.

<u>De-listing:</u>

[99] Christine Gillispie, an officer of the First Defendant, has deposed that the First Defendant has not applied to the BSE to be de-listed. She states that she has been advised that it takes on average a minimum of 3 months for a company to be de-listed from the date an application is made. The Defendants state that the First Defendant would suffer prejudice if it is enjoined from de-listing and it turns out at the trial that the Defendants were in the right. The Defendants' case is that an order restraining them from de-listing would consequentially require the First Defendant to comply with mandatory disclosure requirements of being a listed company, at substantial cost, inconvenience and irreparable harm. The First Defendant states that as a result of being a publicly listed company it will be obliged to pay annual listing fees to BSE ($20,000.00), monthly maintenance fee of $4,901.36 monthly or approximately $60,000.00 annually to BCSDI, and an annual listing fee of $1,500 to the Financial Services Commission ("FSC"). It would have unspecified cost in preparing quarterly reports to the FSC. I am not sure why there would be a need to print 2,300 annual reports at this stage.

[100] The First Defendant states that an order restraining it from de-listing would continue to prevent the integration of the two operating companies which provide services under the Flow and C&W Business brands in the market and that, in itself would cause severe prejudice to the First Defendant. Counsel for the Defendants argued that the prejudice which would flow from an order which has the effect of preventing it from integrating the two companies would be unquantifiable. In addition, there are unspecified costs for the preparation of standalone financials, the maintenance of separate accounts, bookkeeping systems and billing systems, the obligation for separate audits and the resulting separate audit fees, which the First Defendant states are substantial, and would flow from any order restraining the First Defendant from de-listing.

[101] The Claimants do not view the First Defendant's fear of prejudice as real, otherwise it would have already applied to de-list. They state that the claim of prejudice stretches the boundaries of credibility given that the Company had been complying with such regulations for over 15 years. Further, that the new disclosure that the de-listing will prevent the integration of the two companies, reinforces the need for the *status quo* to be preserved. The Claimants regard the integration of the two companies as a fundamental change.

[102] The Claimants state that given the First Defendant's stated intention to de-list, they fear the First Defendant will seek to de-list. The de-listing would be irreversible, and will eliminate the public market for the shares held by the Claimants and render it more difficult for shareholders to trade their shares.

[103] I think that the likely prejudice to the First Defendant is real if it is restrained from de-listing. It appears to me too that not all of the losses the First Defendant will suffer, will be easily quantifiable. If the order restricts the integration of the companies, it would be a form of business interruption. Generally, business interruption or interruption in the operations or plans of a business is a form of irreparable damage. The authors (Linda S Adams, Kevin P McGuinness, Jay Brecher) *Halsbury's Laws of Canada – Interim Preservation of Property Rights* (2013 Reissue) at paragraph HIR-4 write:

> "*Financial considerations are far from irrelevant. Disruption of ongoing business is usually regarded as sufficient to constitute irreparable harm, particularly where such disruption is compounded by the probability that any damages sustained will be uncollectible (even if they could be properly assessed) because the persons against whom the injunction is sought include persons, whose identity is*

unknown or because these persons lack any apparent means of making good those damages."

See too *Yim v. Ink Research Corp* (2007) 31 B.L.R. (4th) 218, 2007 CarswellBC 1074, [2008] 2 W.W.R. 639, 2007 BCSC 688, 73 B.C.C.R. (4th)182, where the court regarded an injunction which would freeze the business plan of the defendant as irreparable harm.

[104] In all probability, the First Defendant is likely to apply to be de-listed if it is not enjoined from de-listing. That was amongst the Company's stated objectives communicated in the Circular. Unlike the cancellation of the shares, where the First Defendant states that it has achieved all that is required to cancel the shares, there is clearly still something to be done to de-list, even if only as a matter of a formal application. There was no evidence before me as to the process to de-list.

[105] The probability of the First Defendant applying to de-list is not the end of the matter. I must seek to regulate the rights of the parties in the most just manner as is possible pending the final hearing in a way that would most easily permit justice to be done at the final hearing. That requires me to assess the nature and degree of injury or irreparable harm to the Claimants that would likely occur from the First Defendant de-listing, the adequacy or inadequacy of other remedies which would be available to the Claimants and any other relevant circumstance. I must also assess the nature and the degree of injury or irreparable harm if any, which such interim injunction, if granted, would cause to the First Defendant. I must then exercise my discretion as to the balance of justice, namely, considering what is most just in the circumstances, whether granting or refusing the interim injunction to restrain the First Defendant from de-listing.

