

THE EASTERN CARIBBEAN SUPREME COURT
IN THE COURT OF APPEAL

SAINT CHRISTOPHER AND NEVIS

SKBHCVAP2020/0018

BETWEEN:

BEAUMONT PARK LIMITED

Appellant

and

TECHNOLOGY, DEVELOPMENT & INVESTMENTS LIMITED

Respondent

Before:

The Hon. Mr. Trevor Ward
The Hon. Mde. Esco Henry
The Hon. Mr. Gerard St. C. Farara

Justice of Appeal
Justice of Appeal
Justice of Appeal [Ag.]

Appearances:

Mr. Damian Kelsick KC, with him, Ms. Hadya Dolphin and Ms. Chanté Francis for
the Appellant
Ms. Jean M. Dyer for the Respondent

2024: June 18;
July 22.

JUDGMENT

Civil Appeal – Compromise and Settlement Agreement – Construction and interpretation of release and discharge clauses – Whether the learned judge erred in construing clause 9 of the Compromise and Settlement Agreement – Whether the learned judge erred in construing the ‘Other Claim’ limb of clauses 17-19 of the Compromise and Settlement Agreement – Whether the appellant’s claim against the respondent was barred by the ‘Other Claim’ limb of clauses 17-19 of the Compromise and Settlement Agreement

In the High Court of Justice, Beaumont Park Limited (“the appellant” or “BPL”) sought certain reliefs against three defendants, Technology, Development & Investments Limited (“the respondent” or “TDI”), Vitaly Kryuchkov (“Mr. Kryuchkov”) and Elena Pogoretskaya (“Ms. Pogoretskaya”). The reliefs sought were for orders that TDI and Mr. Kryuchkov pay to the appellant two distinct sums of money. The first, the Legal Fees Claim, was for payment of the sum of US\$84,042.03. This claim was dismissed by the High Court in a written judgment dated 15th June 2020 (“the judgment”) after trial. The appellant’s appeal against this decision was not pursued before this Court.

The second claim, the Sums Advanced Claim, was for re-payment of the sum of US\$3,118,357.81 expended by the appellant on the instructions of Mr. Kryuchkov for the benefit of the respondent (TDI). As pleaded in the statement of claim, the Sums Advanced Claim concerned sums advanced from the funds of the appellant between 14th February 2014 and 10th February 2017 totalling US\$4,347,646.08, which advances were used to discharge the obligations of the respondent pursuant to a Shareholders’ Agreement entered into around 9th December 2013 (the “SHA”) between the appellant, the respondent, Mr. Kryuchkov, Strathmore Investments Limited (“SIL”), Bedford Investments Limited (“BIL”), Daislyn Sharpe (“Ms. Sharpe”) and Michael Martin (“Mr. Martin”), all shareholders of the appellant.

Pursuant to the terms of the SHA, the respondent agreed to fund the further development of certain lands situate in the Federation of St. Christopher and Nevis known as Beaumont Park (the “Project”). As pleaded in the statement of claim, at the Board meeting of the appellant on 5th December 2013, Mr. Kryuchkov was appointed to the Board as nominee of the respondent and some 600,000 shares in the appellant company were issued to the respondent, TDI. The appellant pleaded that in causing it to make the advances, Mr. Kryuchkov breached his fiduciary duties to the appellant. The appellant asserted that the obligation to provide funding for the future development of the Project was, as per the terms of the SHA, that of the respondent, and accordingly the advances made from the appellant’s funds in discharging the respondent’s said funding obligations, were a debt to be repaid to the appellant. Consequently, whilst the respondent’s funding obligation arose out of the SHA, the debt owed by the respondent did not arise out of the SHA.

The situation between the parties worsened and three claims were brought in the High Court: (i) the BIL/Michael Martin Claim (SKBHCV2016/0061) brought by BIL and Michael Martin against BPL, TDI, Vitaly Kryuchkov, Elena Pogoretskaya and TDI Real Estate Corp; (ii) the TDI/BPL Claim (SKBHCV2016/0093) brought by TDI and BPL against Michael Martin, Arthur Sharpe, Daislyn Sharpe, BIL and SIL; and (iii) the SIL Claim (SHBHCV2016/0101) brought by SIL against BPL, TDI, Vitaly Kryuchkov and Elena Pogoretskaya (collectively the “Three Claims”). After a successful court ordered mediation in February 2017, a Compromise and Settlement Agreement (“CASA”) was entered into on 11th February 2017 by the parties settling the Three Claims.

By clause 9 of CASA, the SHA was terminated with immediate effect and all parties thereto were discharged from the performance of all ‘outstanding obligations’ thereunder. By clauses 17-19 of CASA, two categories of claims were discharged. In the first place, the defendants, their servants, agents, employees and successors in title to each of the Three

Claims were discharged and released by the respective claimants from any and all actions, suits, causes of action, claims and demands whatsoever comprised in the respective Claim or otherwise. In the second place, the said defendants, and their servants, agents, employees and successors in title were released and discharged from any actions, suits, causes of action, claims and demands which 'has or at any or but for the execution of this Compromise and Settlement Agreement could or might have had for or by reason of the Defendants shareholding or directorship, or the holding of any office, in BPL' (the appellant) which second category of claims is referred to in the judgment below as the 'Other Claim'.

The learned judge found that, on a balance of probabilities, the Sums Advanced Claim was proven in the amount claimed of US\$3,107,995.44. However, he went on to hold that the Sums Advanced Claim is barred by the 'Other Claim' limb of clauses 17-19 of CASA. The judge also gave judgment in favour of the respondent on its counterclaim for a declaration that CASA remained in full force, but dismissed, on privity of contract principles, the respondent's counterclaim for an order requiring the appellant, its servants and agents, to perform their obligations to pay certain sums/benefits to Mr. Kryuchkov and Ms. Viviana DaSilva that were due to them under clauses 2 and 5 of CASA.

Being dissatisfied with the judge's ruling on both the Legal Fees Claim and the Sums Advanced Claim, the appellant appealed. The appellant challenged the judge's findings that the Sums Advanced Claim was barred by clauses 17-19 of CASA. The appeal essentially concerned a singular issue of interpretation of Clauses 9 and 17-19 of CASA and whether the learned judge was correct to conclude that the 'Other Claim' limb of clauses 17-19 applied to the Sums Advanced Claim thereby barring the appellant from bringing that claim against the respondent.

Held: allowing the appeal against the order barring the Sums Advanced Claim and the declaration on the Counterclaim, and making the orders set out at paragraph 76 of this judgment, that:

1. In construing the terms of a release, a court should be guided by the six principles set out by the House of Lords in **Bank of Credit and Commerce International SA v Ali and others**. These six principles can be distilled into two broad planks. The first is that there are no special rules of interpretation or construction to be applied by a court when construing releases or compromise agreements which would make the approach to their interpretation any different from the ordinary rules of construction to be deployed when interpreting the words of a contract. The second is that it is not uncommon for the wording of releases to be so wide as to extend its coverage not just to existing known claims, but also to existing unknown claims of the contracting parties which might come to light later. As a corollary to this second plank, the fact that a known claim at the time of contracting was not specifically identified and expressly stated to be covered by a release clause, while an important factor in determining whether it was covered by the contractual release, does not lead inexorably to the conclusion that it was not intended to and is not, as a matter of proper construction, covered by the release clause. The judge clearly had in mind these guiding principles when embarking on the exercise of construing clauses 17-19.

Bank of Credit and Commerce International SA v Ali and others [2002] 1 AC 251 applied.

