JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CIVIL APPEAL NO. 88/90

COR: THE HON. MR. JUSTICE CAREY - PRESIDENT (AG.)
THE HON. MR. JUSTICE WRIGHT, J.A.
THE HON. MR. JUSTICE GORDON, J.A. (AG.)

BETWEEN	TELECOMMUNICATIONS OF JAMAICA LIMITED	13TH DEFENDANT/ APPELLANT
AND	HECTOR BERNARD SONIA MILLS MARTIN MORDECAI WELLESLEY POWELL ANNE SAUNDERS GORDON WELLS RICHARD WELLS	PLAINTIFFS/ RESPONDENTS
	(in their personal capacity as well as on behalf of themselves and all other shareholders of Telecommunications of Jamaica Limited except the First and Second Defendant)	
	THE ATTORNEY GENERAL (for the Accountant General, a corporation sole pursuant to the Crown Property Vesting Act)	1ST DEFENDANT/ RESPONDENT
	CABLE & WIRELESS (W.I.) LTD	2ND DEFENDANT/ RESPONDENT
	HORACE BARBER	3RD DEFENDANT/ RESPONDENT
	DOUGLAS C. BUCK	4TH DEFENDANT/ RESPONDENT
	WENTWORTH CHARLES	5TH DEFENDANT/ RESPONDENT
	TOM CHELLEW	6TH DEFENDANT/ RESPONDENT
	ALSTON DOUGLAS	7TH DEFENDANT/ RESPONDENT
	DAVID MAIS	8TH DEFENDANT/ RESPONDENT

FRED PHILLIPS	9TH DEFENDANT/ RESPONDENT
HOSFORD SCOTT	10TH DEFENDANT/ RESPONDENT
PAUL SKEY	11TH DEFENDANT/ RESPONDENT
MAYER MATALON	12TH DEFENDANT/ RESPONDENT
TELLECOMMUNICATIONS OF JAMAICA LIMITED	13TH DEFENDANT/ RESPONDENT

J. Leo-Rhynie, Q.C. and Allan Wood instructed by Livingston, Alexander & Levy for 13th Appellant

R. B. Manderson-Jones for Plaintiffs/Respondents

Douglas Leys and Miss D. Gallimore instructed by Director of State Proceedings for 1st Defendant/Respondent

Emil George, Q.C. and Richard Ashenheim instructed by Milholland, Ashenheim & Stone for 2nd, 4th, 6th, 9th and 11th Defendants/Respondents

Mrs. Angella Hudson-Phillips Q.C. and Steve Shelton instructed by Myers, Fletcher & Gordon etc. for 5th, 7th and 10th Defendants/Respondents

David Muirhead Q.C. and Peter Goldson instructed by N. Levy of Myers, Fletcher & Gordon etc. for 12th Defendant/Respondent

Miss Karen Robertson for 8th Defendant/Respondent

Action against the 3rd Defendant/Respondent was withdrawn

28th, 29th, 30th, 31st January,
1st, 4th February & May 20, 1991

CAREY, P. (AG.):

It is essential in a case of this unusual nature, the first of its kind I understand in this jurisdiction, and in which, especially because men's reputations are at stake, that every effort should be made to give our reasons early. We thought it right to give our decision at the end of the submissions which occupied six working days, so that no one would be kept in

suspense as to our decision. Sadly our hopes have not been realized. We regret the delay in producing our reasons.

The plaintiffs/respondents sued Telecommunications of Jamaica Limited (TOJ) (the 13th defendant) and some eleven other defendants including Cable and Wireless (West Indies) Limited the Government of Jamaica (actually the Accountant General) and other persons being directors of T.O.J. for -

> "..... fraud, misrepresentation and or negligence arising in relation to the issuing by the Defendants in or about September, 1988 of a prospectus for the sale of certain shares in Telecommunications of Jamaica Limited and also in relation to the purchase in 1988 by that company of certain properties. The Plaintiffs also claim damages on the ground that in addition to being fraudulent the purchase of the said properties was ultra vires the Memorandum of Association of Telecommunications of Jamaica Limited The first Defendant is sued under the Crown Proceedings Act on behalf of the Accountant-General, a Corporation Sole pursuant to the Crown Property (Vesting) Act, which is and was at all material times a major shareholder in Telecommunications of Jamaica Limited and was the owner of the shares in that company which were offered for sale to the public in the said prospectus."

The above extract recites the endorsement on the plaintiffs' amended writ. The amended statement of claim contained some twenty-four paragraphs and some of these will be dealt with at a later stage in this judgment. Action was discontinued, we understand, against the third defendant Horace Barber.

The thirteenth defendant T.O.J. applied to the Court for -

> "(1) An Order <u>determining</u> as a preliminary issue in this action the question whether the Plaintiffs are entitled to maintain in this suit a derivative action for the benefit of the Thirteenth Defendant.

"(ii) Alternatively, liberty to file a Defence to the Thirteenth Defendant if necessary."

The matter was heard before Edwards J. by whose order, dated 9th October, 1950 it was declared that the plaintiffs were entitled to maintain a derivative action on behalf of the thirteenth defendant. From his judgment, a note of which we have been furnished, it is clear that he allowed the derivative action to proceed on the basis of fraud only. He is recorded as saying -

"....The question of fraud not ultra vires should be dealt with properly at a trial."

The thirteenth defendant being dissatisfied with that judgment and order, now appeals to this Court for an order that the Judge's order be set aside and the plaintiffs' derivative action not be allowed to proceed.

This case is concerned with the question - when can a shareholder sue?

The matter is governed by a rule commonly known as the rule in Foss v. Harbottle [1843] 2 Hare 461, 67 E.R. 189. Jenkins, L.J. in Edwards v. Halliwell [1950] 2 All E.R. 1064 at page 1066 stated the rule in this way -

" 'The rule in Foss v. Harbottle, as I understand it, comes to no more than this. First the proper plaintiff in an action in respect of a wrong alleged to be done to a company or association of persons is, prima facie, the company or the association or persons itself. Secondly, where the alleged wrong is a transaction which might be made binding on the company or association and on all its members by a simple majority of the members no individual member of the company is allowed to maintain an action in respect of that matter for the simple reason that, if a mere

> "majority of the members of the company or association is in favour of what has been done, then cadit quaestio. No wrong has been done to the company or association and there is nothing in respect of which anyone can sue. If, on the other hand, a simple majority of members of the company or association is against what has been done, then there is no valid reason why the company or association itself should not sue. In my judgment, it is implicit in the rule that the matter relied on as constituting the cause of action shall be a cause of action properly belonging to the general body of corporators or members of the company or association as opposed to a cause of action which some individual member can assert in his own right.'"

Broadly speaking therefore, the company is the proper plaintiff in an action involving a dispute within the company. As the body usually charged with the management of a company, it is the board of directors who must initiate action. But circumstances might exist which might not incline the directors to act in the company's name. There are four sets of circumstances which are often referred to as the exceptions from the rule in Foss v. Harbottle (supra). I would state them as follows:

(i) When the shareholder (being the minority complain that the company is acting ultra vires or illegally;

(ii) Where the shareholder (being the minority) seek to have a resolution of the company in general meeting declared void on the ground that it has not been validly passed e.g. that the resolution was one which could only be passed by a special resolution;

(iii) where the wrong done to the company, also infringes the personal rights of the shareholder and if the wrong to the shareholder could not be rectified by an ordinary resolution of the company;

(iv) where what has been done amounts to a fraud on the minority and the fraudsters are themselves in control of the company.

The effect of these exceptions is that a shareholder will be allowed to sue if what he complains of, could not be validly effected or ratified by an ordinary resolution.

The action which the shareholder brings in his own behalf and on behalf of other shareholders, is not really on his or their behalf but on behalf of the company. The shareholder is acting as a representative of the company. This action is referred to as a derivative action in recognition of the fact that the shareholder is suing on behalf of the company to enforce rights derived from it. The forms of pleading require the minority shareholders to aver the formula - "..... on behalf of themselves and all other shareholders of ....." but that does not in any way alter the character of the action. In so far as the present plaintiffs sued in their personal capacities, the allegations pleaded constitute the personal action. It is right to point out that both the derivative and the personal actions were married in this suit. But this course is permissible where the claims arise out of the same transaction. Prudential Assurance Co. Ltd v. Newman Industries Ltd & Ors. (No. 2) [1980] 2 All E.R. 841.

Mr. Leo-Khynie submitted, and this was conceded by Mr. Manderson-Jones, that the basis of fraud pleaded in the derivative action was contained in paragraphs 17 to 24 of the amended statement of claim. These are quoted hereunder -

17. In or about the month of October, 1988 the First Defendant, the Second Defendant, the Director Defendants and the Twelfth Defendant caused Telecommunications of Jamaica Limited to purchase from the said Development Properties Limited the said land comprised in Certificates of Titles registered at Volume 1180 Folio 336 and Volume 1005 Folio 325 of the Register Book of Titles amounting to some 15 acres with buildings thereon at a price of approximately FORTY-NINE MILLION ONE HUNDRED AND EIGHTY-NINE THOUSAND TWO HUNDRED DOLLARS ($49,189,200.00).

18. The said price of $49,189,200.00 paid for the land was grossly in excess of professional valuations of its true market value.

19. The First and Second Defendants, the Director Defendants and the Twelfth Defendant all fully well knew that the land was not worth or valued at the price paid for it or did not honestly believe that it was or acted in reckless disregard of whether it was or was not and conspired together to have the company purchase the said land at a grossly inflated price as a consequence whereof Telecommunications of Jamaica Limited has suffered considerable loss and damage.

PARTICULARS

Difference between contract price and market price	= $30,000,000.00 (Estimated)
Purchaser's cost of transfer	3,000,000.00 (Estimated)
Purchasers Attorney's fees	1,000,000.00 (Estimated)
	$34,000,000.00

"20. The purchase of the properties and at the price aforesaid is ultra vires the objects of the Memorandum of Association of Telecommunications of Jamaica Limited particularly insofar as it is expressly declared therein that the company shall carry on its business in accordance with commercial principles which were manifestly absent in the said purchase and also insofar as the properties were not necessary for, cannot be conveniently used with and cannot enhance the value of any other property of the company.