[106] In this case, the alleged hardship or prejudice to the Claimants which would follow from the First Defendant de-listing would be that the Claimants would not have a public market to trade their shares. The public market has not been left untouched by the Company or the First Defendant. The present reality is that the shares in the Company, to the extent that there are still shares in the Company, to which I express no opinion, are not being traded or negotiated. An order restraining the First Defendant from de-listing will not change that position between now and the final determination of the matter. If the First Defendant were to de-list, it would be a further step which the court could set aside. I agree with counsel for the Defendants that the de-listing would be reversible. De-listing would not affect the court's ability to order that shares be issued to the Claimants in the First Defendant, should the Claimants succeed at the hearing. The Claimants are not likely to suffer irreparable harm were the First Defendant permitted to de-list.

[107] The harm which the First Defendant is likely to suffer is set out at paragraphs [99] and [100] above. In my view, if the injunction restraining the First Defendant from de-listing is granted, the First Defendant, based on the evidence before me, would likely suffer prejudice disproportionate to any risk of injury or prejudice to the Claimants. In my view, the balance of justice does not incline towards restraining the First Defendant from de-listing.

Status Quo

[108] This did not weigh heavily in the exercise of my discretion. However, preservation of the *status quo* was argued before me. Counsel for the Claimants contended that the *status*

quo to be preserved is the state of affairs that existed before the Company embarked on the alleged oppressive conduct, which he stated would be the state in July 2017. In *Fisher v. Fellows*, Sir John Pennycuick, in the extract from his speech recited above at paragraph [20] of this decision, noted his understanding of *status quo* to refer to the position which obtained when the defendant embarked upon the conduct to be restrained. But Sir John Pennycuick went on to say that different considerations may apply with respect to the state of affairs to be preserved where the claimant has delayed in his application for injunctive relief. In this case, there was delay on the part of the Claimants in making the application for injunctive relief. Different considerations must therefore apply with respect to the *status quo* to be preserved here. It seems to me that the state of affairs which counsel for the Claimants asked me to preserve would have to be recreated. I would have to make orders to unscramble what the Company or the First Defendant has done thus far to recreate the state of affairs which the Claimants asked me to preserve. This would neither be just nor convenient.

[109] I find more compelling the argument of counsel for the Defendants. He referred me to the following extract from the text by David Bean, *Injunctions*, 8th edition, at page 31, where the author writes, with respect to the *status quo*:

> *"……In many cases prompt action may mean that the preservation of the status quo favours the claimant as the defendant's activities are still at the preliminary stage. Conversely, if the defendant has proceeded a long way he may be able to claim that preservation of the status quo involves allowing him to continue manufacturing the product or polluting the river or continuing to distribute the publication, as the case may be. (But this argument will not avail a defendant who has rushed on with his work in order to defeat the claimant's attempt to stop him:…..)"*

[110] The Company or the First Defendant has proceeded a long way. The *status quo* which ought to be preserved is that which allows the First Defendant to continue doing what it

was doing at the time the action was commenced. I think the *status quo* also favours the First Defendant continuing with the long proposed plan to de-list.

Conclusion

[111] The discretionary powers under section 228 (3) of the Companies Act are broad, and should be applied to do justice and equity in the circumstances of the case where interim relief is sought in an action for relief from oppression as is the case at hand. In the end, I conclude that the Companies Act treats loss of status as a shareholder or loss of the bundle of rights comprised in shares by reason of the amalgamation provisions of the Companies Act as compensable in monetary terms. Accordingly, I am of the view, that damages are available and would be an adequate remedy for the Claimants were they to succeed at trial. But is it just in all the circumstances, that the Claimants should be confined to their remedy in damages? I think the answer is, yes. In my judgment, it would be just and equitable to confine the Claimants to their remedies in damages in all the circumstances of the case. I say so for the following reasons:

(a) the unreasonable delay on the part of the Claimants in bringing the action for interim relief, as discussed above;

(b) the Claimants' unwillingness to give an undertaking in damages, which I weigh against the Claimants, which would leave the First Defendant unprotected, should the First Defendant succeed at the trial;

(c) the reliefs sought in the FDCF would still be available to the Claimants if the injunctive reliefs sought herein are refused;

(d) there is doubt as to whether the injunction sought restraining cancellation of the shares would be futile or not, which doubt I have

weighed against the Claimants. Interim injunctive orders are granted to protect or preserve rights and it is not clear how the Claimants would be injured should the injunction restraining cancellation of the shares be refused; and

(e) the likely prejudice to the First Defendant if the injunctions are granted and the Defendants were to succeed at the trial outweighs any likely prejudice the Claimants would suffer should the injunctions be refused and the Claimants were to succeed at the trial.

Disposal

[112] For the reasons indicated herein, the Claimants' application for interim relief filed by way of a notice of application dated 22nd November 2017 is dismissed.

[113] There be cost in the cause.

ALRICK SCOTT
JUDGE OF THE HIGH COURT (Acting)