

**THE EASTERN CARIBBEAN SUPREME COURT
IN THE COURT OF APPEAL**

ANTIGUA AND BARBUDA

ANUHCVP2021/0021

BETWEEN:

**[1] ATTORNEY GENERAL OF ANTIGUA AND BARBUDA
[2] DAVID MATTHIAS**

Appellants

and

HMB HOLDINGS LTD.

Respondent

Before:

The Hon. Mario Michel	Justice of Appeal
The Hon. Mde. Margaret Price Findlay	Justice of Appeal
The Hon. Mr. Trevor M. Ward	Justice of Appeal

Appearances

Mr. Anthony Astaphan SC with him Mrs. Carla Brookes-Harris, Mrs. Cherissa Roberts-Thomas and Dr. David Dorsett for the Appellants
Mr. Larry A.C. Smith, KC with him Mr. Kendrickson Kentish and Ms. Alketz Joseph for the Respondent

2023: November 23;
2024: June 06.

Civil Appeal – Undertaking in relation to shares – Breach of undertaking – Application to discharge undertaking – Whether the judge erred in her application of the principles relating to the discharge of an undertaking - Amended Application – Relation back principle – Appellate review of judge’s discretion - Whether the learned trial judge erred or misdirected herself when she dismissed the appellants’ amended application – Financial sanction - Whether the judge erred or misdirected herself when she imposed a financial sanction – Whether the judge erred or misdirected herself when she failed to dismiss the respondent’s notice of objection

This appeal arises from events dating back some 23 years involving litigation between the Government of Antigua and Barbuda and David Matthias (together “the appellants”) and HMB Holdings Ltd, (“the respondent” or “HMB”). In this judgment, the Government of Antigua and Barbuda and David Matthias are collectively referred to as “the appellants” except where the context requires specific reference to the Government of Antigua and Barbuda, in which case the government will be specifically referred to as “the GOAB or “the Government”.

The respondent previously owned some 108 acres by the sea at Half Moon Bay, Antigua. In 1995, a hurricane destroyed HMB’s hotel on the site. With no re-development occurring in the ensuing years, the GOAB compulsorily acquired the property, acting pursuant to the provisions of the Land Acquisition Act. HMB challenged the constitutionality of this acquisition all the way to the Privy Council, which, in a decision dated 5th June 2007, determined that the compulsory acquisition was lawful. The Government was required to pay HMB compensation for its property. To this end, a Board of Assessment was set up to determine the amount of compensation payable. On 5th January 2010, the Board of Assessment ordered compensation to HMB in the sum of US\$23,820,999.00. HMB was dissatisfied with this award and appealed the decision to the Court of Appeal. The Court of Appeal allowed the appeal and substituted an award of US\$45,499,102.09. Being aggrieved, the Government appealed to the Privy Council. In a decision dated 26th February 2014, the Privy Council allowed the Government’s appeal and substituted an award of US\$26,616,998.00, with full interest at 10.25% per annum for 3½ years and thereafter at 4% per annum until payment.

The next round of litigation centred around the respondent’s efforts to enforce the award made in its favour since the only substantial payment made by the appellants to date is the sum of US\$20,000,000.00 made in December 2015 upon the sale of the property. Smaller sums totalling some US\$4.2 million were paid sporadically in 2015 and 2017. The respondent therefore sought to recover the outstanding balance of the debt through attachment orders and charging orders. Specifically, the charging orders sought were in respect of shares held by the Government in National Assets Management Company Limited (NAMCO), West Indies Oil Company Ltd (WIOC), Eastern Caribbean Amalgamated Bank Limited (ECAB) and State Insurance Company Limited (SIC).

The matter was part-heard when on 18th August 2020 the parties entered into an agreement in relation to the shares that were the subject of the enforcement proceedings. The terms of that agreement were reflected in an undertaking given to the court on 23rd October 2020, whereby the Government undertook that it would not dispose of, transfer, mortgage or otherwise dispose of certain shares which the Government beneficially owned, and which were the subject of a charging order until the determination of the appellate process in the existing proceedings. The shares which were subject to the charging order, beneficially owned by the GOAB and forming part of the undertaking, were the shares held in National Assets Management Company (NAMCO), West Indies Oil Company (WIOC), Eastern Caribbean Amalgamated Bank Limited (ECAB) and State Insurance Company Limited (SIC).

The undertaking in relation to WIOC related to 100% of the shares held by the Government therein. Despite this undertaking, on 24th March 2021, the Government published a

prospectus inviting the purchase of 10% of its shares in WIOC via the Eastern Caribbean Securities Exchange platform. This offer was to run until 21st April 2021. This prompted the respondent's counsel to write to counsel for the Government that very day seeking an explanation and advising them that such action would constitute a breach of the undertaking. The letter further threatened to initiate contempt proceedings against the appellants should the government proceed with the sale.

By letter dated 29th March 2021 counsel for the appellants informed the respondent's counsel, among other things, that the Prime Minister had advised that: (i) it was always the policy and intention of the Cabinet and Government prior to giving the undertaking to sell 10% of the shares in WIOC; (ii) it was not the intention of the Government to pledge 100% of the shares in WIOC under the undertaking; (iii) through mere inadvertence, there was a failure to inform both the Court and counsel for the appellants of the Government's intention to sell 10% of the shares in WIOC; (iv) an apology would be proffered to the learned judge for this inadvertent omission and innocent breach of the undertaking; and (v) the value of the remaining shares exceeded by far the debt owed to the claimant.

On 12th April, 2021, the appellants filed an application ("the application") to have the undertaking discharged and replaced with an undertaking in the following terms:

"The [appellant] undertakes not to transfer, mortgage or otherwise dispose of any of the shares which are the subject of the Charging Orders applications, until the hearing and determination of the appeal by the Court of Appeal, save 10% of the shares held by the Government of Antigua and Barbuda in the West Indies Oil Company Ltd."

On 13th April 2021, the respondent filed an application for urgent interim relief seeking, among other things, an order that the undertaking given to the Court by the appellants be enforced on such terms as the court deems just. Further or alternatively, the respondents sought [(ii)] an order that the undertaking be fortified by the payment of US\$2,000,000.00 into an account at a commercial bank in Antigua and Barbuda in the name of the Registrar of the High Court; [(iii)] an interim injunction restraining the appellants, its servants or agents or otherwise from selling, charging, disposing of or in any manner dealing with the beneficial interest in the shares in WIOC; [(iv)] the appellants pay into an escrow account in a commercial bank in Antigua and Barbuda all of the proceeds of its sale of shares paid up to the date of the hearing of the application.

On 4th May 2021, the appellants filed an amended application (the "amended application"), supported by an affidavit of the Financial Secretary. The amendment sought was in relation to the undertaking to be given by the appellants. This was amended to read:

"The [appellant] undertakes not to transfer, mortgage or otherwise dispose of any of the shares which are the subject of the Charging Order applications, until the hearing and determination of the appeal by the Court of Appeal, save the shares held by the Government of Antigua and Barbuda in the West Indies Oil Company Ltd."

On 17th May 2021, the respondent filed a notice of objection to this amended application on the grounds that it constituted an abuse of the process of the Court and was a substantially

different application from the one filed by the appellants on 12th April 2021 as it sought a discharge from the undertaking with respect to all the shares held by the Government in WIOC.

The court below convened on 22nd April 2021 and heard the applications over four days between 22nd April and 15th June 2021. As a preliminary issue, the judge considered the order in which she should hear the applications. The appellants contended before the judge that its amended application for the discharge and replacement of the undertaking was first in time because it related back to the original application filed on 12th April 2021. The respondent countered that it was a substantially different application altogether and thus the relation back doctrine did not apply. The judge determined that the appellants' application of 12th April 2021 would be considered first.