21. The aforesaid conduct of the First and Second Defendants, of the Director Defendants and the Twelfth Defendant completely disregarded the interest of Telecommunications of Jamaica Limited and of the Plaintiffs and constituted oppressive and unconscionable conduct towards them.

22. Further and/or in the alternative the said loss and damage arising from the purchase of the properties at a grossly inflated price was caused by the negligence of the Defendant Directors and of the Twelfth Defendant.

PARTICULARS

(i) Failing to pay a reasonable price or to forego the purchase and look for more reasonably priced land;

(ii) Failing to obtain any or an adequate number of professional valuations of the properties;

(iii) Alternatively, disregarding or failing to rely on or on the majority of the professional valuations obtained;

(iv) Relying on their own uninformed valuations of the properties or on their own assumptions as to the proper price to be paid for it.

"23. The First and Second Defendants by their absolute control over the votes of Telecommunications of Jamaica Limited and through the Defendant Directors and the Twelfth Defendant who are appointed by them completely overwhelm the Plaintiffs and have refused and/or threaten to refuse to pursue this action against themselves and their Directors in that company's name.

24. In the premises the Defendants are jointly and severally liable to the Plaintiffs.

Edwards J was required at the hearing of the summons before him to determine, as a preliminary issue, whether the plaintiff was entitled to maintain the derivative action against the defendants. In Prudential Assurance Co. Ltd. v. Newman Industries Ltd. & Ors. [1982] 1 All E.R. 354 at p. 366 the following statement by the Court of Appeal (Civil Division) sanctions this procedure -

" ..... In our view, whatever may be the properly defined boundaries of the exception to the rule, the plaintiff ought at least to be required before proceeding with his action to establish a prima facie case (i) that the company is entitled to the relief claimed and (ii) that the action falls within the proper boundaries of the exception to the rule in Foss v. Harbottle."

The procedure for the determination of this preliminary issue is not expressly governed by any provision in the Civil Procedure Code but section 323 thereof may be prayed in aid. It states as follows -

"323. If it appear to the Court or a Judge, that there is, in any cause or matter a question of law, which it would be convenient to have decided before any evidence is given or any question or issue of fact is tried, or before any reference is made to an arbitrator, the Court or Judge may make an order accordingly, and may direct such question of law to be raised for the opinion of the Court, either by special case, or in such other manner as the Court or Judge may deem expedient, and all such

> "further proceedings as the decision of such question of law may render unnecessary may thereupon be stayed."

The current practice in the United Kingdom is governed by O.15/12/5 which reads -

> "Where plaintiffs sue as representative plaintiffs in a minority shareholders or derivative action, the court ought to determine, as a preliminary issue, whether they are entitled so to sue and whether the company was in fact under the control of those alleged to have practised a fraud on it before the court proceeded to hear the main derivative action itself."

Seeing that the Civil Procedure Code does not contain this provision, section 606 of the Code may properly be invoked:

> "606. Where no other provision is expressly made by Law or by Rules of Court the procedure and practice for the time being of the Supreme Court of Judicature in England shall, so far as applicable, be followed, ..."

Edwards J. was not unaware of his obligations: relevant authorities were cited to him. On any fair reading of his judgment, he ruled that the derivative action was maintainable because fraud had been established. He rejected any basis of ultra vires acts on the part of the defendants or any of them. As to this, he expressed himself thus -

> "I spent some time agonizing and found first that the purchase of the land was not ultra vires."

There has been no appeal by the plaintiffs against this finding against them and therefore, I need say no more about that aspect of the case except that the judge came to the right conclusion. He did not expressly deal with negligence and he did not appear to allow the action to proceed on that ground. I think this Court is in the same position as he was to determine whether a prima facie case exists on this ground. Therefore, to return that

issue to the judge for adjudication would be wasteful of judicial time, would lead to increased costs, and would only produce an unnecessary multiplicity of hearings.

Negligence may be a basis for maintaining a derivative action, but not every act of negligence will justify such an action by minority shareholders. In Alexander v. Automatic Telephone Co. [1900] 2 Ch. 56 Lindley M.R. at pages 66, 67 made this point -

> " ' The Court of Chancery has always exacted from directors the observance of good faith towards their shareholders and towards those who take shares from the company and become co-adventurers with themselves and others who may join them. The maxim 'Caveat emptor' has no application to such cases, and directors who so use their powers as to obtain benefits for themselves at the expense of the shareholders, without informing them of the fact, cannot retain those benefits and must account for them to the company, so that all the shareholders may participate in them.' "

The case of Daniels v. Daniels [1978] 2 All E.R. 89 is relevant although the facts involve a sale at an undervalue. In the instant case the pleadings alleged purchase at an overvalue. The facts from the case are contained in this extract from the headnote -

> "The plaintiffs were minority shareholders in the third defendant ('the company'). The first and second defendants were majority shareholders and directors of the company. In October 1970 the company sold certain land to the second defendant for £4,250 on the instructions of the first and second defendants as directors. In 1974 the land was sold by the second defendant for £120,000. The plaintiffs brought an action against the defendants alleging that the price at which the land had been sold to the second defendant was well below its market value and that the first and second defendants knew that that

> "was so, but had purported to adopt the probate value of the land although a probate value was usually much less than the open market value. The defendants applied to strike out the statement of claim as disclosing no reasonable cause of action since it did not allege fraud or any other ground that would justify an action by minority shareholders against the majority for damage caused to the company."

Templeman J. made the following comment at page 95 -

> "The authorities which deal with simple fraud on the one hand and gross negligence on the other do not cover the situation which arises where, without fraud, the directors and majority shareholders are guilty of a breach of duty which they owe to the company, and that breach of duty not only harms the company but benefits the directors. In that case it seems to me that different considerations apply. If minority shareholders can sue if there is fraud, I see no reason why they cannot sue where the action of the majority and the directors, though without fraud, confers some benefit on those directors and majority shareholders themselves. It would seem to me quite monstrous particularly as fraud is so hard to plead and difficult to prove, if the confines of the exception to **Foss v. Harbottle** [1843] 2 Hare 461 were drawn so narrowly that directors could make a profit out of their negligence ....."

In **Pavlides v. Jensen & Ors.** [1956] 2 All E.R. 518, where the plaintiffs alleged that the sale was grossly negligent because it was at an undervalue, Danckwerts J. held that the action was not maintainable. He reasoned thus at page 523 -

> "On the facts of the present case, the sale of the company's mine was not beyond the powers of the company, and it is not alleged to be ultra vires. There is no allegation of fraud on the part of the directors or appropriation of assets of the company by the majority shareholders in fraud of the minority. It was open to the company, on the resolution of a

> "majority of the shareholders, to sell the mine at a price decided by the company in that manner, and it was open to the company by a vote of the majority to decide that, if the directors by their negligence or error of judgment had sold the company's mine at an undervalue, proceedings should not be taken by the company against the directors. ....."

These authorities lead me to the view that unless the breach of duty benefits the directors or some of them, then the negligence will be regarded as a problem of internal management or rather mismanagement. Thus there must be some breach of duty involving impropriety which can be ascribed to the management. With respect to its internal management, a company may have to live with foolish directors or an amiable set of lunatics but neither their folly nor lunacy gives minority shareholders a basis for a derivative action.

In the instant case, the negligence was pleaded in paragraph 22 in this manner -

> "22. Further and/or in the alternative the said loss and damage arising from the purchase of the properties at a grossly inflated price was caused by the negligence of the Defendant Directors and of the Twelfth Defendant.
>
> PARTICULARS
>
> (i) Failing to pay a reasonable price or to forego the purchase and look for more reasonably priced land,
>
> (ii) Failing to obtain any or an adequate number of professional valuations of the properties,
>
> (iii) Alternatively, disregarding or failing to rely on or on the majority of the professional valuations obtained;
>
> (iv) Relying on their own uninformed valuations of the properties or on their own assumptions as to the proper price to be paid for it."

The negligence pleaded in my view, refers to and involves a management decision. That is not a question for the Court; that is a question which calls for business judgment. There is no question but that the appellant had, by its memorandum and articles of association, the power to purchase property for its business and the price paid on a purchase of property was a bona fide exercise of its powers. It was Lord Wilberforce who said in Howard Smith Ltd v. Ampol Petrolem Ltd [1974] A.C. 821 at p. 832 -

> "There is no appeal on merits from management decisions to courts of law; nor will courts of law assume to act as a kind of supervisory board over decisions within the powers of management honestly arrived at."

The Court will not interfere in such matters. The allegations contained in the averments at paragraph 22 of the amended statement of claim do not make any allegation of impropriety whatever. There is no suggestion in any shape or form of any benefit to any director of the company. The conclusion is inevitable therefore that the derivative action which the judge permitted to be maintained, could not proceed on the basis of the negligence pleaded in the amended statement of claim.

There remains only the question of fraud. I can now refer to paragraphs 17-19 of the amended statement of claim which Mr. Manderson-Jones contended, contained the allegation of fraud. An examination will show that so far as paragraph 17 went, it alleged that all the defendants except the 10th Defendant caused the appellant to purchase property at a price of $49.189 million dollars. Paragraph 18 alleged that the price was in excess of professional valuations and paragraph 19 alleged -

(i) that the defendants knew the price was excessive;

(ii) did not honestly believe it was worth the sum paid or did not care what was the value;

(iii) conspired together to purchase at an overvalue.

The learned judge in dealing with the question of fraud said this -

> "There is a question of who should pay transfer tax, and there is a veiled suggestion of fraud on the minority ....."