2. The Sums Advanced Claim related to monies already advanced by the appellant to the respondent to discharge the latter's obligation to provide funding under the SHA for the future development of the Project. On the evidence it was clear that this claim must have been known to exist at the time of entering into CASA by both the appellant and the respondent. Despite this, there is no mention whatsoever of this claim in CASA much less of the respondent being released or in some way absolved from its unquestionable liability to repay the sums advanced by the appellant.
3. By clause 9 of CASA, all parties to the SHA were released from all 'unperformed obligations' under the SHA. However, it is clear from the judgment that the learned judge did not embark upon the exercise of construing clause 9 and applying it to the issue in dispute between the parties in relation to the Sums Advanced Claim. This was, perhaps, because the wording of clause 9 is clear and unequivocal. The Sums Advanced Claim is a claim relating to the sums advanced by the appellant to TDI, allegedly in breach by Mr. Kryuchkov of his fiduciary duties to the appellant, to discharge the respondent's funding obligations under the SHA. The sums advanced by the appellant and to be repaid by the respondent gave rise to a debt outside the SHA. Properly construed, this debt or obligation to repay the sums advanced did not arise under the SHA. It was therefore a discreet claim made by the appellant for the reimbursement of the money which it advanced to the respondent. Moreover, the express purpose of CASA is an agreement to settle the Three Claims, and the Sums Advanced Claim was not the subject of any of the Three Claims settled by or under the terms of CASA. Accordingly, viewed in this way, the Sums Advanced Claim, albeit a prior existing claim known to the appellant and the respondent, was not caught by the 'Other Claim' provisions of clauses 17 to 19 of CASA.
4. Under clauses 17-19 of CASA, the releasors are the named claimants in the Three Claims and the releasees are the named defendants in each of the Three Claims. Under clause 17, both the respondent and appellant are releasors, but neither of them are releasees. Thus, the respondent could not be the beneficiary of the release and discharge under clause 17, much less of its liability to repay to the appellant the Sums Advanced, which liability the learned judge found proven on the evidence. The 'Other Claim' limb or category of claims to be released therefore does not apply to the Sums Advanced Claim under clause 17. Pursuant to clause 18, both the appellant and respondent are releasees. Since the appellant is not named as a releasor, the 'Other Claim' limb could not be construed as releasing the respondent from the Sums Advanced Claim. Finally, under clause 19, both the appellant and respondent are named as releasees. Again, as the appellant was not a named releasor in clause 19, the respondent could not benefit from the 'Other Claim' limb and was thus not discharged from its obligation to repay the Sums Advanced. The learned judge therefore erred in his construction of clauses 17 to 19 and was wrong to find that the 'Other Claim' limb was wide and clear enough to be construed as applying to the Sums Advanced Claim.

5. The contractual Project funding obligation under the SHA was that of the respondent. The respondent's liability to repay the appellant the Sums Advanced did not arise out of any binding obligation under the SHA, even though the advances were used to discharge the respondent's funding obligation under the SHA. The judge was therefore wrong to find that the respondent's liability to repay arose out of the SHA. Furthermore, it was erroneous to say that the source of the alleged debt was clearly the SHA, when those sums were advanced out of the appellant's funds, albeit at the direction of Mr. Kryuchkov who held offices in both the respondent and the appellant. The learned judge further erred by finding that as the respondent's funding obligation under the SHA was based directly on its shareholding in the appellant and the Sums Advanced Claim was therefore caught by the 'Other Claim' provision in clauses 17 to 19 of CASA. Whilst the respondent was a shareholder in the appellant, even at the time of entering into CASA, it did not follow that the advances did not create a debt owing by the respondent to the appellant which debt arose outside of the SHA. No obligation on the part of the appellant existed or arose under or by virtue of the SHA to step in and to advance the sums necessary to fund the Project. The judge also based his finding on what he saw as the common denominator between the appellant and the respondent, that is Mr. Kryuchkov, who was on the board of both the appellant and respondent. However, this factor was not a sound basis for concluding that the Sums Advanced Claim, which did not arise under the SHA, was caught by the 'Other Claim' limb of clauses 17 to 19.

JUDGMENT

- [1] **FARARA JA [AG.]:** This is an appeal from the judgment and orders made by a learned judge of the High Court dated 15th June 2020 ("the judgment") in Claim No. SKBHCV2017/0246 ("the Claim"). In the Claim the appellant sought recovery and/or accounting for two principal sums of money. By the judgment, the court below, having found the 'Sums Advanced Claim' in the sum of US\$3,118,357.81 proven on the facts, went on to find that this claim was barred by a certain limb of the releases at clauses 17 to 19 of a Compromise and Settlement Agreement ("CASA") dated 11th February 2017 entered into by various parties, including the appellant and the respondent.
- [2] By the judgment the learned judge also dismissed the Legal Fees Claim in the sum of US\$84,042.03 on the bases that the said claim had not been proven on a balance of probabilities and, in any event, the appellant was estopped and precluded through its conduct in compromising the proceedings in respect of which the legal fees were

incurred, from advancing the Legal Fees Claim. The judge also gave judgment in favour of the respondent on its counterclaim for a declaration that CASA remains in full force 'and is conclusive between the parties thereto on all matters arising in the BIL Claim and the SIL Claim'. However, he dismissed, on privity of contract principles, the aspect of the respondent's counterclaim for an order requiring the appellant, its servants and agents, to perform their obligations to pay certain sums/benefits to Mr. Kryuchkov and Ms. Viviana DaSilva that were due to them under clauses 2 and 5 of CASA.

The appeal

[3] The appellant, by notice of appeal filed 15th July 2020 challenged the learned judge's findings and conclusion that the Sums Advanced Claim was barred by clauses 17 to 19 of CASA. It also challenged the judge's findings and conclusions with respect to the legal fees claim and the counterclaim. However, before this Court, Mr. Kelsick KC, learned counsel for the appellant, elected to argue the grounds of appeal relating to the Sums Advanced Claim being barred by the 'Other Claims'¹ limb of clauses 17 to 19 of CASA and, consequentially, the lower court's granting of the declaration on the counterclaim. This follows because the counterclaim is parasitical to the success of the appeal on the Sums Advanced Claim. Learned counsel did not pursue, and effectively abandoned, the appeal against the Legal Fees Claim, which finding, and order must therefore stand. It is also to be noted that the respondent did not file a respondent's notice, nor has it filed a counter appeal.

[4] In summary, the appeal, as argued before us, concerns a singular issue of interpretation of clauses 9, and 17 to 19 of CASA, and an assessment of whether the learned judge was correct in concluding that the 'Other Claims' provision of clauses 17 to 19 applied to the Sums Advanced Claim, with the consequence that the appellant was, by these provisions, barred from bringing that claim against the respondent.

¹ The relevant 'Other Claim' limb of clauses 17 to 19 reads 'or otherwise now has or at any or but for the execution of this [CASA] could or might have had for or by reason of the Defendants shareholding or directorship, or the holding of any office, in BPL [the appellant]'.

[5] The grounds upon which the appellant seeks to challenge and have this Court set aside the judge's finding that the Sums Advanced Claim was barred by the 'Other Claims' limb of clauses 17 to 19 ("the Main Appeal") are set out at paragraph 3(vi) to (xiii) of the appellant's notice of appeal. These are:

"(vi) The court misconstrued clauses 17 to 19 of CASA.

(vii) The court failed to appreciate that in the 3 Claims, the appellant and respondent were at all material times under the control and direction of Mr. Kryuchkov.

(viii) In none of clauses 17 to 19 was there a release from the appellant to the respondent or visa versa. The court therefore erred in holding that CASA estopped the claim to recover the Sums Advanced.

(ix) The court failed to give due regard to the fact that the words "could or might have had for or by reason of the Defendants shareholding or directorship, or holding of any office, in BPL" were found in clauses that contained specific releases and had to be construed in their context.

(x) The court erred in holding that the claim for the Sums Advanced was covered by the said words without further identifying which specific clause of CASA applied thereto.

(xi) In any event the court erred in holding that the words "could or might have had for or by reason of the Defendants shareholding or directorship, or the holding of any office, in BPL" applied to the claim for the Sums Advanced.

(xii) The court erred in failing to hold that said claim was a simple debt and was in any event not contemplated in any way by the Shareholder Agreement (as amended) nor could be said to have arisen "by reason of" shareholding, or directorship or holding of any office in BPL.

(xiii) The court erred in finding that the Sums Advanced fell within the words "could or might have had for or by reason of the Defendants shareholding or directorship, or the holding of any office, in BPL" because they were caused to be advanced by Mr. Kryuchkov, the nominee of the respondent, and/or because the sums were paid to discharge obligations of the respondent under the Shareholder Agreement (as amended)."

- [6] The counterclaim issue is dealt with in the single ground of appeal at paragraph 3(xiv):
- “(xiv) The court erred in granting the declaration which added nothing to the orders made on the claim.”
- [7] The Main Appeal challenges the interpretation, findings and conclusions of the learned judge at paragraph [34] of the judgment. The appellant therefore seeks orders allowing the appeal, setting aside the order made by the learned judge below dismissing the Sums Advanced Claim and an order entering judgment for the appellant in the sum of the Sums Advanced Claim, with prescribed costs to the appellant in the court below and in the appeal.
- [8] The appellant’s grounds of appeal in relation to the judge’s conclusion on the Sums Advanced Claim (the Main Appeal) can be conveniently distilled into one issue, that is, did the learned judge err in construing the meaning, applicability and legal effect of clauses 9, and/or 17 to 19 of CASA and in finding that clauses 17 to 19 applied to the Sums Advanced Claim to bar or estop the appellant from making that claim.
- [9] Before dealing with the Main Appeal issue, it is convenient to set out the appellant’s pleaded case on the Sums Advanced Claim in the statement of claim and to also deal, in some detail, with CASA and to some extent, the Shareholders’ Agreement (“SHA”).

The Sums Advanced Claim

- [10] By the Claim, the appellant (as claimant) sought certain reliefs against three defendants, namely, Technology, Development & Investments Limited (“the respondent”), Vitaly Kryuchkov (“Mr. Kryuchkov”) and Elena Pogoretskaya (“Ms. Pogoretskaya”). The reliefs sought were for, *inter alia*, orders that the respondent and Mr. Kryuchkov pay and/or account to the appellant for two distinct sums of money. The first is the Sums Advanced Claim in the sum of US\$3,118,357.81. This claim will be set out in detail below. The second is the Legal Fees Claim. It is for payment by the respondent to the appellant of the sum of US\$84,042.03

reimbursement of 50% of the respondent's legal fees paid or incurred to its lawyers. As stated above, the Legal Fees Claim was dismissed by the court below and the appeal against that decision was not pursued by the appellant.

[11] The Sums Advanced Claim is for the payment and/or account of the sum of US\$3,118,357.81 'expended by the appellant on the instructions of [Mr. Kryuchkov] for the benefit of [the respondent]'. As pleaded in the statement of claim, the Sums Advanced Claim concerned certain sums of money advanced or paid between 14th February 2014 and 10th February 2017 totalling US\$4,347,646.08 'which advances were effected by discharging the obligations of [the respondent] incurred pursuant to the Shareholders Agreement' entered into on or about 9th December 2013 between the appellant, the respondent, Mr. Kryuchkov and certain other parties.²

[12] As pleaded, pursuant to the terms of the SHA the respondent agreed to fund the further development of certain lands situate at Caines Estate in the Parishes of St. Paul and St. John in St. Christopher and Nevis comprising approximately 350 acres known as "Beaumont Park" ("the Project"), and to do so by direct cash input as and when required to meet the agreed budget for the development of the Resort as set out in Appendix C to the SHA.³ Also as pleaded, for each dollar in excess of US\$600,000 invested by the respondent in the appellant, the respondent would be issued one share in the appellant company.⁴ Furthermore, the SHA provided that the respondent would have three members on the Board of Directors of the appellant.⁵ It is pleaded that at the Board meeting of the appellant on 5th December 2013, Mr. Kryuchkov was appointed to the Board 'as nominee of [the respondent]'; and some 600,000 shares in the appellant company were issued to the respondent. It is also pleaded in the statement of claim that at all material times Mr. Kryuchkov

² See para. 10 of the Statement of Claim.

³ See para. 4(d) of the Statement of Claim.

⁴ See para. 4(f) of the Statement of Claim.

⁵ See para. 4(g)(iii) of the Statement of Claim.

'acted for and on behalf of [the respondent]' and was the Chairman and President of the appellant.⁶

[13] At paragraph 11 of the statement of claim, the appellant pleaded that, in causing the appellant to make the said advances to the respondent, Mr. Kryuchkov breached his fiduciary duties to the appellant. More specifically, it was pleaded at paragraph 11(d) that he abused his position and offices in the appellant 'to discharge, and thereby avoid or postpone the fulfilment by [the respondent] of its obligations' to fund the further development of the Resort (as set out at paragraph 4(d)); acted in circumstances where his interests conflicted with his fiduciary duties; and caused the appellant to advance sums to the respondent 'with no agreement by [the respondent] to pay interest on the sums so advanced'. It was also pleaded, and the judge so found, that on Mr. Kryuchkov's instructions, the advances were posted as receivables in the accounts of the appellant as due to the appellant from the respondent.⁷

[14] Moreover, in the judgment the learned judge accepted the evidence of Ms. Reid, the Chief Financial Officer of the appellant, that she had received instructions from Mr. Kryuchkov, the then President and Chairman of the Board of the appellant, to make the payments (advanced) from the funds of the appellant with future reimbursement to be made by the respondent, and that 'Mr. Kryuchkov knew there were amounts [the respondent] had to reimburse [the appellant]'.⁸

[15] At paragraph 15 of the statement of claim, the appellant pleaded as follows:

"15. [the respondent] and/or Mr. Kryuchkov are therefore liable to repay to [the appellant], and/or to account, to [the appellant] for, the said sum of US\$3,118,357.81 or such other sums paid by [the appellant] on behalf of [the respondent] in discharge of [the respondent's] obligations referred to at paragraph 4(d) above." (i.e. its project funding obligations)

⁶ See para. 6 of the Statement of Claim.

⁷ See para. 12 of the Statement of Claim.

⁸ See paragraph [9] of the judgment.

- [16] It is clear that the appellant's pleaded case was that the obligation to provide funding for the future development of the Project was, by the terms of the SHA, that of the respondent, and the advances made to the respondent from the funds of the appellant to enable it to meet that obligation as demanded were to be repaid or reimbursed by the respondent to the appellant. Thus, while the respondent's funding obligation arose out of the SHA, the debt owed by the respondent to the appellant arising from the advances made, did not arise out of the SHA as the appellant had no separate obligation under the SHA to provide the advances to the respondent.

The Compromise and Settlement Agreement

- [17] The Compromise and Settlement Agreement ("CASA") was entered into by the parties thereto after a successful court ordered mediation in February 2017 of the three extant claims filed in the High Court of Justice. The parties to CASA are the appellant ("BPL"), Strathmore Investments Limited ("SIL"), Bedford Investments Limited ("BIL"), the respondent ("TDI"), Vitaly Kryuchkov ("Vitaly"), Authur Sharpe ("Authur"), Daislyn Sharpe ("Daislyn") and Michael Martin ("Michael"). Recital (5) of CASA states:

"The parties have agreed to settle the BIL/Michael Claim, the TDI/BPL Claim and the SIL Claim (hereinafter collectively called "the Claims") upon the terms and conditions hereinafter set out."

- [18] The BIL/Michael Claim is a reference to Claim No. SKBHCV2016/0061 brought by BIL and Michael Martin against BPL (appellant), TDI (respondent), Vitaly Kryuchkov, Elena Pogoretskaya and TDI Real Estate Corp. The TDI/BPL Claim is Claim No. SKBHCV2016/0093 brought by TDI (respondent) and BPL (appellant) against Michael Martin, Arthur Sharpe, Daislyn Sharpe, BIL and SIL. And the SIL Claim is Claim No. SHBHCV2016/0101 brought by SIL against BPL (appellant), TDI (respondent), Vitaly Kryuchkov and Elena Pogoretskaya.
- [19] Pursuant to the terms of CASA, the respondent (TDI) was required to transfer 200,000 of its (600) shares in the appellant (BPL) to SIL, and a further 200,000 of its shares in the appellant to BIL. Thus, the respondent, as part of the settlement

and compromise of the three Claims, was required to divest itself of and transfer a total of 400,000 of its shares in the appellant (BPL). The appellant also had certain other obligations under CASA. It was required, pursuant to clause 2, to appoint Mr. Kryuchkov to the office of Vice President of Marketing with effect from 1st March 2017, upon the terms and conditions as to salary and otherwise at sub-paragraphs (a) to (e) of clause 2. The appellant was also required to appoint Mr. Kryuchkov as a real estate agent in connection with the sale of lots at Beaumont Park, upon terms as to payment of a commission per lot sold by the appellant to a purchaser introduced to the appellant by Mr. Kryuchkov. Also, pursuant to the terms of CASA. Mr. Kryuchkov was required to resign forthwith as Chairman of the Board of the appellant company and as its President.

[20] Clause 9 of CASA is of some importance to the determination of the issues in this appeal. It states:

“9. The Shareholder Agreement is terminated with immediate effect and all parties thereto are discharged from the performance of all outstanding obligations thereunder.”