In a judgment dated 10th August 2021 the judge made the following orders: i) that there be payment of the sum of EC\$869,890.54 to be placed into an account in a commercial bank in Antigua and Barbuda standing to the credit of the action and in the name of the Registrar of the High Court; ii) that the amended application to discharge and replace the undertaking in the terms stated is dismissed; iii) that the undertaking that the "[appellants] not to transfer, mortgage or otherwise dispose of any of the shares which are the subject of the charging order applications until the hearing and determination of the appeal by the court of appeal" shall continue to stand; iv) that the notice of objection filed by the respondent on 17th May 2021 is allowed in part.

Being dissatisfied with the judge's decision, the appellants filed a notice of appeal on 13th October 2021 which advanced 9 grounds of appeal. However, based on the similar framing of the issues in the skeleton arguments of the parties, they agree that the issues that arise for consideration on this appeal are:

- i) whether the judge erred or misdirected herself when she dismissed the appellants' amended application (grounds i to v);
- ii) whether the judge erred or misdirected herself when she imposed a financial sanction (grounds vii, viii and ix); and
- iii) whether the judge erred or misdirected herself when she failed to dismiss the respondent's notice of objection.

Held: allowing the appeal on grounds (i) - (v), setting aside the orders at paragraph 1(b) & (c) of the judgment below, remitting the appellants' amended application dated 4th May 2021 to a judge of the High Court to be heard on an expedited basis, dismissing grounds (vii), (viii) and (ix), affirming the order of the judge at paragraph 1(a) of her judgment and making no order as to costs, that:

1. In litigation, it is not uncommon for parties to give an undertaking to the court which represents a promise to the court to perform or refrain from performing certain actions. Such an undertaking usually serves as an alternative to an injunction or a court order, though it is no less binding. It is settled that a court always has the discretion to release a party from an undertaking where the party seeking release can demonstrate good cause. The court's power is limited to either granting or refusing the application for release; it does not extend to varying the undertaking already given. Nonetheless, it

is open to the court upon discharging, or as a condition to discharging an undertaking, to replace it with a further undertaking in different terms; whether as offered or on terms different from that offered. The court also has the discretion to discharge an undertaking when it is proved to have been given under a mistake. An undertaking which is accepted by the court can be discharged by the court at any stage if it is just to do so and the fact that it is recorded in a consent order does not change its nature from a promise to an order. In approaching the application to discharge the undertaking in the context of the facts of this case, the proper focus of the judge's enquiry ought to have been to ask herself whether the appellants had given an undertaking in terms much wider than intended and, if so, whether it was just in all the circumstances to release the appellants from it and replace it with a further or different undertaking offered by the appellants, or, alternatively, whether there was a significant change of circumstances which made it just to release the appellants from the undertaking and replace it with a further or different undertaking than that offered by the appellants.

Birch v Birch [2017] 1 WLR 2959 applied; **Stanford International Bank Ltd v Lapps** [2006] UKPC 50 applied; **Mullins v Howell** (1879) 11Ch. D. 763 considered; **Kensington Housing Trust v Oliver** (1997) 30 HLR 608 applied.

2. Where, as in this case, an application has been amended, an issue often arising is what is the order in which it should be heard where there were prior applications pending before the amended application. Generally, the relation back principle states that an amendment duly made, takes effect from the date of the original document that it amended. The application to discharge the undertaking filed on 12th April 2021 was first in time. When properly analysed, the substance of the application before the judge was to discharge the original undertaking while offering to replace it with a different undertaking. The grounds of the amended application filed on 4th May 2021 were the same, save for the addition of a new ground. The fact that the appellants sought to amend the application by substituting a different replacement undertaking did not alter the nature and substance of the application, which was to discharge the original undertaking, principally on grounds of mistake. The fact that the terms of the replacement undertaking that the appellants were prepared to offer were different from the undertaking offered on 12th April 2021 was also of no moment, since a replacement undertaking can be, and often is, in different terms, even on terms different from the one currently on offer.

Birch v Birch [2017] 1 WLR 2959 applied

3. The judge therefore erred in finding that because the amended application offered a different undertaking, the relation back principle did not apply. This error led the judge to treat the application of 12th April, 2021 as a separate and distinct application and resulted in the judge not giving any real or substantive consideration to the reasons advanced by the appellants as to why the undertaking offered with the amended application should be accepted in place of the undertaking that had been breached. Even if, the judge was right to regard the amended application as substantially different and therefore to be considered last, she was nonetheless required to

examine the terms of the proposed undertaking and assess whether and to what extent to limit the release to that which was necessary to avoid serious hardship or injustice. The judge therefore erred in principle and misdirected herself when she dismissed the appellants' amended application by failing to take account of relevant matters and considering irrelevant ones.

Birch v Birch [2017] 1 WLR 2959 applied; **A v A** [2018] 4 WLR 66 applied.

4. The question of whether sanctions should have been imposed on the appellants for breach of the undertaking is entirely separate from the question of what an appropriate replacement undertaking would be. It is the intentional breach of an undertaking that renders a party liable to be held in contempt. There is no dispute that the original undertaking had been breached by the appellants. While the judge made no express finding either that the breach was inadvertent or that it was intentional, arguably her finding that there were no mala fides in the publication of the prospectus carries the implication that she found that there was no intention to wilfully breach the undertaking. Whether the breach was intentional or inadvertent, the judge looked to the conduct of the appellants once they were fixed with knowledge that a potential breach of the undertaking loomed large, to determine whether to impose a sanction. There is little difference whether the failure is due to deliberate or reckless dilatoriness in arresting the breach or to half-hearted efforts, mere indifference, or lethargy, in circumstances where the appellants were promptly notified that the course on which they had embarked would breach the undertaking and be in contempt of court. The judge was entitled to take the view that once the breach was communicated to the appellants, it became necessary for them "to do more than file an application to be released from the undertaking and have another substituted" and that the appellants ought to have engaged in action to arrest the breach of the undertaking until such time as the appellants' application for release of the undertaking was determined.
5. The appellants' contention that the judge ought not to have imposed a financial sanction amounts essentially to a challenge to the judge's exercise of discretion in determining that the imposition of a financial sanction for breach of the undertaking was appropriate. This therefore engages the settled principles regarding appellate restraint when reviewing the exercise of a judge's discretion. Applying this approach, it cannot be said that the appellants have established that appellate intervention is warranted on any of the permissible bases, either in relation to the decision to impose a fine or in determining the quantum. The judge's formula for arriving at the appropriate fine to be paid was to note that the percentage of shares divested by the sale amounted to 5.3% of the original undertaking and to therefore apply 5% to the proceeds of the sale of the shares which amounted to EC\$17,397,810.94. This formula yielded the sum of EC\$869,890.54 which was the fine imposed. There is nothing irrational or disproportionate about this approach. Accordingly, the judge did not err or misdirect herself when she imposed a financial sanction in the sum of \$ EC\$869,890.54 for the appellants' breach of the undertaking.

Green Elite Limited (in liquidation) v Mr. Fang Ankong et al BVIHCP2019/0030 (delivered 11th June 2021, unreported) followed; **Ming Siu Hung, and others v J F**

Ming Inc and another [2021] BCC 438 applied; **Kwok Kin Kwok v Yao Juan** [2022] UKPC 52 applied.