He ended his judgment in the following terms -

> "The question is whether the Plaintiffs are entitled to continue this matter. I come to the conclusion with a great deal of difficulty, that at this stage, a question of fraud is alleged by the Plaintiffs. <u>They should be entitled to maintain a derivative action for the benefit of the Thirteenth Defendant.</u>
>
> All we have here are allegations. I think that it would come within the exception to the rule in FOSS V. HARBOTTLE. The question of fraud not ultra vires should be dealt with properly at a trial. This matter should proceed to trial so that the matter can be resolved. Fraud is alleged, all directors concerned are involved as parties to the action."

It is plain, from what he said, that he had before him the several affidavits, including among others, affidavits filed by Mr. Hector Bernard who deposed on behalf of the plaintiffs and by Mr. William Bertram on behalf of T.O.J. The judge required this material to decide whether the plaintiffs had established a prima facie case that the action fell within the exceptions to the rule in <u>Foss v. Harbottle</u> (supra). Before dealing with this material however, I desire to make two comments regarding first, the pleadings as to fraud and secondly, regarding Mr. Bernard's affidavit.

With regard to the pleadings, it is a well known rule that if fraud is being pleaded, particulars thereof must be given. Section 170 (1) of the Civil Procedure Code provides as follows -

> "170. (1) In all cases in which the party pleading relies on any misrepresentation, fraud, breach of trust, wilful default or undue influence, and in all other cases in which particulars may be necessary beyond such as are exemplified in the Forms aforesaid, particulars (with dates and items if necessary) shall be stated in the pleading:"

Paragraph 19 which I repeat clearly breached this rule but Mr. Manderson-Jones not lacking confidence in his pleadings, maintained that fraud was adequately particularised.

> "19. The first and Second Defendants, the Director Defendants and the Twelfth Defendant all fully well knew that the land was not worth or valued at the price paid for it or did not honestly believe that it was or acted in reckless disregard of whether it was or was not and conspired together to have the company purchase the said land at a grossly inflated price as a consequence whereof Telecommunications of Jamaica Limited has suffered considerable loss and damage.

PARTICULARS

Difference between contract price and market price	= $30,000,000.00 (Estimated)
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Purchasers Attorney's fees	1,000,000.00 (Estimated)
	$34,000,000.00

Nothing therein stated amounted in my view, to fraud. The pleadings contained no averment that there was any benefit to any of the defendants.

Fraud in this regard, means an abuse of power, that is, the misuse of a fiduciary position which injures the company. Lord Davey in **Burland v. Earle** [1902] A.C. 83 at page 93 illustrated this meaning of fraud when he said -

> "..... the cases in which the minority can maintain such an action are, therefore confined to those in which the acts complained of are of a fraudulent character or beyond the powers of the company. A familiar example is where the majority are endeavouring directly or indirectly to appropriate to themselves money, property, or advantages which belong to the company, or in which the other shareholders are entitled to participate, ..."

Templeman J. (as he then was) in **Daniels v. Daniels** (supra) at page 96 gave a number of examples -

> "..... The principle which may be gleaned from **Alexander v. Automatic Telephone Co** [1900] 2 Ch 56 (directors benefiting themselves) from **Coke v. Deeks** [1916] 1 A.C. 554, [1916-17] All E.R. Rep. 285 (directors diverting business in their own favour) and from dicta in **Pavlides v. Jensen** [1956] 2 All E.R. 518 [1956] Ch. 565 (directors appropriating assets of the company) is that a minority shareholder who has no other remedy may sue where directors use their powers intentionally or unintentionally, fraudulently or negligently in a manner which benefits themselves at the expense of the company..."

So far as paragraph 19 of the pleadings went, it could ex facie, charitably be interpreted as suggesting that the defendants were not acting in the best interests of the company because they purchased the property recklessly at an inflated value, and conspired together to do so. However, no overt acts of this conspiracy were particularised as required by the Civil Procedure Code. Mr. Manderson-Jones' argument that the mere averment of a conspiracy, for example to purchase at an overvalue, constitutes fraud is, I fear, ill-conceived. The conspiracy must be to benefit the directors, to divert business in their own favour or appropriating assets of the company or some act of

a fraudulent character. The authorities to which I have referred make that perfectly plain.

The other comment which I foreshadowed, relates to these affidavits. An affidavit is evidence in writing. It speaks to the personal knowledge of the deponent. See section 408 Civil Procedure Code which provides -

> "408. Affidavit shall be confined to such facts as the witness is able of his own knowledge to prove, except that on interlocutory proceedings or with leave under section 272A or section 367 of this law an affidavit may contain statements of information and belief with the sources and grounds thereof."

Arguments of the deponent are therefore impermissible. Hearsay evidence is only permissible if the source and grounds thereof, are stated. Mr. Bernard's affidavit is defective in those respects. It also contains assertions of facts, but no evidence to substantiate these assertions. That limited the material which the judge below could have considered or for that matter, which we ourselves are entitled to take into account. Illustrations of these defects appear hereafter.

The relevant details of the purchase about which the plaintiffs complain, appear in the affidavit of Mr. Bertram. T.O.J. was formed he stated, for the purpose of implementing a joint venture between the Government of Jamaica and Cable and Wireless (West Indies) Limited with the object of acquiring Jamintel and the Jamaica Telephone Company Limited (J.T.C.). J.T.C. had obtained reports prepared by Cable and Wireless PLC of the United Kingdom to assess the needs of J.T.C. One of the recommendations was the acquisition of a suitably sized area as a telephone service centre. These reports were presented to a Board Meeting of J.T.C. held 29th August, 1988. Present were the 4th, 5th, 10th, 11th, and 12th defendants. The twelfth defendant

declared his indirect interest because the sites at Newport West and Washington Boulevard which were recommended were owned by Development Properties Limited, a company of which he was a director and which itself was owned by another company - Industrial Commercial Developments Limited in which he was a shareholder and a director. The Board requested an engineering appraisal of the Newport West site, that the company's interest in the properties be communicated to the owner and that alternative sites be presented.

Pursuant to the directives of the Board, negotiations between the management team began with the owners of both sites. At some point in the negotiations, the owners had reduced their asking price to $49 Million net. The J.T.C. Board gave its approval for the properties to be purchased at a figure not exceeding $46 Million net. It was agreed that that decision should be put to the T.O.J. Board for ratification. That ratification came at a meeting on the same date. Present were the 6th, 7th, 9th and 10th defendants. The twelfth defendant withdrew. The properties were purchased in December 1988 at a price of $46 Million net. A new Board of Directors for T.O.J. was subsequently appointed by the shareholders. That newly constituted Board on 2nd July, 1990 re-affirmed and adopted the decisions of the previous Board approving the acquisition of the properties.

The price actually received by the owners was $46 Million net but that as might well be appreciated, did not represent the consideration for the properties. The agreement for sale shows that the purchase money was stated to be $49,189,200.00. A receipt reflecting the payment of transfer tax was exhibited showing $3.6 Million representing 7.5 percent of the consideration.

To make allegations of fraud may be a comparatively simple exercise, but its proof is not to be undertaken lightly. This

leads me to examine the affidavits deposed to by Mr. Bernard.

I can now examine the plaintiffs' material. Mr. Bernard's affidavit contained an allegation of some breach of section 18 of the Transfer Tax Act which was committed by certain unspecified defendants. There were no averments in the pleadings which could allow this evidence to be adduced. The breach alleged was that the transferee had not paid the Transfer Tax as required by section 18 (4) of the Act. The offence which is created by section 18 (5) is in the following terms -

> "18. (1-4A) .....
> (5) Every transferee who contravenes the requirement to make any payment under subsection (4) shall be guilty of an offence against this Act."

Plainly the offence created, is the failure by the transferee to pay the appropriate tax to the Commissioner of Stamp Duties. Mr. William Bertram, the senior Vice President Finance and Secretary of T.O.J. exhibited a receipt from the Stamp Commissioner as proof of payment of the relevant tax liability. The effect of this is that there was no evidence of a contravention of the Act by the directors (the transferee).

Then there were paragraphs asserting that the purchase price was false or misleading. Paragraph 13 states as follows:

> "13. THAT likewise the statement in paragraph 21 of the Affidavit sworn to by WILLIAM WILBERFORCE BERTRAM on 7th August, 1990, that 'the sum of $49,189,200.00..... was within the authority conferred to negotiate for a price of $46 million net of costs' is manifestly false and misleading as $49,189,200.00 is the NET price stated in the Transfer and on the Certificate of Title of which William Wilberforce Bertram was aware or ought to have been aware and which, curiously enough are not exhibited to his affidavit. Moreover, the seventeen-page Affidavit of William Wilberforce Bertram interestingly fails to state the price whether net or gross actually paid for the properties and the break-down of the price, if gross."

This is plainly argument, not evidence of any fact. For present purposes, it is wholly incapable of being subsumed under any head of liability.

Thereafter followed a number of paragraphs of arguments to show that the price paid was in excess of the average valuations submitted by the three professional valuators required to submit their opinions. On that basis, in paragraph 18, Mr. Bernard came to the conclusion of overvalue. He deposed as follows -

> "18. THAT the properties were therefore purchased at a considerable over-value of which all Defendants were fully aware at the time the purchase was made."

Then in paragraph 23 a charge was made against the President of T.O.J. Mr. Chantrelle. What was alleged against him was that - "he had knowingly and falsely represented himself to be signing as a Director that no seal was affixed." This was wholly false because Mr. Chantrelle was a director and had properly signed the instrument of transfer as such and the common seal had been duly affixed. In drafting the affidavit in these terms, the attorney on the record for the plaintiffs Mr. Manderson-Jones, was guilty of the greatest irresponsibility, for he should have made the most careful check to ensure he had his facts right before causing such a disgraceful statement to be made in Mr. Bernard's affidavit. He did apologize to us in open Court but it must be said the damage had already been done. Nothing in the remaining paragraphs, (and in total there were some 49 paragraphs including quotations and sub paragraphs) contained any evidence whatsoever capable of supporting the averments of "fraud" in paragraph 19 of the amended statement of claim.

