NOVA SCOTIA COURT OF APPEAL
Citation: *Budd v. Bertram*, 2018 NSCA 95

Date: 20181129
Docket: CA 476882
Registry: Halifax

Between:

Peter B. Budd, Darren Comeau, Nina Barnaby, David Wilson, Jane E. Lowrie and Vincent Stuart

Appellants

v.

J. Douglas Bertram, J. Scott Bertram, Marc Blinn and Alan McGuire

Respondents

Judge:	The Honourable Justice Hamilton
Appeal Heard:	October 17, 2018, in Halifax, Nova Scotia
Subject:	Section 4(2)(c) of the Third Schedule of the *Companies Act*, RSNS 1989, c.81; Application for leave to bring a derivative action.
Summary:	The respondent shareholders of approximately twenty-five per cent of the shares of a company were successful in having the motions judge grant leave for them to commence a derivative action in the name of the company. They claimed that one of the company's transactions was not properly approved by the directors or shareholders and that the appellant directors had breached their fiduciary duties. Two of the appellant directors were in a position of conflict. The appellant directors appealed.
Issues:	Did the motions judge err when she granted leave to the respondents to bring a derivative action by failing to conduct a cost/benefit analysis as part of her consideration of what "appears to be in the interests of the company"?

Result: Appeal dismissed. The Court adopts the position of the Saskatchewan Court of Appeal set out in paragraph 68 of *Jahnke v. Johnson*, 2018 SKCA 59. The central consideration in any s.4 (2)(c) inquiry is the strength of the proposed action, but that it is not the only or, necessarily, the deciding consideration. In most, but not all cases, another consideration should be the financial effect on the company of the proposed derivative action proceeding or not proceeding. The judge made no reversible error in how she dealt with costs and benefits considerations in granting leave.

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Respondents

Judges:	Derrick, Hamilton, Scanlan JJ.A.
Appeal Heard:	October 17, 2018, in Halifax, Nova Scotia
Held:	Appeal dismissed with costs, per reasons for judgment of Hamilton, J.A.; Derrick and Scanlan, JJ.A. concurring
Counsel:	Brian K. Awad, for the appellants Andrew Nickerson, Q.C. and Jason T. Cooke, for the respondents

Reasons for judgment:

[1] The sole issue raised by the appellants in this appeal is whether the motions judge, when she granted leave to the respondents to bring a derivative action, erred by failing to conduct a cost/benefit analysis as part of her consideration of what "appears to be in the interests of the company", under s.4(2)(c) of the Third Schedule to the *Companies Act*, RSNS 1989, c.81, ("*Act*").

[2] For the reasons that follow, I would dismiss the appeal.

BACKGROUND

[3] The appellants are all directors of Fundy Tidal Inc. ("FTI") and the appellant, Vincent Stuart, is also the president. The respondents are minority shareholders of FTI, together holding approximately 25% of the shares. The respondent, Douglas Bertram, was formerly the CEO of FTI, formerly chair of its board and continues to be a director. There are other directors of FTI who are not parties.

[4] FTI was incorporated under the *Act* in 2006 for the purpose of getting involved with future local tidal-power projects.

[5] Nova Scotia's Community Feed-in Tariff ("COMFIT") program was created in 2010 to increase renewable sources of electricity in the Province by guaranteeing rates per kilowatt hour for energy supplied to Nova Scotia Power Corporation's provincial electricity distribution grid (the "grid"). To benefit from COMFIT, a company had to become a Community Economic Development Corporation ("CEDC") under the *Securities Act*, RSNS 1989, c.418 ("*Securities Act*"), which FTI did. Under the COMFIT program, the Province awarded FTI approvals to develop certain small scale, in-water, tidal power projects and to provide the electricity produced to the grid. FTI was responsible for securing the means by which its in-water generated power would access the grid. These approvals were thought to be FTI's primary assets.

[6] One of several conditions attached to these approvals was a date by which each project had to be in service (i.e. built and operating). Currently, that date is December 31, 2018, approximately seven and one-half months after the original hearing before Justice Suzanne Hood and approximately two and one-half months after the hearing of this appeal. FTI's development of the approved projects has

been “parked” at least since the litigation began. It is acknowledged that FTI’s projects cannot be in service by the December 31, 2018 deadline and that getting an extension is a political decision. Appellants’ counsel stated before the motions judge that it will not be easy to get an extension – “if it’s even possible”. Respondents’ counsel was equally pessimistic.

[7] As required by the COMFIT program, FTI made a public offering in 2013. It raised some capital, but it was recognized that FTI would need to partner with others as significantly more capital was required to develop the tidal power projects that were awarded to it. For example, in 2013, the estimate for its Petit Passage and Grand Passage projects, with a total of 1 megawatt, was $14 million. In 2015, it was estimated that its Digby Gut project, a 1.95 megawatt project, would cost $28 million.

[8] In 2014, FTI and Tribute Resources Inc. (“TRI”), a Toronto Stock Exchange (“TSX”)-listed renewable energy development company, agreed to partner with each other to develop FTI’s Digby Gut project. Jane Lowrie, one of the appellants, is the President, CEO and a director of TRI. Peter Budd, another of the appellants, is a consultant with TRI. TRI formed International Marine Energy Inc. (“IME”), with others, to participate in the Digby Gut project on its behalf. The final corporate structure appears to have left FTI in control of the Digby Gut project and Ms. Lowrie and Mr. Budd on FTI’s Board of Directors. FTI’s shareholders approved its Digby Gut transaction which involved FTI transferring its Digby Gut COMFIT to the operating corporate entity.

[9] It wasn’t long before conflict arose amongst some of the parties concerning the terms of the business arrangement between FTI and TRI.

[10] Nonetheless, FTI began to focus on developing its remaining two projects, Petit Passage and Grand Passage. There is conflicting evidence concerning what people initially knew about how FTI’s Petit Passage project could gain access to the grid. It appears it was eventually understood that access to the grid for the Petit Passage project required FTI to enter into a commercial arrangement in relation to an existing wind turbine that by July 2016 was owned by Katalyst Wind Inc. (“Katalyst”). As directors of FTI, Ms. Lowrie and Mr. Budd knew FTI was pursuing such an arrangement with Katalyst.

[11] Before May 2016, IME and Tocardo International BV (“Tocardo”), on their own behalf and not on behalf of FTI, entered into an arrangement with Katalyst to purchase the necessary wind turbine. Tocardo is one of several international

suppliers of in-water turbines. IME and Tocardo formed Spray Energy Limited Partnership and Spray Energy Inc., General Partner to own the wind turbine. Having thus gained the means by which the power generated by the Petit Passage project could access the grid, in May 2016, IME and Tocardo offered to purchase the Petit Passage COMFIT from FTI in exchange for shares and the cancellation of a debenture between FTI and IME. FTI would not control the Petit Passage project under their offer.

[12] The respondents objected to the Spray Energy proposal.

[13] In July 2016 it was publicly announced that IME had acquired a 46.5 per cent interest in Tocardo.

[14] In January 2017 documentation was executed by Mr. Stuart on behalf of FTI purporting to give effect to the Spray Energy transaction. It appears this documentation included FTI's Grand Passage project in addition to the Petit Passage project that was the only project included in the May 2016 offer. There is conflicting evidence as to whether the Spray Energy transaction was approved by a properly constituted Board of Directors of FTI. It was not approved by FTI's shareholders.

[15] In March 2017, the respondents commenced the underlying court proceeding, originally as an oppression action, but later amended to become a derivative action requiring leave. They never sought to have FTI pay the legal costs of the proposed action.

[16] In their amended statement of claim for the proposed derivative action, the respondents claim that the transaction between FTI and Spray Energy is invalid because:

1. it breaches the FTI Shareholders' Voting Agreement which provides that FTI will develop, manage and operate tidal power electrical generation facilities, not act as a passive investor which FTI would be under the Spray Energy transaction;
2. it was not approved by a properly constituted Board of Directors of FTI;
3. it was not approved by a special resolution of FTI's shareholders pursuant to s.26(9) of the *Act*, which is required for the sale of a substantial part of FTI's undertaking such as this; and

4. FTI did not comply with Nova Scotia securities law or obtain the required regulatory approvals, one effect of which was that its shares could not be transferred.

[17] The respondents also claim that the appellant directors of FTI are in breach of their fiduciary duties because they failed to act in FTI's best interests when they:

1. declined to review and entertain proposals from two other reputable energy developers at the time the Spray Energy offer was available, and
2. considered the Spray Energy proposal without adequate information before them as to whether it would benefit FTI, preventing them from making a reasoned judgment as to its advisability.

[18] With respect to Ms. Lowrie and Mr. Budd, the respondents claim they breached their fiduciary duties to FTI by acting against FTI's interests in acquiring the wind turbine on behalf of companies with which they are affiliated, and constructing the Spray Energy transaction in such a manner that FTI is not in control of the Petit and Grand Passage projects.

[19] The appellants counter by saying the Spray Energy transaction is not contrary to the Shareholders Voting Agreement; does not require shareholder approval and was approved by FTI's Directors. They say the Directors' resolutions are valid because Ms. Lowrie and Mr. Budd declared their interest in the transaction and refrained from voting. (The evidence filed on behalf of the respondents claims that Ms. Lowrie voted.) The appellants say the Spray Energy proposal was the only one that was on the table. (The respondents' evidence is that there were proposals from two other reputable energy developers involving international suppliers of in-water turbines other than Tocardo.) The appellants say they acted in good faith and in the best interests of FTI.

[20] The appellants do not dispute the fact that Ms. Lowrie and Mr. Budd are affiliated with IME and that IME, with others, purchased on their own behalf and not on behalf of FTI, the wind turbine required for the development of the Petit Passage project, knowing FTI was trying to acquire it. Nor do they dispute that FTI would not control the Petit and Grand Passage projects under the Spray Energy proposal.

[21] Justice Hood heard the leave application in May 2018 and gave her short unreported decision two days later, with the December 31, 2018 deadline in mind.

[22] It should be noted that the foregoing paragraphs setting out the background to this appeal are based on my review of the record with its significantly conflicting evidence. It will be for the trial judge to determine the facts independent of anything stated in my description of the background.

Standard of review

[23] The decision under appeal is interlocutory and discretionary. The applicable standard of review is set out in *L&B Electric v Oickle*, 2006 NSCA 41:

> [13] The standard of review on an appeal such as this is well settled: this court will not interfere with the discretionary interlocutory decision of the judge unless wrong principles of law have been applied or a patent injustice would result, *Minkoff v. Poole and Lambert* (1991), 1 N.S.R. (2d) 143 (N.S.C.A.) at p. 145. An appeal from a discretionary order is not an occasion that permits this court to re-weigh the various relevant considerations and exercise its discretion in place of that of the judge of first instance. *Cluett v. Metro Computerized Bookkeeping Ltd.* (2005), 233 N.S.R. (2d) 237 at ¶ 2.

Issues

[24] Did the judge err in granting leave to the respondents to bring the derivative action, by failing to conduct a cost/benefit analysis as part of her consideration of what "appears to be in the interests of the company", under s.4(2)(c) of the Third Schedule to the *Act*?

Statutory Provisions

[25] The statutory provisions governing derivative actions in Nova Scotia are set out in the Third Schedule to the *Act*.

[26] Section 4(1) of the Third Schedule provides that a complainant may apply to the court for leave to bring a derivative action.

[27] Section 4(2) sets out the conditions of which the court must be satisfied before granting leave:

> (2) No action may be brought … under subsection (1) of this Section 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) of this Section 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.
>
> [emphasis added]

[28] This wording, "it appears to be in the interests of the company", is identical to analogous provisions in the federal legislation, *Canada Business Corporations Act*, SC 1974-75-76, c 33, s.239(2), and in corresponding legislation in Ontario, R.S.O. 1990, c. B.16, s.246(2), Alberta, R.S.A 2000, c.B-9, s240(2), Saskatchewan, R.S.S. 1978, c. B-10 s.232(2) and Newfoundland, R.S.N.L 1990, c. C-36, s.369(2). The wording employed in the B.C legislation, S.B.C 2002, c. 57, s.233(1), is different insofar as it uses the term "best interests" of the corporation rather than "interests."

Appellants' Position

[29] As evidenced by the only issue the appellants raise in this appeal, they do not challenge the judge's findings that the first two criteria set out in s.4(2)(a) (notice) and (b) (good faith) were met. Nor do they challenge her findings under s.4(2)(c) that the proposed derivative action contains arguable issues for trial; has a chance of success and is not bound to fail.

[30] The appellants' argument is that under s.4(2)(c) the judge was required to also consider the costs and benefits to FTI of proceeding with the proposed action or not proceeding with it.

[31] They say the following paragraphs in her reasons indicate she failed to do such an analysis:

> [46] To enter into a cost benefit analysis proposed by the responding defendants in this case would require me to make findings not only of credibility but also to consider the merits of each party's position.
>
> [47] As I have said, the threshold is low and I must be satisfied that there is a chance that the claims will succeed at trial. I conclude in my discretion that it is not obvious that they will fail.

Analysis

[32] Derivative actions allow minority shareholders, among others, to bring actions in the name and on behalf of the company, to enforce a right of the company, when those who control the company refuse to do so. Federal and provincial statutes were enacted to permit such actions, which for the most part had been previously barred at common law. There are helpful discussions of the history of derivative actions in *L & B Electric Ltd. v. Oickle*, 2005 NSSC 110, paras 34 to 41, affirmed on appeal, 2006 NSCA 42 and *First Edmonton Place Ltd. v. 315888 Alberta Ltd.* [1988] 60 Alta LR (2d) 122, page 5 to 7, reversed on other grounds, 1989 ABCA 274.

[33] Derivative actions serve two purposes:

1. they ensure that a shareholder has a right to recover property or enforce rights for the corporation if the directors refuse to do so, and
2. 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.

See: M. A. Maloney, "*Whither the Statutory Derivative Action?*" (1986), 64 Can. Bar Rev. 309; *Richardson Greenshields*, para 21; *Chen v Sumwa Trading Co Ltd*, 2018 ABQB 269, para 34.

[34] Granting leave to commence a derivative action is a discretionary remedy arising out of equitable principles, *Black Fluid Inc. v. Opulence Clothing Inc.*, 2014 ABQB 138, para 23. Leave should not be granted where there is an adequate alternate remedy available to the complainant, *Crescent (1952) Ltd. v. Jones*, 2011 ONSC 756, para 21 and authorities stated therein. The parties agree there is no alternative remedy in this case.

[35] The legislation governing derivative actions is drawn in broad terms and, as remedial legislation, should be given a liberal interpretation in favour of the applicant, *Richardson Greenshields of Canada Ltd. v. Kalmacoff*, ONCA, 1995 OJ No 941, para 22. A judge hearing a leave application is not called upon to determine questions of credibility or to resolve the issues in dispute, and ought not to try. These are matters for trial, *Richardson Greenshields*, para 22; *Jahnke v. Johnson*, 2018 SKCA 59, para 63. The threshold the applicant has to meet is low

as the test is that it “appears” to be in the interests of the company, not that it is in the interests of the company.

[36] The Saskatchewan Court of Appeal in *Jahnke v. Johnson*, 2018 SKCA 59, recently stated that courts have used different phrases to explain how a judge should determine whether a proposed derivative action “appears to be in the interests of the corporation”:

> [64] Numerous cases have attempted to explain how a judge should determine whether a proposed action “appears to be in the interests of the corporation” by framing the relevant test in terms of the apparent strength or merit of the proposed claim. In this regard, courts have used terminology such as “an arguable issue worthy of trial” (*L&B Electric* at para 46); “a reasonable argument which would not be dismissed out of hand” (*Primex Investments Ltd. v Northwest Sports Enterprises Ltd.*, [1996] 4 WWR 54 (BC Sup Ct) at para 39); a claim that does not appear “frivolous or vexatious or is bound to be unsuccessful” (Re *Marc-Jay Investments Inc. and Levy* (1974), 50 DLR (3d) 45 (Ont H Ct J) at 47); and “whether the proposed action has a reasonable prospect of success or is bound to fail” (*Jordan Enterprises Ltd. v Barker*, 2015 BCSC 559 at para 35).

[37] In *Primex Investments Ltd. v Northwest Sports Enterprises Ltd.*, [1996] 4 WWR 54 (BC Sup Ct) (affirmed on appeal [1997] 2 WWR 129, except with respect to one appellant, leave to appeal to the SCC denied), the court suggested that these different phrases mean essentially the same thing:

> 47 The Respondents asked me to apply this "reasonable prospect" test rather than the "arguable" test from the *Bellman case*. In my view, there is no difference between these two tests. Any position can be argued by competent counsel but, in using the word "arguable", I believe Nemetz C.J.B.C. was referring to a reasonable argument which would not be dismissed out of hand. An argument which is not dismissed out of hand is one which has a reasonable prospect of succeeding. In *Marc-Jay Investments Inc. v. Levy*, O'Leary J. said this (p. 47):
>
> > It is obvious that a Judge hearing an application for leave to commence an action, cannot try the action. I believe it is my function to deny the application if it appears that the intended action is frivolous or vexatious or is bound to be unsuccessful.

See also: *Mackenzie v Craig* (1997) 205 AR 363 (Alta QB), affirmed 1999 ABCA 84.

[38] Starting with *Primex* it appears, courts also began to explicitly refer to the need for a judge, when considering what appears to be in the interests of the company, to weigh the potential relief if the proposed derivative action were

successful against the cost and inconvenience that the action may pose to the company:

> 49 … The Court should determine whether the proposed action has a reasonable prospect of success or is bound to fail. If it is asserted that the proposed defendants in the derivative action have a defence to the claim, the Court must decide whether such a defence is bound to be accepted by a trial judge following the completion of the trial of the derivative action. It is not necessary for the applicant to show that the action will be more likely to succeed than not. **As noted in the Dickerson Report, the Court should also be satisfied that the potential relief in the proposed action is sufficient to justify the inconvenience to the company of being involved in the action**.
>
> [emphasis added]

[39] The British Columbia Supreme Court in *Discovery Enterprises Inc. v. Ebco Industries Ltd.*(1998), 40 BCLR (3d) 43, affirmed on appeal, 50 BCLR (3d) 195, stated:

> [63] The cost and inconvenience of commencing a derivative action is an important consideration in deciding whether to grant leave.
>
> This is so because it likely would not be in the interest of a corporation to have an action commenced on its behalf where potential recovery was very small in relation to the cost and inconvenience to the company….

[40] In *L & B Electric*, Justice Moir of the Supreme Court of Nova Scotia suggested it is necessary to consider costs, both financial and intangible:

> 48 … It is prudent business not to authorize a suit without weighing the financial cost and intangible costs against the potential gains, financial or intangible. Although I know of no authority for it, I think this has to be part of the inquiry into the interests of the company in the proposed suit.

[41] In *Black Fluid*, Justice Veit of the Alberta Court of Queen's Bench, referred with approval to a cost/benefit analysis:

> 23 …a cost/benefit analysis has, from the beginning, been part of the analysis that is required in determining whether a particular derivative action appears to be in the best interests of a corporation. Indeed, the notion of the cost benefit assessment can be found in much other case law, including, for example, *Nord Invest Ltd.* (emphasis added)

[42] The Court in *Melnyk v. Acerus Pharmaceuticals Corporation*, 2017 ONSC 1285, approved on appeal, 2018 ONSC 1353 (Div Ct) accepted the principle that,

at least for a company traded on the TSX, the "interests of the company" test requires a consideration of the maximization of the value of the company and noted that each case must be assessed on its own facts (para43). It explains:

> [41] It is inherent in any concept of the maximization of the value of the corporation that there will be a comparison between two or more alternative courses of action. In the context of a leave motion under s. 246(2) of the OBCA, the alternatives are to proceed with the action or to refrain from proceeding, either absolutely or for a period of time. This requires an assessment of the potential costs and potential benefits of each course of action. Accordingly, any inquiry into whether prosecution of a proposed action "appears to be in the interests of the corporation" is best approached as an assessment of the probable impact on the market value of the corporation of the costs associated with prosecution of the action, being the impact of such action on the corporation's business operations as well as the financial resources of the corporation necessary to dedicate to the action, relative to the probability of a successful outcome in the litigation that would increase the market value of the corporation.
>
> [42] Given the foregoing, it is self-evident that an "interests of the corporation" test that is limited to whether a proposed action is frivolous or vexatious is unrealistically narrow, at least in the context of a public corporation. The fact that a proposed action would increase the value of a corporation if it is successful is not sufficient to justify a finding that the proposed action "appears to be in the interests of the corporation". The overall costs to the corporation, even if successful, may more than outweigh the potential increase in value that could be achieved in the litigation.

[43] The Court in *Urichuck v Kent*, 2017 ABQB 432, also stated that a costs analysis is required, although a review of the reasons suggests that the court did not in fact do such an analysis, reaching its decision to dismiss the application on the basis that the proposed derivative action was " bound to fail":

> [17] … Before granting permission, a court must undertake a cost-benefit analysis to determine whether the proposed action appears to be in the interests of the corporation.

[44] The Court in *Jahnke*, referring to some of these cases, stated:

> [68] … I should clarify that the "interests of the corporation" inquiry is not tightly restricted to nothing more than an assessment of the apparent strength of the proposed action. This is because, as recognized in the Dickerson Report itself, there are circumstances when it would clearly not be advisable for a corporation to pursue a claim even where success seems almost certain. I have in mind here, for example, situations such as those where an action will cost far more to prosecute than it can possibly yield in damages, where pursuing a claim will harm

> important and ongoing business relationships, or where going to court will generate problematic publicity for the corporation. In all of these sorts of situations, the narrow question of whether a claim is arguable will not properly answer the question of whether that claim is in the interests of the corporation. This is not a new idea. Cases where a court has been prepared to consider more than just the chances of success for a proposed action include *Schadegg v Alaska Apollo Resources Inc*., 1994 CarswellBC 2132 (BC Sup Ct), *Melnyk v Acerus Pharmaceuticals Corporation*, 2017 ONSC 1285 (CanLII), *Maxwell v Schuman*, 2005 BCSC 1430 (CanLII), *Discovery Enterprises Inc. v Ebco Industries Ltd*. (1997), 1997 CanLII 4375 (BC SC), 40 BCLR (3d) 43 (Sup Ct), and *Primex Investments*. **Thus, while the strength of the proposed action is the central consideration in any s. 232(2)(c) inquiry, it is not the only consideration or, necessarily, the deciding consideration.**
>
> [emphasis added]

See also: *Nord Invest Ltd. v Maple Leaf Foods Inc*., 2008 NLCA 11, para 28, 29; *Carr v. Cheng*, 2005 BCSC 445, para 24, 25 and *Chen v. Sumwa Trading Co. Ltd.*, 2018 ABQB 269, para 43.

[45] I adopt the position of the Saskatchewan Court of Appeal set out in paragraph 68 of *Jahnke*. The central consideration in any s.4(2)(c) inquiry is the strength of the proposed action, but that it is not the only or, necessarily, the deciding consideration.

[46] That said, in most cases another consideration should be the financial effect on the company of the proposed action proceeding or not proceeding. This seems to flow from the very nature of companies incorporated under the *Act*, that earning a profit is in the company's interest. However, there may be cases where a consideration of costs and benefits will be less important, for instance where the issue is whether directors are in breach of their fiduciary duties due to being in a conflict of interest position; *Richardson*, para 32.

[47] The cost factors the appellants say the judge failed to consider are:

1. there would be no financial advantage to FTI of the derivative action proceeding because the delay caused by the litigation would foreclose FTI ever receiving any financial benefit or any experience from its projects due to the December 31, 2018 deadline, and
2. there would be no financial gain to FTI even if the derivative action was successful because there were no alternative proposals available to FTI to develop the Petit and Grand Passage projects.

[48] The judge's reasons are short and not as clear as they could be. While she did not characterize her comments as relating to costs and benefits, her reasons indicate she considered the appellants' first cost factor:

> [38] The responding defendants [now appellants] say that if leave is granted to commence a derivative action, the December 31, 2018 deadline will not be met, and the Spray Energy proposal will not go ahead.
>
> [39] They say therefore that because of that, it is not in the company's interests for leave to commence a derivative action be granted….

She did not explain how this argument factored into her decision.

[49] At the hearing before the judge, as at the hearing of this appeal, both counsel acknowledged that FTI's projects could not be in service by the December 31, 2018 deadline and the difficulties of getting an extension, if possible at all. Ms. Lowrie avers in her affidavit:

> [37] … due to these delays caused by Bertram, it is highly unlikely that any Fundy projects will be realized as the COMFITs expire on December 31, 2018.

[50] This suggests that whatever the judge decided, whether to grant leave or not, it was probably too late for FTI to benefit, financially or in experience, from its projects. But this is not the end of a consideration of costs and benefits in determining what appears to be in the interests of FTI on the record before us. Although time may have run out for FTI to benefit from its projects, time has not run out for it to benefit financially from its claim for damages arising from the alleged breach of the appellants' fiduciary duties, if this part of its claim succeeds. There is no dispute that two directors, Ms. Lowrie and Mr. Budd, were in a position of conflict with FTI with respect to the Spray Energy transaction. They declared their conflict. It is disputed whether Ms. Lowrie voted. At this point, it cannot be known if this conflict gives rise to a breach of fiduciary duties. That must await determination at trial where witnesses will testify and full cross-examination will take place. FTI could receive substantial damages if its claim for breach of fiduciary duties succeeds. As the respondents are not claiming legal costs in connection with the proposed derivative action, there is no offsetting cost consideration to be weighed against this potential benefit. Accordingly, no matter what weight the judge gave to this first argument of the appellants, it does not give rise to a reversible error.

[51] With respect to the second cost issue the appellants say the judge should have considered - that there would be no financial advantage to FTI even if the

proposed action were successful because there were no other proposals available and, hence, no chance of financial gain - her reasons state the evidence that there were other proposals (para14) but do not indicate how this factored into her decision.

[52] Again, I am satisfied the judge did not make a reversible error. The record contains significant conflicting evidence on whether there were other proposals available to FTI to allow it to proceed with its Petit and Grand Passage projects. If the judge was referring to this cost argument of the appellants, when she stated in paragraph 46 of her reasons that she could not determine this issue because it would require her to make findings of credibility and consider the merits of each parties position, she did not err. It is not for a judge on a leave application to determine questions of credibility or to resolve the issues in dispute.

[53] An order under s. 4 is a discretionary order. I am not persuaded that the judge committed any error of law in granting leave to the respondents to proceed with the derivative action.

[54] I would dismiss the appeal and order the appellants to pay costs to the respondents forthwith, in the amount of $1,400 plus disbursements.

Hamilton, J.A.

Concurred in:

Derrick, J.A.

Scanlan, J.A.