# In The Supreme Court of Bermuda

## CIVIL JURISDICTION
## COMMERCIAL COURT

**2020: No. 275**

**BETWEEN:**

**NKWE PLATINUM LIMITED**

**Plaintiff**

**- and -**

**GLENDINA PTY LIMITED & OTHERS (as set out in Schedule One attached to the Originating Summons in these proceedings)**

**First Defendant**

**GENORAH RESOURCES (PTY) LIMITED**

**Second Defendant**

**Before** **Hon. Chief Justice Hargun**

**Appearances:** **Mr. Jonathan O'Mahoney of Conyers Dill & Pearman Limited for the Plaintiff**

**The Defendants did not appear**

**Date of Hearing: 28 October 2021**

**Date of Judgment: 12 November 2021**

**JUDGMENT**

*Whether appropriate to grant declaratory relief in the absence of all affected parties; the effect of amalgamation under sections 104 to 109 of the Companies act 1981; whether the amalgamated company is a "new company"; whether there is a "transfer" of property from the amalgamating companies to the amalgamated company*

**HARGUN CJ**

**Introduction**

1. The principal issue raised in these proceedings relates to the legal effect of an amalgamation under sections 104 to 109 of the Companies Act 1981 ("**the Act**"). The Plaintiff contends that the following an amalgamation under the Act the amalgamation companies continued to exist as the one amalgamated company. The Defendants, on the other hand, contend in related proceedings pending in South Africa, that as a matter of Bermuda law the amalgamated company being the amalgamation of two previous entities is *ipso facto* a new entity. The Defendants contend that there is "*transfer*" of the property from the amalgamating companies to the amalgamated company.

2. At the conclusion of the hearing on 28 October 2021 the Court granted the following relief (with reasons to be set out in a subsequent written judgment):

    (1) A declaration that the nature of an amalgamation of Bermuda companies under Bermuda law pursuant to those sections of the Act relating to amalgamation, in particular sections 104 to section 109 is such that:

        (i) The amalgamating companies continues to exist following the amalgamation as one amalgamated company.

(ii) Upon the issuance of a certificate of amalgamation, the property of each amalgamating company becomes the property of the amalgamated company and accordingly assets that were held by one of the amalgamated companies prior to the amalgamation become the property of the amalgamated company by operation of law and not by way of transfer or by operation of contract.

(iii)The assets of Nkwe prior to the Amalgamation continue to be its assets notwithstanding the Amalgamation (as defined below).

(2) An injunction prohibiting the Defendants from representing to the South African Department of Mineral Resources ("**DMRE**") or any third party that the effect of the Amalgamation was that there was a transfer or disposal of the Mining Right or otherwise make representations to any party which are contrary to the true effect of the amalgamation under Bermuda law, as determined by this Court.

**Background**

3. The background to these proceedings is conveniently set out in the Originating Summons filed in these proceedings and dated 21 August 2020.

4. The Plaintiff, Nkwe Platinum Limited, is a Bermuda exempted company ("**Nkwe**"), as amalgamated with Gold Mountains (Bermuda) Limited.

5. Gold Mountains (Bermuda) Investments Limited, was an exempted company registered in Bermuda ("**BidCo**").

6. Gold Mountains (H.K.) International Mining Company Limited, is a company incorporated and registered in Hong Kong ("**Gold Mountains**"). Bidco was incorporated as a wholly owned subsidiary of Gold Mountain.

7. Zijin Mining Group Co Limited is a company listed on the Hong Kong Stock Exchange ("**Zijin**").

8. Pursuant to the terms of an amalgamation agreement dated 16 of August 2018 ("**Amalgamation Agreement**"), Bidco and Nkwe agreed to amalgamate and continue as one company ("**Amalgamation**") pursuant to the Act.

9. The Amalgamation took place on 14 March 2019. The Plaintiff contends that as a consequence of the Amalgamation the assets and liabilities of each amalgamating company became those of the amalgamated company by operation of the Act upon registration of the amalgamation by the Registrar of Companies.