It was necessary to undertake this examination to demonstrate the complete absence of any relevant material. And at the end of the day, the pleadings not having alleged fraud in

the sense I have adumbrated, it is not perhaps surprising that this prolix and argumentative affidavit, provided no material whatever to mount an attack on the ground of fraud against any of the defendants.

Since the plaintiff's personal action can nevertheless be maintained against the defendants, I do not think it is necessary to consider the amorphous allegations which relate to each individual defendant in that regard. The only allegation of impropriety viz, that against Mr. Chantrelle which found itself in an affidavit was entirely without foundation. The conclusion at which I have arrived did not come about as has been suggested in some quarters because there were ranged against a solitary inexperienced attorney, a number of eminent Queens Counsel, but because the action he initiated, was wholly misconceived.

If there is existing evidence of impropriety which has resulted in benefit to any director, that evidence has not been forthcoming. Allegations of fraud, ought not to be made lightly and it is not fraud because a company purchases property from a company of one of its own directors at a price in excess of the average of three valuation figures. The question must be whether the price paid was that which a willing purchaser would pay to a willing buyer. In this case, the figure paid was less than the asking price. Moreover, where the evidence is clear that the director concerned declared his interest, took no part in any discussion at Board meetings on the matter and received no Board papers on the matter, it is scandalous in the absence of any evidence whatever to the contrary, to impute impropriety or other <u>mala fides</u> to him as Mr. Bernard suggested in his affidavit. Paragraph 26 is an example of the sort of scandalous material which section 408 of the Civil Procedure Code forbids. It was in the following form -

> "26. Furthermore, that the Twelfth Defendant may have left the Board Room of the Thirteenth Defendant does not mean that he also left the Board Rooms of Industrial Commercial Developments Limited or of Development Properties Limited. Nor does his leaving the Board Room mean that he did not continue to have unrestricted access to information, including Board papers, and to wield influence over the management and the Board of the Thirteenth Defendant in connection with the transaction for the purchase of the properties."

I have said enough to show that neither the pleadings nor the affidavits of Mr. Bernard provide a scintilla or a soupcon of evidence of fraud. The learned judge having found a 'veiled suggestion of fraud,' was in error when he concluded on that footing that "a question of fraud is alleged by the plaintiffs they were entitled to maintain a derivative action." Having also said - "all we have here are allegations," he should have been altered to his functions in respect of the preliminary issue, namely, that he could not decide the issue on mere allegations but that he was required to satisfy himself that a prima facie case had been established. Prudential Assurance Co. Ltd. v. Newman Industries Ltd & Ors. (supra) at page 366. That is enough, in my view to dispose of this appeal.

Before parting with this case, I am constrained to deal with a matter of profound importance which occurred in the course of the hearing.

After the matter was called on, I intimated to counsel appearing before the Court, that each member of the Court was a shareholder in the thirteenth defendant company. It could be said we declared interest - our purpose was a negative one, to prevent or forestall rumour, gossip and uninformed talk. But for Mr. Manderson-Jones there was not a disentient voice with

respect to the Court's composition. He stated that he objected to the Court on the basis of bias - in that the members of the Court owned shares in the thirteenth defendant's company. We overruled his objection and the appeal proper began.

Sadly we are not in the position of the English Court of Appeal when Lord Denning in **Bromley London Borough Council v. Greater London Council and Another** [1982] 1 All E.R. 129 at page 131 could speak with confidence when he stated the position in England thus -

> "At the outset I would say that all three members of this court are interested on all sides. We are all fare-paying passengers on the tubes and buses and benefit from the 25% cut in fares. My wife and I also have the benefit of senior citizens to travel free. We are all ratepayers in the area of Greater London and have to pay the increase rates imposed by the supplementary precept. No objection is taken by any party to our hearing the case. Any Court of Appeal would be likewise placed."

We are not likewise similarly placed.

Subsequently, however Mr. Leo-Rhynie, Q.C. supported by his colleagues brought to our attention, the old case of **Dymes v. Grand Junction Canal** [1852] 3 H.L.C. 759. I called their attention to **R. v. Mulvihull** [1990] 1 All E.R. 436 and invited counsel to assist us by any submissions they cared to make on the subject. I am much indebted to counsel who greatly assisted us.

Judicial impartiality is undoubtedly an essential element in the administration of justice, hence the rule that no man should be a judge in his own cause. It is a translation of a latin maxim - "nemo judex in re sua." This rule against bias has been applied extensively over the years against inferior tribunals whether of justices or magistrates or other administrative bodies through the prerogative remedy of

certiorari. As this remedy is not available against superior Courts, it is perhaps not surprising that there are few cases involving those Courts. One of these and the case most often referred to, is Dymes v. Grand Junction Canal [1852] 3 H.L.C. 759 which suggests that the rule applies to courts no matter how august their status. In that case, Lord Cottenham L.C. in a Chancery suit had affirmed a number of decrees made by the Vice-Chancellor in favour of a canal company in which the Lord Chancellor was a shareholder. Lord Cottenham's decrees were set aside by the House of Lords by reason of his pecuniary interest and the House of Lords itself considered the appeal on its merits and affirmed the decrees of the Vice-Chancellor.

It is, I think, important to understand this case in the context of its times. In 1852, at the time of this decision the principle in Salomon v. Salomon & Co [1897] A.C. 22 of a corporate personality had not been developed or appreciated. It certainly was not then appreciated that a company upon incorporation becomes a legal entity separate and distinct from its members. In the state that the law then stood, it was an easy step to hold that a shareholder owned the business which the company ran. Thus it could be and was held by the trial judge and the Court of Appeal that the company formed was a mere sham and an "alias," agent, trustee or nominee for Salomon who remained the real proprietor of the business. The decision of the House of Lord in that case settled the concept of a corporate personality.

But even before 1897, the year of Salomon v. Salomon (supra), the view that because a judge might have shares in a company which was involved in litigation, disqualified him from participating in the hearing, was being seriously questioned. In London and North-Western Railway Co. v. Lindsay [1856] 3 McQueen's Appeal 99 which was a case before the House of Lords,

Lord Cranworth, L.C. intimated to the Bar that a member of the House, Lord Wensleydale would not be present because he was a shareholder in the Railway Company. There followed this exchange between Bench and Bar -

> "Mr. Attorney General: Sir R. Bethell I very much regret it, my Lords. Assent on my part, as representing the Railway Company, would not be of any avail, but I rather apprehend that my learned friends who appear for the Respondent, if they had been here, would have joined with me in that regret.
>
> The Lord Chancellor: I must say that in the present state of our social relations, when almost everybody has shares in some or other of these companies, to suppose that that disqualifies them from discharging judicial functions in cases in which those companies are concerned is a very dangerous doctrine.
>
> Mr. Attorney General: Certainly, my Lord; I urged that very strongly in a case that arose in this House some years ago Grand Junction Railway v. Dymes
>
> Lord Brougham: You mean in the case in which Lord Cottenham was a shareholder.
>
> Mr. Attorney General: Yes, my Lord; but I am sorry to say that the rule in that case was carried to a very great extent. In former times it will be remembered that it was not the rule acted upon. Lord Eldon was a holder of Bank stock, but he never for a moment considered that he was disqualified from adjudicating in a case in which the Bank was concerned; but at present the law so stands, that I am afraid it would require the interference of the Legislature.
>
> Lord Brougham: Even if the consent of the parties were given.
>
> The Lord Chancellor: I do not think that any legislative interference can be necessary in the case of appeals to this House, for according to that rule, in almost every case the decision must be had, because the judgment is the judgment of the House itself, and there is, we may depend upon it, in every case some one Poor or other who has an interest in the case where a large company is concerned."

If I might leap the century and three decades since that case, we come to **R v. Mulvihull** [1990] 1 All E.R. 436, a decision of the English Court of Appeal (Criminal Division). The fact that this was a criminal case, is not in my view, of any significance because the rule as to bias remains the same whatever the nature of the case. There the appellant was charged with and convicted of conspiracy to rob, the case against him being that he had actually been involved in six robberies and one attempted robbery at premises belonging to various banks and building societies. One of the offences had taken place at a branch of a bank in which, at the time of the trial, the trial judge owned 1,650 shares. The judge did not disclose his shareholding in open court. The appeal was taken on the ground that, had he known of the judge's shareholding the appellant would have objected to his conducting the trial. The appeal was dismissed, the court holding that where the judge had no direct pecuniary interest in the outcome but had instead an interest which fell short of being a direct pecuniary interest, there was no presumption of bias. Instead the test was whether a reasonable and fair-minded person, sitting in court at the trial and knowing that the trial judge held 1,650 shares in one of the banks which the appellant was said to have robbed, would not reasonably have entertained such a suspicion, or would not have acted reasonably if he had.

In my judgment, the rule against bias in modern form means that no one may be a judge in a cause in which he has a direct pecuniary interest in the outcome of the case. This interest irrespective of its extent acts as an automatic disqualification because the law then assumes bias.

R. v. Camborne Justices ex parte Pearce [1954] 2 All E.R. 850.

The interest which a shareholder has in a company was explained in Prudential Assurance Co. v. Newman Industries & Ors. (No. 2) (supra) (C.A.) at page 366 -

> "The plaintiff's shares are merely a right of participation in the company on the terms of the articles of association. The shares themselves, his right of participation, are not directly affected by the wrongdoing. The plaintiff still holds all the shares as his own absolutely unincumbered property."

If a wrong is done to the company, the shareholder does not suffer any personal loss. The loss is through the company in the diminution in the value of the assets of the company. A shareholder who happens to be a judge is in no different position. In my view, a judge shareholder can have no direct pecuniary interest in the outcome of this appeal.

