12/2/2022

Deficiencies in the Civil Procedure Rules:

Deriving Solutions to Derivative Action Applications

Mikhail H. R. Williams, Daynia L. Allen & Timera A. Mason

THE JAMAICAN BAR ASSOCIATION CONFERENCE (2022)

Table of Contents

Introduction 2
Derivative actions and the common law 3
The Companies Act of Jamaica 6
Failure to apply for leave to commence a derivative action 7
Applying for leave 9
Similarities between rule 56.3 and section 212 10
The Courts' approach to applications for leave for judicial review 11
The Courts' guidance on derivative action applications 13
Benefits of specialized rules on derivative action applications 18
A comparison of Form 2 and Form 7 20
The Nature of the Application: Interlocutory or final? 22
Proposed rules 28
Conclusion 31

INTRODUCTION

1. When the Civil Procedure Rules ("the CPR") was first introduced in 2002, it declared itself a "**new procedural code with the overriding objective of enabling the court to deal with cases justly**[1]". Former Chief Justice and Chairman of the Rules Committee at that time Lensley Wolfe, O.J. highlighted a few of the CPR's objectives which included:

    - Simplifying the language and procedures used in the Courts so that members of the public, in particular, can more easily understand the process; and
    - Reduce delays and adjournments so that matters will be disposed of expeditiously.

2. The objectives above suggest that the rules should be a depository of the Court's civil procedures which are written in a manner so simple and clear that any reasonably intelligent member of the public reading it would be able to represent themselves (at least procedurally). Similarly, adherence to the rules will allow the court to focus more on the substance of disputes rather than procedural issues.

3. It is noteworthy that Justice Wolfe's preface includes a sage disclaimer. It reads:

    > **The Rules Committee recognizes that... [t]hese rules will require some fundamental changes in the way in which civil proceedings in the Supreme Court .... are pursued, and no doubt flaws and ways to improve them will be identified**.

4. With the rising need for actions to be brought on behalf of companies due to misconduct or inaction by those who manage them, the Companies Act has created a gateway for complainants to bring an action on the company's behalf. Such claims

[1] Rule 1.1 (1)

are known as 'derivative actions' and pursuant to section 212 of the Companies Act, these actions are commenced by first applying for leave from the Court. Quite similar to the other pieces of legislation, the Companies Act does not give further instructions on how the application should be brought. This is why our Rules of Court are important.

5. However, the CPR does not provide any further and/or specific assistance, and practitioners and litigants are left to determine whether applications for leave should be made by a notice of application for court orders (Form 7) pursuant to rule 11 or by a fixed date claim form (Form 2) pursuant to rule 8. It is this mischief, among others, that this paper addresses.

6. This paper will therefore explore the origin, purpose and effect of derivative actions, identify how our courts have dealt with the applications for leave and propose amendments to the CPR to correct this deficiency.

DERIVATIVE ACTIONS AND THE COMMON LAW

7. Although the focus is on applications to bring derivative actions, it is necessary to consider the common law developments on derivative actions.

8. To borrow Justice Brooks' words in **Cable & Wireless Jamaica v Eric Jason Abrahams**[2], **"the derivative action was born out of a need to correct the potential for injustice that was created by the fact of the separate legal identity which a company possesses"**[3].

9. It is well known that companies have separate legal identities from their officers (whether directors, shareholders or otherwise). Therefore, at common law, where a wrong is done to the company, the general rule is that the company would be the

[2] [2020] JMCA Civ 45
[3] At paragraph 11

proper plaintiff to commence an action in respect of the alleged wrong[4]. This rule has two elements which Jenkins LJ in **Edwards v Halliwell**[5] stated as follows[6]:

> **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 of 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*[7].**

10. The obvious problem created by this rule is that shareholders who are affected by a wrong being done to the company are not able to commence an action against it. Therefore, if the company chooses not to or fails to file an action, the shareholder has no recourse.

11. However, the common law eventually developed an exception this rule - where the company's director commits the wrong against the company. This is how 'derivative actions' were birthed, albeit with restriction. According to the learned authors of the text Company Law[8] to bring a derivative action, a shareholder had to establish **"(i) fraud on the minority and (ii) wrongdoer control which prevents the company itself bringing an action in its own name…"**.[9]

12. Justice Brooks (now President of the Court of Appeal) also commented on this historical position in **Cable & Wireless**. He highlighted the prejudice that the

[4] See Foss v Harbottle (1843) 67 ER 189; (1843) 2 Hare 461
[5] [1950] 2 All ER 1064
[6] At 1066
[7] "Cadit quaestio" meaning "the dispute is resolved".
[8] Hannigan, Brenda, *Company Law*, Lexis Nexis Butterworths, 2003
[9] At page 458

separate legal identity created for shareholders and that the law eventually allowed them to commence an action in limited circumstances. He described those circumstances in this way[10]:

> **...In certain cases, it allowed an individual complaint, such as a shareholder, to initiate, or defend, an action, on behalf of the company, where the persons in control of the company refused to act. The two main cases are where, firstly, the action complained of is fraudulent, or secondly, is outside the authority of the company's memorandum of association....**

13. Justice Brooks then cited the Privy Council decision in **Burland and Others v Earle and Others**[11] which makes the state of the common law even clearer:

> **…But an exception is made to the second rule, where the persons against whom the relief is sought themselves hold and control the majority of the shares in the company, and will not permit an action to be brought in the name of the company. In that case, the courts allow the shareholders complaining to bring an action in their own names. This, however, is mere matter of procedure in order to give a remedy for a wrong which would otherwise escape redress…The cases in which the minority can maintain such action are, therefore, confined to those in which the acts complained of are of a fraudulent character or beyond the powers of the company...**

14. The takeaway from the common law's interaction with derivative actions is simply that it sought to cure a deficiency in the law that saw one vulnerable group of stakeholders being prejudiced by its inability to obtain redress. However, Parliament stepped in to enact legislation to improve on the common law position.