[21] The SHA is dated 9th December 2013, was amended on 10th September 2014 and was terminated and is of no further effect by clause 9 of CASA. The parties to the SHA were the respondent (TDI), BIL, SIL, Daislyn Sharpe and Michael Martin, all shareholders of the appellant (BPL). Accordingly, by clause 9, all parties to the SHA were no longer required to discharge or to perform any ‘outstanding obligations’ thereunder as of the date of CASA 11th February 2017, it having thereby been terminated with immediate effect. In the judgment, the learned judge, having set out clause 9 of CASA, did not go on to construe its terms or to pronounce on its effect. He simply accepted the correctness of counsel for the appellant/claimant’s submission that as of the date of its termination the appellant was discharged from its outstanding, that is, ‘unperformed’ obligations under the SHA. I shall return to clause 9 and its legal effect later in the judgement.

[22] Clauses 17, 18 and 19 of CASA have, essentially, the same wording or terms, the only material differences between them being that they each discreetly concern one of each of the three Claims sought to be compromised and settled by the terms of CASA. Thus, the essential meaning or effect to be given to the wording of each of clauses 17 to 19 is the same. Each of these clauses provides for two categories of claims which are being released and discharged thereunder. The first is the named existing one of the three Claims. The second is what has been referred to as the ‘Other Claims’ in the judgment. These clauses read as follows:

“17. TDI and BPL hereby RELEASE AND DISCHARGE the Defendants to the TDI/BPL Claim, and their servants, agents, employees and successors in title, from any and all actions suits causes of action claims and demands whatsoever comprised in the said claim or otherwise now has or at any or but for the execution of this Compromise and Settlement Agreement could or might have had for or by reason of the Defendants shareholding or directorship, or the holding of any office, in BPL. (emphasis added)

18. BIL and Michael [Martin] hereby RELEASE AND DISCHARGE the Defendants to the BIL/Michael Claim, and their servants, agents, employees and successors in title, from any and all actions suits causes of action claims and demands whatsoever comprised in the said claim or otherwise not has or at any or but for the execution of this Compromise and Settlement Agreement could or might have had for or by reason of the Defendants shareholding or directorship, or the holding of any office, in BPL. (emphasis added)

19. SIL hereby RELEASES AND DISCHARGES the Defendants to the SIL Claim, and their servants, agents, employees and successors in title from any and all actions suits causes of action claims and demands whatsoever comprised in the said claim or otherwise now has or at any or but for the execution of this Compromise and Settlement Agreement could or might have had for or by reason of the Defendants shareholding or directorship, or the holding of any office, in BPL. (emphasis added)”

The Main Appeal - Is the Sums Advanced Claim barred by clauses 9, and/or 17 to 19 of CASA?

Appellant’s submissions

[23] The judge’s finding that the Sums Advanced Claim is barred by clauses 17 to 19 of CASA is to be found at paragraph [34] of the judgment. It is to be observed that in

reaching this conclusion, the learned judge did not identify for the purpose of his ruling on this point of defence, which of clauses 17, 18 or 19 he found to be applicable to the Sums Advanced Claim. Likewise, he did not make a finding of dismissal of the Sums Advanced Claim based on the provisions of clause 9. However, the provisions of clause 9 have been relied on by learned counsel Ms. Dyer for the respondent as supportive of or another basis upon which the judge's determination of the Sums Advanced Claim ought to be upheld by this Court. I shall return to this below.

[24] Paragraph [34] of the judgment states:

“The court is of the opinion that the direction given by Mr. Kryuchkov (a nominee director of the [appellant]) for the Sums Advanced to be paid from the funds of the [appellant] to discharge the obligations of [the respondent] (a shareholder of [the appellant]).....**falls squarely within the meaning of the words of the Other Claims found in clauses 17 to 19 of [CASA]. Consequently, [the Sums Advanced Claim] is barred by virtue of clauses 17 to 19 of [CASA].**” (emphasis added)

[25] The appellant strongly disagrees with the judge's conclusion at paragraph [34]. It is submitted that the Sums Advanced Claim is for the repayment to the appellant of monies which it advanced to the respondent as third-party payments owed by the respondent, which payments the respondent was obligated to make under and pursuant to the terms of the SHA. These advances were made at a time when the appellant company was under the control of Mr. Kryuchkov, who was then also the sole beneficial owner and controlling mind of the respondent. Moreover, the Sums Advanced Claim was not part of any of the three Claims compromised and settled by the parties to CASA. If, argues the appellant, it was intended that any claim by the appellant be reimbursed for the sums advanced on behalf of and in fulfillment of the respondent's obligations to further fund the Beaumont Park development was to be compromised and the respondent released from its liability to repay the sums advanced, this would have been specifically addressed and provided for in CASA, to which agreement the appellant and the respondent are both contracting parties. This was not done and there is no release applicable to the instant Sums Advanced Claim, including the releases at clauses 17 to 19. Furthermore, the learned judge,

faced with a difficult task of construction, expressed at paragraph [31] some difficulty in construing the wording of the 'Other Claims' limb or category of the claims and causes of action to be released pursuant to clauses 17 to 19.

[26] However, the appellant went further in developing its argument on this Main Appeal issue. It is submitted that the provisions of clauses 17 to 19 of CASA are pellucid. The releases and discharges from liability provided for in each of these provisions are intended to apply to and to cover two categories of claims or causes of action. The first are those included in the BIL and SIL Claims; and the second, is the 'Other Claims' that existed or could have existed 'by reason of the Defendants shareholding or directorship, or the holding of any office, in BPL'.

[27] Learned counsel for the appellant, Mr. Kelsick KC, in his oral presentation, drilled down on the language of each of clauses 17 to 19 and their fundamental legal effect and effectiveness as releases and discharges of liabilities and claims existing and known or existing and unknown at the time of entering into CASA. In providing his analysis, learned counsel also juxta positioned each of the three release clauses with the named claim therein and sought to construe the proper meaning and effect of the 'Other Claims' limb of each of these clauses.

[28] In attempting to do justice to his analysis, I now set out below, in summary form, his analysis and key points (emphasis added) as follows:

- 1) By **clause 17**, the **respondent and the appellant** jointly and severally released the Defendants to the **TDI/BPL Claim** No. SKBHCV2016/0093, from all actions, suits, causes of action, claims and demands whatsoever '**comprised in the said claim**', that is, in the TDI/BPL Claim. The "Defendants" to the TDI/BPL Claim are **Michael Martin, Aurther Sharpe, Daislyn Sharpe, BIL and SIL**. Pursuant to this clause 17, the respondent (TDI) and the appellant (BPL) also released and discharged the said Defendants from any actions, claims etc. which existed or could have

existed '**by reason of the Defendants shareholding or directorship, or the holding of any office, in BPL**'.

- 2) It is submitted on behalf of the appellant, that properly construed, under clause 17 the **releasors** are the respondent and the appellant (TDI and BPL), and the **releasees** are the named Defendants (as per above) in the TDI/BPL Claim. Neither the respondent nor the appellant are **releasees** under clause 17 and, more specifically, the second or 'Other Claims' provision thereunder. Accordingly, on any reasonable construction, the respondent could not be the beneficiary of the release and discharge under clause 17, much less of its liability to repay to the appellant the Sums Advanced, which liability therefor the learned judge found proven on the evidence. Therefore, on any proper construction of clause 17, the 'Other Claims' secondary limb of claims to be released cannot apply to the appellant as a releasor or to the Sums Advanced Claim, and the learned judge was wrong to so find.
- 3) By **clause 18**, BIL and Michael Martin are the named **releasors**. The 'Defendants' to the BIL/Michael Claim No. SKBHCV2016/0061 (the **releasees**) are BPL (appellant), TDI (respondent), Vitaly Kryuchkov, Elena Pogoretskaya, and TDI Real Estate Corp. (incorporated under the laws of Panama). The release hereunder relates to all claims, actions, suits, causes of action and demands whatsoever comprised in the **BIL/Michael Claim**. To the extent that the respondent is named in clause 18, it is in the capacity of a **releasee**. However, the appellant (BPL) is also not named as a releasor, but only as a **releasee**. Accordingly, the 'Other Claims' limb of clause 18 cannot, on any sound construction, be construed as applying to the respondent being released from the Sums Advanced Claim by the appellant.
- 4) By **clause 19**, SIL (only) is the named **releasor**. The releasees are the Defendants in the SIL Claim, namely, BPL (appellant), TDI (respondent),

Vitaly Kryuchkov, and Elena Pogoretskaya. By clause 19, SIL is releasing these Defendants from all actions, suits, causes of action, claims and demands whatsoever comprised in **the SIL Claim** No. SKBHCV2016/0101, and the 'Other Claims' under the secondary limb. Again, the respondent is a named releasee/beneficiary of the release and discharge, but the appellant BPL is not a named releasor under clause 19. It is submitted therefore that clause 19 cannot, as a matter of law and construction, be interpreted as a release by the **appellant** of any liability owed to it by the respondent (including the Sums Advanced Claim), and the learned judge erred in so interpreting this provision and making this finding.

[29] From his analysis of the meaning and, importantly, the effect in law of the releases at clauses 17,18 and 19, the appellant submits it is clear that none of these provisions (clauses 17 to 19) apply or can apply to the Sums Advanced Claim. It is submitted further that the Sums Advanced Claim is a specific or discreet claim made by the appellant for the reimbursement of the money which it advanced to the respondent to meet the latter's obligation under the SHA to continue to fund the development of Beaumont Park. It is not a claim which arises under the SHA nor is it a claim for breach or non-performance by either the respondent or the appellant under the SHA. Moreover, these advances were made by the appellant before CASA was entered into by the parties and was a claim which, accordingly, was known to the appellant and the respondent prior to CASA. Yet there is no mention whatsoever of this claim in CASA much less of the respondent being released or in some way absolved from its unquestionable liability to repay the sums advanced by the appellant, which liability the learned judge found had been proven on a balance of probabilities.

[30] It is my considered view, the above analysis and submissions by learned counsel for the appellant as to the correct meaning and legal effect of the releases at clauses 17,18 and 19 of CASA and why the contrary findings and decision reached by the learned judge barring the appellant from pursuing the Sums Advanced Claim is, as

a matter of fundamental principles, wrong, are profound in their simplicity and unanswerable. If correct, the appeal must be allowed, and the orders made by the learned judge set aside. Indeed, learned counsel for the respondent in her oral and written submissions has not addressed the matter head on.

[31] By clause 9 of CASA the respondent, as is the case with all other parties to the SHA, is released from all unperformed obligations under the SHA. It is submitted by the appellant that this clause does not assist the respondent either. The starting point is that the Sums Advanced Claim related to monies already advanced by the appellant to the respondent to discharge the latter's obligation to provide funding under the SHA. Looked at in this way, this claim relating to payments made prior to CASA, cannot be classified as "unperformed obligations" under the SHA on the part of the respondent. That funding obligation under the SHA was a continuing one and the Sums Advanced, as claimed in the Claim, related to the respondent's performance and discharge of that funding obligation as it arose from time to time in the development of the Project. In this sense, the Sums Advanced Claim did not relate to an "unperformed" obligation of the respondent. Properly construed, the SHA having been terminated effective 11th February 2017, the respondent's continuing obligation to make future funding payment to the Project would have ceased.

[32] Accordingly, it is the case for the appellant on the Main Appeal that, as a matter of simple construction, the provisions of clauses 9, 17, 18 and 19 of CASA are clear, and do not cover, and were never intended to extend to cover, the Sums Advanced Claim, and the learned judge erred in construing clauses 17 to 19 to find that the instant claim falls squarely with these clauses so as to bar the appellant from bringing the Sums Advanced Claim.

Respondent's submissions

- [33] I now turn to the respondent's submissions in answer to the grounds of the Main Appeal against the judge's conclusion that the Sums Advanced Claim is barred by clauses 17 to 19 of CASA.
- [34] In its written and oral submissions, the respondent placed much reliance on certain parts of the appellant's pleaded case in the court below and on the 'context' within which the interpretative exercise ought to be carried out by the Court. The objective of this approach was two-fold. The first, is to direct the Court's attention to specific paragraphs of the appellant's statement of claim in the court below (paragraphs 4(d), 11(b), and 15) which, the respondent argues, demonstrate that the Sums Advanced Claim arises out of the SHA, and that the advances were made as a direct result of the respondent's shareholding in the appellant. The second is to demonstrate the correct 'context' which ought to inform the Court's approach when construing CASA which, the respondent submits, was to achieve a holistic and comprehensive settlement of all claims, known and unknown, between the parties to the SHA by the terms of CASA. The respondent contends that this is what the parties sought to achieve by CASA and, in particular, by clauses 9, and 17 to 19. It is submitted that when the construction issue is approached in this way, it leads to the conclusion that the judge was correct in the way in which he interpreted clauses 17 to 19, and in concluding that the Sums Claimed is a claim which fell squarely within the wording and scope of the 'Other Claims' limb of the releases at clause 17 to 19.
- [35] Counsel for the respondent first took the Court to paragraph 4(d) of the statement of claim. There the appellant pleaded that the parties had entered into the SHA by which it was agreed, *inter alia*, that the respondent/defendant, TDI, had agreed to fund the further development of the Resort 'from the date of the [SHA] by direct cash input as required to meet the budget for the development of the resort as set out in Appendix C to the [SHA] ("the Budget")'. In my judgment, this was clearly and singularly a contractual obligation of the respondent. It was not an obligation of the

appellant under the SHA to either fund the Project or to provide the funding for the Project to enable the respondent to meet its financing contractual obligations. Moreover, neither in the court below nor before this Court did the parties point to some other agreement which required the appellant to fund the respondent's obligation under the SHA to fund the Project.

[36] Next the respondent relied on paragraph 10 of the statement of claim, which states (in part):

“Between February 14, 2014 and February 10, 2017 Mr. Kryuchkov caused BPL to advance to TDI sums totaling US\$4,347,646.08 **which advances were effected by discharging obligations of TDI incurred pursuant to the Shareholders Agreement** to fund the further development of the Resort from the date of the [SHA] by direct cash input as and when required to meet the agreed budget for the development....” (emphasis added)

[37] Again, this pleading speaks to the contractual obligation of the respondent to provide the funding for the Project, which obligation arises under and pursuant to the SHA. It is not pleaded that the appellant had any such parallel or separate obligation, or any obligation to provide to the respondent the necessary funds to discharge the respondent's contractual funding obligation under the SHA. Even if the practical mechanics deployed for making the advances was to pay them over directly to the Project, and not first to the respondent, this does not change the factual and legal position that the liability of the respondent to repay those sums is as between the appellant and the respondent and does not arise under the SHA.

[38] Reliance was also placed by the respondent on paragraph 11(b) of the statement of claim. Here the appellant pleaded that Mr. Kryuchkov ‘had abused his positions and offices in BPL [the appellant] to cause BPL to discharge, and thereby avoid or postpone the fulfilment by TDI of its obligations set out in paragraph 4(d) above’. Paragraph 11 concerns the pleaded allegations of breaches of fiduciary duty by Mr. Kryuchkov to the appellant in causing the appellant to make the said advances. Again, this pleading does not assert any obligation on the part of the appellant to

provide the development funding for the Project or to advance such funding to the respondent to enable the respondent to fulfill its funding obligations under the SHA.

[39] I respectfully do not agree with the respondent's submissions, which were accepted by the learned judge, that the funding advances made by the appellant to meet the obligations of the respondent under the SHA arose out of the SHA, or because of the respondent being a shareholder of the appellant. These findings were not supported by the evidence, including the documentary evidence in this case. The SHA contained no obligation on the part of the appellant to provide such funding as a shareholder of the appellant company. The obligation rested solely with the respondent.

[40] The respondent underscored that the appellant's case on the Sums Advanced Claim was clearly rooted in the SHA, and that what is pleaded at paragraph 11(b) of the statement of claim is relevant to a consideration of the provisions of clause 9 of CASA, which provision absolves the parties to the SHA from any obligations thereunder then outstanding or not performed. As the argument goes, this is what is pleaded at paragraph 4(b) in relation to the respondent's funding obligation under the SHA. However, in my view this is a false premise. Clause 9 was not in play here as the liability for the respondent to repay the sums advanced to fund the Project arose not under the SHA, but by virtue of those funds having been advanced out of the funds of the appellant, which led to an obligation, outside of the SHA, for the respondent to repay and to account for these sums to the appellant. This is the essence of what the learned judge found when he was satisfied that the Sums Advanced Claim had been proven on a balance of probabilities.⁹

[41] The respondent also asserted that the claims being made in each of the three Claims settled by CASA were derivative claims or some form of a derivative claim. In attempting to make good this contention, learned counsel referred to the Fixed

⁹ See paras. [9], [12] and [13] of the judgment.

Date Claim Form in each of these claims. Counsel took the Court to paragraphs 6 and 8 of the BIL Claim Form where the claimant in that matter seeks, among other reliefs, an interim order appointing a receiver to manage the affairs of the appellant. Counsel also took us to the reliefs at paragraphs 2 to 4 of the Fixed Date Claim Form in the SIL Claim concerning claims for an account. In my view, this is a weak point at best which does not advance the matter any further, as counsel for the appellant demonstrated in his reply submissions.

[42] In its defence, the respondent disputed any liability for the Sums Advanced Claim, and also pleaded that the Sums Advanced Claim was barred by CASA. In this respect, the respondents rely on the judge's treatment of their grounds of defence from paragraph [22] to [37] of the judgment. In particular, the respondent relies, as correct, on the judge's finding at paragraph [32] that '[it] cannot be disputed that [the respondent's] obligations under the [SHA] was based directly on its shareholding in [the appellant]'. Reliance is also placed by the respondent on the judge's findings at paragraphs [34] and [36] of the judgment, that the directions given by Mr. Kryuchkov (who was an officer of both the appellant and the respondent) to make the advances from the funds of the appellant to satisfy the respondent's funding obligations under the SHA, 'falls squarely' within the meaning of 'Other Claims' that existed or could have existed by reason of the Defendants shareholding or directorship, of the holding of any office, in BPL, in clauses 17 to 19 of CASA. It is also submitted that, as a consequence of this provision in the releases, BPL's claim in the present proceedings was barred 'as such obligation arose out of TDI's [the respondent's] shareholding in BPL [the appellant]'.¹⁰ I will give further consideration below to paragraphs [34] and [36] of the judgment.

[43] Regarding CASA and the approach a court should adopt when construing this settlement agreement as a whole and clauses 9, and 17 to 19 in particular, the respondent submits that the learned judge was correct in the way in which he approached the issue of construction of settlement agreements. At paragraph [35]

¹⁰ See para. 5(ii) of the respondent's skeleton.

of the judgement, the learned judge set out the six principles of construction emerging from the decision of the House of Lords in **Bank of Credit and Commerce International SA v Ali and others**¹¹ as applicable to construing releases or compromise agreements. No issue has been taken before regarding the correctness of any of these six principles as set out in the judgment. Accordingly, nothing useful will be served by reproducing them here. I adopt them wholesale as being correct for the purposes of my analysis of the Main Appeal issue, albeit some additional treatment of them appears below.

[44] The respondent also pointed to the judge's acceptance, at paragraph [31] of the judgment, of the meaning advanced by counsel for the appellant/claimant of the words 'in the said claim or otherwise now has or at any or but for the execution of this [CASA] could or might have had for or by reason of the Defendants shareholding or directorship, or the holding of any office, in BPL'. The judge not only accepted counsel's meaning of those words, but then proceeded to apply that meaning when construing the scope of the 'Other Claims' limb of clauses 17 to 19. The accepted meaning posited by counsel for the appellant in the court below is 'other claims that existed or could have existed **by reason of the Defendants** shareholding or directorship, or the holding of any office, in BPL'. (emphasis added) This led the judge to frame the issue for determination in this way 'at the time of execution of the [CASA], could the [appellant] have brought the instant Claim', that is, for recovery of the Sums Advanced.¹²

[45] In my view, while this question could have some bearing, it was soundly answered by the learned judge when he found the Sums Advanced Claim proven. Moreover, it is clear that this valid claim did exist at the time the parties entered into CASA, but it was not mentioned or alluded to in any way in CASA. Having regard to the substantial amount of this claim, it is difficult to understand why, if the intention was that the respondent would, by clauses 17 to 19, be released from its liability to refund

¹¹ [2002] 1 AC 251.

¹² See para. [31] of the judgment.

the US\$3 million plus dollars to the appellant, it was not specifically addressed and dealt with in that manner in CASA. Moreover, why was there not a release of claims, causes of action and liabilities between the appellant as releasor and the respondent as releasee?

[46] The respondent submits that the learned judge committed no error of construction of clauses 17 to 19 of CASA and that he was correct to conclude that the wording of the 'Other Claims' limb of these clauses, in particular, of clause 18 and 19 relating, respectively, to the BIL claim and SIL claim, 'are wide enough for the lower court to have found that the parties must be taken to have intended to release the unknown existing claims at the time of the settlement which arose out of [the respondent's] shareholding in [the appellant]'. It is submitted also that the courts have a strong interest in upholding 'the integrity of a settlement', and public policy requires that they should be enforced 'as the whole point of a settlement is to bring finality'.¹³ For my part, I accept this last sentence as being a correct statement of legal principle.

[47] In summary, the respondent's case is that the learned judge approached the exercise of construing clauses 17 to 19 in the correct and principled way, he was correct in finding that the Sums Advanced Claim arose out of the SHA and because of the respondent's shareholding in the appellant. Accordingly, the learned judge reached the correct conclusion as a matter of law and fact, that this claim is barred by the scope and legal effect of the 'Other Claims' limb of clauses 17 to 19 of CASA. It is contended, therefore, that the appeal ought to be dismissed and the orders made by the judge confirmed, with costs to the respondent.

Analysis and conclusion

[48] Much of the Court's analysis of the submissions and points advanced on both sides has been made above. To the extent that I do not rehearse them in this section, they, of course, are an integral part of the Court's reasoning to the outcome of this appeal.

¹³ See para. 22 of the respondent's submissions.

- [49] The learned judge began his consideration of whether the instant claim falls within the realm of the 'Other Claims' limb in clauses 17 to 19 of CASA by stating the obvious: '[it] is difficult to understand fully the meaning of these words'. Indeed, the 'Other Claims' limb of each release clause (clumsily drafted as they were) lends itself, perhaps, to some uncertainty regarding the scope and legal effect of each of these clauses or worse to more than one interpretation. However, this notwithstanding, it is the function of the court to do the best it can in construing the provision of a contract under scrutiny in the proceedings and, ultimately, to make sense of it in the context of the contract or agreement as a whole.
- [50] In construing the terms of a release, as has already been stated, a court should be guided by the six principles set out by the House of Lords in the **Bank of Credit and Commerce International v Ali** case. The learned judge reminded himself of these sage principles of construction at paragraph [36]. The learned judge clearly had to mind these guiding principles when embarking upon the exercise of construing clauses 17 to 19. This much is uncontroversial. Of particular importance in the instant matter, is the principle that release clauses must be approached bearing in mind that it is not unusual for contracting parties to frame a release in wide terms intended to apply to not only claims and causes of action which are then known, but also claims and causes of action involving the parties to the release contract which, at the time, were unknown. However, the nub of this appeal revolves around the way in which the learned judge approached the construction exercise and the extent to which he correctly applied these principles and the correctness of his analysis of the wording and legal effect of these release clause.
- [51] These six principles may, conveniently, be distilled into two broad planks. The first is that there are no special rules of interpretation or construction to be applied by a court when construing releases or compromise agreements, which would make the approach to their interpretation by a court any different from the ordinary rules of construction to be deployed when interpreting the words of a contract. The second

is that it is not uncommon for the wording of releases to be as wide as to extend coverage not just to existing known claims, but also to existing unknown claims of the contracting parties which might come to light later. Accordingly, the mere fact that a particular claim between contracting parties, which was unknown to the parties at the time of contracting for the release, came to light post contracting, is not a good basis in of itself for necessarily excluding that claim from the words and scope of the release. Further and as a corollary to this second plank, the fact that a known claim at the time of contracting was not specifically identified and expressly stated to be covered by a release clause, while an important factor in determining whether it was covered by the contractual release, does not lead inexorably to the conclusion that it was not intended to and is not, as a matter of proper construction, covered by the release clause.

[52] These principles serve to underscore the significance of a court or judge first construing the release clause within the context of the whole agreement, before deciding whether the particular claim under consideration falls squarely within or without the wording and scope of the release. In doing so, a court must not resort to a strained or unsupported interpretation. It is for the parties to craft the wording of their agreement so as to achieve their mutual understanding and agreement so as to make clear what has been agreed upon. This cannot be more important than when including a clause or clauses whereby a party is releasing and discharging another contracting party from liability or from a claim or cause of action, whether known or unknown, whether existing or potential.

[53] In the instant matter, the Sums Advanced Claim was not a claim made in proceedings before CASA was entered into by the parties. This was accepted by the learned judge as the correct position. However, from the evidence and findings of proof of liability made by the learned judge in reaching the determination that the Sums Advanced Claim had been established by the appellant, it is clear that this claim must have been known to exist at the time of contracting for CASA by both the appellant and the respondent. This is pellucid from the judge's evidential findings

at paragraphs [9] to [13] of the judgment. Accordingly, it can be deduced with considerable certainty, that the Sums Advanced Claim was a 'known' claim at the time when the parties entered into CASA on 11th February 2017, at least known to the appellant and the respondent.

[54] The respondent in their submissions seem to be saying that the Sums Advanced Claim was unknown at the time of contracting for CASA and only came to light thereafter. I completely reject this scenario. This would mean that the appellant and the respondent, when negotiating for and entering into CASA, would have known that the respondent had a liability to the appellant in a sum exceeding US\$3 million, which sum was shown in the accounting books of the appellant as a receivable to be repaid. However, that is not the end of the matter. It must still be shown that the Sums Advanced Claim was not caught by the releases (or any of them) at clauses 17 to 19 of CASA.

[55] The respondent underscores in its submissions, that both the appellant and the respondent are parties to CASA and, accordingly, the appellant must be taken to have agreed to all 20 clauses of CASA, inclusive of clauses 17 to 19. This much is certainly indisputable. It is also submitted that the judge was correct to conclude at paragraph [34] that the present Claim falls squarely with the 'Other Claims' limb of clauses 17 to 19 of CASA, since the present Claim relates to the respondent's funding obligation under the SHA which were 'outstanding' and therefore caught by clause 9 and is no longer enforceable. In support of this interpretation, the respondent referred to paragraph 11(b)(i) of the statement of claim in the instant proceedings.

[56] This is the gist of the respondent's clause 9 argument. However, the judge made no such finding based on clause 9 of CASA, and the respondent has not filed a respondent's notice asking this Court to uphold the judge's decision on the Sums Advanced Claim being barred by clause 9. That is not necessarily fatal, as by section 35(2) of the **Eastern Caribbean Supreme Court (Saint Christopher and**

Nevis) Act¹⁴ the Court of Appeal has the power to confirm, vary, amend or set aside any order of the High Court notwithstanding the respondent has omitted to file a respondent's notice. Section 35(2) (in material part) states:

“(2) The powers of the Court of Appeal under section 35 ‘may be exercised notwithstanding that no notice of appeal or respondent’s notice has been given in respect of any particular part of the decision of the High Court by any particular party to the proceedings in the Court or that any ground for allowing the appeal or for affirming or varying the decision of that Court is not specified in such notice; and the Court of Appeal may make any order in such terms as the Court of Appeal thinks just to ensure the determination on the merits of the real question in controversy between the parties.”

[57] However, the learned judge appears to have considered that clause 9 may or could have some significance to the determination of the Sums Advanced Claim. At paragraph [20] he accepted that counsel for the appellant/claimant was correct in submitting that clauses 9 and 17 to 19 of CASA provided that (a) the respondent is discharged from its outstanding (i.e. unperformed obligations under the SHA); (b) the appellant and respondent released the defendants to the TDI/BPL Claim from all claims in that claim, or other claims that existed or could have existed ‘by reason of the Defendants shareholding or directorship, or the holding of any office, in [the appellant]’; and (c) SIL and BIL respectively released the defendants in the SIL Claim and BIL Claim from all claims in the SIL Claim and BIL Claim, other claims that existed or could have existed ‘by reason of the Defendants shareholding or directorship, or the holding of any office, in [the appellant]’.

[58] In so doing, however, the learned judge did not embark upon the exercise of construing the wording of clause 9. This is, perhaps, not surprising since the wording of clause 9 is clear and ought not be controversial. In any event, in my considered opinion, by accepting this submission or interpretation by counsel for the appellant, it did not take the matter of the interpretation of clause 9 any further than what is plainly obvious from the wording of clause 9 itself. It cannot be in doubt that the appellant, as a party to CASA, is bound by the provisions of clause 9 such that it

¹⁴ Cap. 3.11 of the revised laws of Saint Christopher and Nevis, 2020.

cannot pursue and cannot be pursued for any claims concerning 'unperformed obligations' under the SHA.

[59] With that said, I can discern no merit in the respondent's clause 9 point. The provision itself is clear. However, the Sums Advanced Claim is not, for the reasons mentioned above, an 'outstanding obligation' under the SHA. The liability did not arise under the SHA and, in any event, the sums advanced and to be repaid were in discharge of an existing obligation of the respondent. We are not here dealing with any post-CASA obligations for which a claim has been brought, such as would be caught by clause 9.

[60] The respondent argues that the finding at paragraph [34] is consistent with the clear purpose of CASA, which was for the parties to settle, in a holistic and comprehensive way, all claims, known and unknown at the time, between the parties to CASA in relation to the SHA and the Project. As this line of argument goes, if the appellant's argument is upheld by this Court, it would mean that there was no comprehensive and final settlement of all claims known and unknown arising 'by reason of the Defendants shareholding or directorship, or the holding of any office, in BPL'.

[61] The simple answer to this submission, in my view, is that there is nothing in the wording of CASA which supports the argument that the settlement thereunder provided was intended by the parties to be holistic or comprehensive relative to all issues concerning the Project and the Project land. The stated purpose of CASA at Recital (5) was clearly stated as an agreement to settle the three Claims; not all claims known or unknown. This was made clear by the terms of clause 9 itself by which the SHA was terminated, and the parties thereto discharged from the performance of 'all outstanding obligations thereunder'. These provisions do not go as far as saying, for instance, that a party to the SHA cannot bring a claim against another party relating to some prior obligation thereunder which had been already

performed, unless such prior obligation or cause of action was caught by the provisions of clauses 17 to 19.

[62] The judge's finding is that the Sums Advanced Claim was barred by the words of the 'Other Claims' in clauses 17 to 19 'or might have had for or by reason of the Defendants shareholding or directorship, or the holding of any office, in BPL [the appellant]'. It is not premised on the provisions of clause 9. Similarly, his finding is not premised on the first (or principal) limb ("the Claims limb") of clauses 17 to 19 by which the named releasor(s) agreed to release the Defendants from one of the three named Claims in Recital (3).

[63] One of the appellant's principal bases for seeking to uphold the judge's finding that the instant claim is barred by clauses 17 to 19 of CASA, is that 'the source of the alleged debt was clearly the [SHA] which was entered into by [the respondent] in its capacity as a shareholder of [the appellant]'. This was also the finding of the learned judge at paragraph [33] of the judgment. However, I respectfully disagree with this finding as a matter of interpretation of the SHA and CASA, and as a matter of law. A reading of CASA does not support the contention that the respondent entered into CASA 'in its capacity' as a shareholder of the appellant (BPL). This is not to say that the respondent was not at that material time a shareholder of the appellant, which is a different issue from the point sought to be made by the respondent. The respondent was one of the eight contracting parties to CASA. It is reasonable to deduce that the respondent was a necessary party to that compromise and settlement agreement because the stated purpose of the agreement was to settle the three Claims, of which the respondent was a claimant in one (the TDI/BPL Claim) and a defendant in the other two.

[64] In my considered view, this is very different from saying that the appellant had an obligation under the SHA to provide funds to the respondent to enable the respondent to discharge its obligation thereunder to fund the development of the Beaumont Park Project. In this respect, reliance on the appellant's pleaded case,

including paragraphs 4(d), 11(b), 10 and 15 of the statement of claim, does not assist the respondent. The fact that it is pleaded that the advances by the appellant were 'effected by discharging obligations of [the respondent] incurred pursuant to [the SHA]' does not demonstrate that the appellant, by making those advances, did so under the SHA or in some way became obligated under the SHA to do so, or that the liability and the Sums Advanced Claim for repayment of the advances arose out of the SHA. The contractual funding obligation was solely that of the respondent under the SHA but its liability to the appellant to repay the advances did not arise out of any obligation under the SHA.