A factor which should not be left out of consideration is the function of this Court. We are not called upon to be primary decision makers: we are required to determine a question of law, viz. whether there are facts which in law amount to fraud. We are called upon to do so in an interlocutory appeal. We are in no different position to the judge in R. v. Mulvihull who would have had to determine as a matter of law whether the facts before him amounted in law to the charges preferred against the appellant on the indictment. He had to answer the question - Was there a prima facie case to answer? The Court of Appeal did not suggest that in considering that question of law, the judge was a judge in his own cause.

We can then apply the second test articulated in R. v. Mulvihull (supra) i.e. whether the reasonable and fair-minded person sitting in this Court in possession of all the relevant facts would consider the trial unfair. To remind of those facts -

(i) the fact that the judge had shares in a public company T.O.J. which shares were marketed on the Stock Exchange and the fact that the company had an authorized share capital of One Thousand Million Dollars ($1000M).

(ii) that shares give a shareholder a right of participation in the company but any wrong to the company is not a 'loss' to the shareholder.

(iii) that the judges were not 'trying' any factual issue but considering a question of law;

(iv) that whatever the outcome, the judge as a shareholder does not suffer a loss and therefore has no direct pecuniary interest in the outcome.

If the test is applied to those facts, the reasonable fair-minded person could not reasonably have entertained any suspicion but that a fair hearing was in progress.

I think Lord Cranworth was right. If the rule against bias means that when a judge has shares in a company involved in litigation before him, that he is disqualified, then, in present day Jamaica when a great number of people have shares in public companies, it would be a dangerous doctrine. In this Court of seven members where most, if not all, own shares in some public company or other, in almost every case our decision must be bad because in any case where such a company is concerned, some one judge of appeal or other will have an interest.

It is, I think right to make one further point in this regard. In small societies such as ours, the situation may be such, that there may be no judges at all to replace those who may rightly be held to be disqualified on the ground of bias or more precisely, the real likelihood of bias. In those cases, this rule of natural justice must yield to necessity, for otherwise the machinery of justice would break down. An

example of this occurred in **Dymes v. Grand Junction Canal** (supra) where before the appeal from the Vice-Chancellor came to the House of Lords, the Lord Chancellor had to sign an order for enrolment. It was held by their Lordships that his shareholding in the company, which disqualified him from hearing the appeal, did not affect the enrolment since no one but he had power to effect it. It was said at page 787 - "For this is a case of necessity, and where that occurs the objection of interest cannot prevail." See also **The Judges v. A.G. for Saskatchewan** [1937] 53 T.L.R. 464 where the Government of the province required the Court to determine whether the salaries of judges were liable to income tax. The Privy Council confirmed that the Court was entitled to act as a matter of necessity.

Since the present court comprises seven members, two of whom own no shares in T.O.J., it would not at all be possible to convene a bench of three, none of whom owned shares in the thirteenth defendant. Mr. Manderson-Jones had argued that the court could be constituted of the two non-shareholding members and one shareholder. But that does not circumvent the rule, for it could be suggested that the possibility of taint would affect the two non-shareholding members. This rule of necessity would result in a panel of the court comprising any sort of permutation. There would be no ideal position. In my view, however, for the reasons I have offered, the rule of necessity need not be relied on.

For the reasons I have given, I am satisfied that it is not the law that a judge is disqualified automatically from discharging his judicial functions in a case which involves a company in which he has shares. It has to be shown that the judge has a direct pecuniary interest in the outcome, and none of the judges has any direct pecuniary interest in the outcome

of this interlocutory appeal nor has any member of the Court been shown to have any such interest. Mr. Manderson-Jones suggested that since the litigation had been initiated, shares had fallen but, as Mrs. Hudson-Phillips correctly pointed out, and be it noted this fact appeared in Mr. Manderson-Jones' own affidavit, the value of the shares had since risen by 33 1/3%

For all these reasons, I agree with my brothers that the appeal should be allowed and the order of Edwards J that the derivative action proceed, be set aside. The respondents, we held, were entitled to their costs both here and below.

WRIGHT, J.A.:

Enshrined as the rule in **Foss v. Harbottle** (1843) 2 Hare 461 is the principle of the supremacy of the majority in a company. From this it follows that where there is a complaint that a wrong has been done to the company, the proper plaintiff is the company. But for good reasons there are admitted exceptions in circumstances which cannot be remedied by a confirmation by the majority. The exceptions are:

1. Where the act complained of is ultra vires the company or is illegal.

2. Where the act constitutes a fraud against the minority and the wrong-doers are themselves in control of the company.

3. Where a resolution requiring a qualified majority has been passed by a simple majority.

Arising out of the sale of two properties to the defendant company, Telecommunications of Jamaica Limited (T.O.J.), by Development Properties Limited, a company in which Mayer Matalon, Chairman of T.O.J., was also Chairman and/or Director, for a price of approximately $40,000,000 nett, the plaintiffs commenced action against the defendants/respondents with the exception of the thirteenth defendant/respondent (T.O.J.) claiming damages:

> "For fraud, misrepresentation and or negligence arising in relation to the issuing by the defendants in or about September, 1988 of a prospectus for the sale of certain shares in Telecommunications of Jamaica and also in relation to the purchase in 1988 by the company of certain properties."

This suit, which carefully avoided any allegations against T.O.J., lay on the books for a year before T.O.J. was added and the allegations amended to read so far as is relevant -

> "The plaintiffs also claim damages on the ground that in addition to being fraudulent the purchase of the said properties was ultra vires the Memorandum of Association of Telecommunications of Jamaica Limited ..."

This action by the plaintiffs is known as a derivative action and whenever such an action is brought the company has the right to have a determination by the Court as a Preliminary Issue the question whether the derivative action should be maintained. By summons dated August 21, 1990, T.O.J. brought the issue before the Court and after a hearing in Chambers on October 8 and 9, 1990, Edwards, J. ordered:

> 1. That the plaintiffs are entitled to maintain a derivative action on behalf of the thirteenth defendant.

He granted leave to appeal and fixed the date for the hearing of the Summons for Directions pending the hearing of the appeal. This appeal is against his order that the derivative action be maintained. The four grounds on which that order is challenged are set out below:

> 1. By Summons dated 21st August 1990 the Thirteenth Defendant applied to the Court to determine as a preliminary issue the right of the Plaintiffs/Respondents to maintain the derivative action purportedly brought for the benefit of the Thirteenth Defendant herein. Prior to the hearing of the Summons aforementioned the Plaintiffs/Respondents raised the following three issues for the determination of the learned Judge, the first two of which were in objection to the hearing of the aforementioned Summons of the Thirteenth Defendant:
>
> (i) that the Summons was not properly constituted,
>
> (ii) that the Summons was out of time as the pleadings had been closed, Summons for Directions fixed for hearing and therefore the application was an abuse of the process of the Court,

(iii) that the deponents to Affidavits filed on behalf of the Thirteenth Defendant/ Appellant should be ordered to attend for cross-examination.

The learned Judge determined the third aforesaid issue raised by the Plaintiffs/Respondents by ruling that cross-examination should only be ordered in exceptional circumstances and that it would not be appropriate at that stage to order the deponents to Affidavits filed on behalf of the Thirteenth Defendant/ Appellant to attend for cross-examination. However the learned Judge misapprehended that he ought to have ruled on the first two aforesaid issues raised in limine by the Plaintiffs/ Respondents before hearing and determining the Summons of the Thirteenth Defendant aforementioned and instead erred by ordering that the Plaintiffs/ Respondents were entitled to maintain the derivative action herein thereby effectively determining the substantive Summons of the Thirteenth Defendant aforementioned without firstly ruling on the aforesaid issues in limine raised by the Plaintiffs/Respondents and without evidence being adduced and/or submissions being made in respect of the said Summons by the parties thereto.

2. The learned Judge erred when he found that the Plaintiffs/ Respondents were entitled to maintain a derivative action as his findings were contrary to such order having regard to the principles affirmed in the cases of PRUDENTIAL ASSURANCE CO. LTD. v. NEWMAN INDUSTRIES LIMITED NO. 2 [1982] 1 ALLER 354 and SMITH v. CROFT (No. 2) 1987 3 WLR 405.

3. The learned Judge failed to appreciate that the Plaintiffs/ Respondents should not be allowed to maintain the derivative action on behalf of the Thirteenth Defendant/Appellant unless the action fell within the proper boundaries of the exception to the rule in FOSS v. HARBOTTLE that is to say that the Plaintiffs/

" Respondents had on the evidence adduced established a prima facie case that i) the acts complained of were ultra vires, illegal or a fraud perpetrated on the Company and ii) the Company was prevented from being properly joined as a Plaintiff to the action by reason of the fact that it was controlled by the wrongdoers. In failing to find a prima facie case of either wrongdoing or control by the wrongdoers, the learned Judge erred in ordering that the derivative action could be maintained.

.. The learned Judge erred in failing to order that the derivative action ought not to be pursued by the Plaintiffs/Respondents in light of his findings which were as follows:

(i) The acts complained of by the Plaintiffs/Respondents were not ultra vires the objects contained in the Memorandum of Association of the Thirteenth Defendant/ Appellant

(ii) The Affidavits of the Plaintiffs/Respondents did not go beyond mere allegations or assertions of fraud

(iii) The Plaintiffs/Respondents had made no request or approach to the Thirteenth Defendant/Appellant for it to consider the bringing of such an action."

T.C.J. is a public company with a share capital of US1,000,000,000 and several millions of its shares were offered on sale to the public. In addition, its shares are quoted on the Jamaican Stock Exchange. Aware that five of the seven Judges comprising the Court of Appeal (which five include the three presiding Judges) are shareholders in T.C.J., the Court thought it best to make the disclosure rather than leave it to be discovered. Mr. Leo-Rhynie, Q.C., after consultation, speaking on behalf of all counsel, except Mr. Manderson-Jones, said they had no objection to the Bench, as constituted. For

his part, Mr. Manderson-Jones stated that if the Court accepted his suggestion made by letter which he had exhibited and remit the case to the Court below, he would raise no objection but otherwise he would object on the ground of bias. He announced, in rather unbecoming manner, that he agreed with the first ground of appeal and accordingly he had nothing to argue and would be withdrawing from the Court to attend to a trial matter elsewhere. He was only deterred from carrying out this act of discourtesy by a stern warning from the Bench and thereafter he did nothing to disguise his displeasure and, indeed, had to be cautioned more than once. Such conduct is inexcusably contumelious.