[10] At paragraph 12
[11] [1902] AC 83

THE COMPANIES ACT OF JAMAICA

15. Parliament's solution to that issue in Jamaica comes in the form of section 212 of the Companies Act. This section provides that:

> **(1) Subject to subsection (2), a complainant may, for the purpose of prosecuting, defending or discontinuing an action on behalf of a company, apply to the Court for leave to bring a derivative action in the name and on behalf of the company or any of its subsidiaries, or intervene in an action to which any such company or any of its subsidiaries is a party.**
>
> **(2) No action may be brought, and no intervention in an action may be made under subsection (1) unless the Court is satisfied that—**
>
> **a) the complainant has given reasonable notice to the directors of the company or its subsidiary of his intention to apply to the Court under subsection (1) if the directors of the company or its subsidiary do not bring, diligently prosecute or defend, or discontinue, the action;**
> **b) the complainant is acting in good faith; and**
> **c) it appears to be in the interests of the company or its subsidiary that the action be brought, prosecuted, defended or discontinued.**
>
> **(3) In this section and section 213 and 213A, "complainant" means—**
>
> **a) a shareholder or former shareholder of a company or an affiliated company;**
> **b) a debenture holder or former debenture holder of a company or an affiliated company;**
> **c) a director or officer or former director or officer of a company or an affiliated company.**

16. The Companies Act has therefore altered the common law in several ways[12], but we will focus on two which we consider significant.

17. First, to commence a derivative action, a litigant is required to first obtain leave from the Supreme Court; and, second, the "proper plaintiffs" include a wider group of stakeholders who can seek to commence a derivative action.

18. Where a wrong is done to the company, the Companies Act provides that current and former shareholders, directors and debenture holders can apply for and obtain the Court's approval to give instructions on behalf of the company to sue or defend a claim.

FAILURE TO APPLY FOR LEAVE TO COMMENCE A DERIVATIVE ACTION

19. A key element arising from the Companies Act is the requirement for permission to commence a derivative action. There are cases coming from our Courts that have made it clear that where litigants do not follow the procedure provided for under the Companies Act there are consequences. The decision of Justice Batts in **Courtney Wilkinson & John Levy v Gerard Charles Chambers & Ors.**[13] is an example.

20. In that case, the claim concerned the way in which West Indies Petroleum Limited was being managed by the board of directors who were named defendants. The claim was framed as a shareholder oppression action, but what the claimants effectively sought were remedies for a derivative action. The claimants did not seek permission before filing the claim.

[12] The Companies Act widened the offences for which a derivative action may be brought, removed the requirement to prove the wrongdoer controls the company, and altered the common law so that the derivative action is brought in the company's name instead of the complainant's own name.
[13] [2021] JMCC Comm 41

21. Justice Batts agreed with Counsel for the Defendants that it was a necessary pre-condition for claimants/applicants to apply for leave to bring such an action. He stated:

> **Errors, neglect, fraud and, abuse of authority in the operation of a company will affect all debenture holders, officers, directors and, shareholders. The statutory scheme provides a remedy for that in Section 212. It is a remedy which has preconditions to safeguard against frivolous claims by disgruntled debenture holders, directors or shareholders who may wrongfully use the court's process to interrupt or interfere with the running of the company…The point, being made here, is that there is a very good reason for the statutory scheme. It is to ensure that the Section 213A oppression claim is reserved for complaints of direct injury to a Claimant personally in his capacity as debenture holder shareholder and/or director and/or officer (or a former holder of any of those positions), and not, for issues primarily related to injury to the company. This principled approach applies regardless of the size of the company involved.**[14]

22. As result, Justice Batts struck out Messrs. Wilkinson and Levy's claim.

23. In the earlier decision of **Valley Slurry Seal Caribbean & Anor v Valley Slurry Seal Company & Anor**[15], Justice Mangatal struck out a claim for failure to apply for leave to commence the derivative action. At the hearing before her, counsel for the claimants argued, unsuccessfully, that the failure to obtain leave from the court before commencing a derivative action did not necessarily mean that the claim should be struck out. Justice Mangatal rejected that argument and found the failure to obtain permission to commence derivative actions was a **'jurisdictional issue'**, not merely a procedural misstep.[16] *(Our underlined emphasis)*

[14] At paragraph 9
[15] [2012] JMCC Comm. 18
[16] At paragraph 13

24. Our courts have consistently held that a jurisdictional issue will either be an irregularity or a nullity.

25. In **Joseph Nanco v Anthony Lugg & Anor**[17] McDonald-Bishop, J (as she then was) explained that "**It is well established in the law of civil practice and procedure that while an irregularity can be waived, a nullity cannot be...**"[18]

26. The Privy Council confirmed this position in a separate appeal from Jamaica and explained that a nullity included "**proceedings which appear to be duly issued but fail to comply with a statutory requirement."**[19]

27. In any event, the authorities are clear on the point that a failure to utilize the procedure provided for in the Companies Act, that is, applying for leave to commence the derivative action, will likely result in the claim being struck out.

28. The critical question therefore becomes, how do litigants and practitioners properly apply for leave to commence a derivative action? And how can the CPR properly guide litigants and practitioners to prevent claims being struck out? These and other questions are discussed below.

APPLYING FOR LEAVE

29. Having established that the failure to apply for and obtain leave before bringing a derivative action is fatal, one would expect the CPR to explain the procedure for making such an application.

30. However, the CPR does not indicate how applications for leave to bring a derivative action should be commenced. In the absence of specific rules on how to apply for leave to bring a derivative action, the natural inclination is to adopt the procedure used in

[17] [2012] JMSC Civ 81 (see also **Vendryes v Keane and Anor** [2011] JMCA Civ. 15)
[18] At paragraph 39
[19] See Leymon Strachan v The Gleaner Company Limited and Another [2005] UKPC 33 at paragraph 26.

applications for leave to apply for judicial review since those claims also include a requirement to first obtain leave from the court.

31. To that end, there are striking similarities between applications for leave in judicial review proceedings, and derivative actions.

SIMILARITIES BETWEEN RULE 56.3 AND SECTION 212

32. Perhaps the most obvious similarity between judicial review proceedings and derivative action proceedings is in the language used.

33. Rule 56.3(1) provides that: "**A person wishing to apply for judicial review must first obtain leave.**" Although not identical, it is similar to section 212 of the Companies Act which states that "**a complainant may… apply to the Court for leave to bring a derivative action**." Both provisions require applicants to obtain the court's permission to bring proceedings for certain relief.

34. Another similarity is the purpose the requirement for leave serves. As mentioned earlier in paragraph 21 above, Justice Batts noted in **Courtney Wilkinson**, that section 212 "**has preconditions to safeguard against frivolous claims by disgruntled debenture holders, directors or shareholders who may wrongfully use the court's process to interrupt or interfere with the running of the company".**

35. Justice Pettigrew Collins made the same observation about applications for leave to apply for judicial review in **Dale Austin v The Public Service Commission et al**[20]. In her own words:

> **The primary role of the court at this stage, is to ensure that actions which are frivolous and vexatious are sifted out and eliminated, so that leave is**

[20] [2022] JMSC Civ. 55, at paragraph 17

not granted where an action is without any arguable ground, having a realistic prospect of success.

36. The purpose of requiring leave, therefore, is to safeguard body corporates or public bodies from frivolous or vexatious interference with the discharge of their corporate or public functions.

37. Finally, the leave application in either case is not a trial of the merits of the proceedings for which leave is being sought.

38. In **Dale Austin**, Justice Pettigrew Collins stated that "**At the leave stage, the court is concerned with** whether **the threshold [for granting leave] is met. The court is not concerned with the merits of the case…**" [21]

39. In **Sally Ann Fulton v Chas E Ramson Ltd**[22], Justice Sykes (now Chief Justice) indicated that "**This court accepts that at [the application for leave] stage it is not a trial of the ultimate issues."**[23]

40. It is clear however, that Part 56 of the CPR does not indicate how the application for leave to bring a judicial review application is to be commenced. Instead, the Courts have had to provide a solution from the Bench. We discuss the Courts' position below.

THE COURTS' APPROACH TO APPLICATIONS FOR LEAVE FOR JUDICIAL REVIEW

41. The Courts have sought to rectify the CPR's failure to indicate how applications for leave to apply for judicial review should be made by ruling on the proper procedure.

[21] At paragraph 14
[22] [2016] JMSC Comm 14
[23] At paragraph 96

42. In **Lafette Edgehill and Others v Greg Christie**[24] the appellants (being the claimants below) filed two sets of documents: (1) a fixed date claim form seeking leave to apply for judicial review and (2) fixed date claim form seeking judicial review. Both sets of documents were filed on the same day and supported by affidavits. The Court granted permission on the leave application but did not order the judicial review claim to be filed within 14 days of the order granting leave, as required by the rules[25]. The claimants/appellants sought to rely on the judicial review claim form filed before the leave was granted.

43. The first hearing of the 'judicial review' claim came before Justice Rattray who ruled that the Court had no jurisdiction to entertain the application for judicial review on the basis that the judicial review claim pre-dated the order granting leave to apply for judicial review. The appellants appealed.

44. Justice Phillips started her reasons for dismissing the appeal by indicating that the sole issue was whether the fixed date claim form which was before Justice Rattray was valid. She indicated[26]:

> **There is no question that under the CPR, proceedings are started when the claim form is filed... Generally, when the [fixed date claim form] is issued, the registry must fix a date, time and place for the first hearing of the claim... but this is not an application for judicial review... the application for leave is preliminary to the claim commencing, as leave is required for the claim to have efficacy.**

45. Justice Phillips then acknowledged that the CPR did not state how the application for leave was to be made but reasoned that it should commence by notice of application. She explained[27]:

[24] [2012] JMCA Civ 16
[25] See Rule 56.4(12)
[26] At paragraph 65
[27] At paragraph 66

> **... the rules do envisage an application being made before the claim is issued, which must be made to the registry where it is likely that the claim to which the application relates will be made (rule 11.5(3)). This is relevant to the application for leave to apply for judicial review, as the notice of application is filed with an accompanying affidavit before the claim is filed....**

46. In her decision she relied on rule 11.5 (3) which she indicated envisages "an application being made before the claim is issued..." It is important to note, that rule 8.1 (5) provides that where a remedy is sought "**before proceedings have started**", it must be sought by application under Part 11.

47. In Justice Phillips' view, the application for leave to bring a judicial review claim was considered a step "**preliminary to a claim**", and in those circumstances it was appropriate to seek leave by using a notice of application for court orders. One may argue that "**before proceedings have started**"[28] and "**preliminary to a claim**" mean the same thing. In fact, in **Suzette Curtello v University of the West Indies**[29] Justice Phillips says definitively: "**The refusal to grant leave to appeal to proceed to judicial review is clearly an interlocutory judgment, and therefore leave is required to appeal the same (see section 11(1) (f) of the Judicature (Appellate Jurisdiction) Act).**"

THE COURTS' GUIDANCE ON DERIVATIVE ACTION APPLICATIONS

48. Given the similarities between applications for leave to apply for judicial review, and derivative action applications, one might logically conclude that the same procedure would apply. That is not a conclusion supported by the Courts.

[28] As envisaged by Rule 8.1(5)
[29] [2018] JMCA App 37, at paragraph [25]

49. In Earle Lewis and Another v Valley Slurry Seal Company and Others[30], the applicants sought leave to bring a derivative action by filing a notice of application with supporting affidavit and Justice Mangatal observed[31]:

> **As I indicated ... whilst hearing this matter, it seems to me that this application should perhaps have been brought by way of an originating proceeding, in particular a Fixed Date Claim Form, supported by an Affidavit.....**
>
> **In our jurisdiction, petitions have been reserved mainly, when dealing with company matters, for winding up proceedings. Other applications to do with companies which require a summary proceeding, used to be made by originating summons, and under the CPR 2002, by way of Fixed Date Claim Form....[32]**

50. It is not known whether there were fulsome submissions on the use of the fixed date claim form or notice of application for court orders, however, the learned Judge exercised her powers under rule 26.9 (3) to treat the application before her as if it was made by fixed date claim form. The powers exercisable under rule 26.9 (3) can be invoked of the court's own motion.

51. In 2021, Justice Brooks set out certain factors which he stylized as "guidance" for future cases of a similar nature in **Chas E Ramson Limited v Sally Ann Fulton**[33]. He was careful, however, to state that his guidance was being made "**Without being compendious and recognising that each case will depend on its own circumstances."[34]**

52. The first factor he identified was:

[30] [2013] JMCC COMM. 21
[31] At paragraphs 15 and 16
[32] See rule 8.1 (4) (f)
[33] [2021] JMCA Civ 54
[34] At paragraph 81

> **...applications for leave pursuant to section 212 of the Act should be made by fixed date claim form;**

53. He did not explain why applications under section 212 should be commenced by fixed date claim form, unlike Justice Mangatal who provided some reasoning for her selection. In fairness, this was not a direct issue on appeal. That appeal was concerned with the statutory interpretation of the standard of proof and evidentiary tests applicable to complainant applicants.

54. In 2022, Justice McDonald-Bishop upheld a decision where a derivative action application was struck out at first instance for disclosing no reasonable grounds for being brought[35]. It was argued before the appellate Judge that the derivative action application was not a 'claim' capable of being struck. In dismissing that ground, Justice McDonald-Bishop referred to Justice Brooks' guidance in his 2021 decision which she described as "**the procedure [laid down] to be employed when dealing with applications for leave to bring derivative actions**." [36]

55. She went on to state[37]:

> **Indeed, the appellant cannot proceed by way of fixed date claim form supported by an affidavit and then contend that the rules applicable to fixed date claim forms and admissibility of evidence by way of affidavit should not be applied to her case. With the originating process for leave being by fixed date claim form, the company would have had no recourse but to apply for the court to deal with the originating process that was before it, which was the fixed date claim form supported by affidavit. The process used by the appellant is the accepted procedure in this jurisdiction for commencing an application for leave to bring a derivative action. Therefore, the fixed date**

[35] Sally Ann Fulton v Chas E Ramson Limited [2022] JMCA Civ 21
[36] At paragraph 18
[37] At paragraph 21

> **claim form and the supporting affidavit stood together for the consideration of the learned judge as the appellant's statement of case, which embodied her application for leave to bring the derivative action.**

56. Viewed in the context of what was before the Court, Justice McDonald-Bishops' statement above is perfectly understandable. However, in the context of whether the derivative action application *should* be considered as a claim, the statement seems to offer a tautological argument: It is a claim because it is commenced by a fixed date claim form.

57. The other factors listed by Justice Brooks are as follows:

> 1) **the company which is the subject of the alleged abuse should be the named respondent;**
> 2) **the claim should be supported by affidavit evidence which addresses all elements of section 212;**
> 3) **as best practice, although not a requirement, a proposed particulars of claim for the derivative action sought, should be exhibited;**
> 4) **the hearing of the application is intended to be a summary procedure to permit the chambers judge to quickly determine whether a complainant may institute a derivative claim;**
> 5) **there is unlikely to be significant cross-examination at the hearing although there may be affidavit evidence from both the applicant and the company;**
> 6) **the hearing is not a trial; it is aimed at determining whether the applicant should be given leave to initiate the derivative action, not deciding on the merits of the applicant's complaint;**
> 7) **in determining whether the provisions of section 212(2) have been satisfied, the chambers judge should be guided by:**
>
> i. **the ordinary civil standard;**
> ii. **the principles governing hearings which are not trials; and**
> iii. **a non-elevated cogency for the standard of proof;**

8. **"[t]he granting of leave is not automatic, but requires the court to exercise a judicial discretion. In deciding whether to grant leave, the court must balance the clear policy of the section to protect the legitimate interests of persons who fit within the definition of 'complainant' and the at least equal interest in avoiding undue interference with corporate management that is being conducted in good faith, as well as the need to avoid a multiplicity of actions"; and**
9. **a distinction must be drawn between the entitlement to commence a derivative action, which is for the benefit of the company, and an oppression action, which supports an individual shareholder's interest, but the two are not mutually exclusive and the simultaneous pursuit of both is not necessarily an abuse of the process of the court.**

58. Without a doubt Justice Brooks' judgment is incredibly helpful in filling the void left by Companies Act and the CPR.

59. Another dimension to this discussion relates to the type of orders that the Court should make for the derivative action when it grants leave. Section 213 of the Companies Act provides that the Court may, in connection with an action brought or intervened in under section 212, make such interim or final order as it thinks fit, including –

a. **authorizing the complainant, the Registrar or any other person to control the conduct of the action;**
b. **giving directions for the conduct of the action;**
c. **directing that any amount adjudged payable by a defendant in the action be paid, in whole or in party, directly to the former and present shareholders or debenture holders of the company or its subsidiary, instead of to the company or its subsidiary; or**
d. **requiring the company or its subsidiary to pay reasonable legal fees incurred by the complainant in connection with the action.**

60. It would seem therefore that the Court has wide powers to make orders or directions, whether final or interim, as it thinks fit.

61. In another decision by Justice Batts[38], he had to consider an application by a Company (the subject of a successful derivative action application), for it to pay the successful complainant's legal fees. In granting that application, Justice Batts opined[39]:

> **On the matter of providing for the costs of the derivative litigation it is manifest that, although always discretionary, the usual order should be for the company to bear the costs. The request for leave is the methodology by which it is established that the claim is in the interest of the company. The benefits if any will go to the company. An interested party who has borne the costs, related to a successful application for leave, should not except in some unusual circumstance be also asked to pay the costs of the action.**

62. It is to be noted, however, that in that claim before Justice Batts, the complainant was not a named party. Indeed, the leave stage had long been passed, and the application for payment of costs to the successful complainant applicant was made in the derivative action claim. It seems that it should rightly have been an order sought in the application, and not in the derivative action claim.

63. Perhaps, it would be beneficial for the CPR to state what orders the court may make when it grants a derivative action application.

BENEFITS OF SPECIALIZED RULES ON DERIVATIVE ACTION APPLICATIONS

64. In light of these issues, there are some benefits to creating specialized rules which govern the procedure for making derivative action applications in Jamaica.

[38] See **Chas E Ramson Limited v John Ramson & Ors**. [2022] JMCC Comm 28
[39] At paragraph 14

65. Firstly, clearly defined rules in this area will make it easier for complainants to access the Court. This fulfils one of the objectives of the CPR[40] to simplify the language and procedures used in the Courts and the overriding objective.

66. In 2020, The World Bank's Doing Business Index identified among other things "**simplified judicial procedures**" as a key indicator of the ease of conducting commercial activities. According to the World Bank, the jurisdictions which offer simpler, clearly defined procedures to access courts to solve commercial disputes, scored higher on the quality of judicial processes index and ranked higher overall[41]. Specialized rules would therefore have some effect on Jamaica's standing on the Index.

67. Secondly, it is clear that derivatives actions are necessary modern devices which are used to hold boards accountable and to protect companies' commercial interests. Robins JA succinctly explained the utility of derivative actions in **Richardson Greenshields of Canada Limited v Kalmacoff and others**[42]**.** He said, in part:

> **In deciding whether leave should be granted, it should be borne in mind that a derivative action brought by an individual shareholder on behalf of a corporation serves a dual purpose. First, it ensures that a shareholder has a right to recover property or enforce rights for the corporation if the directors refuse to do so. Second, and more important for our present purposes, it helps to guarantee some degree of accountability and to ensure that control exists over the board of directors by allowing shareholders the right to bring an action against directors if they have breached their duty to the company…**[43]

[40] See paragraph 1 above.
[41] https://documents1.worldbank.org/curated/en/688761571934946384/pdf/Doing-Business-2020-Comparing-Business-Regulation-in-190-Economies.pdf pages 6 and 34.
[42] (1995) 22 OR (3d) 577; 123 DLR (4th) 628; 80 OAC 98; 18 BLR (2d) 197; [1995] OJ No 941 (QL); 54 ACWS (3d) 477
[43] At paragraph 21 (see also: **Sally Ann Fulton v Chas E. Ramson Limited** [2016] JMSC Comm 14, cited at paragraph 58)

68. Thirdly, specialized rules will save the court's time and resources. With the implementation of specialized rules, judicial time will be utilized more effectively because parties will spend less time arguing about the procedure to commence the derivative actions, the proper parties to the proceedings and the orders that should be sought.

69. It should be noted that the UK's Civil Procedure Rules include a rule governing derivative claims[44], but the law governing derivative actions there is different from our own[45]. In the UK, applicants must file and serve the derivative action claim first, and then seek permission for the claim to continue.[46]. In Jamaica, it is the reverse.

70. Since the CPR is silent on how these applications are to be made, the Court of Appeal has indicated what the required procedure is for making derivative action applications. However, as we are unable to locate a judgment that does a comparison of the respective forms, we discuss the use of the forms below.

A COMPARISON OF FORM 2 AND FORM 7

71. We previously reviewed the Courts' decisions directing complainants to seek leave to bring a derivative action by way of fixed date claim forms (Form 2). On the lower courts, the Court of Appeal's decisions on this issue are binding, however, they are not binding on the Rules Committee who can determine that the application should be brought by notice of application for court orders (Form 7). We make the case for using notices of applications for court orders instead of fixed date claim forms below.

72. It must first be admitted that the two forms are very similar in that they name the parties involved, give notice of the date, time and place of the hearing to the respondent, are supported by affidavit evidence, and are considered summarily in chambers by a judge who exercises case management powers.

[44] See Rule 19.9 [UK]
[45] In the UK, the derivative action claim is first filed and served, and then permission is sought to "continue" the claim, whereas the Companies Act requires permission to be sought to "bring" a derivative action claim.
[46] See Rule 19.9 (3) [UK]

73. However, there are 2 practical differences between them. The first difference concerns stamp duty. Fixed date claim forms are liable for the payment the stamp duty on filing. If we accept this form as the proper procedure to commence a derivative action then the natural consequence is that if the application is granted, stamp duty will have to be paid twice – (1) for the application seeking leave and (2) for the substantive claim.

74. By contrast, if, the application for leave is commenced by a notice of application for court orders then stamp duty will only be paid when the application is granted, and the derivative action claim is to be filed.[47]

75. In judicial review proceedings, leave is sought by notice of application for court orders, and if leave is granted, the same claim number from the notice of application for court orders is used to file the fixed date claim form. It is the fixed date claim form on which stamp duty is to be impressed. The same does not apply for derivative action applications. If leave is granted, the derivative action claim is issued with a new claim number and the parties may change.

76. The other, more substantial difference concerns the evidentiary rules which apply to the different forms.

77. The general rule is that an affidavit should only contain facts known by the deponent from his or her own knowledge[48]. This is acknowledged as the CPR's codification of the rule against hearsay evidence, which applies to affidavits filed in support of fixed date claim forms. However, the CPR permits hearsay evidence in procedural or interlocutory proceedings, but the source of the hearsay information must be identified in the affidavit[49].

[47] The Judicature Rules of the Supreme Court (Fees) (Amendment) Order, 2016
[48] Rule 30.3 (1)
[49] Rule 30.3 (2) (b)

78. The apparent conflict in determining the proper procedure to commence a derivative action claim is whether the application seeking leave falls into the exception to the rule against hearsay.

THE NATURE OF THE APPLICATION: INTERLOCUTORY OR FINAL?

79. At paragraph 39 above, we mention Justice Sykes' 2016 decision in **Sally Ann Fulton**. In that case, Justice Sykes reviewed cases from Canada, New South Wales and Singapore where there are statutory requirements for complainants to apply for permission to bring a derivative action. He compared those jurisdictions to ours in order to determine if our Companies Act: (1) imposed an elevated standard of proof for applications for leave to bring a derivative claim, (2) required a subjective test to prove the applicant's good faith, and (3) required a lower threshold to prove that the requested action *appears* to be in the interest of the company.

80. On the first and second issues, Justice Sykes found that the ordinary civil standard of 'on a balance of probabilities' applies, and the applicant's good faith is to be an honestly held belief[50], that is, it is an entirely subjective test. On the third issue, he held[51]:

> **...The consequence then, given that this application is not a final hearing to determine whether the claim has been made out, given that the permission is to commence or continue a claim, given that it is exceedingly rare for cross examination to take place on the affidavits, given that the judge at this stage like the judge on injunction applications is not to resolve conflict of evidence (and there usually is because hostility between the factions is frequently present) the cogency of evidence required could not possibly be that required for fraud or anywhere near that level of cogency. It has to be at the other end of the sliding scale of cogency.**

[50] Paragraph 76
[51] Paragraph 96

81. Justice Sykes' conclusion on the third issue seems to lend support to the view that the derivative action application is, **'preliminary to the derivative action.'** Arguably, it also suggests that the application is similar to an application for leave to bring a judicial review claim.

82. Justice Sykes' decision was upheld by a majority in the Court of Appeal in 2021[52]. The dissenting Judge disagreed with Justice Sykes' conclusion that "good faith" was to be construed as entirely subjective test, and with his factual finding that the application was not motivated by the applicant's self-interests. The Court did not seem to disturb his reasoning quoted at paragraph 80 above.

83. In a separate 2019 decision[53], Justice Batts granted a company's application to strike out a derivative application on the basis that the claim disclosed no reasonable grounds for being brought. He held that the applicant sought to rely on inadmissible hearsay statements in breach of rule 30.3 (1) in support of the application for leave. The applicant deponed that she had received information from an informant who did not wish to identify themselves or to be a part of the proceedings.

84. According to Justice Batts[54]:

> **.... In the case before me the Claimant is relying on information that she received from an individual within the company who wishes to remain anonymous. The Claimant has no evidence to show that what was said to her is true.…I agree with Defence counsel that the Claimant cannot be allowed to rely on hearsay evidence in order to prove her claim.**
>
> **I find that this application, not being interlocutory in character or falling within the ambit of the exceptions, the evidence being relied on by the**

[52] **Chas E. Ramson Limited v Sally Ann Fulton** [2021] JMCA Civ 54, before Brooks, Sinclair-Haynes and F. Williams, JJA (Sinclair-Haynes, JA dissenting).
[53] **Sally Ann Fulton v Chas E. Ramson Limited** [2019] JMSC Comm 32
[54] At paragraphs 24 – 26

> **Claimant is inadmissible hearsay evidence. The Claimant is not allowed to rely on facts, the proof of which, she has no admissible evidence. In this case the claimant has in any event failed to state the source of her information and belief. It is manifest that the evidence is based largely on conjecture... The Claimant has, due to lack of evidence, failed to show any reasonable ground for the grant of leave to bring a derivative action.**
>
> **In summary, the Claimant's use of hearsay evidence to support her claim, as well as the absence of evidence in proof of her assertions, preclude an order giving leave to bring a derivative action…"**

85. There is no equivocation about Justice Batts' decision. He does not consider the derivative action application interlocutory, and the absence of admissible evidence in proof of the applicant's assertions precluded the court from granting leave. That decision was upheld by the Court of Appeal in 2022.[55]

86. As we mentioned earlier, Justice McDonald-Bishop accepted that the application for leave to bring a derivative action, commenced by fixed date claim form, was a claim capable of being struck out. In the course of her decision, the learned Justice of Appeal gave three reasons why she accepted Justice Batts' decision as correct.

87. Firstly, on whether the claim was procedural, she cited a passage from the Hong Kong Courts[56] where Peter Ng, J stated, in part[57]:

> **...The legal position is clear – whether a shareholder can commence a derivative action in the name and on behalf of the company is a matter of substantive law, and is governed by the law of incorporation ie *lex incorporationis*...**

[55] **Sally Ann Fulton v Chas E. Ramson Limited** [2022] JMCA Civ 21.
[56] **Wong Ming Bun v Wang Ming Fan** [2014] 1 HKLRD 1108, per Peter Ng, J as cited by Brooks JA, in **Cable & Wireless Jamaica Limited v Eric Jason Abrahams** [2020] JMCA Civ 45
[57] At paragraph 36.

88. She then reasoned[58]:

> **So, the question of whether the appellant could commence a derivative action in the name of the company, for which leave was being sought, was a matter of substantive rather than procedural law. In such circumstances, reliance on hearsay information would not be permissible.**

89. The reference to 'substantive law' was a determinative factor for Justice McDonald-Bishop. The term is usually used to refer to a law that defines and determines the rights between parties, as opposed to 'procedural law' which does not make those determinations.

90. One may argue that applications for leave to bring a derivative action could be considered a matter of both substantive and procedural law. Substantive in the sense that a complainant must prove that they qualify to obtain leave, and procedural in the sense that it is a necessary step to take before obtaining eventual redress.

91. On the second issue of whether the application was interlocutory, Justice McDonald-Bishop referred to (with approval[59]) Palmer J's opinion in **Swansson v Pratt**[60] that an order on an application for leave to bring a derivative action is not interlocutory in character. She then indicated[61]:

> **I accept [Palmer J's] position as a correct statement of the law since all the issues arising between the parties with respect to the application would be finally and conclusively determined at the end of those proceedings whether or not leave was granted.**

[58] At paragraph 74
[59] At paragraph 75
[60] [2002] NSWSC 583
[61] At paragraph 76

92. This seems to be a compelling argument. What Justice McDonald-Bishop describes is what is known as the 'application test[62]' which was developed to determine if an order of the court is interlocutory (for which leave to appeal is necessary) or final (for which leave to appeal is not required). However, Justice McDonald's reliance on Swansson is open to criticism based on the Court's previous decisions.

93. Justice Sykes discussed Swansson in great detail and held that[63] "**This court is cautious about relying on this case despite [it's] commendation by both sides**" and then indicated two reasons for not relying on that case which were upheld by the Court of Appeal.

94. He pointed out that the legislation applicable in Swansson is different from the provisions in Canada and section 212 of the Companies Act were taken from the Canadian legislation.

95. For his second reason, he opined[64]:

> **The second reason for adopting a cautious approach to Swannson is that it appears that Palmer J adopted a very restrictive approach to the statute which may be justified by his Honour's interpretation of the statute. That approach, as will be seen, is not justified by the wording of the Jamaican statute. His Honour said at paragraph 24:**
>
> > ***It is clearly the intent of Pt 2F.1A that leave to bring a derivative action must not be given lightly. An application under s 237(2) is not interlocutory in character; the relief sought is final and the applicant bears the onus of establishing the requirements of the subsection to the Court' satisfaction.***

[62] Jamaica Public Service Company Limited v Rose Marie Samuels [2010] JMCA App 23 in paragraphs 13 -23
[63] [2016] JMSC Comm 14 at paragraph [33]
[64] At paragraph 34

96. Justice Sykes took issue with relying on Palmer J's conclusion that the application is not interlocutory in character, in **Swansson**. In fact, Justice Sykes took the opposite view at paragraph 96 of his decision[65].

97. It is important to note that one of the grounds raised in the appeal against Justice Sykes' decision was that he misinterpreted or misapplied the reasoning in **Swansson** which is reproduced above.

98. Speaking for the majority of the Court, Justice Brooks rejected that ground, and accepted Justice Sykes' assessment of **Swansson**[66]. Even in her dissenting opinion, Justice Sinclair-Haynes indicated[67] "**The learned judge's review of the Swansson case, and his observations [on it] are supported by Palmer J's statement**."

99. The third reason Justice McDonald-Bishop indicated for accepting Justice Batts' decision is that, "**In any event, even if the application were procedural or interlocutory, the learned judge would have acted properly in rejection [the hearsay portion of the affidavit] on the ground that it was inadmissible hearsay. This is simply because it failed to comply with rule 30.3 (2) of the CPR. In contravention of the rule, the appellant failed to state the source of her information or belief she was relying on...." [68]**

100. On this point, she was correct in upholding Justice Batts' decision.

101. In summary, the Courts have had no choice but to comment on the procedure to be adopted to obtain leave to bring a derivative action, since the CPR does not specifically indicate how it is to be done. Our analysis of the Courts' decisions is not an indictment on the Courts, which were left with no alternative in the circumstance.

[65] See quotation at paragraph 80 above.
[66] At paragraph 50
[67] At paragraph 208
[68] At paragraph 77

PROPOSED RULES

102. With all that being said, in this section, we consider the ways in which rules concerning applications for derivative actions can be accommodated.

103. If we accept that applications for leave to bring a derivative action should be commenced by fixed date claim form, then an easy solution may be to amend rule 8.1(4). We propose the following:

The Claimant – how to start proceedings

8.1 (1) ...

(2) ...

(3) ...

(4) Form 2 (fixed date claim form) must be used -

(a) in mortgage claims;

(b) in claims for possession of land;

(c) in hire purchase claims;

(d) where the claimant seeks the court's decision on a question which is unlikely to involve substantial dispute of fact;

(e) whenever its use is required by a rule or practice direction; ~~**and**~~

(f) where by any enactment proceedings are required to be commenced by petition, originating summons or motion; **and**

(g) for applications to bring a derivative action, [and must be supported by affidavit evidence.]

(For the procedure under a fixed date claim see rule 27.2)

104. Our preferred option would be to amend Part 71 (Commercial Division), and we suggest the following:

Commercial proceedings

71.3 In this Part "commercial claim" includes any case arising out of trade and commerce in general and any case relating to -

(a) ...
(b) ...
(c) ...
(d) ...
(e) ...
(f) ...
(g) ...
(h) ...
(i) ...
(j) ...
(k) ...
(l) ...
(m) ...
(n) ...
(o) ...
(p) applications for leave to bring a derivative action under the Companies Act

105. Under Part 71, we propose introducing the following rules:

Applications to bring a derivative action

71.9 (1) For the purpose of prosecuting, defending or discontinuing a claim, an application for leave to bring

a derivative action may be made by a current or former–

(a) shareholder;

(b) debenture holder; or

(c) director or officer

of the company on whose behalf the claim is intended to be brought or any of its subsidiaries.

(2) An application under paragraph (1) is to commence by [fixed date claim form (form 2)] [notice of application for court orders (form 7)] and evidence on affidavit.

(For the rules on affidavit evidence see rule 30.3)

(3) The company on whose behalf the claim is intended to be brought is to be a named [defendant] [respondent] to the application.

(4) The Court may not grant an application to bring a derivative action unless satisfied that –

(a) the applicant is entitled to apply to the court for leave under any enactment or law;

(b) the applicant has given reasonable notice to the directors of the company or its subsidiary of his or her intention to apply to the court to bring a derivative action;

(c) the applicant is acting in good faith; and

(d) it appears to be in the interests of the company or its subsidiary that the claim is to be brought, prosecuted, defended or discontinued.

(5) At the hearing of the application for leave to bring a derivative action, the Court may make such interim or final order as it thinks fit including -

(a) authorizing the applicant, the Registrar or any other person to control the conduct of the action;

(b) directing the date by which the derivative action claim is to be filed and served;
(c) giving directions for the conduct of the action;
(d) directing that any amount adjudged payable to the company in the derivative action is to be paid in whole or in part, directly to former and/or present shareholders or debenture holders of the company, instead of to the company or its subsidiaries; and
(e) requiring the company or its subsidiary to pay the [claimant's] [applicant's] reasonable legal fees incurred in connection with the action;
(f) grant a special costs certificate; or
(g) order the immediate taxation of the costs of the application for leave to bring the derivative action, if the application is granted.

CONCLUSION

106. The CPR's objective to simplify the civil courts' procedures would be achieved by introducing rules governing applications for leave for derivative actions to the CPR.

107. It is the function of the Rules Committee to determine the procedures applicable to the Courts, and we recommend that they consider the suggestions made in this paper.

108. The Courts have endorsed certain procedures for making these applications, but ultimately, the decision lies with the Rules Committee which will no doubt consider those decisions.

109. Whatever conclusion the Rules Committee makes on the procedure (if it decides to make rules), it will certainly simplify the process of accessing the Courts and help to further the overriding objectives of the CPR.

110. It is fitting to conclude on this note from Lord Neuberger MR[69] in appeal against a trial judge's decision to strike out a claim brought by a claimant in a contentious estate matter, who lacked the authority to sue. He stated[70]:

> **Arguments such as that which the defendant successfully raised before the judge in this case are never very attractive, and one of the purposes of the CPR is to rid the law of unnecessary technical procedural rules which can operate as traps for litigants... The need for consistency, clarity and adherence to the established principles is much greater than the avoidance of a technical rule, particularly one which has a discernible purpose, namely, to ensure that an action is brought by an appropriate claimant.**

111. We wish to acknowledge the invaluable research and contributions of members of the Civil Procedure and Practice Committee of the Jamaican Bar Association to this paper, especially **Richard Reitzin, Seyon Hanson, Kristina Exell, Melissa McLeod** and **Kristen Fletcher**.

Mikhail H. R. Williams
Daynia L. Allen
Timera A. Mason

[69] **Millburn-Snell & Others v Evans** [2011] EWCA Civ 577.
[70] At paragraph 41