[65] In this sense, the liability of the respondent to repay the Sums Advanced, as found by the judge, did not 'arise out of' the SHA, albeit these advances concerned and were used to discharge the respondent's funding obligation under the SHA. Additionally, it is a complete fallacy to say that the 'source of the alleged debt was clearly the [SHA]'. The source of the Sums Advanced debt was the finding, on the evidence, that those sums were 'advanced' out of the funds of the appellant (which had no contractual obligation under the SHA to fund the development) giving rise to an enforceable legal debt or obligation on the part of the respondent to repay the advancements, as was clearly accepted by the learned judge.

[66] In considering the application to the Sums Advanced Claim of the first limb of these clauses, the learned judge found that (i) there is nothing in the statement of claim in the BIL Claim and the SIL Claim 'to suggest that the reference to dividends refers to anything remotely related to, or in fact are, the Sums Advanced'. He also found at paragraph [27] that the subject matter of the instant claim before him was 'not identical or similar to the subject matter in both the BIL Claim and the SIL Claim'. Accordingly, he concluded at paragraph [29], in these words:

"Having considered the scope of the **BIL Claim** and **SIL Claim**, 'there is nothing contained [in the BIL Claim and SIL Claim] 'that is identical or similar to the claims in the instant claim.'"

This finding remains unchallenged in the appeal.

[67] The judge considered the issue whether the instant claim existed or could have existed by reason of the Defendant's shareholding or directorship, or holding of any office, in the appellant. His reasoning and conclusions on this issue are to be found at paragraphs [31] to [34] and [36] to [38] of the judgment. In these paragraphs, the judge first observes that at the time of execution of CASA the respondent was a shareholder of the appellant and held a seat on its Board with Mr. Kryuchkov as its nominee. The learned judge states that the actions of Mr. Kryuchkov must be taken to be the actions of the respondent 'acting as its nominee on the Board of Directors holding the offices of President and Chairman of the Board of the appellant'. The learned judge then goes on to observe at paragraph 32 that the Sums Advanced by the appellant **'were directly related to and were indeed paid to allow [the respondent] to meet its obligations under the [SHA]. It cannot be disputed that [the respondent's] obligations under the [SHA] was based directly on its shareholding in [the appellant]'**. (emphasis added)

[68] These findings then led the learned judge to conclude at paragraph [34], (set out above), that the Sums Advanced Claim falls squarely within the 'Other Claims' language of clauses 17 to 19. Also, he opined at paragraphs [36] and [37] that the wording of this limb of the releases is sufficient to cover the instant claim, which wording, accordingly, precludes the instant claim.

[69] Recognizing that the learned judge was faced with a difficult question of construction, I am of the considered determination that he erred in construing the meaning and legal effect of the releases at clauses 17, 18 and 19 of CASA, in particular, the words: **'or otherwise now has or at any or but for the execution of this Compromise and Settlement Agreement could or might have had for or by reason of the Defendants shareholding or directorship, or the holding of any office, in BPL.'** (emphasis added) As dealt with above, it was incorrect for the learned judge to find or to conclude that the Sums Advanced Claim arose out of the SHA. The legal basis for the Sum Advanced Claim arose not from the SHA or

any obligation on the part of the appellant under the SHA. The respondent's liability to repay the Sums Advanced by the appellant, arose, as the judge found, by virtue of the advance having been made from the funds of the appellant, albeit at the direction of Mr. Kryuchkov, who it seems held offices in both the appellant and the respondent.

[70] Moreover, the learned judge erred in finding that the respondent's funding obligation under the SHA was based directly on its shareholding in the appellant. While it is clear that the respondent is a shareholder in the appellant and the advances were made by the appellant, it does not follow that the advances did not create a debt owing by the respondent to the appellant. Indeed, it is not uncommon to have companies which are part of the same 'group' and closely related and governed, to have legitimate monetary claims one against the other, which debts are shown in the balance sheet of the group or of each interrelated company as a liability to be paid or discharged.

[71] This leaves the question whether the wording of clauses 17 to 19 relating to 'Other Claims' was wide and clear enough to be construed as applying to the instant Claim. The judge concluded that it was. Again, with the utmost respect, the learned judge got this wrong. The judge seems in his reasoning to have pegged this finding on what he saw as the common denominator between the appellant and the respondent, that is Mr. Kryuchkov, who was on the board of both companies. In my respectful view, this factor is not a sound basis upon which to conclude that the instant claim, arising not under the SHA, is covered by the 'Other Claims' limb of clauses 17 to 19 as based directly on the respondent's shareholding in the appellant.

[72] The respondent contended that it is beyond dispute, as the judge found at paragraph [32], that its obligation under the SHA was based directly on its shareholding in the appellant. While it is correct that the respondent was at the time of entering into CASA a shareholder of the appellant (BPL) (see clause 1 of CASA), this does not answer the question of whether the appellant had an obligation under the SHA to

step in and to advance on behalf of the respondent, the sums necessary to meet its funding obligation under the SHA. In fact, no such obligation on the part of the appellant existed or was shown to exist. As the judge observed (at paragraph [12]) these advances were not the subject of a loan agreement. However, the judge's finding of the Sums Advanced Claim having been proven, did not rest on the existence of any loan agreement. The judge's finding of liability to repay at paragraph [12] is based, in part, on the evidence of the sums advanced having been recorded in the accounts receivable section of the appellant's financial statements. It is also based (perhaps principally) on his finding of fact at paragraph [9] that these sums were indeed advanced 'from the funds' of the appellant, to enable the respondent to meet its funding obligation under the SHA, which funding obligation was solely that of the respondent. In this vein, it is to be noted that the learned judge, at paragraph [10], when considering and assessing the evidence before him and the appellant's burden of proof, did not accept Mr. Kryuchkov's evidence that these advances were 'dividends' for which no obligation to repay arose.

[73] The Sums Advanced were all made prior to entering into CASA, yet the language of CASA does not address this claim, neither specifically nor even by necessary implication. In my considered view, the appellant's counsel's interpretation of clauses 17, 18 and 19 and their respective legal effect as releases (summarized above) is decisive of the Main Appeal issue. The respondent has not surmounted these obstacles in its written and oral submissions.

[74] This conclusion leads inexorably to the single ground challenging the granting of the Counterclaim and a declaration, also being upheld.

Disposition

[75] For the reasons given above the appeal must be allowed on the Sums Advanced Claim and the declaration made on the Counterclaim, and the respective orders made by the learned judge thereon set aside. The appeal against the order dismissing the Legal Fees Claim in the sum of US\$84,042.03 stands, that aspect of

the appeal having not been pursued before this Court. On the matter of costs, the appellant should, on the usual principles, have its prescribed costs of the Sums Advanced Claim in the sum of US\$3,107,995.44 and Counterclaim in the court below. The respondent is therefore entitled to prescribed costs on the Legal Fees Claim in the court below. In relation to costs in the appeal, the appellant has succeeded on its appeal in relation to the Sums Advanced Claim and did not seek to argue or to maintain its appeal against the Legal Fees Claim. In these circumstances, costs being always at the discretion of the Court, I would award the appellant 75 percent of its costs in the appeal.

Order

[76] Accordingly, I would make the following orders:

- (i) The appeal on the Sums Advanced Claim and the declaration made on the Counterclaim are allowed.
- (ii) The orders made by the court below dismissing the Sums Advanced Claim, and allowing, in part, the Counterclaim by granting declaratory relief, are set aside.
- (iii) Judgment is entered for the appellant on the Sums Advanced Claim in the sum of US\$3,107,995.44 to be paid by the respondent.
- (iv) Prescribed costs on the Sums Advanced Claim in the court below shall be paid by the respondent to the appellant pursuant to CPR 65.5(1) within 30 days, the value of the Sums Advanced Claim for this purpose being US\$3,107,995.44.
- (v) Prescribed costs to be paid by the respondent to the appellant on the Counterclaim in the court below pursuant to CPR 65.5(2)(b) within 30 days, if not agreed. The value of the Counterclaim for this purpose is EC\$50,000.00.

- (vi) Prescribed costs shall be paid by the appellant to the respondent on the Legal Fees Claim pursuant to CPR65.5(1) within 30 days, the value of the Legal Fees Claim for this purpose being US\$84,042,03.
- (vii) The appellant shall have and be paid by the respondent 75 percent of its costs in the appeal, such costs to be assessed by a judge or master of the High Court, if not agreed within 30 days.

I concur.
Trevor Ward
Justice of Appeal

I concur.
Esco Henry
Justice of Appeal

By the Court

Chief Registrar