The objection based on bias was over-ruled. To my mind, it is unthinkable that Judges of Appeal, who are all qualified lawyers with years of experience, could be thought to be influenced by any question of bias in dealing with the questions which come before them for determination. And, in my opinion, the Judges of the Supreme Court ought to be regarded in the same light. No evidence is needed to conclude that the various Judges of this land would not be able to make a significant contribution to the assets of the various banks in the country. But, if for no other reason than for convenience, the Judges do use the services of these banks. Is it to be said that whenever cases involving banks are before the Courts a poll has to be taken to determine which Judge has an interest in any such bank? In our population of just a little over two million people, there are just seven Judges sitting in the Court of Appeal and twenty-one in the Supreme Court. It is not difficult to envisage a situation in which, if this allegation of bias were countenanced, that it might be impossible to find a Judge to adjudicate in a case concerning a bank, a mortgage institution, an insurance company or any other financial

in ...ation in which, in the normal conduct of his affairs, a Judge may have a financial interest.

Inasmuch as no authorities were before the Court at the commencement of this matter, although reference was made to decided principles, counsel, with the exception of Mr. Manderson-Jones, on the following day sought leave to bring to the Court's attention certain cases including:

> Dymes vs. Grand Junction Canal Co. Proprietors (1852) 3 H.L.C. 759
>
> R. v. Burton and another, Justices Exparte Young (1897) 460
>
> R. v. Mulvihill (1990) 1 All E.R. 436.

The majority of the cases cited stemmed from decisions in Justices Courts and were the pronouncements of Review Tribunals which we doubted could apply to a Court of Appeal. R. v. Mulvihill (supra) was a criminal case in which the accused had been convicted of conspiracy to rob, the case against him being that he was actually involved in six robberies and one attempted robbery at premises belonging to various banks and building societies. One of the offences had taken place at a branch of a bank in which, at the time of the appellant's trial, the trial judge owned 1650 shares. The Judge did not disclose his shareholding in open Court. The appellant contended that had he known of the Judge's shareholding he would have objected to his conducting the trial. The appeal was dismissed and although that case involved trial by judge and jury in which the Judge only gave effect to the findings of the jury the principles stated by the Court of Appeal are of assistance here. In giving the judgment of the Court, Brooke, J. said at page 439:

> "There are two clear and distinct lines of authorities which help a court in determining what test to apply when it is contended that a judicial decision should be set aside on the grounds that the adjudicator has an interest, real or perceived, in the outcome of

> "the proceedings. The first of these lines of authority is concerned with cases in which the adjudicator has a direct pecuniary interest in the outcome of the case. In these cases the Court applies very strictly the maxim that nobody may be a judge in his own cause, and decisions which are made in those circumstances are voidable because bias is conclusively presumed. The other line of authority is concerned with cases in which there is no such direct pecuniary interest in the outcome of the case, but the surrounding circumstances give rise to a reasonable suspicion that justice is not being done because an adjudicator has an interest which falls short of being a direct pecuniary interest:
>
> > 'In such a case there is no such presumption as arises in the case of a pecuniary interest, but the question is whether there is a real likelihood, arising from circumstances such as would give rise to a challenge to the favour, that the judge or justice would have a bias'."

There is a caveat to be observed in dealing with the question of direct pecuniary interest which is that cases which pre-date Salomon v. Salomon & Co. Ltd. (1897) A.C. 22 (which established the distinction between the company and the shareholder) are not likely to be very helpful. It is my considered opinion, after a full discussion of the cases, that the position of the Judges of the Court hearing this appeal is not in conflict with the principles stated in R. v. Mulvihill (supra). The Court's original decision remained unaltered.

Let me now return to the appeal proper. It was submitted that the learned trial judge dealt only with the third of the three issues and then found in favour of the plaintiffs. With this the plaintiffs/respondents agree and would have the matter remitted to the learned judge for further consideration. However, from submissions made before us and from a reading of

the judgment delivered by the learned judge, it is clear that the issues were fully ventilated before him. It follows that this Court is equally seised of the issues and since a remittal would incur further delay and costs it was decided not to remit the case.

Grounds 2, 3, and 4 are really repetitive of the complaint against the order declaring the entitlement of the plaintiffs/respondents to maintain the derivative action. Such an order involves a finding that the case falls within the exception to the Rule in Foss v. Harbottle (supra). But this is not under the heading of ultra vires. The learned judge made a specific finding that the purchase of the properties was not an ultra vires act. And that must, indeed, be so. To be ultra vires the company, an act must be beyond the objects for which it is incorporated. Consequently, the company could neither initiate the act nor approve it in a general meeting. What T.C.J. has done is to acquire property, an act specifically provided for by object No. 16 of the Memorandum of Association, which, so far as is relevant, reads:

> "To purchase or by any other means acquire any freehold leasehold or any other property for any estate or interest whatever etc."

Supportive of this object is object No. 40, which reads:

> "To do all such other things as may be deemed incidental or conducive to the attainment of the above objects or any of them."

So the acquisition of property cannot be ultra vires the company. However, it appears that Mr. Manderson-Jones sought to imbue the ultra vires principle with a new meaning. He contended that T.C.J. was not authorized to make the acquisition for the price paid which he maintained was in excess of "the maximum of $45 million net with the company (T.C.J.) being responsible for the transfer costs". But such a

contention has nothing to recommend it. I say so for two reasons. Firstly, the authority to purchase land sets no price beyond which the company may not buy. Secondly, no particular contractual formula has been imposed upon the company. The language complained of is certainly not a device to impose upon the company the obligation of paying the vendor his full price and then paying the Transfer Tax on that sum.

The other ground on which it was claimed that T.O.J. had acted ultra vires was set out at paragraph 23 of the affidavit of Hector Bernard in which the case for the plaintiffs appear. The paragraph reads:

> "THAT the instrument of transfer of the said properties which purported to be signed under the Common seal of the Thirteenth Defendant by one of its Directors was not signed by any Director of the Thirteenth Defendant. It was signed by the President of the Thirteenth Defendant, R.C. Chantrelle, who knowingly and falsely represented himself to be signing as a Director. That no seal was affixed."

This was a most unfortunate allegation for which Mr. Manderson-Jones apologized to the Court blaming the allegation against Mr. Chantrelle on an oversight. Indeed, the matters about which complaint was made in the cited paragraph were of Mr. Manderson-Jones' own making. The transfer occupies two pages but only the first page thereof was exhibited to the aforesaid affidavit of Hector Bernard. No signature appears on this page and accordingly the seal of the company was not affixed to that page. But when William Bertram, Secretary to the company, exhibited the complete transfer the signature of Mr. Chantrelle as director and the seal of the company are there to be seen. The election of Mr. R. Chantrelle as a director is contained in the Minutes of the First Annual General Meeting of T.O.J. held in Kingston on November 30, 1968, and there should have been no difficulty in ascertaining who

were the directors of T.C.J. at the material time. Conclusively, therefore, the issue of the ultra vires action by T.C.J. is effectively laid to rest.

In the same resting place also are to be found the charges against certain of the defendants/respondents against whom the order of Edwards, J. cannot possibly have any effect. Their respective attorneys pointed out the bases on which these defendants/respondents are in no way involved.

Mrs. Hudson-Phillips, by referring to the record, pointed out quite clearly that Mr. Wentworth Charles (fifth defendant/respondent) was absent from the meeting on 24th October, 1988 where the decision was taken to purchase the parcels of land and he played no part in the implementation of the agreement. Clearly, therefore, no liability can be laid at his door under any head of claim.

The record also reveals that at the meeting of T.C.J. on 24th October, 1988, Mr. Hosford Scott (tenth defendant/respondent) indicated his intention not to seek re-election and so was not re-elected at the Annual General Meeting of T.C.J. held on 30th November, 1988. Accordingly, he was not a director of T.C.J. at the time of the implementation of the decision to purchase. No liability can attach to him.

On behalf of David Mais (the eighth defendant/respondent) Miss Karen Robertson relied on the record to show that he was absent from the meeting held on 24th October, 1988, at which the decision to purchase the two sites was taken and no basis for attaching liability to him exists.

As regards the remaining defendants/respondents, copious submissions were made and several authorities cited on the remaining issue of fraud. But before adverting to these submissions and authorities, it is necessary to

identify the fraud in contemplation and to determine whether the pleading conforms with the requirements. The endorsement of the writ alleging fraud is in the following terms:

> "The Plaintiff's claim is for damages for fraud, misrepresentation and or negligence arising in relation to the issuing by the Defendants in or about September, 1986 of a prospectus for the sale of certain shares in Telecommunications of Jamaica Limited and also in relation to the purchase in 1986 by that company of certain properties. The plaintiffs also claim damages on the ground that in addition to being fraudulent the purchase of the said properties was ultra vires the Memorandum of Association of Telecommunications of Jamaica Limited. The First Defendant is sued under the Crown Proceedings Act on behalf of the Accountant-General, a Corporation Sole pursuant to the Crown Property (Vesting) Act, which is and was at all material times a major shareholder in Telecommunications of Jamaica Limited and was the owner of the shares in that company which were offered for sale to the public in the said prospectus."

If the claim of fraud was to go forward, what should follow is that in the Statement of Claim the charge of fraud should "be pleaded with the utmost particularity" (Or: 18/8/8). Section 170(2) of the Judicature (Civil Procedure Code) Law requires:

> "In all cases in which a party pleading relies on any misrepresentation, fraud ... particulars shall be stated in the pleading ..."