JUDGMENT

Introduction

- [1] **Ward JA:** This appeal arises from events dating back some 23 years involving litigation between the Government of Antigua and Barbuda and David Matthias (together “the appellants”) and HMB Holdings Ltd, (“the respondent” or “HMB”). In this judgment, I will refer to the Government of Antigua and Barbuda and David Matthias collectively as “the appellants” except where the context requires specific reference to the Government of Antigua and Barbuda, in which case I will specify “the GOAB or “the Government”. For present purposes, only a brief summary of the relevant background facts is necessary.
- [2] The respondent previously owned some 108 acres by the sea at Half Moon Bay, Antigua. In 1995, a hurricane destroyed HMB’s hotel on the site. With no re-development occurring in the ensuing years, the GOAB compulsorily acquired the property, acting pursuant to the provisions of the Land Acquisition Act¹. HMB challenged the constitutionality of this acquisition all the way to the Privy Council, which in a decision dated 5th June 2007 determined that the compulsory acquisition was lawful. The Government was required to pay HMB compensation for its property. To this end, a Board of Assessment was set up to determine the amount of compensation payable. On 5th January 2010, the Board of Assessment ordered compensation to HMB in the sum of US\$23,820,999.00. HMB was dissatisfied with this award and appealed the decision to the Court of Appeal. The Court of Appeal allowed the appeal and substituted an award of US\$45,499,102.09. Being aggrieved, the Government appealed to the Privy Council. In a decision dated 26th February 2014,² the Privy Council allowed the Government's appeal and substituted

¹ Cap. 233 Laws of Antigua and Barbuda.

² [2014] UKPC 5.

an award of US\$26,616,998.00, with full interest at 10.25% per annum for 3½ years and thereafter at 4% per annum until payment.

- [3] The next round of litigation centred around the respondent's efforts to enforce the award made in its favour since the only substantial payment made by the appellants to date is the sum of US\$20,000,000.00 made in December 2015 upon the sale of the property. Smaller sums totalling some US\$4.2 million were paid sporadically in 2015 and 2017. The respondent therefore sought to recover the outstanding balance of the debt through attachment orders and charging orders. Specifically, the charging orders sought were in respect of shares held by the Government in National Assets Management Company Limited (NAMCO), West Indies Oil Company Ltd (WIOC), Eastern Caribbean Amalgamated Bank Limited (ECAB) and State Insurance Company Limited (SIC). The enforcement proceedings also gave rise to a constitutional question as to whether the statutory immunity of the Crown from enforcement of judgments was unconstitutional.
- [4] The matter was part-heard when on 18th August 2020 the parties entered into an agreement in relation to the shares that were the subject of the enforcement proceedings. It was agreed that in relation to the constitutional claim, any possible appeal would be expedited and that the Government would give an undertaking pending the determination of the constitutional claim in the High Court and Court of Appeal.
- [5] The terms of that agreement were reflected in an undertaking given to the court on 23rd October 2020, whereby the Government undertook that it would not dispose of, transfer, mortgage or otherwise dispose of certain shares which the Government beneficially owned, and which were the subject of a charging order until the determination of the appellate process in the existing proceedings. The shares which were subject to the charging order, beneficially owned by the GOAB and forming part of the undertaking, were the shares held in National Assets Management Company (NAMCO), West Indies Oil Company (WIOC), Eastern

Caribbean Amalgamated Bank Limited (ECAB) and State Insurance Company Limited (SIC).

- [6] Notably, this undertaking in relation to WIOC related to 100% of the shares held by the Government therein. Despite this undertaking, on 24th March 2021, the Government published a prospectus inviting the purchase of 10% of its shares in WIOC via the Eastern Caribbean Securities Exchange platform. This offer was to run until 21st April 2021. This prompted the respondent's counsel to write to counsel for the Government that very day seeking an explanation and advising them that such action would constitute a breach of the undertaking. The letter further threatened to initiate contempt proceedings against the appellants should it proceed with the sale.
- [7] By letter dated 29th March 2021 counsel for the appellants informed the respondent's counsel, among other things, that the Prime Minister had advised that: (i) it was always the policy and intention of the Cabinet and Government prior to giving the undertaking to sell 10% of the shares in WIOC; (ii) it was not the intention of the Government to pledge 100% of the shares in WIOC under the undertaking; (iii) through mere inadvertence, there was a failure to inform both the Court and counsel for the appellant of the Government's intention to sell 10% of the shares in WIOC; (iv) an apology would be proffered to the learned judge for this inadvertent omission and innocent breach of the undertaking; and (v) the value of the remaining shares exceeded by far the debt owed to the claimant.
- [8] On 12th April 2021, the appellants filed an application ("the application") to have the undertaking discharged and replaced with an undertaking in the following terms:
- "The [appellant] undertakes not to transfer, mortgage or otherwise dispose of any of the shares which are the subject of the Charging Orders applications, until the hearing and determination of the appeal by the Court of Appeal, save 10% of the shares held by the Government of Antigua and Barbuda in the West Indies Oil Company Ltd."

- [9] On 13th April 2021, the respondent filed an application for urgent interim relief seeking, among other things, an order that the undertaking given to the court by the appellants be enforced on such terms as the court deems just. Further or alternatively, the respondents sought [(ii)] an order that the undertaking be fortified by the payment of US\$2,000,000.00 into an account at a commercial bank in Antigua and Barbuda in the name of the Registrar of the High Court; [(iii)] an interim injunction restraining the appellants, its servants or agents or otherwise from selling, charging, disposing of or in any manner dealing with the beneficial interest in the shares in WIOC; [(iv)] the appellants pay into an escrow account in a commercial bank in Antigua and Barbuda all of the proceeds of its sale of shares paid up to the date of the hearing of the application.
- [10] On 4th May 2021, the appellants filed an amended application (the “amended application”), supported by an affidavit of the Financial Secretary. The amendment sought was in relation to the undertaking to be given by the appellants. This was amended to read:
- “The [appellant] undertakes not to transfer, mortgage or otherwise dispose of any of the shares which are the subject of the Charging Order applications, until the hearing and determination of the appeal by the Court of Appeal, save the shares held by the Government of Antigua and Barbuda in the West Indies Oil Company Ltd.”
- [11] Thus, the amended application sought to alter the replacement undertaking the GOAB was prepared to offer by removing 100% of the Government’s shares in WIOC and not just 10% as indicated in the application dated 12th April 2021.
- [12] On 17th May 2021, the respondent filed a notice of objection to this amended application on the grounds that it constituted an abuse of the process of the Court and was a substantially different application from the one filed by the appellants on 12th April 2021 as it sought a discharge from the undertaking with respect to all the shares held by the Government in WIOC.

Proceedings in the court below

- [13] The court below convened on 22nd April 2021 and heard the applications over four days between 22nd April and 15th June 2021. As a preliminary issue, the judge considered the order in which she should hear the applications. The appellants contended before the judge that its amended application for the discharge and replacement of the undertaking was first in time because it related back to the original application filed on 12th April 2021. The respondent countered that it was a substantially different application altogether and thus the relation back doctrine did not apply. The judge determined that the appellants' application of 12th April 2021 would be considered first. I will return later in this judgment to the judge's conclusions on this issue as reflected in her judgment as it forms a substantial plank of the appellants' challenge on this appeal.

The judgment under appeal

- [14] The judge identified the central issues as: (i) whether the appellants ought to be released from the undertaking and the proposed (amended) undertaking substituted; (ii) if the appellants are in breach of the undertaking what sanctions, if any, are applicable in the circumstances; and (iii) whether the court ought to grant any of the reliefs sought by the respondent.
- [15] In relation to the first issue, the judge acknowledged that she had the discretion to release a party from an undertaking given by them but considered that before determining whether to exercise that discretion she first had to consider: the true import of the undertaking; whether the terms were clear and unambiguous; whether the undertaking was known to the parties; whether there was a breach of the undertaking; and whether the defendants ought to be released from the undertaking.³
- [16] The judge also considered at the outset the question of procedural fairness in proceeding with an allegation of breach of an undertaking, having regard to the

³ See para [25] of the judgment in ANUBOA2010/0001 delivered 10th August 2021, ROA, p.16.

provisions of rule 53.6 of the **Civil Procedure Rules, 2000** (“CPR”) which requires that an undertaking given to the court must, if practicable, be given in writing in the appropriate practice form and a copy endorsed with a notice in accordance with rule 53.3(b) or 53.4 (b) and, if practicable, must be served on the person giving the undertaking.

[17] The judge determined that, despite the undertaking not being served on the appellants in accordance with rule 53.6, the court should proceed to consider the breach having weighed in the balance the fact that the terms of the undertaking were clearly known to the appellants, that it was previously articulated in an agreement between the parties, and that correspondence passing between the parties reflected that the appellants clearly understood the import of the undertaking. Considering this, the court determined that this was a situation where the court could exceptionally proceed to consider the breach of the undertaking notwithstanding non-compliance with rule 56.3.

[18] The next issue the judge addressed in her judgment was whether the undertaking had been breached. The judge found as a fact that the undertaking had been breached and moved to consider the sanctions to be imposed for the breach. While prepared to accept that there was a policy decision taken to divest 10% of the shares in WIOC and that there were no mala fides in the publication of the prospectus, the judge considered that once the breach was communicated to the appellants, it became necessary for them “to do more than file an application to be released from the undertaking and have another substituted”. She found that the appellants ought to have engaged in action to arrest the breach of the undertaking until such time as the appellants’ application for release of the undertaking was determined.

[19] The judge found that there was little evidence before her of attempts to arrest the breach in the early stages, finding that a letter dated 2nd June 2021 sent to the Eastern Caribbean Securities and Exchange Commission by the Prime Minister asking the Commission to postpone the sale. She found that it did not go far enough

in addressing the situation in that the full circumstances were not placed before the Commission and, further, that despite the breach being notified to the appellants since 24th March 2021, the Prime Minister's letter was only sent on 2nd June 2021. These matters led the judge to conclude that "the failure to take decisive steps at the early stages of the process to arrest the breach ought to result in sanctions being visited upon the [appellants]" in the sum of EC\$869,890.54.

- [20] It was only after determining that the undertaking had been breached and that the imposition of a sanction was appropriate (paragraphs 27 – 42), that the judge addressed her mind to the appellants' amended application, commencing at paragraph 43 of the judgment.
- [21] Accepting that she had a discretion to release a person from obligations arising under an undertaking and guiding herself by the authority of **Birch v Birch**,⁴ the judge held that on an application to be released from an undertaking, the court's power was limited to either granting or refusing the application. She noted that the exercise of that discretion arises primarily, but is not necessarily restricted to, circumstances where there has been a significant change of circumstances.
- [22] The court's reasons for dismissing the amended application are articulated at paragraph [46] of the judgment in the court below. In summary, the judge was not impressed with the argument that the value of the shares to secure the undertaking far exceeded the debt owed to the respondent since the value of the shares was always known to the appellants. Secondly, the judge found that there was no evidence presented to the court which supported the appellants' contention that the undertaking would have a crippling effect on the WIOC or its shareholders. The judge added, however, "the court is prepared to accept the undertaking which treats with the remaining shares in WIOC in which [the] GOAB is beneficially entitled which now stands at 41%." The judge seemingly accepted the undertaking contained in

⁴ [2017] 1 WLR 2959.

the application dated 12th April 2021 which proposed excluding 10% of the WIOC shares from the undertaking.

[23] The learned judge then briefly considered the applicability of the relation-back principle which was relevant to the order in which the applications ought to have been heard. The judge recognised that the appellants' application to discharge and replace the undertaking was filed first in time, and by operation of the relation-back doctrine, an amendment would relate back to the original date of the application. However, she held that the doctrine did not preserve the priority of the hearing of the appellants' application in the circumstances of this case, since the appellants sought to present and substitute an entirely different undertaking in its amended application which raised additional matters, that although related to the general subject matter, were generally different from the matters initially before the court. As such, the relation back doctrine did not apply so as to permit the appellants' amended application to be heard prior to the respondent's application.

[24] Finally, the judge addressed the respondent's application for interim relief. She formed the view that fortification of the undertaking was not necessary given the value of the remaining shares subject to the undertaking. She also noted that there was no evidence that the GOAB had taken any further steps which would threaten the undertaking. The learned judge also refused to grant the injunctive relief sought on the basis that damages would be an adequate remedy since the value of the undertaking given by the Government secured the damages which the respondent was likely to suffer from the injunction not being granted.

[25] Based on her findings, the judge, inter alia, made the following orders: i) that there be payment of the sum of EC\$869,890.54 to be placed into an account in a commercial bank in Antigua and Barbuda standing to the credit of the action and in the name of the Registrar of the High Court; ii) that the amended application to discharge and replace the undertaking in the terms stated is dismissed; iii) that the undertaking that the "[appellants] not to transfer, mortgage or otherwise dispose of

any of the shares⁵ which are the subject of the charging order applications until the hearing and determination of the appeal by the Court of Appeal” shall continue to stand; iv) that the notice of objection filed by the respondent on 17th May 2021 is allowed in part.

The Appeal

[26] On 13th October 2021, the appellants filed a notice of appeal which advanced 9 grounds of appeal. However, based on the framing of the issues in the skeleton arguments of the parties, they agree that the issues that arise for consideration on this appeal are:

- (i) whether the judge erred or misdirected herself when she dismissed the appellants’ amended application (grounds i to v);
- (ii) whether the judge erred or misdirected herself when she imposed a financial sanction (grounds vii, viii and ix); and
- (iii) whether the judge erred or misdirected herself when she failed to dismiss the respondent’s notice of objection.

[27] The appellants did not deploy any oral arguments in relation to ground vi, which averred that the judge erred in finding that there was compliance with CPR 53.6 or that compliance was not necessary because the appellants knew of the undertaking. I propose to deal with each issue in turn, noting that there is some overlap between issues (i) and (iii) and the grounds of appeal subsumed within them.

The appellants’ submissions – Issue (i)

[28] In relation to the first issue, the appellants’ core contentions, aggregated from their written and oral submissions before this Court, may be summarised as follows. First, the judge erred by misconstruing or failing to properly consider and or apply the principles of law relating to the discharge or release of a party from an undertaking to the facts of this case. According to the appellants, the relevant and correct

⁵ The judge noted that this refers to the remaining 41% of shares which the GOAB holds in WIOC.

principles are as articulated in **Arlidge, Eady & Smith on Contempt**⁶ and as distilled from **Mullins v Howell**⁷ and **A v A**.⁸ From these authorities, the appellants advance the proposition that there is always a discretion in the court, upon good cause being shown, to release a person from an undertaking or to modify the terms of any obligation imposed. Where a party gives a more wide-ranging undertaking than he intended, the court in its discretion may decline to enforce that part of the undertaking which had been given by mistake; even where that mistake was on one side only. The appellants submitted that **Mullins** is the authority for the proposition that the High Court ought not to enforce any part of an undertaking which, through inadvertence or mistake, extended beyond the intention of the party giving the undertaking.

[29] Relating these principles to the evidence before the judge, the appellants submitted that in light of the judge's apparent acceptance of the facts that (i) prior to the undertaking the GOAB had a publicly articulated policy that it would divest 10% of the shares in WIOC; (ii) the pledge of all the WIOC shares was in error; (iii) there were no mala fides in the publication of the prospectus for the sale of 10% of WIOC shares; and (iv) that the value of the remaining shares to secure the undertaking was greatly in excess of the debt owed to the respondents, had the judge applied the correct legal principles, she ought to have exercised her discretion to not enforce the part of the undertaking consisting of the 10% of the shares in WIOC which were sold in accordance with the prospectus, since that part of the undertaking was included through inadvertence or mistake and extended the undertaking beyond the intention of the appellants.

[30] The appellants also identify other reasons which they say should have led the judge to exercise her discretion in their favour. These were that the breach of the undertaking was unintentional and minimal and did not detract from the purpose and substance of the undertaking which was to ensure expedition and sufficiency of

⁶ 2nd Edition, Sweet & Maxwell, 1999 at paragraphs 12-174 to 12-175.

⁷ (1879) 11 Ch. D 763.

⁸ [2018] 4 WLR 66.

assets in the event the respondent succeeded on its constitutional challenge (which has been since dismissed by the Court of Appeal). Secondly, there was no prejudice to the respondent as the undertaking remained in full force, and the shares in WIOC that were sold consisted of only 5.3% of the value of the undertaking. Thus, a substantial part of the assets securing the undertaking remained intact.

- [31] The appellants complain that not having considered and applied the correct legal principles, the judge took irrelevant matters into account in exercising her discretion not to discharge the undertaking. In particular, the appellants contend that the judge's finding that the appellants should have done more to 'arrest the breach' was not an important or a material consideration. Rather, it was whether in all the circumstances the appellants had acted deliberately, recklessly, or with some element of an intent not to seek to restrain the process. The appellants referred to the Prime Minister's letter to the Eastern Caribbean Securities Commission requesting a postponement of the sale and pointed out that the judge appreciated that the window of opportunity to delay the sale was very narrow. However, the judge focused only on the Prime Minister's letter and did not take into account the evidence of the efforts of functionaries of WIOC who were moving the process and failed to appreciate that the Prime Minister's letter was a measure of last resort to try to arrest the process. The appellants submitted that the failure to take these relevant facts into account constituted an error of law.

The respondents' submissions

- [32] For the respondents, King's Counsel, Mr. Larry A.C. Smith, in a vigorous counter, submitted that in substance this was an appeal which seeks to challenge discretionary orders made by the court below, and reminded this Court of the salient principles governing appellate restraint when reviewing the exercise of a judge's discretion. It was submitted that the judge, in her discretion, determined that the appellants were not entitled to be relieved from the undertaking and fashioned an appropriate remedy. Secondly, the court made findings of fact as to the appellants' breach of the undertaking and was entitled to impose an appropriate sanction.

- [33] In oral submissions, Mr. Smith further submitted that there was no error in relation to the undertaking which was required to be rectified. That was because of the GOAB's articulated policy in relation to its intention to divest shares in WIOC related to 10% only and the GOAB had effectively modified the undertaking without the court's approval by selling 10% of WIOC's shares. It was argued that the breach of the undertaking was deliberate and involved no inadvertence in relation to the sale of the WIOC shares.
- [34] The respondents rely on **Birch v Birch** for the proposition that the court cannot exercise its discretion to release a party from an undertaking unless the applicant demonstrates that there has been a significant change in circumstances. They contended that the appellants have not established any such significant change of circumstances.
- [35] The respondents also submit that the judge was right to refuse to entertain the substitution of the proposed undertaking as reflected in the appellants' amended application of 4th June 2021 because it was a substantially different undertaking from the one sought to be replaced.

Discussion

- [36] Before turning to examine the law in relation to the discretion to release a party from or to discharge an undertaking, I should say by way of preliminary observation that in so far as the respondents characterise the nature of the appeal as essentially a challenge to the judge's exercise of discretion, it seems to me that this is not true in relation to all aspects the appellants' challenge. The appellants frontally challenge the judge's understanding and application of the relevant legal principles and contend additionally that the judge took irrelevant factors into consideration and ignored relevant ones, which they say renders the exercise of her discretion blatantly wrong. It is left to be explored whether they have made good their

contention that the judge failed to engage with any of the relevant legal principles in treating with the issue of release from and replacement of an undertaking.

The discretion to release a party from an undertaking

[37] In litigation, it is not uncommon for parties to give an undertaking to the court which represents a promise to the court to perform or refrain from performing certain actions. Such an undertaking usually serves as an alternative to an injunction or a court order, though it is no less binding. As the Privy Council said in **Stanford International Bank Ltd v Lapps**,⁹ '[a]n undertaking to the court has the same effect on the party who gives it and demands the same strict observance as does an injunction. An intentional breach of an undertaking is as much a contempt of court as an intentional breach of an injunction.'

[38] It is settled that a court always has the discretion to release a party from an undertaking where the party seeking release can demonstrate good cause. In **Birch v Birch**, Lord Wilson was emphatic that "the universality of the jurisdiction to grant release from an undertaking has, it seems, never been doubted but that the debate has centred on the criteria to be applied."¹⁰ Lord Wilson then reviewed the cases of **Kensington Housing Trust v Oliver**¹¹, which held that an undertaking can be discharged if it is just to do so; and the case of **Mid Suffolk District Council v Clarke**¹² which held that while it was necessary for a grant of release to be just, it had also to be predicated on a significant change of circumstances. Having considered both perspectives, Lord Wilson offered the following guidance:

"It is, I suppose, inconsistent with the admitted existence of a discretionary jurisdiction to say that it can never be exercised unless a particular fact, such as a significant change of circumstances, is established. If a discretionary jurisdiction is shackled in that way, the result is instead, that the jurisdiction does not even exist unless the fact is established. For all practical purposes, however, the Court of Appeal in the *Mid Suffolk* case gave valuable guidance. I summarise it as being that unless there has been

⁹ [2006] UKPC 50.

¹⁰ At p. 2964, e.

¹¹ (1997) 30 HLR 608.

¹² [2007] 1 WLR 980.

a significant change of circumstances since the undertaking was given, grounds for release from it seem hard to conceive.”

[39] Lord Wilson makes the further important point that ‘an undertaking being a solemn promise which a litigant volunteers to the court, a court has no power to impose any variation of the terms of a voluntary promise’.

[40] The options which are open to a court on an application to be released from an undertaking are described in the following way by Lord Wilson:

“A litigant who wishes to cease to be bound by her (or his) undertaking should apply for “release” from it (or discharge of it); and often she will accompany her application for release with an offer of a further undertaking in **different** terms. The court may decide to accept the further undertaking and, in the light of it, to grant the application for release. Equally, the court may indicate that it will grant the application for release only on condition that she is willing to give a further undertaking or one in terms **different** from those of a further undertaking currently on offer. In either event, the court’s power is only to grant or refuse the application for release; and, although exercise of its powers may result in something which looks like a variation of an undertaking, it is the product of a different process of reasoning. In *Cutler v Wandsworth Stadium Ltd* [1945] 1 All ER 103, 105 D-E Morton LJ said:

“the court does not vary an undertaking given by a litigant. If the litigant has given an undertaking and desires to be released from that undertaking, the application should be an application for release... Litigants are not ordered to give these undertakings; they choose to give them, and an application to have an undertaking already given varied is wholly wrong in form.”¹³ (Emphasis added)

[41] Two important principles emerge from the dicta of Lord Wilson. The first is that the court’s power is limited to either granting or refusing the application for release; it does not extend to varying the undertaking already given. Nonetheless, it is open to the court upon discharging, or as a condition to discharging an undertaking, to replace it with a further undertaking in **different** terms; whether as offered or on terms different from that offered. I will return to this more fully when examining the

¹³ At p. 2963 B-E.

reasons advanced by the judge for refusing to substitute the proposed replacement undertaking.

[42] In the much older case of **Mullins v Howell**, on which the appellants rely, Jessell MR held that the court had the discretion to discharge an undertaking when it is proved to have been given under a mistake. While strictly speaking that case was concerned with an application to discharge a consent order which was made pursuant to an agreement by which the defendant gave an undertaking to remove certain obstructions, it has been held that an undertaking which is accepted by the court can be discharged by the court at any stage if it is just to do so and the fact that it is recorded in a consent order does not change its nature from a promise to an order.¹⁴

[43] Based on these authorities, in approaching the application to discharge the undertaking in the context of the facts of this case, the proper focus of the judge's enquiry ought to have been to ask herself whether the appellants had given an undertaking in terms much wider than intended and, if so, whether it was just in all the circumstances to release the appellants from it and replace it with a further or different undertaking offered by the appellants, or, alternatively, whether there was a significant change of circumstances which made it just to release the appellants from the undertaking and replace it with a further or different undertaking offered by the appellants.

The judge's approach

[44] The judge's consideration of the relevant legal principles in relation to the discharge of an undertaking can be found at paragraphs [24] and [25]. She first defines the nature of an undertaking and observes that where there is a breach of an undertaking an application may be made to the court to commit for contempt. The

¹⁴ See Kensington Housing Trust case at 613-614.

judge correctly recognised that the court has a discretion to release a person from an undertaking. According to her, the factors relevant to the exercise of that discretion involved a consideration of “the true import of the undertaking, whether the terms were clear and unambiguous, whether the undertaking was known to the parties, whether there was a breach of the understanding and whether the defendants ought to be released from the undertaking.”

[45] In purporting to treat with the issue of a mistake when giving the undertaking, under the caption “**The Undertaking Breach of the Undertaking: Error or inadvertence in the Undertaking Given**” the judge merely observes that the liability associated with the breach of an undertaking is strict and renders the person who commits it liable to process for contempt. The judge does not at this point specifically address the question of whether the undertaking was mistakenly given in wider terms than intended by analysing the evidence bearing on this issue and coming to a conclusion and, based on her conclusion, determining whether it would be just to discharge the undertaking.

[46] Having noted her discretion to release a party from an undertaking, and having considered the preliminary procedural issue identified at paragraphs [16] and [17] above, the judge simply moved next (at paragraph 28) to make a finding that the breach of the undertaking was proved beyond reasonable doubt (this was never really in issue) and at paragraphs [33] to [42] moved to consider the appropriate sanction having found that the undertaking was breached.

The judge’s approach to the amended application

[47] After determining that the undertaking was breached and that a fine was appropriate, the judge then engaged at para [43] with what she captioned “**The Amended Application.**”

[48] Here the judge correctly identifies three principles derived from **Birch v Birch** relating to the jurisdiction to release a person from an undertaking, namely, that the

Court has a discretion to release a person from an undertaking; that this power is restricted to granting or refusing the application; and that the exercise primarily arises where there has been a significant change in circumstances.

[49] Having stated these principles, the judge offered the following reasons for dismissing the amended application:

“[45] In the circumstances of this case the defendants contended that the release ought to be granted since the undertaking as it stands is disproportionate and oppressive, the value of the shares held in the other entities is in excess of the debt owed and the commitment given on the WIOC shares would have a crippling effect on the ability of WIOC to modernize, expand and compete regionally.

[46] This court notes that the value of the shares was always known to the defendants and there is no reason that there should be a different perception on this matter at this juncture. Additionally, there is no evidence presented to the court which supports the defendant’s position that the undertaking would create the crippling effect on the WIOC or its shareholders as is contended by the defendants. In such circumstances and based upon the evidence before the court, this court will refuse the undertaking as stated in the amended application.”

[50] The judge gives two reasons for refusing to accept the proposed undertaking as reflected in the amended application. First, she was not moved by the fact that the value of the shares held by the GOAB in the other entities exceeded the debt owed as the value of these shares was always known. The second reason given was that there was no evidence before her to support the appellants’ assertion that the undertaking would create a crippling effect on the WIOC or its shareholders. The judge therefore rejected that undertaking but added that she was prepared to “accept the undertaking which treats with the remaining shares in WIOC to which [the] GOAB is beneficially entitled which now stands at 41%”.

[51] Immediately thereafter, the judge turned to examine the relation back principle. The logic of dealing with it at that stage of the judgment is not altogether clear to me, since the judge had already determined to hear the application of 12th April 2021 first and which she treated as a separate application and had ruled on it. It seems

to me the first order of business that ought to have been addressed in the judgment was whether the amended application related back to the application of 12th April 2021 and thus should be heard first.

[52] Be that as it may, the court in the exercise of its case management powers can determine the order in which applications are heard. In the ordinary course of things, the first in time should usually be heard first except where it is logically necessary to hear a later application first. Where, for example, as in this case, an application has been amended, an issue often arising is what is the order in which it should be heard where there were prior applications pending before the amended application. This is where the relation back principle is usually invoked. In general terms, the relation-back principle states that an amendment duly made takes effect from the date of the original document that it amended. In the context of pleadings in particular, the principle does not apply where the amendment seeks to substitute new parties or new causes of action.

[53] Relating this to the context of this case, and viewing matters in proper perspective, the position is that when the appellants were put on notice that the publication of the prospectus for the sale of shares in WIOC would breach the undertaking, the appellants responded by filing the application to have the original undertaking discharged and at the same time offered an undertaking in terms that would exempt 10% of its shares in WIOC from the undertaking. Such an approach is permissible as gleaned from **Birch**, as discussed at paragraph [40] above. The appellants grounded their application to discharge the undertaking on the basis that the reference in the undertaking to 'any' of the shares owned by GOAB, which included the shares in WIOC, was an inadvertent error. The proposed undertaking of 12th April 2021 appears to be consistent with the GOAB's assertion that the original undertaking was mistakenly extended beyond the intention of the GOAB when it committed 100% of its shares in WIOC, instead of 90%, and would have been consistent with its stated policy to divest 10% of its shares in WIOC.

[54] At paragraphs [7] to [11], the judge had summarised the evidence that was adduced in support of the application dated 12th April 2021 in the following terms:

“[7] The defendants filed their application and deposed that on 23rd October 2019 the Cabinet had agreed as a matter of general policy, that the Government would divest 10% of its shares in WIOC. The defendants further contend that the policy decision regarding the sale was ratified by the Cabinet on 17th June 2020.

[8] The defendant provided evidence that this policy decision was publicly articulated and disclosed a publication of the Caribbean Business Report which represented that 10% of WIOC shares would be sold utilizing a crowd-funding mechanism. The defendants also disclosed an article published on 25th October 2019 in the Daily Observer which referred to the decision of Cabinet of the previous day to sell the shares. Similar publications were carried by ABS TV and Radio on 24th October 2019...

[10] The evidence filed on behalf of the defendant also referred to statements made in the Budget 2015 delivered on 12th January 2015 indicating the intention that the shares be divested and also in the Budget 2021 delivered on 28th January 2021. The defendants represent that the publication during the month of March 2021 of the divestment of 10% of the shares held by the Government marked the coming “to fruition of a public offering of 10% of the Government’s shares in WIOC which was previously articulated.

[11] The defendants indicated that the economic circumstances of the Government which have been aggravated by a further reduction in the revenue to the government as a result of the adverse effects of the Covid-19 pandemic, required that the sale proceed. The evidence of the defendant is that revenues declined by a further \$78.7 million for the first quarter in 2021 when compared to the first quarter of 2020 while there was increased expenditure arising from the pandemic and the mitigation of the effects of the pandemic.”

[55] The judge accepted that there was such a previously articulated policy. Based on this evidence, it seems to me that the mistake when giving the undertaking was in committing 100% of the shares in WIOC as opposed to 90%, consistent with the GOAB’s prior public utterances regarding its intention to divest 10% of its shares in WIOC.

[56] However, the amended application of 4th May 2021 sought to replace the undertaking offered on 12th April 2021 with one that excluded 100% of WIOC’s

shares from the undertaking. This is where the issue arose in the court below as to whether this was the same or a substantially different application to the one filed on 12th April 2021, leading to an engagement and extensive submissions on the relation back principle. To my mind, it consumed more time than warranted.

[57] Undoubtedly, the application to discharge the undertaking filed on 12th April 2021 was first in time. Properly analysed, the substance of the application before the judge was to discharge the original undertaking while offering to replace it with a different undertaking. What the amended application sought to do was to offer a different undertaking from the one first proposed on 12th April 2021. The grounds of the amended application were the same, save for the addition of a ground alleging that “if some of WIOC’s shares were subject to a charge, it would have a crippling effect on the ability of WIOC to modernise, expand and compete regionally as access to additional capital to modernize expand and improve WIOC’s competitive position by way of access to greater capital by becoming a listed company would be cut off and would otherwise have the knockoff effect of adversely affecting the value of the shareholding of the other shareholders.” The Financial Secretary also spoke to these matters in his affidavit in support of the amended application.

[58] The fact that the appellants sought to amend the application by substituting a different replacement undertaking did not alter the nature and substance of the application, which was to discharge the original undertaking, principally on grounds of mistake. The fact that the terms of the replacement undertaking that the appellants were prepared to offer were different from the undertaking offered on 12th April, 2021 is also of no moment because, as **Birch** makes clear, a replacement undertaking can be, and often is, in different terms, even on terms different from the one currently on offer. In other words, nothing in law prevented the judge from accepting the latter undertaking even though in different terms from the one first proposed.

- [59] The judge however took the view that the relation back doctrine did not apply because the amended application “sought to present and substitute an entirely different undertaking and raised additional matters which, although related to the general subject matter, were generally different from the matters initially before the court. Accordingly, this court finds that the use of the relation-back doctrine does not preserve the priority of the hearing of the defendant’s application.”¹⁵
- [60] For the reasons explained above, I am of the view that the judge erred in finding that because the amended application offered a different undertaking, the relation back principle did not apply. This error led the judge to treat the application of 12th April 2021 as a separate and distinct application and resulted in the judge not giving any real or substantive consideration to the reasons advanced by the appellants as to why the undertaking offered with the amended application should be accepted in place of the undertaking that had been breached.
- [61] Even if, contrary to my finding, the judge was right to regard the amended application as substantially different and therefore to be considered last, she was nonetheless required to examine the terms of the proposed undertaking and assess whether and to what extent to limit the release to that which was necessary to avoid serious hardship or injustice.¹⁶ The judge was therefore required to determine whether the replacement undertaking could be substituted for the original undertaking without hardship or injustice. In this regard, the judge would at least have been required to consider what prejudice or injustice would inure to the respondents if 100% of the WIOC shares were excluded from the undertaking and why it was still necessary to commit 90% (or the Government’s remaining 41%) of the WIOC shares to the undertaking. The judge was required to address her mind to this issue, particularly given her earlier acceptance¹⁷ that (i) the value of the remaining shares to secure the undertaking greatly exceeded the debt owed to the respondents; (ii) her acceptance that the shares were pledged by mistake, given the

¹⁵ See paragraph 15 of the judgment.

¹⁶ See *A v A* [2018] 4 WLR 66.

¹⁷ See Transcript of 12th June 2021.

GOAB's prior and publicly articulated policy with respect to the divestment of some of those shares and that the fact that the sale was restricted to 10% of the shares, which was consistent with the articulated policy of the GOAB; and (iii) there is no evidence of significant loss or damage to the respondents or the ability of the respondents to enforce a judgment should judgment be given in their favour.¹⁸

[62] The judge seems to have considered these factors only in relation to determining the appropriate fine. However, all these factors were relevant to the issue of whether to accept the replacement undertaking. These were the relevant considerations; not whether the latter undertaking was substantially different from the undertaking first proposed on 12th April 2021. The judge did not advert her mind to these matters and therefore erred in principle.

[63] For the foregoing reasons I would hold that the judge erred and misdirected herself when she dismissed the appellants' amended application by failing to take account of relevant matters and considering irrelevant ones.

[64] At this juncture, it is convenient to address issue 3 which is related to the judge's dismissal of the amended application. This is because in doing so, the judge purported to accept the undertaking given on 12th April 2021 and granted part of the respondent's applications by granting an interim injunction restraining the appellants, its servants or agents or otherwise, from selling, charging, disposing of or in any manner dealing with the beneficial interest in the shares in WIOC.

Issue (3) - Whether the judge erred or misdirected herself when she failed to dismiss the respondent's notice of objection.

[65] The appellants make the point that the judge ought to have dismissed the respondent's application entirely and erred in ordering that "the undertaking that the GOAB undertakes not to transfer, mortgage or otherwise dispose of the shares (footnoted by the judge as meaning the remaining 41% GOAB shares in WIOC)

¹⁸ See paragraph 40 of the judgment.

which are the subject of the Charging Order applications until the hearing and determination of the Appeal by the Court of Appeal to continue to stand.”

- [66] The appellants complain that the judge was wrong to do so in light of her apparent acceptance of the facts that (i) that prior to the undertaking the GOAB had a publicly articulated policy that it would divest 10% of the shares in WIOC; (ii) that the pledge of all the WIOC shares was in error; (iii) there were no mala fides in the publication of the prospectus for the sale of 10% of WIOC shares; and (iv) that the value of the remaining shares to secure the undertaking was greatly in excess of the debt owed to the respondents. It was submitted that applying the correct legal principles, the judge ought to have exercised her discretion to not enforce the part of the undertaking consisting of the 10% of the shares in WIOC which were sold in accordance with the prospectus, since that part of the undertaking was included through inadvertence or mistake and extended the undertaking beyond the intention of the appellants.

Discussion

- [67] By her order on this aspect of the respondent’s application, the judge effectively accepted the undertaking given by the appellants in its 12th April 2021 application which sought to exempt 10% of its shares in WIOC from the undertaking. This she did via a fleeting statement made upon her refusal to accept the replacement undertaking that sought to exempt 100% of WIOC’s shares from the undertaking. The judge simply said that “the court is prepared to accept the undertaking which treats with the remaining shares in WIOC to which [the] GOAB is beneficially entitled which now stands at 41%.”
- [68] With respect, it seems artificial to “accept” an undertaking which really was no longer on offer by the appellants, who had sought to replace it by its amended application. This is the product of the judge’s flawed approach when addressing the amended application and its relationship to the original application. In not addressing or applying at all the relevant principles that ought to have guided her in the exercise

of her discretion in deciding whether to accept a replacement undertaking and in what terms, the judge erred in principle and arrived at her decision without considering and applying the relevant legal principles. I would therefore resolve issue (3) in favour of the appellants.

Issue 2 – Whether the judge erred or misdirected herself when she imposed a financial sanction

[69] The appellants submit that the judge's finding that the appellants should have done more to 'arrest the breach' was not the important or even a material consideration. They submitted that the issue the judge should have considered was whether in all the circumstances the appellants had acted deliberately, recklessly or with some element of an intent not to seek to restrain the process. The appellants contend that considering the Prime Minister's letter to the Eastern Caribbean Securities Commission requesting a postponement of the sale and given that the judge appreciated that the window of opportunity to delay the sale was very narrow, a penalty should have been imposed only if there was some harm, bad faith or intention to undermine or deceive the court. When this is taken together with the prompt letter from the appellants and suggested apology from the Prime Minister; the appellants' applications to release and replace the undertaking; the finding of no mala fides in publishing the prospectus; and that the breach was not deliberate, the judge ought not to have imposed a penalty or pecuniary sanction.

[70] For the respondents, it was submitted that the breach of the undertaking was deliberate and that there was no inadvertence in including the shares in WIOC. Furthermore, there was ample time between the publishing of the prospectus and the sale of the shares for the appellants to have approached the court to deal with the matter. According to the respondent, there were no real steps taken to stop the sale of the shares. Instead, having received a letter from counsel complaining of the breach of the undertaking the appellants proceeded to sell the shares in accordance with their previously stated intention. Thus, properly understood, the judge's finding

of no mala fides was limited to the publication of the prospectus and was not a finding of no mala fides in proceeding to the sale of the shares.

- [71] Further, the respondents noted the absence of any evidence from the Prime Minister, whom they describe as “a principal actor in these proceedings”, being the Minister of Finance, and who would have been properly placed to know what was required to be put in the letter to the Eastern Caribbean Securities Commission to arrest the sale.