10. The First Defendants, Glendina Pty Limited ("**Glendina**"), acts as trustee for the Sunset Superannuation Fund and was a shareholder of Nkwe prior to the Amalgamation. Glendina is also one of a group of former minority shareholders (referred to as the "**Former Minority Shareholders**") of the Plaintiff. Prior to the Amalgamation, the Former Minority Shareholders owned shares of the Plaintiff listed on the Australian Stock Exchange.[1] Pursuant to the terms of the Amalgamation Agreement the Former Minority Shareholders received the Amalgamation consideration being $0.10 per share.

11. The Former Minority Shareholders exercised their right to dissent and seek court appraisal of the fair value of their shares under section 106 of the Act. They commenced an appraisal action in this Court on 14 October 2018 which proceedings are currently pending in this Court.

12. The Second Defendant, Genorah Resources (Pty) Limited ("**Genorah**"), is a former shareholder of the Plaintiff and is a company incorporated in South Africa.

13. Nkwe's principal asset is a mining project, known as the Garatouw Farm as well as two adjoining exploration tenements "Heoepakrantz" and "DeKom" ("**Mining Assets**"), as set out in the Mining Right which was notarially executed and came into effect on 22 January 2014 ("**Mining Right**").

[1] The majority of the shares in Nkwe were, immediately prior to the Amalgamation, owned by Jin Jiang Mining Limited ("**JJKM**"), which is a wholly owned subsidiary of Zijin.

14. Nkwe's 74% interest in the Mining Right was acquired from the Second Defendant, Genorah, who holds the remaining 26% interest in the Mining Right.

15. A dispute has arisen between Nkwe on the one hand and Genorah and the Former Minority Shareholders on the other as to the legal effect of an amalgamation under Bermuda law.

16. Under section 11 of the South African Mineral and Petroleum Resources Development Act 2002 ("**MPRDA**") consent of the DMRE is required in the event the interests in the Mining Right are "*ceded, transferred, let, sublet, assigned, alienated, or otherwise disposed of*".

17. The Plaintiff has adopted the position, *inter alia*, that the Amalgamation did not require consent under section 11 of MPRDA because, as a matter of Bermuda law, the Amalgamation did not effect or result in a transfer or disposal of the Mining Right.

18. By letter dated 2 May 2019 the First Defendants, through their Australian lawyers, asserted, inter alia, that "*a new legal entity emerged from the amalgamation*" and as such the Plaintiff "*is not the holder of the Mining Right*".

19. By letter dated 21 May 2019 the First Defendants repeated the assertion that the Plaintiff "*no longer holds the Mining Right*", and that a consent was required to "*transfer*" the Mining Right under section 11 of the MPRDA. It is asserted in that letter that "... *the amalgamation does involve a transfer of the Mining Right and as such it needs to be transferred to the amalgamated entity.*"

20. By letter dated 1 April 2020 the First Defendants, this time through their South African lawyers, asserted that "*it is clear that by virtue of the implementation of the amalgamation transaction, the Old Nkwe can no longer function as a company*" and "*Old Nkwe ceased to exist following the amalgamation*", concluding that in the view of the First Defendants by operation of law there was a transfer of "*Old Nkwe's property to Bidco*".

21. By letter dated 19 February 2020, the Second Defendant contended that "*the Amalgamation...created a new legal entity*", and that "*if...the Mining Right is claimed to have transferred to [the Plaintiff] by the above process as applied to [the Plaintiff] by Bermuda law, then [the Plaintiff] simply needed a Ministerial Consent from the DMRE. The rest of other arguments is just sophistry*".
22. It appears clear that the Defendants contend that there was in fact a disposal or transfer of the Mining Right as a consequence of the Amalgamation, that no consent was obtained and therefore the Mining Right is avoided or has lapsed or has been lost.

23. It is in these circumstances the Plaintiff has commenced proceedings seeking a declaration of the legal effect of an amalgamation under the Act.

24. The application is supported by the four affidavits sworn by Mr. Jonathan O'Mahony, counsel for the Plaintiff in these proceedings and two affidavits of Mr. Christopher Loxton, counsel practicing in the High Court of South Africa.

25. On 24 September 2020 the Court granted the Plaintiff leave to issue and serve the Originating Summons in these proceedings out of the jurisdiction on the First Defendants in Australia and on the Second Defendant in South Africa, pursuant to RSC Order 11 rule(1)(ff). The Court is satisfied that service has indeed been effected in accordance with the terms of the Order dated 24 September 2020.

*26.* By letter dated 18November 2020, MalanScholes (South African attorneys for the Second Defendant) notified the Plaintiff's Bermuda attorneys that the Second Defendant "*... will not enter an appearance to defend the purely academic and unenforceable proceedings instituted by Nkwe Respondents in the Supreme Court of Bermuda and will oppose any court proceeding instituted by Nkwe in South Africa to enforce any Judgment handed down by the Supreme Court of Bermuda.*"

27. There are presently pending proceedings in South Africa commenced by the Second Defendant. Additionally Glendina (the company alone) has applied to intervene in the South African proceedings as an additional defendant. Nkwe is named as the First

Respondent, and Nkwe Platinum SA (Pty) Ltd as the Second Respondent to the proceedings. In the South African proceedings the Second Defendant seeks declaratory relief, including that:

(1) "*the conclusion of the Amalgamation Agreement...and/or its implementation...constitute[s] a transfer and/or change of control of the Garatouw Mining Right*";

(2)"*Nkwe Platinum Limited...has been deregistered...following upon and as a consequence of the conclusion and/or implementation of the Amalgamation Agreement*";

(3) "*the undivided shares of Nkwe Platinum Limited...in the Garatouw Mining Right has lapsed*"; and

4) "*Restraining Nkwe Platinum Limited...from holding itself out as the Holder of the undivided share in Garatouw Mining Right*".

28. The affidavit evidence filed by the Second Defendant in support of the Notice of Motion pending in the South African proceedings asserts, *inter alia*,:

(1) "*Pursuant to the conclusion of the Amalgamation Agreement...[the Plaintiff] came into existence*";

(2) "*[the Plaintiff's] registration number was purportedly changed from 53596 to 32747*";

(3) "*This appears to be an elaborate attempt to ensure [the Plaintiff] appears to be the same legal entity as Original NKP, which it is not*";

(4) "*Original NKP no longer has the ability to function as a standalone company or to comply with the provisions of MPRD Act or the conditions recorded in the Garatouw Mining Right as all the shares have been cancelled*";

(5) "*The dissolution of Original NKP was carried out in the manner as specified in Clause 10 of the Amalgamation Agreement*".

**The appropriateness of granting declaratory relief**

29. At the earlier hearing the Court asked Mr. O'Mahony to address the question whether it was appropriate for the Court to make a declaration in circumstances where all parties were not present to argue that the disputed legal point. Mr. O'Mahony has helpfully taken the Court through the relevant authorities including *Goldcrest v McCole & Ors* [2016] EWHC 1571; *Bank of New York Mellon v Essar Steel India* [2018] EWHC 3177; *Juul Labs Inc v MFP Enterprises* [2020] EWHC 3380; and *Montlake Qiaif Platform v Tiber Capital & Ors* [2021] EWHC 202.

30. In *Goldcrest* Master Matthews addressed the issue as to whether it was appropriate for the Court to make a declaration in the absence of an affected party and held that there was no prohibition as long as the court was satisfied that the declaration can be given without injustice to those affected by it. At paragraph 43 Master Matthews held:

> "*Whatever the experiences of the past, in the modern legal system, where the rules in the High Court should not be interpreted differently in the QBD and in this division, and the overriding objective (CPR rule 1.1) of doing justice at proportionate cost is to be observed everywhere, it would not be right to hold that declarations can never be given on default judgments. In my judgment, the better rule is that declarations should not be given without argument inter partes, save in the clearest cases. That is consistent with all the judicial statements to which I was referred except that of Buckley LJ. Even in relation to his views, the fact is that the rules of evidence today are more relaxed than they were in his time, and there is an even greater need to conserve precious trial time for those cases where it really is necessary. So long as a declaration can be given without injustice to those affected*

*by it, the court should not be hamstrung merely by the fact that it is being sought on an application for default judgment.*" (emphasis added)

31. In *Bank of New York Mellon* Marcus Smith J again confirmed that there was no absolute prohibition against the Court making a declaration in circumstances where the defendant elects not to participate in the proceedings. At paragraph 22 Marcus Smith J held:

> *"The Defendant has chosen not to engage with these proceedings, although properly served (as I have found). The consequence is that the Defendant's contentions regarding the declarations sought by the Claimant will not be heard by the court. That, I fully accept, is not the Claimant's fault.* ***I also accept that it would be invidious and wrong to allow a defendant's non-participation to prevent the making of declarations.*** *That is particularly so where, as here, the claim is a Part 8 claim, not turning on substantial disputes of fact. Nevertheless, where the defendant is absent, even if that absence is not the fault of the claimant and might be said to be the fault of the defendant, it is incumbent on the court to approach the factors set out in paragraph 21 above with great care and with something of a conservative mindset against the granting of a declaration, bearing in mind the propositions summarised in paragraph 21(5) above."* (emphasis added)

32. At paragraph 21 of his Judgment Marcus Smith J set out the relevant principles which should guide the court in exercising its discretion whether to make a declaration:

> *(1) There must, in general, be a real and present dispute between the parties before the court as to the existence or extent of a legal right between them. However, the claimant does not need to have a present cause of action against the defendant. A present dispute over a right or obligation that may only arise if a future contingency occurs may well be suitable for declaratory relief and amount to a real and present dispute.*

*(2) Each party must, in general, be affected by the court's determination of the issues concerning the legal right in question.*

*(3) The fact that the claimant is not a party to the relevant contract in respect of which such a declaration is sought is not fatal to an application for a declaration, provided that the claimant is directly affected by the issue. In such cases, however, the court ought to proceed very cautiously when considering whether to make the declaration sought.*

*(4) The court will be prepared to give declaratory relief in respect of a "friendly action" or where there is an "academic question", if all parties so wish, even on "private law" issues. This may be particularly so if the case is a test case or the case may affect a significant number of other cases, and it is in the public interest to decide the point in issue.*

*(5)* ***The court must be satisfied that all sides of the argument will be fully and properly put****. It must, therefore, ensure that all those affected are either before it or will have their arguments put before the court. For this reason, the court ought not to make declarations without trial [citing Buckley LJ in Wallersteiner v Moir].*

*(6) In all cases, assuming that the other tests are satisfied, the court must ask: is this the most effective way of resolving the issues raised? In answering that question, the court must consider the other options of resolving the issue."* (emphasis added)

33. In considering whether to grant declaratory relief the following factors appear to the Court to be relevant. First, both defendants have been properly served in accordance with the Court order dated the 24 September 2021 and have elected not to appear in these proceedings. It is noteworthy that the First Defendant is already before this Court as the plaintiff in the appraisal action, which is closely connected with the South African proceedings.

34. Second, both Glendina and Genorah have instructed Bermuda counsel in relation to the very issue before this Court, namely, the legal effect of amalgamation under sections 104

to 109 of the Act. Both Defendants have filed evidence of Bermuda law in the South African proceedings in relation to this issue in the form of an expert opinion of Mr. David Kessaram of Cox Hallett Wilkinson Limited dated 25 November 2020. I accept Mr. O'Mahony's submission that Bermuda is plainly the more appropriate forum for the determination of issues of Bermuda law.

35. Third, the Court is satisfied that this is not an academic dispute. Both Glendina and Genorah are seeking to argue that, as a matter of Bermuda law, the effect of the amalgamation has been to transfer the Mining Right from Nkwe to the Amalgamated Co., with the consequence that the right has lapsed in light of the failure to obtain the required consent of the DMRE.

36. Fourth, the Court is satisfied that a declaration in relation to this issue would serve a useful purpose. In this regard the Court refers to the affidavit evidence of Mr. Loxton SC confirming that where a foreign Court applies its own law, which is relevant to a determination in South Africa, a South African court will find a decision of the foreign court highly persuasive. A decision therefore by the Bermuda court on the effect of the amalgamation under Bermuda law is likely to be highly material to deciding the issues for determination in South Africa.

37. Finally, the Court is satisfied that all sides of the argument have been properly put to the Court. In this regard the Court has had the benefit of the argument put on the behalf of the Defendants in the form of the opinion of Mr. David Kessaram, which has been produced to the Court as an exhibit to Mr. O'Mahony's Second Affidavit. In addition to the written and oral submissions of Mr. O'Mahony on behalf of the Plaintiff, the Court had the benefit of being able to review the expert opinions of Mr. David Chivers QC filed in the South African proceedings. The Court was referred to Mr. Chivers initial opinion dated 19 November 2020 and his supplementary opinion (replying to the arguments of Mr. David Kessaram) dated the 22 October 2021.

38. Having regard to the above considerations the Court is satisfied that this is an appropriate case where the Court should grant the declaratory relief sought.

**The legal effect of amalgamation under the Act**

39. The statutory provisions dealing with the amalgamation of companies are set out in sections 104 to 109 of the Act. The statutory provisions envisage that each company proposing to amalgamate or merge shall enter into an agreement setting out the terms and means of effecting the amalgamation or merger (section 105). They provide for shareholder approval of the amalgamation or merger and set out the information to be supplied to shareholders (section 106). Importantly they provide that any shareholder who did not vote in favour of the amalgamation or merger, and is not satisfied that it has been offered fair value for the shares in the company, may apply to the Court for an appraisal of the fair value of its shares. Section 108 provides for registration of the amalgamated or surviving company.

40. The Act itself provides for the legal consequences of amalgamation pursuant to the provisions of the Act. Section 109 provides that:

> ***Effect of certificate of amalgamated or surviving companies***
>
> ***(1)*** *On the date shown in a certificate of amalgamation—*
>
> *(a) the amalgamation of the amalgamating companies and their continuance as one company shall become effective;*
>
> *(b) the property of each amalgamating company shall become the property of the amalgamated company;*
>
> *(c) the amalgamated company shall continue to be liable for the obligations of each amalgamating company;*
>
> *(d) an existing cause of action, claim or liability to prosecution shall be unaffected;*
>
> *(e) a civil, criminal or administrative action or proceeding pending by or against an amalgamating company may be continued to be prosecuted by or against the amalgamated company;*

(f) *a conviction against, or ruling, order or judgment in favour of or against, an amalgamating company may be enforced by or against the amalgamated company; and*

(g) *the certificate of amalgamation shall be deemed to be the certificate of incorporation of the amalgamated company; however, the date of incorporation of a company is its original date of incorporation and its amalgamation with another company does not alter its original date of incorporation.*

41. The legal effect of amalgamation under the statutory provisions set out in the Act was first considered by the Supreme Court of Bermuda in the judgment of Meerabux J in *Clark v Energia Global International Ltd* [2002] Bda LR 39. Two essential points should be noted from the judgment of Meerabux J. First, the provisions appearing in sections 104 to 109 of the Act are derived from Canadian legislation and in particular the Canada Business Corporations Act. Section 109(1) of the Act is in identical terms as section 182(1) of the Canada Business Corporations Act. Second, the effect of amalgamation under sections 104 and 109 of the Act is that the two companies are continued as one with their assets and liabilities intact. At pages 8-9 of the judgment Meerabux J held:

> *"Section 108 of the 1981 Act provides that the amalgamation of the two companies becomes effective when the application for the registration of the amalgamation is made to the Registrar of Companies and the Registrar issues a Certificate of Amalgamation. Section 109 of the 1981 Act provides, inter alia, that on the date shown in the Certificate of Amalgamation –*
>
> *(a) the amalgamation of the amalgamating companies and their continuance as the one company shall become effective;*
> *(b) the property of each amalgamating company shall become the property of the amalgamated company;*

*(c) the amalgamated company shall continue to be liable for the obligations of each amalgamated company.*

*Fraser & Stewart, Company Law of Canada, Sixth Edition, Carswell, at pages 567-568, commented on the like section that appears in the Canada Business Corporation Act, R.S.C. 1985 c.44, as follows:*

> *"The jurisprudence makes it clear that the amalgamated corporation is one and the same entity as the amalgamated corporations. In the case of R v Black and Decker Corporation Manufacturing Co. Limited, [1975] 1 S.C.R. 411 (S.C.C.)* ***the Supreme Court of Canada determined that the amalgamation of corporations under the former Act did not involve the "death by suicide or the mysterious disappearance" of the amalgamated corporations. Instead, the relevant statutory scheme provided that each amalgamated corporation was "continued" within the amalgamated corporation, finding "security, strength and... survival in that union."*** *Accordingly a prosecution against the amalgamated corporation for an offense by one of the amalgamated corporations could be brought. The [reasoning] of R v Black & Decker case has been followed throughout Canada and it is beyond doubt that the same principles apply to amalgamations under the Act. For example, in Re Canada Business Corporations Act (1991), 3 O.R. (3d) 336, the Ontario Court of Appeal assumed, that upon an amalgamation under the Act of the amalgamating corporations continued as one corporation."*
>
> *"Thus I rule that the effect of sections 104 and 109 of the 1981 Act is that the two companies are continued as one with their assets and liabilities intact."* (emphasis added)

42. The decision of Meerabux J in *Clark v Energia Global* is referred to in *Offshore Commercial Law in Bermuda*, Second Edition, edited by former Chief Justice Kawaley (first published in 2013). At page 228 it is noted that the Bermuda legislature drew heavily

on the Canada Business Corporations Act for sections 104-109 of the Act (there being no English statutory equivalent). At page 232 the learned author (Kiernan Bell) notes that "*The Court in Clark and others v Global International Ltd ruled that the effect of sections 104 and 109 of the CA 1981 is that the two companies are continued as one with their assets and liabilities intact.*"

43. The Canadian jurisprudence in relation to the legal effect of an amalgamation is firmly rooted in the reasoning of Dickson J in the decision of the Supreme Court of Canada in *R v Black & Decker Manufacturing Co.* [1975] 1 S.C.R. 411. The following passages from the judgment of Dickson J are illuminating in relation to the issues raised by the Defendants in the South African proceedings:

- *" Whether an amalgamation creates or extinguishes a corporate entity will, of course, depend upon the terms of the applicable statute, but as I read the Act, in particular s. 137, and consider the purposes which an amalgamation is intended to serve,* ***it would appear to me that upon an amalgamation under the Canada Corporations Act no "new" company is created and no "old" company is extinguished****. The Canada Corporations Act does not in terms so state and the following considerations in my view serve to negate any such inference: (i)* ***palpably the controlling word in s. 137 is "continue". That word means "to remain in existence or in its present condition"—Shorter Oxford English Dictionary. The companies "are amalgamated and are continued as one company" which is the very antithesis of the notion that the amalgamating companies are extinguished or that they continue in a truncated state****; (ii) the statement in s. 137(13)(b) that the "amalgamated company possesses all the property, rights..." If corporate birth or death were envisaged, one would have expected to find, in the statute, some provision for transfer or conveyance or transmission of assets and not simply the word "possesses", a word which re-enforces the concept of continuance;... The effect is that of blending and continuance as one and the selfsame company; (v) the Act contains a number of*

*express provisions whereby the life of corporate creations may be terminated— Videlicet where a company carries on business not within the scope of its objects (s. 5(4)), or forfeits its charter (s. 31), or surrenders its charter (s. 32), or is dissolved (s. 133(11)). The Act is silent on the extinction of companies by amalgamation;"* (page 417 emphasis added)

- *"The word "amalgamation" is not a legal term and is not susceptible of exact definition: In re South African Supply and Cold Storage Company[6]. The word is derived from mercantile usage and denotes, one might say, a legal means of achieving an economic end. The juridical nature of an amalgamation need not be determined by juridical criteria alone, to the exclusion of consideration of the purposes of amalgamation. Provision is made under the Canada Corporations Act and under the Acts of the various provinces whereby two or more companies incorporated under the governing Act may amalgamate and form one corporation.* ***The purpose is economic: to build, to consolidate, perhaps to diversify, existing businesses; so that through union there will be enhanced strength. It is a joining of forces and resources in order to perform better in the economic field. If that be so, it would surely be paradoxical if that process were to involve death by suicide or the mysterious disappearance of those who sought security, strength and, above all, survival in that union.*** *Also, one must recall that the amalgamating companies physically continue to exist in the sense that offices, warehouses, factories, corporate records and correspondence and documents are still there, and business goes on. In a physical sense an amalgamating business or company does not disappear although it may become part of a greater enterprise."* (page 420 emphasis added)

- *"But in an amalgamation a different result is sought and different legal mechanics are adopted, usually for the express purpose of ensuring the continued existence of the constituent companies. The motivating factor may be the Income Tax Act or*

*difficulties likely to arise in conveying assets if the merger were by asset or share purchase.* ***But whatever the motive, the end result is to coalesce to create a homogeneous whole. The analogies of a river formed by the confluence of two streams, or the creation of a single rope through the intertwining of strands have been suggested by others.*** *"* (page 421 emphasis added)

- *"**The effect of the statute, on a proper construction, is to have the amalgamating companies continue without subtraction in the amalgamated company, with all their strengths and their weaknesses, their perfections and imperfections, and their sins, if sinners they be.** Letters patent of amalgamation do not give absolution."* (page 422 emphasis added)

44. The Canadian courts have consistently rejected the contentions, such as those made by the Defendants in the South African proceedings, that (i) an amalgamation results in a "*new*" amalgamated company; or (ii) the amalgamation necessarily means that the property of the amalgamating companies has to be "*assigned*" to the amalgamated company; or (iii) the amalgamation necessarily means that the property of the amalgamating companies has to be "*transferred*" to the amalgamating company.

45. In *Rossi v McDonald's Restaurants of Canada Limited* [1991] B.C.J. No. 429 the court was faced with the argument that the effect of the amalgamation was to "*assign*" the lease of a property from the amalgamating companies to the amalgamating company. There was no dispute that no consent to the assignment was sought from the landlord or the amalgamating company. It was argued that as a result the amalgamated company was in default of the lease and as a result had lost its right to renew the lease. The court concluded that "*companies that amalgamate continue in existence as the new corporation, and that a*

*new corporation possesses all the property and rights the amalgamation has brought together*".

46. Shaw J first referred to the decision of the Supreme Court of Canada in *Black & Decker Manufacturing*. Shaw J then referred to the decision in *Whitco Chemical Co. v Town of Oakville* [1975] 1 S.C.R.273, where the issue was whether a writ issued in the name of an amalgamating company one day after its amalgamation into a corporation bearing a different corporate name was fatal to the proceedings. The Supreme Court of Canada held that the error was not fatal. Spence J, for the Court, said at page 283:

> *"I am, however, of the opinion that in the present case there was a not an extinguishment of the corporate identity of the Whitco Chemical Company, Canada, Limited, in holding that the writ had been issued in the name of a non-existent plaintiff"*

47. Shaw J then referred to the case *In Re Manco Systems (1989), 72 C.B.R. 130 (B.C.S.C.)* where the issue was whether an amalgamated company had to reregister securities under the Company Act 1979, which securities had already been registered by the amalgamating companies before the amalgamation. At stake was the validity of the securities against the trustee in bankruptcy. Cowan J held that no new registration was required. That decision was upheld in the Court of Appeal where Southin JA, for the Court, said at p.113:

> "*It is not necessary to engage in metaphysical speculation as to the nature of an amalgamated company. The amalgamated companies are, by s. 275, "continued as one". They have not disappeared completely.*"

48. Having analysed these authorities Shaw J concluded:

> "*Upon consideration of the above-cited authorities on assignment and on amalgamation, I am of the opinion that an amalgamation does not constitute an assignment. Whereas an assignment fully divests the assignor of the property or right that is assigned, the effect of an amalgamation is quite different.*

***Amalgamating companies continue to exist as the amalgamated corporation, and as such they continued to possess all the property and rights that they had before the amalgamation**. There may be dilution of ownership in the sense that it is shared with the other amalgamating company or companies, but there is not the complete divestiture of property or rights which is a fundamental characteristic of an assignment*." (emphasis added)

49. In *Loeb Inc. v Cooper* [1991] 5 O.R. 259 the Ontario Court rejected the argument that the effect of an amalgamation was to the breach of the covenant not to assign the lease without the landlord's consent. In coming to this conclusion Henry J held:

> "*While Black & Decker concerned a prosecution for a criminal offence alleged, there can be no question that its principle applies equally to a civil context. As I understand the judgment in Black & Decker the Supreme Court of Canada decided that in principle an **amalgamation under s. 137 of the Canada Corporations Act did not result in a transfer of the rights and obligations from "old" companies to a "new" company; this includes any supposed transfer of criminal responsibility and must a fortiori embrace any supposed transfer of civil rights and obligations**. There cannot be, without more explicit expression in the legislation or the judgment, two different interpretations according as the subject matter is criminal or civil*." (emphasis added)

50. It appears that New Zealand has also enacted amalgamation provisions based upon the Canadian legislation. In *Carter Holt Harvey Ltd V McKernan* [1988] 3 NZLR 403, the defendants had given personal guarantees to a subsidiary of the plaintiff in respect of a trading account, no mention being made of assigns or successors of the subsidiary company. Thereafter the subsidiary company was amalgamated with the plaintiff company under the Companies Act 1955. The Master held that the amalgamated company was a different entity from the individual companies which amalgamated to constitute it so that

a change in the identity of the creditor terminated the liability of the guarantor under a continuing guarantee. The Court of Appeal reversed the decision of the Master and held:

> *"We discern in the legislation a parliamentary intent that the benefits and burdens of the contracts of all merging companies are to continue in force for all purposes.* ***The amalgamated company is to enjoy all advantages previously conferred on any of the amalgamated companies and to have their liabilities. It is not to be treated as a different entity or as a new party to the contractual arrangements****. It is not the equivalent of an assignee. Accordingly, in the case of a guaranty, neither the amalgamation of the creditor nor of the debtor will discharge the guarantee in respect of post-amalgamation advances, any more than it would discharge pretty amalgamation advances.* ***The amalgamated company simply stands in the shoes of the amalgamating company****."* (emphasis added)

51. In *Elders New Zealand Ltd v PGG Wrightson Ltd* [2009] NZCCLR 17, Elders New Zealand and Wrightson Ltd were joint owners of several stock saleyards. The relevant agreements or company constitutions gave each co-owner a right of pre-emption if the other wish to "***transfer****, sell, lease or otherwise dispose of the whole or part of its interest in the Saleyards*." Wrightson and PGG agreed on the terms of an amalgamation, with PGG continuing as the surviving company under the name "PGG Wrightsman Ltd". The issue on appeal was whether an amalgamation triggered Elder's pre-emptive rights as co-owner of the saleyards. The Supreme Court of New Zealand held that the amalgamation resulted in fusion of Wrightson and PGG. PGG and Wrightson, as the amalgamated Co., held the property of Wrightson by operation of law as if it was still Wrightson. No transfer or disposition of property was involved in the amalgamation and the rights of preemption did not arise. McGarth J, for the Court, held at [23]-[24]:

> *"[23] The idea that an amalgamated company is a continuation of the amalgamating companies, expressed in s 219 and explained in Carter Holt Harvey, clarifies the conceptual nature of the process of amalgamation under Part 13. That Part, including the concept of continuance, was proposed by the Law Commission,16 which took the model from Canadian corporations legislation.17*

*In R v Black and Decker Manufacturing Co Ltd, 18 the Supreme Court of Canada had said of the equivalent provision in Canadian legislation that "continue" was the controlling word and carried the meaning "to remain in existence or in its present condition". Its effect was that of "blending and continuance as one and the selfsame company". There was "an amalgamated company into which, simultaneously, two amalgamating companies have fused along with their assets and liabilities". The Supreme Court held that it followed that an amalgamated corporation remained liable for prosecution for offences committed prior to the amalgamation.*

*[24] The passages cited above from Carter Holt Harvey also make clear that the amalgamated company enjoys the benefits and burdens of its amalgamating companies' contracts by operation of law. The concept of continuance under s 219 colours the meaning of "succeeds" in s 225.* ***There is no assignment or other disposition of rights causing property to pass to the amalgamated company because it is in law the same entity****. It must follow that if the merger with Wrightson had taken place under the Part 13 procedure, the contractual rights of pre-emption would not have been triggered. This is accepted by the appellant."* (emphasis added).

52. It was for the reasons and analysis outlined above the Court made the declaration set out in paragraph 2 above. Having made the declaration in terms stated the Court considered it appropriate to additionally grant the corollary injunctive relief.

53. The declaration made by the Court is in accordance with the opinions expressed by Mr. Chivers QC in the South African proceedings. The opinions expressed by Mr. David Kessaram are not consistent with the declaration made by the Court. It appears that Mr. Kessaram has not adequately taken into account (i) the decision of the Bermuda Supreme Court in *Clark v Energia Global*; (ii) the fact that sections 104 to 109 of the Act are based

upon Canadian legislation; and (iii) the decisions of the Canadian courts and in particular the decision of the Supreme Court of Canada in *R v Black & Decker Manufacturing*.

Dated this 12th day of November 2021


NARINDER K HARGUN
CHIEF JUSTICE