The insistence on the appropriate pleading, when fraud is alleged, is further emphasized in Order 18/12/13 where it is stated that:

> "...it is now provided that the necessary particulars of fraudulent intention must be contained in the pleading. The pleader should accordingly set out the

> "facts, matters and circumstances relied upon to show that the party charged had or was actuated by a fraudulent intention. Fraudulent conduct must be distinctly alleged and as distinctly proved, and it is not allowable to leave fraud to be inferred from the facts (**Davy v. Garrett** (1878) 7 Ch. D. 473 p. 489) .....
> .....
> General allegations, however strong may be the words in which they are stated, are insufficient to amount to an averment of fraud of which any Court ought to take notice. (**Wallingford v. Mutual Society** (1880) 5 App. Cas. 685 p. 697) .....
> .....
> The acts alleged to be fraudulent must be set out, and then it must be stated that these acts were done fraudulently, otherwise no evidence in support of them will be received (Re **Rica Gold Washing Co.** (1879) 11 Ch. D. 36) ....."

It follows from the above-mentioned provisions regarding the pleading of fraud that when Edwards, J. looked at the pleadings if he did not find compliance with these requirements he should have advised himself that there were no allegations of fraud of which he ought to take notice. So the question naturally arises "What are the allegations of fraud on which he made the order that the plaintiffs are entitled to maintain a derivative action on behalf of the thirteenth defendant? It would rather appear that the plaintiffs had resiled from the charge of fraud mentioned in the endorsement to the Writ because in none of the twenty-four paragraphs in the Statement of Claim can there be found even a general allegation of fraud let alone any charge of fraud pleaded with the utmost particularity. In his judgment, the learned judge said:

> "There is a veiled suggestion of fraud on the minority. It is not established that those in control did not do anything as they were not told of the action."

Then later he said:

> The question is whether the plaintiffs are entitled to continue this matter. I come to the conclusion with a great deal of difficulty, that at this stage, a question of fraud is alleged by the plaintiffs. They should be entitled to maintain a derivative action for the benefit of the thirteenth defendant. All we have here are allegations. I think that it would come within the exception to the rule in **Foss v. Harbottle**. The question of fraud, not ultra vires, should be dealt with properly at a trial. This matter should proceed to trial so that the matter can be resolved. Fraud is alleged, all directors concerned are involved as parties to the action."

As I have shown earlier, this omnibus finding concerning the directors would result in directors who had nothing whatsoever to do with the transactions being unnecessarily involved in a lengthy litigation. Further, those directors who are involved would not be able to meet the allegations of fraud because of the non-compliance with the requirements for pleading fraud.

Although no Court ought to take notice of general allegations of fraud we did, with counsel, examine the voluminous affidavit evidence filed as counsel spared no effort in the endeavour to show that the order made by Edwards, J. was done in error and we came away empty-handed. No fraud was disclosed. For instance, in contending that the directors acted fraudulently it must be shown that they, as directors, stood to gain some benefit. In **Prudential v. Newman Industries (No. 2)** (1980) 2 All E.R. 841 at page 859A-B, the principle is stated thus:

> "Thus the authorities show that the exception applies not only where the allegation is that directors who control a company have improperly appropriated to themselves money, property or advantages which belong to the company or, in breach

> "of their duty to the company, have diverted business to themselves which ought to have been given to the company, but more generally where it is alleged that directors though acting 'in the belief that they were doing nothing wrong' (per Lord Lindley MR in **Alexander v. Automatic Telephone Co.** [1900] 2 Ch 56 at 65) are guilty of a breach of duty to the company (including their duty to exercise proper care) and as a result of that breach obtain some benefit."

This element of benefit is a sine qua non in the proof of fraud against directors. But one would search in vain to find evidence of such benefit.

The affidavit of William Wilberforce Bertram, secretary of T.C.J., discloses that the relevant directors were aware of the duty to exercise proper care. Accordingly, they did not just rush to acquire the disputed properties. Alternative sites were considered with certain criteria in mind. Engineers' reports were obtained in respect of all sites under consideration and it was against these criteria that the suitability of the disputed sites was decided and the others eliminated. Then, too, the price of $46 million nett was arrived at after negotiation. The asking price was $54 million nett. Further, at the meetings discussing the choices of sites, the twelfth defendant/respondent declared his interest, left the meeting and took no part in the ensuing deliberations or decision concerning the sites. His action was in accordance with Article 105 of the Articles of Association of the Telephone Company of Jamaica.

Accordingly, I have been unable to identify any tainted conduct by the twelfth defendant/respondent or by any of the other defendants/respondents which can be accommodated under the rubric "fraud".

Despite the thoroughness and eloquence of counsel in defence of their clients, having regard to the path I have adopted in confronting the issue of fraud, I do not regard it as necessary to examine those submissions which all emphasize the fact that there is no question of fraud on the part of any of the defendants/respondents. I must, however, record my appreciation of the very valuable contribution of counsel.

These, then, are my reasons for concurring in allowing the appeal with costs to the defendants/respondents.

GORDON, JA (AG.)

The Plaintiffs Respondents who are shareholders of the thirteenth defendant company Telecommunications of Jamaica Limited (T.O.J), filed suit against the defendants claiming damages for fraud, misrepresentation and/or negligence. The plaintiffs also claimed that acts done by the defendants were ultra vires and fraudulent and that the defendants were in control of the company. On this basis the plaintiffs sought to maintain a derivative action for the benefit of the thirteenth defendant.

By summons dated the 21st August, 1990 the thirteenth defendant sought:

> (i) "An order determining as a preliminary issue in this action the question whether the Plaintiffs are entitled to maintain in this suit a derivative action for the benefit of the 13th defendant.
>
> (ii) Alternatively, liberty to file a defence to the thirteenth Defendant if necessary."

At the hearing of the summons the Plaintiff/Respondent raised in limine the following issues:

> (a) that the summons was not properly constituted.
>
> (b) that the summons was out of time as the pleadings had been closed, summons for Directions fixed for hearing and therefore the application was an abuse of the process of the court and
>
> (c) that the deponents to affidavits filed on behalf of the thirteenth defendant should be ordered to attend for cross-examination.

In an oral judgment delivered on 9th October, 1990 and reduced to writing by the parties hereto, Edwards J. ruled that the plaintiffs were entitled to maintain a derivative action and that it was inappropriate at that stage to order cross-examination. The thirteenth defendant now appealed this order maintaining that arguments were addressed to the learned trial judge on the issues raised in limine by

the Plaintiffs/Respondents and he failed to rule on (a) and (b) (supra) and he ruled on the substantive summons of the thirteenth defendant without the benefit of argument and acted in error in dismissing the thirteenth defendant's summons.

As the Respondents still have their personal action to be tried, I will deal only with so much of the facts as I deem necessary for the purpose of the decision arrived at.

The thirteenth defendant is a company duly incorporated on 19th May 1987 with registered offices at 47 Half Way Tree Road in St. Andrew. The purpose for the formation of the company is stated in the affidavit of William Bertram, the senior Vice President, finance and Secretary of the thirteenth defendant. This affidavit was sworn in support of the summons filed by the thirteenth defendant dated 21st August, 1990 and the deponent therein stated:

> "3. The Thirteenth Defendant was formed for the purpose of implementing a joint venture between the Government of Jamaica and the Second Defendant, Cable and Wireless (West Indies) Limited, with the objective of acquiring ownership of Jamaica International Telecommunications Limited (hereinafter called "Jamintel") and the Jamaica Telephone Company Limited (hereinafter called "JTC") in order to centralise the business of telecommunications in Jamaica.
>
> 4. In furtherance of the joint venture the Government of Jamaica transferred its entire shareholding in JTC to the Thirteenth Defendant in return for shares in the Thirteenth Defendant and subsequently, the Thirteenth Defendant acquired the remaining shares in JTC in exchange for shares in the Thirteenth Defendant. The Second Defendant and the Government of Jamaica also transferred all their shares in Jamintel to the Thirteenth Defendant in return for shares in the Thirteenth Defendant, thereby rendering Jamintel and JTC wholly owned subsidiaries of the Thirteenth Defendant.

5. The Thirteenth Defendant was formed as a private Company with an authorised share capital of One Thousand Million Jamaican Dollars ($1,000,000,000) and of its issued share capital 53.1 per cent of the shares were owned by the Government of Jamaica, and 39 per cent of the shares were owned by the Second Defendant from 2nd March 1988. In June 1989, the Second Defendant acquired a further 20 per cent of issued shares of the Thirteenth Defendant to bring its total share-holding to 59 per cent, which now makes the Second Defendant the owner of the majority of the issued shares of the Thirteenth Defendant.

6. On the 1st July 1987, the Articles of Association of the Thirteenth Defendant were duly amended to effectually convert the Thirteenth Defendant from a private company to a public company.

The affidavit of Mr. Bertram states that prior to the formation of the thirteenth defendant and as part of negotiations between the Government of Jamaica and the second defendant, the JTC requested the parent company of the second defendant in the U.K, Cable and Wireless PLC of the U.K of Great Britain to conduct a survey of the JTC's operations to assess the needs and make recommendations. Cable and Wireless PLC a company of undoubted expertise and repute sent a team to Jamaica to carry out a survey and this team's report was submitted to the Government in due course. The team recommended improvements that would result in the increase in JTC's customers from the then existing 90,000 to approximately 250,000 with this being doubled every ten years. The improvement would render the operations of JTC viable and the service it offered comparable with that in other countries. The team recommended the siting of telephone service centres on land of 12 to 20 acres. The circumstances of the acquisition of sites necessary to implement this recommendation is the basis of the complaint of the plaintiffs/respondents in this suit.