Discussion - Issue (2)

- [72] The question of whether sanctions should have been imposed on the appellants for breach of the undertaking is entirely separate from the question of what an appropriate replacement undertaking would be. It is the intentional breach of an undertaking that renders a party liable to be held in contempt.
- [73] There is no dispute that the original undertaking had been breached by the appellants. While the judge made no express finding either that the breach was inadvertent or that it was intentional, arguably her finding that there were no mala fides in the publication of the prospectus carries the implication that she found that there was no intention to wilfully breach the undertaking.
- [74] It cannot seriously be disputed, however, that the GOAB bears responsibility for its breach, even if inadvertent. Taking the most charitable view, it was the height of recklessness and indicative of an absence of the requisite degree of diligence for the GOAB to be unaware of its own undertaking given to the Court in 2020 when it issued the prospectus in March 2021. While the evidence was that the GOAB’s counsel was not instructed in relation to the GOAB’s policy to divest its shares in WIOC at the time it gave the undertaking, there was no evidence before the judge that the Government was not made aware of the undertaking at any time between the date when it was given and the date when it published the prospectus.

- [75] Whether the breach was intentional or inadvertent, the judge looked to the conduct of the appellants once they were fixed with knowledge that a potential breach of the undertaking loomed large, to determine whether to impose a sanction. To my mind, this was a relevant consideration in assessing whether to impose a sanction, and this approach has not been criticised by the appellants. What they posit is that the judge erred in failing to ask herself whether the appellants had acted deliberately, recklessly or with some element of an intent not to seek to restrain the process.
- [76] Respectfully, I see little difference whether the failure is due to deliberate or reckless dilatoriness in arresting the breach or to half-hearted efforts, mere indifference, or lethargy, in circumstances where the appellants were promptly notified that the course on which they had embarked would breach the undertaking and be in contempt of court.
- [77] In my view, the judge carefully explained the factors that she considered in determining that a sanction was appropriate in such circumstances where the appellants were put on notice almost immediately upon publication of the prospectus that to proceed with the sale would constitute a breach of the undertaking, yet they proceeded with the sale. While prepared to accept that there was a policy decision taken to divest 10% of the shares in WIOC and that there were no mala fides in the publication of the prospectus, the judge was entitled to take the view that once the breach was communicated to the appellants, it became necessary for them “to do more than file an application to be released from the undertaking and have another substituted” and that the appellants ought to have engaged in action to arrest the breach of the undertaking until such time as the appellants’ application for release of the undertaking was determined.
- [78] The judge found that there was little evidence before her of attempts to arrest the breach in the early stages. She found that a letter dated 2nd June 2021 sent to the Eastern Caribbean Securities and Exchange Commission by the Prime Minister, asking the Commission to postpone the sale did not go far enough in addressing

the situation in that the full circumstances were not placed before the Commission and, further, that despite the breach being notified to the appellants since 24th March 2021, the Prime Minister's letter was only sent on 2nd June 2021. These matters led the judge to conclude that the failure to take decisive steps at the early stages of the process to arrest the breach ought to result in sanctions being visited upon the appellants.

- [79] Contrary to the appellants' submissions, the judge did not ignore these relevant factors. It was for the judge to determine what weight she would ascribe to them as a matter falling properly within her discretion. This Court has held that "how heavily each factor should be weighed in the balancing exercise is a matter for the judge at first instance and this Court ought to give great deference to the conclusion reached by the Judge".¹⁹ This position was made even clearer by the Privy Council in **Ming Siu Hung, and others v J F Ming Inc and another**²⁰ where it was held that:

"A view that a judge should have given more weight to a relevant matter is not within the scope of appellate review. Matters of weight when exercising a discretion are for the judge, provided that his assessment of weight is not irrational..."

- [80] Furthermore, even if it is accepted that at the time of giving the undertaking the GOAB, through inadvertence, failed to instruct its counsel of its policy in relation to its intention to divest some of its shares in WIOC and was seemingly unaware of the undertaking at the time it published the prospectus, the judge's point is that upon being notified of the breach more robust and proactive steps were required to arrest it.
- [81] As the transcripts of the hearing held on 22nd April 2021 show, the judge on her own initiative sought clarification from counsel for WIOC, Dr. Cort, as to where matters stood as at that date in relation to the prospectus. The answer to her query was that an application was made to the Eastern Caribbean Security Regulatory Commission

¹⁹ Green Elite Limited (in liquidation) v Mr. Fang Ankong et al BVIHCMAP2019/0030 (delivered 11th June 2021, unreported)

²⁰ [2021] BCC 438.

for an extension of time beyond the previously fixed deadline of 21st April, within which interested parties/applicants could apply to purchase shares, to which there had been no reply. However, Dr. Cort added subsequently that WIOC could continue to accept bids pending a formal response from the Commission. It was further clarified by the CEO of WIOC that the actual process of issuing the invitation, accepting the bids for the shares, accepting the cash and subsequent settlement and allotment of shares was being handled, not by WIOC, but by its brokers, the Bank of Saint Lucia Ltd. The judge found as a fact that the evidence before her was deficient in establishing that the appellants had taken sufficiently decisive steps at an early stage to arrest the breach. This was a finding open to her on the evidence.

[82] Before this Court, the appellants were unable to point to any specific satisfactory evidence that was placed before the judge on this issue. We were told only that “others were conducting the process and they had asked that the process be delayed.” That was the sum total of the evidence before the judge. This evidence could hardly lead to a conclusion that adequate steps were being taken by the GOAB to halt the sale of the shares.

[83] This Court may not disturb the judge’s findings of primary facts unless that they were plainly wrong in the sense that either there was no evidence to support the finding, or the finding was based on a misunderstanding of the evidence or was one which no reasonable judge could have reached: **Kwok Kin Kwok v Yao Juan**.²¹

[84] In my view, the facts found and assessments made by the judge could justify her conclusion that there was a failure to take decisive steps at the early stages of the process to arrest the breach, which should result in sanctions in the form of a fine being visited upon the appellants.

[85] As to the appellants’ contention that the judge ought not to have imposed a financial sanction, this criticism amounts essentially to a challenge to the judge’s exercise of

²¹ [2022] UKPC 52, para. 40.

discretion in determining that the imposition of a financial sanction for breach of the undertaking was appropriate. This therefore engages the settled principles regarding appellate restraint when reviewing the exercise of a judge's discretion. In summary, an appeal will not be allowed unless the appellate court is satisfied (1) that in exercising his or her judicial discretion, the judge erred in principle either by failing to take into account relevant factors and considerations, or by taking into account or being influenced by irrelevant factors and considerations; and (2) that, as a result of the error or the degree of the error, in principle the trial judge's decision exceeded the generous ambit within which reasonable disagreement is possible and may therefore be said to be clearly or blatantly wrong."

[86] Applying this approach, I am unable to find that the appellants have established that appellate intervention is warranted on any of the permissible bases, either in relation to the decision to impose a fine or in determining the quantum. I disagree with the appellants bare assertion that the quantum was disproportionate. The judge's formula for arriving at the appropriate fine to be paid was to note that the percentage of shares divested by the sale amounted to 5.3% of the original undertaking and to therefore apply 5% to the proceeds of the sale of the shares which amounted to EC\$17,397,810.94. This formula yielded the sum of EC\$869,890.54 which was the fine imposed. There is nothing irrational or disproportionate about this approach.

[87] I would, accordingly, hold that the judge did not err or misdirect herself when she imposed a financial sanction in the sum of \$EC\$869,890.54 for the appellants' breach of the undertaking.

Disposition

[88] For the reasons discussed above, I would make the following orders:

- (1) The appeal is allowed on grounds (i) - (v).
- (2) The orders of the judge at paragraph 1(b) & (c) of her judgment are set aside.

- (3) The appellants amended application dated 4th May 2021 is remitted to a judge of the High Court to be heard on an expedited basis.
- (4) Grounds (vii), (viii) and (ix) are dismissed. The order of the judge at paragraph 1(a) of her judgment is affirmed.
- (5) Given that each party has enjoyed some measure of success on important issues arising on the appeal, there will be no order as to costs.

I concur
Mario Michel
Justice of Appeal

I concur
Margaret Price Findlay
Justice of Appeal

By the Court

Chief Registrar