On or about 2nd September, 1988 the thirteenth defendant issued a prospectus dated 31st August, 1988 offering to the

public 105,400,000 shares in the thirteenth defendant company at a price of $0.60 per share. At the time of this offer the first defendant owned (on behalf of the Government of Jamaica) 53.1 per cent and the second defendant 39 per cent of the issued shares of the thirteenth defendant. The application list for this public offer of shares opened on the 21st September, 1988 and closed on the 28th September, 1988. Shortly after the allotment of shares they were listed on the Jamaica Stock Exchange. At the time of offer, the thirteenth defendant was actively contemplating the acquisition of two sites one at Washington Boulevard and the other at Newport West in St. Andrew. Both sites "came closest to meeting the ideal requirements for the company's concept of telephone service centres." The management team of the JTC had entered into discussions with the owners of the sites, Commercial Development Limited which was wholly owned by Industrial Commercial Development Limited (ICD), a public company whose shares are listed on the Jamaica Stock Exchange, for the purchase of the sites. The owners asked $54 Million net of all legal and transfer costs. The team offered $43.9 Million net. The negotiations continued and the Board of the JTC was asked to approve of the purchase of the two properties at a figure not exceeding $46 Million net with the buyer being responsible for all transfer costs. On 24th October, 1988 about 10.30 a.m the Directors of JTC considered the submissions of the negotiating team and unanimously approved the purchase of the sites at Newport West and Washington Boulevard for a maximum net price of $46 Million. At about 2:00 p.m the same day the Board of Directors of the thirteenth defendant met and ratified the decision taken by the Board of Directors of JTC to purchase the two sites.

The Plaintiffs alleged that the sites were purchased at a gross over-value and that this was probably influenced

by the twelfth defendant, Mr. Mayer Matalon, the Chairman of the Board of Directors of JTC and TCL who was also a shareholder and director of the vendor Development Properties Limited, and Industrial Commercial Development.

The Newport West property comprised some 16 acres and the asking price was $35.00 per square foot, that is, approximately $24.5 Million net. The site at Washington Boulevard was six acres, the asking price was $48 per square foot or approximately $12.5 Million net. This was the position when consideration of the acquision of the sites was in progress in August 1988. In a letter to the Chairman of the Board of Directors of JTC dated October 11, 1988; Mr. Neville Saddler, senior Director, pointed out that the asking price of $12.5 Million net for the Washington Boulevard site referred to the land only "and that the cost of building (thereon) 74,000 square feet would be in the order of $10.0 Million. This would give a composite asking price of the order of $96.00 per square foot (Land and building)." It is accepted that there was a substantial building on the Washington Boulevard site. The total asking price for the two sites was thus $24.5 plus $22.5 = $47 Million net.

In accordance with the accepted practices, valuations were had from three independent and qualified valuators. They gave these valuations:

Valuator	Date	Newport West	Washington Boulevard	Total
Langford & Brown	7. 9.88	24m	25m	49m
C.D Alexander & Co.	21. 9.88	10.5m	27.1m	37.6m
Allison Pitter & Co	14.10.88	17.4m	14.0m	31.4m

It was against this background that the negotiations for the acquisition of the sites were conducted and concluded in December 1988 for a price of $46 Million net.

The original writ dated 29th March, 1989 had but twelve defendants the thirteenth defendant was added to the writ

approximately one year later on the 25th March, 1990. The particulars grounding the derivative action are contained in paragraphs 17 - 23 of the amended statement of claim. Paragraphs 17 and 18 claim that the defendants one to twelve caused the thirteenth defendant/appellant to purchase the sites for $49,189,200 which was grossly in excess of the true market value. The other paragraphs aver:

> "19. The First and Second Defendants, the Director Defendants and the Twelfth Defendant all fully well knew that the land was not worth or valued at the price paid for it or did not honestly believe that it was or acted in reckless disregard of whether it was or was not and conspired together to have the company purchase the said land at a grossly inflated price as a consequence whereof Telecommunications of Jamaica Limited has suffered considerable loss and damage.
>
> PARTICULARS
>
> | | | |
> |---|---|---|
> | Difference between contract price and market price | = | $30,000,000.00 (Estimated) |
> | Purchaser's costs of transfer | = | 3,000,000.00 (Estimated) |
> | Purchasers Attorney's fees | | 1,000,000.00 (Estimated) |
> | | | $34,000,000.00 |
>
> "20. The purchase of the properties and at the price aforesaid is ultra vires the objects of the Memorandum of Association of Telecommunications of Jamaica Limited particularly insofar as it is expressly declared therein that the company shall carry on its business in accordance with commercial principles which were manifestly absent in the said purchase and also insofar as the properties were not necessary for, cannot be conveniently used with and cannot enhance the value of any other property of the company.

"21. The aforesaid conduct of the First and Second Defendants, of the Director Defendants and t.. the Twelfth Defendant completely disregarded the interest of Telecommunications of Jamaica Limited and of the Plaintiffs and constituted oppressive and unconscionable conduct towards them.

"22. Further and/or in the alternative the said loss and damage arising from the purchase of the properties at a grossly inflated price was caused by the negligence of the Defendant Directors and of the Twelfth Defendant.

PARTICULARS

(i) Failing to pay a reasonable price or to forego the purchase and look for more reasonably priced land,

(ii) Failing to obtain any or an adequate number of professional valuations of the properties;

(iii) Alternatively, disregarding or failing to rely on or on the majority of the professional valuations obtained;

(iv) Relying on their own uninformed valuations of the properties or on their own assumptions as to the proper price to be paid for it.

"23. The First and Second Defendants by their absolute control over the votes of Telecommunications of Jamaica Limited and through the Defendant Director and the Twelfth Defendant who are appointed by them completely overwhelm the Plaintiffs and have refused and/or threaten to refuse to pursue this action against themselves and their Directors in that company's name."

The Summons of the thirteenth defendant appellant seeking to have the court determine as a preliminary issue the right of the plaintiff to maintain the derivative action is grounded in Supreme Court Practice (White Book) 1988 O.15/12/5:

> "Where plaintiffs sue as representative plaintiffs in a minority shareholders or derivative action, the court ought to determine, as a preliminary issue, whether they are entitled so to sue and whether the company was in fact under the control of those alleged to have practised a fraud on it before the court proceeded to hear the main derivative action itself."

This order follows Prudential Assurance Co. Ltd. v. Newman Industries Ltd. (No. 2) 1982 1 ALL ER 354 at 355. There the Court of Appeal held:

> (1) "Although the proper plaintiff in an action in respect of a wrong done to a company was prima facie the company itself, exceptionally a minority shareholder could bring a derivative action where the wrong done to the company amounted to fraud and the wrongdoers were themselves in control of the company and thus able to prevent the company from suing; but when such an action was brought by a minority shareholder the question whether in fact the company was controlled by the alleged wrongdoers should first be determined before the derivative action itself was allowed to proceed."

I accept the authority of Prudential v. Newman (supra) as relevant and applicable to these proceedings. The rationale for this procedure is that "to allow the derivative action to proceed without determining the preliminary issue is an approach which defeats the whole purpose of the rule in Foss v. Harbottle (1843) 2 Hare 461 and sanctions the very mischief which the rule was designed to prevent." Edwards, J. had therefore to determine on the summons brought by the thirteenth defendant appellant whether the derivative action should be allowed to proceed. He resolved the issues, thus:

> "The question is whether the Plaintiffs are entitled to continue this matter. I come to the conclusion with a great deal of difficulty, that at this stage, a question of fraud is alleged by the Plaintiffs. They should be entitled to maintain a derivative action for the benefit of the Thirteenth Defendant.

> All we have here are allegations. I think that it would come within the exception to the rule in FOSS v. HARBOTTLE. The question of fraud not ultra vires should be dealt with properly at a trial. This matter should proceed to trial so that the matter can be resolved. Fraud is alleged, all directors concerned are involved as parties to the action."

Earlier in his judgment he had said:

> "I spent some time agonising and found first that the purchase of the land was not ultra vires ...."

The learned judge here disposed of the claim that the acts done were ultra vires the company. He found that they were intra vires and accordingly the case did not fall within this exception to the rule in Foss v. Harbottle.

For the plaintiffs/respondents to succeed there must be evidence which on the balance of probabilities establishes that this case falls within the exceptions to the rule in Foss v. Harbottle. The evidence must show that fraud has been committed, and that the fraudsters are in control of the company making the company impotent to act in its own protection and therefore the minority needed the protection of the court to so act on behalf of the company. Basic to fraud must be evidence that there has been gain by those in control, the direct result of the fraudulent act complained of. On the evidence the chairman of JTC Limited, Mr. Matalon, attended the meeting of that company on 24th October, 1988.

When the subject of the acquisition of the lands came to be considered and decision taken he declared his interest, withdrew from the meeting and took no part in the discussion and decision. Similarly at the meeting of the Board of Directors of the thirteenth defendant which ratified the decision to acquire the lands, he declared his interest, withdrew from the meeting and had nothing to do with the deliberations.

This action on his part was consonant with ethics and with the Articles of Association and cannot be faulted.

The contract of sale was entered into by two competent and capable parties very experienced in the commercial field. The terms of the agreement do not violate the practice in that field. The court will not interfere in the internal management of a company when the persons appointed to govern the affairs of the company act within the bounds of propriety. The Board of Directors by Article 81 is the body charged with the management of the Company.

There was before the court below no prima facie evidence of fraud to support a derivative action and Edwards, J. fell in error when he accepted "a veiled suggestion of fraud," based on allegations of fraud unsupported by evidence, as sufficient to rule that the matter should proceed to trial.

Overriding these considerations there is a basic defect in the pleadings. Section 170 (1) of the Civil Procedure Code Law requires:

> "In all cases in which the party pleading relies on any misrepresentation, fraud breach of trust, wilful default or undue influence, and in all other cases in which particulars may be necessary beyond such as are exemplified in the Forms aforesaid, particulars (with dates and items if necessary) shall be stated in the pleading."

The pleadings fail to comply with the requirements of this section so on the threshold the plaintiffs action in this respect is barred.

The affidavit evidence which was before Edwards, J. was also before us and was the basis of detailed submissions and references. We were invited to invoke the power contained in Rule 18 (3) of the Rules of the Court of Appeal in the following words: