THE EASTERN CARIBBEAN SUPREME COURT
IN THE COURT OF APPEAL
(CIVIL DIVISION)

ANGUILLA

AXAHCVAP2022/0004

BETWEEN:

BARNES BAY DEVELOPMENT LIMITED (IN LIQUIDATION)

Appellant

and

[1] STARWOOD CAPITAL GROUP (STARWOOD CAPITAL GROUP GLOBAL LP)
[2] SOF-VIII HOTEL II ANGUILLA HOLDINGS LLC
[3] BRADFORD KORZEN
[4] KOR DUO INVESTMENT PARTNERS LP
[5] KOR DUO II LLC

Respondents/Cross-Appellants

Before:

The Hon. Mde. Vicki-Ann Ellis	Justice of Appeal
The Hon. Mde. Esco Henry	Justice of Appeal
The Hon. Mr. Gerard St. C. Farara KC	Justice of Appeal [Ag.]

Appearances:

Mr. William Hare with Mr. Alex Richardson for the Appellant
Mrs. Tana'ania Small-Davis KC with Mr. D. Michael Bourne for the Respondents/Cross-Appellants

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2024: April 15, 16;
2025: April 9.

Interlocutory appeal – Strike out of claim- Amendment – Abuse of court process – Sale of property by auction – Breach of fiduciary duty - Equitable lien over the Property - Rescission or avoidance of the sale of the Property - Whether the learned trial judge erred in law by finding that any claim based on a critique of the suitability of the sale procedures sanctioned by the U.S. proceedings was an abuse of process and whether in arriving at that conclusion he erred in principle - Whether the learned judge erred in the exercise of his judicial discretion by striking out the a) claims against the fourth and fifth respondents; b) equitable lien claims; and/or c) rescission or avoidance of sale claims - Whether the learned judge *erred by finding that there are serious issues to be tried on the claims for breach of fiduciary duty, dishonest assistance and conspiracy to injury since he made other findings that according to the respondents are inconsistent with such a determination - Whether the learned judge erred in law by allowing the claims for breach of fiduciary duty, dishonest assistance and conspiracy to injure by unlawful means to proceed to trial, notwithstanding the respondents' contentions that: a) on the facts, there was no injury or damage to the appellant company caused by the Chapter 11 Bankruptcy proceedings; and/or b) no steps had been taken to amend the - claim during the protracted period of eleven years since the occurrence of the events giving rise to the claim*

The subject matter of this interlocutory appeal is a property situated at Barnes Bay, West End, Anguilla comprising some thirty-six acres of land on which sits a luxury resort formerly known as The Viceroy Anguilla Resort and Residences, now styled Four Seasons Resort and Residences Anguilla ("the Property"). Prior to July 2011, the Property was owned by Barnes Bay Development Limited ("the Company") a company incorporated in Anguilla. On 27th July 2011 the Property was sold by public auction pursuant to an order of the United States Bankruptcy Court for the District of Delaware approving Procedures for the auction and sale of the Debtors' Assets ('Bids Procedure Order') at the instance of the second respondent SOF-VIII Hotel II Anguilla Holdings LLC ("SOF"), to whom the Company was indebted for a sum in excess of US$350,000,000.00. The debt exceeded the Company's assets. Having acquired the outstanding loans on 13th October 2010, SOF held security for its debt over all of the Company's assets including a first charge over the real property at Meads Bay, Anguilla. At that time Mr. Bradford Korzen was one of the Company's directors and had personally guaranteed the loan to the extent of US$150,000,000.00.

Pursuant to a commitment agreement dated 16th March 2011, SOF agreed to provide 'debtor in possession' financing to the Company in anticipation of Bankruptcy proceedings under the United States Bankruptcy Code. It also entailed indemnification provisions for Mr. Korzen, the fourth and the fifth respondents. The Company's directors at that time were Mr. Korzen, a Mr. Victor Duva and a Mr. Jeff Smith.

The Company initiated Chapter 11 Bankruptcy Proceedings in the United States Bankruptcy Court and had placed itself in bankruptcy there pursuant to an order dated 17th March 2011. It was subsequently placed in liquidation by the High Court in Anguilla in 2012 after a compulsory winding up petition was filed on 6th October 2011 by one of its creditors, Mr. Jonathan Simon. Messrs. John Greenwood and Hadley Clinton were appointed its liquidators without opposition.

Following a series of proceedings in the US Bankruptcy Court that were initiated by the Company under directorship of a Board of which Mr. Korzen was a member, the US Court made an order approving the sale of the Property by auction and expressly permitted credit bidding by SOF. - The Property was sold - to SOF who was the sole bidder at the auction. On motion by SOF for relief from the automatic stay to register its title, an order was made lifting the stay and for the title to the Property to be transferred to SOF. Title was registered in the Land Registry on 22nd September 2011. By letter dated 5th October 2012, SOF's lawyer wrote to liquidator Mr. Hadley Chilton and submitted its claim for its outstanding secured debt of US$240,000,000.00 and unsecured debt of US$13,000,000.00 in the liquidation and PSA Creditor debt of US$19,000,000.00.

On 26th July 2017, Barnes Bay Development Limited (In Liquidation) ("Barnes Bay") sued Starwood Capital Group ("Starwood" or "the first respondent"), SOF, Bradford Korzen ("the third respondent"), Kor Duo Investment Partners II LP ("KDIP" or "the fourth respondent") and Kor Duo II LLC ("Kor Duo II" or "the fifth respondent") (collectively "the respondents") seeking:

a) Rescission, alternatively avoidance of the sale of the Property by the appellant to the second respondent.
b) Further or alternatively, an account of profits or damages.
c) Alternatively, an equitable lien over the Property.
d) Such further and other relief as the Court thinks fit.

The kernel of the appellant's case is that the first and second respondents entered into the - commitment agreement for the purpose of influencing the third respondent Mr. Bradford Korzen and through him the Company's Board of Directors to agree the debtor in possession proposal which was designed to give substantial control of the Company's affairs to the first and second respondents with the ultimate objective of achieving a swift progression to an auction and sale of the Property to the second respondent and/or agree that it be sold to the second respondent. The appellant claimed that in the process Mr. Korzen committed a breach of fiduciary duty to the Company which was induced by or knowingly and dishonestly assisted by the other respondents.

The appellant -- contended that in relation to the auction, the Company's board did not cause the Company to make any effort to market the Property to other prospective bidders and did not retain an investment banker or broker to attempt to solicit higher bids or better offers. The appellant alleged that it was entitled to rescission or avoidance of the sale of the Property to SOF because Mr. Korzen, by entering into the complained of arrangements between himself, Starwood and SOF had put himself in a position in which his personal interests conflicted with his duty to the appellant and by doing so, he had breached his fiduciary duty to the appellant. Additionally, the appellant claimed that Starwood and SOF had disregarded the fact that Mr. Korzen's entry into the arrangements constituted a breach of his fiduciary duty to the appellant. In those circumstances, the appellant asserted that the sale of the Property was voidable, and it elected to rescind the sale by bringing this claim.

In relation to its claim for an account of profits, the appellant grounded it in allegations that the other respondents had, by entering into the impugned arrangements, intentionally induced or knowingly and dishonestly assisted Mr. Korzen in his alleged breach of fiduciary duty. In the case of Starwood and SOF, the charge was that they had conspired to injure the appellant by unlawful means, by virtue of Mr. Korzen's alleged breach of fiduciary duty; that in Starwood's case, this came about by Starwood causing or permitting SOF to enter into the arrangements with Mr. Korzen. The claim for damages relates to any loss suffered by the appellant arising from the transfer of the Property to SOF.

As a further alternative, the appellant claimed an equitable lien over the Property in respect of approximately US$65,000,000.00 being money that it asserted it had expended to acquire and develop the Property, having received same from investors by way of returnable deposits on residences to be built on the Property. The appellant alleged that it held those funds on trust for the investors and was therefore entitled to an equitable lien over the Property of at least that amount, in exercise of its purported entitlement to assert the investors' beneficial interest in those monies.

By notice of application filed on 13th February 2019, the respondents applied for among other orders, an order striking out the name of Starwood Capital Group as a defendant; leave to amend the claim form and statement of claim to change the first respondent's name in them to "Starwood Group Global LP" instead of "Starwood Capital Group"; orders striking out or staying the claim against them and striking out the claim against the first respondent on the ground that no entity with that name existed. They also sought an order to set aside service of the claim form on the fourth and fifth respondents.

By a written decision delivered on 19th August 2022, the learned judge made orders striking out the claim against the fourth and fifth respondents; striking out paragraph 19 of the statement of claim by which the appellant claimed an equitable lien over the Property in the sum of US$65,000,000.00 and paragraph 3 in which such a lien was claimed; striking out paragraph 14 of the statement of claim where the appellant sought rescission or alternatively avoidance of the sale ("the strike out orders"). The learned judge also granted a declaration that it would be an abuse of the court's process for the appellant to contest the suitability of procedures approved by the United States Bankruptcy Court for the sale of the Property by auction and that a claim premised on such unsuitability would likewise be an abuse of process ("abuse of process orders").

Being dissatisfied with the decision, the appellant on 6th September 2022 applied for leave to appeal. By order dated 14th October 2022, leave to appeal was granted. The appellant filed this interlocutory appeal on 4th November 2022 advancing several grounds of appeal against the learned judge's strike out and abuse of process orders.

In relation to the abuse of process orders, the appellant's grounds of appeal are that the learned judge erred in a) finding that it was unarguable that it (the Company) had not given informed consent to or had otherwise submitted and engaged in the US Bankruptcy Proceedings in a proper manner so as to preclude it (by virtue of the concept of abuse of process) from contending subsequently that the impugned sale was invalid under Anguillan law; b) finding that the Company's decision to enter the US Proceedings could not be shown to be invalid or ineffective; c) failing to consider that Mr. Korzen was one of two directors and that there were not three directors; and therefore he erred - in concluding that the presence of two other directors could remedy any defect in the decision to initiate the US Proceedings; d) failing to conclude that it was arguable that Mr. Korzen and his fellow directors did not disclose to the Board or the US Court the benefits they and their affiliates had received and failed to recuse themselves from company decisions in which they were conflicted; e) in that he was mistaken in failing to adequately consider why SOF would offer a series of benefits to Mr. Korzen and the other directors if it did not expect anything in return and by failing to infer that there was such expectation and therefore - the decision to enter the US Proceedings may be impugned; - f) in concluding that the procedures for sale of the Property were in accordance with Anguillan law; and g) finding that any claim based on a critique of the suitability of the referenced sale procedures were an abuse of process. The appellant's further grounds of appeal assert that the learned judge erred in striking out the claims against the fourth and fifth defendants; striking out the equitable lien claim and the rescission and avoidance of sale claims.

The respondents filed a counter-notice of appeal on 21st November 2022. In it, they challenged the learned judge's finding that there were serious issues to be tried on the claims for breach of fiduciary duty, dishonest assistance and conspiracy to injury, on the basis that such a finding is wholly inconsistent with several of his other findings. The respondents also submitted that although the learned judge correctly ruled that the particulars of a claim for dishonest assistance of breach of fiduciary duty should identify what the defendant is alleged to have done to assist the alleged breaches of fiduciary, there was no such specificity of pleading in the instant case as to what actions by Starwood constituted knowing and dishonest assistance to Mr. Korzen to enter into the inducements. Likewise, there was no pleading as to Starwood's alleged role in arranging to offer secret benefits to Mr. Korzen.

The issues that arise for consideration may conveniently be condensed into four:

1. Whether the learned trial judge erred in law by finding that any claim based on a critique of the suitability of the sale procedures sanctioned by the U.S. proceedings was an abuse of process and whether in arriving at that conclusion he erred in principle.
2. Whether the learned judge erred in the exercise of his judicial discretion by striking out the:
    a) claims against the fourth and fifth respondents;
    b) equitable lien claims; and/or
    c) rescission or avoidance of sale claims.
3. Whether the learned judge erred by finding that there are serious issues to be tried on the claims for breach of fiduciary duty, dishonest assistance and conspiracy to injury since he made other findings that according to the respondents are inconsistent with such a determination.
4. Whether the learned judge erred in law by allowing the claims for breach of fiduciary duty, dishonest assistance and conspiracy to injure by unlawful means to proceed to trial, notwithstanding the respondents' contentions that:
    a) on the facts, there was no injury or damage to the appellant company caused by the Chapter 11 Bankruptcy proceedings; and/or
    b) no steps had been taken to amend the claim, described by the respondents as being severely deficient, during the protracted period of eleven years since the occurrence of the events giving rise to the claim.

At the hearing of the appeal, the respondents made an application to adduce as fresh evidence on the appeal, the letter of resignation as director of Mr. Victor Duva dated 31st March 2010 addressed to Barnes Bay Development Ltd. to address whether the board comprised three or two directors at the material times. Leave was granted to the respondents to admit it as fresh evidence for the purposes of the appeal.

Held: dismissing the appellant's appeal against the decision of the learned judge delivered on 19th August 2022 and affirming the orders made at paragraph 179 of his decision, dismissing the respondents' counter notice of appeal and awarding the respondents 75% of their costs and the appellants 25% of their costs on the appeal to be assessed if not agreed that:

1. The fresh evidence that was admitted for purposes of the appeal was germane to the resolution of the abuse of process issue. It diverges from the learned judge's finding that the Board comprised three directors when the decision was made to proceed in the US Bankruptcy Court to secure the approval of a plan for sale of the Property. Mr. Duva's resignation from serving on the Board meant that only Mr. Smith and Mr. Korzen were directors when the impugned decisions were made. In fact, this new evidence compellingly supports such a finding because there is no evidence that any other directors were appointed or served during the material times. The learned judge therefore erred by finding that there were three directors at the time.

2. Breach of fiduciary duty by a company's director arises in a number of circumstances at common law or in contravention of a statutory duty. Broadly speaking, it occurs where a director fails to act in the company's best interest; acts for an improper purpose or fails to act in good faith. A director of a company is duty bound to use his best efforts for the benefit of the company and disregard his own private interests in favour of the company's, whenever a conflict arises between the two. If, contrary to this duty a director nonetheless makes a decision in furtherance of his private interests in preference to those of the company without the company's informed consent and/or approval such conduct constitutes a breach of fiduciary duty. Informed consent as a concept affords a defence to a director who, before voting at a board of director's meeting on a matter involving such conflict of interests, makes full and frank disclosure to the Board and/or the Company's shareholders and receives their consent to the proposed decision. It cannot be said that the learned judge made findings anywhere in the judgment that the appellant had given informed consent to the US proceedings or had not engaged in them in a proper manner despite the appellant's criticism that the judge made such findings on the abuse of process point.

   Section 97 of the **Companies Act** Cap. C65 of the Laws of Anguilla, Revised Edition 2010 applied; **Imperial Mercantile Credit Association (Liquidators) v Coleman** (1870) 6 Ch. App. 563 applied; **Regal (Hastings) Ltd. v Gulliver** [1967] 2 A.C. 134 applied.

3. There was no evidence before this Court on which to determine the quorum set by the articles or by-laws of the appellant. In the absence of this and other salient pieces of evidence, the court below and this Court are hampered in making any determination about the effectiveness or validity of the impugned resolution to initiate the US proceedings. It cannot be said that the learned judge erred by finding that he did not consider it to be a determinative factor that the subject motion was procured by a board that was improperly influenced by a conflicted director. More importantly, he made no ruling that it was not arguable that the Company had properly submitted to and engaged in the US proceedings. He concluded merely

that the impugned decisions and actions about which the appellant complains, were not shown to be invalid or ineffective. On the materials before him and the law, it was open to him to so find. He was entitled to so find and these appear to be matters which are properly reserved for the trial.

Cavendish-Bentinck v Fenn (1887) 12 App. Cas 652 considered; Sections 77, 80 and 84 of the **Companies Act** Cap. C65 of the Laws of Anguilla, Revised Edition 2010 applied.

4. With respect to the appellant's contention that the board of directors were hopelessly conflicted, having all received inducements and failed to disclose them or have independent directors appointed to vote on the resolution in their place, the learned judge at paragraph 71 of the judgment dealt succinctly with the appellant's argument and rejected it as having not been pleaded. This Court agrees that absence of pleadings on this issue is a complete rebuttal to such claim.

5. The learned judge was not required to conclude that the evidence supports a finding that Mr. Korzen and the other directors did not disclose the benefits they received to the Board or the US Court in order to judicially resolve the applications under consideration. No reasons have been advanced why it was necessary for him to have done so. It was sufficient for him to note that those are factual concerns which are properly reserved for determination at the trial when more fulsome particulars and testimony tested by cross-examination would better assist the court in its deliberations and thus the learned judge did not err in this regard.

6. As for the appellant's contention that the learned judge erred by not considering the breadth and impact of the inducements which affected all members of the Board, particularly Mr. Korzen, it ignores the fact that the appellant's pleadings did not allege that all three directors benefited from the inducements. The learned judge's analysis demonstrated that as far as Mr. Korzen was concerned, he had regard to the possibility that Mr. Korzen might have been conflicted as alleged but chose to reserve for trial the full issue of whether he was liable for breach of fiduciary duty, the consideration of which would interrogate and determine those related concerns. For those reasons, it was therefore not necessary for the learned judge to consider the breadth and impact of the inducements in relation to any of the directors for purposes of disposing of the applications before him thus he did not err on this issue as contended by the appellant.

7. As regards the appellant's argument that the court erred by not finding that directors other than Mr. Korzen were implicated and chargeable with allegations of breach of fiduciary duty, it is noted that this was not pleaded and need not have troubled the learned judge. Additionally, the learned judge properly deferred for consideration at trial whether Mr. Korzen is liable for breach of fiduciary duty which would entail an analysis of the evidence and law to determine if he had a duty to recuse himself from company decisions in respect of which he was conflicted. Therefore, the appellant's - criticism that the learned judge erred by failing to make a finding on that issue is not borne out.

8. *Res judicata* only arises if the same claim or the same issue has previously been decided by a court in proceedings between the same parties or their privies. In **Henderson** estoppel a party is precluded from raising in subsequent proceedings matters which were not but could and should have been raised in the earlier ones. In relation to the appellant's argument that the learned judge misunderstood and misapplied the legal principles relative to *res judicata* and **Henderson** abuse of process in failing to appreciate that they were identical legal constructs, the learned judge identified and outlined the correct principles of law vis-à-vis *res judicata* and **Henderson** estoppel. The judge's application of the circumstances of this case to the legal principles is impeccable and affords no legitimate basis for interference by this Court.

   Henderson v Henderson (1843) 67 ER 313 applied**; Norsk Tillitsmann ASA v Norinvest Ltd** BVIHC(COM) 48 of 2011 (delivered 27th July 2011, unreported) applied**; OJSC Oil Company Yugraneft (In Liquidation) v Abramovich and Others** [2008] EWHC 2613 applied.

9. It is trite law that inherent in the power of sale conferred on a chargee is the recognition that in law the chargee's right, title and interest in the charged property corresponds to the chargee's equity by virtue of and by reference to the outstanding amount of the debt under the charge. In practical terms, although the registered title is recorded in the name of the chargor, the sale of the property by a chargee in exercise of its power of sale being as it is at the chargee's election does not involve the chargor as an active participant. In such circumstances, it is fallacious to say that the chargor is a party to the agreement for sale, except as required in the formal sense to effectuate the transfer of title from the chargor to the new owner. At paragraph A of the Bids Procedure Order, it is noted that the sale by auction is to be conducted under Anguilla law including sections 72 and 75 of the **Registered Lands Act ("RLA")** and that SOF was thereby exercising its power of sale pursuant to section 75 of the **RLA**. For these reasons, to the extent that the learned judge's determination may be interpreted as conveying the notion that the appellant is not a party to the agreement for sale, he did not thereby err in law or in fact.

   Sections 72 and 75 of the **Registered Land Act** Cap. R.30 of the Laws of Anguilla, Revised Edition 2010 applied.

10. As to the propriety and legality of SOF being permitted to credit bid at the auction, section 75(1) of the **RLA** expressly permits a chargee to make a credit bid. The practice of credit-bidding, governed in Anguilla as it is by statute is not objectionable in law. It is evident that the learned judge did not err in his consideration of this issue.

    Section 75 of the **Registered Land Act** Cap. R.30 of the Laws of Anguilla, Revised Edition 2010 applied.

11. A court that is called on after the fact to determine whether procedures for sale were compliant with the law or in breach of a duty of care to take reasonable steps to obtain a proper price conducts an exercise which is different from that undertaken by a court that is examining and approving procedures for sale by auction. The issue of whether the overall marketing efforts for the sale of the Property were reasonable, adequate or deficient were properly to be made to the US Bankruptcy Court to which the Company had submitted itself for such purposes. The appellant was therefore precluded from contending otherwise in the Anguilla Courts and the learned judge correctly found that this aspect of its claim is therefore an abuse of the court's process. Contrary to the appellant's contention, the learned judge made no finding as to the appropriateness, completeness or legality of the procedures for sale that were approved by the US Bankruptcy Court, specifically as it relates to the duty to take reasonable care to obtain a proper price. The argument that he erred in doing so is therefore not sustainable.

12. It is settled law and well-known that when interpreting a statute, a court must give effect to the natural and ordinary meaning of the words used in the statute unless to do so would lead to absurdity and a result contrary to the legislature's intent. The words used by the legislative drafter in subsection (3) of section 75 of the **RLA** are not ambiguous and must therefore be accorded their ordinary and natural meaning. It follows that it is properly interpreted to mean that in any case where a claimant alleges that he has suffered damage as a consequence of the irregular exercise of a power of sale, such a claimant's remedy is limited to damages against the chargee. This seems reasonable in view of the fact that sale of property pursuant to the exercise of a power of sale quite often results in the property being transferred to a third party and not to a chargee. The subsection under contemplation makes no exception even in such instances. The learned judge's determination that in light of section 75(3) the appellant is not entitled to have the sale rescinded or avoided is sound.

Section 75(3) of the Registered Land Act Cap. R.30 of the Laws of Anguilla, Revised Edition 2010 applied; **Joseph Cadette v St. Lucia Motor v. General Insurance Company Limited** SLUHCV2018/0039 (delivered 22nd February 2021, unreported) applied.

13. The court is empowered by the Civil Procedure Rules (Revised Edition) 2023 ("**CPR**") 26.3(1)(b) to strike out a statement of case or part of it, if it discloses no reasonable ground for bringing a claim. It is well-established that the discretionary power conferred on the court pursuant to CPR 26.3(1)(b) must be exercised judicially. A judicial officer charged with this function is enjoined by CPR 1.2 to have regard to the overriding objective to do justice between the parties. It is settled that the authority vested in the court to strike out a claim must be deployed sparingly and only in the most obvious of cases where the court is satisfied that the claimant has not advanced a viable claim on the pleadings, whether because the claim is incurably bad, has no real prospect of succeeding, is an abuse of the court's process or is otherwise unsustainable. If, however, the statement of case raises a serious

issue of fact which may be properly determined at trial on receipt of evidence, it would not be just to strike out such a pleading.

Rule 26. 3 of the **Civil Procedure Rules (Revised Edition) 2023** applied; **Tawney Assets Limited v East Pine Management Limited and others** BVIHCVAP2012/007 (delivered 17th September 2012, unreported) considered.

14. In a claim involving some element of dishonesty, the facts pleaded must support a finding of dishonesty and not some other unrelated tort or wrong. Likewise, in the claim alleging the commission of the torts of a) knowingly and dishonestly assisting and inducing breaches of fiduciary duty by Mr. Korzen; and b) conspiring by Mr. Korzen with the other three respondents to injure the appellant by the unlawful means of breach of fiduciary duties by entering into the inducements, the appellant had to include any factual assertions as to what conduct was allegedly engaged in that amounted to such knowing and dishonest assistance or conspiracy to injure by unlawful means. Contrary to the prescriptions of **CPR** rules 8.7 and 8.7A the appellant did not include a concise statement of the facts relied on or annex supporting documentation from which such particulars could be ascertained. The judge therefore did not err when he ruled that the appellant's case against the fourth and fifth respondents was not particularised and as a consequence those claims disclosed no reasonable case or serious issue to be tried against them on the merits and by extension that the claims against them ought to be struck out. The learned judge applied the relevant legal principles in arriving at his determination and did not err by considering irrelevant matters or by not considering pertinent factors. His decision falls within the generous ambit within which reasonable disagreement is permissible, is defensible and is not palpably wrong and thus this Court will not interfere with his ruling.

Rules 8.7 and 8.7A of the **Civil Procedure Rules (Revised Edition) 2023** applied**;** **Belmont Finance Corp Ltd. v Williams Furniture Ltd**. [1979] Ch. 250 applied; **East Caribbean Flour Mills Limited v Ormiston Ken Boyea** SVGHCVAP2006/0012 (delivered 16th July 2007, unreported) applied.

15. It is trite law that a court is empowered to order the repayment by a vendor to a purchaser of land, the deposit paid directly to the vendor towards the purchase. However, the court may only do so having regard to the terms of the contract and all other circumstances. Without pleadings or evidence as to the terms of the sale and purchase agreements between the appellant and the purchasers/investors, it is highly doubtful that the appellant's case to enforce an equitable lien against the respondents on the investors' behalf is a reasonable ground for bringing this claim. It is now settled law that while a lien is created against the subject property, in the purchaser's favour where he pays a deposit to the vendor towards the purchase price, no such lien is created in respect of such deposits paid to a stakeholder. The necessary corollary is that the lien arises in contract as held in **Gribbon v Lutton**; is personal to the purchaser and does not transfer to and cannot be exercised by the vendor. In the instant case, the appellant is not in a position to proceed on the basis articulated in its statement of case. Consequently, the judge

applied the correct principles of law to the circumstances of this case and cannot be said to have made a blatantly wrong decision consequent on considering and applying incorrect principles or by misapplying correct principles of law.
Gribbon v Lutton [2002] QB 902 applied; **Combe v Swaythling** [1947] Ch. 625 considered.

16. Despite the respondents' claim that the learned judge erred by finding that there are serious issues to be tried on the claims for breach of fiduciary duty, dishonest assistance and conspiracy to injury since he made other findings that according to the respondents are inconsistent with such a determination, this Court finds that in all of those instances, the learned judge quite carefully explained either what is required to plead a particular cause of action (e.g. paragraphs 110 and 111) or that the pleading is not fully particularised (e.g. in paragraph 113), but nonetheless noted (e.g. in paragraph 124) that there is room and opportunity for amendment to supply the flagged details. Thus, those statements by the learned judge are not inconsistent with his ultimate determination that there are serious issues to be tried. Accordingly, this ground of appeal in the respondents' cross appeal fails.

17. On the authority of **Regal Hastings**, it is settled that a claimant with a claim for breach of fiduciary duty need not plead or prove that he has been injured or benefitted from the actions of the fiduciary. It suffices if he simply pleads and establishes that the fiduciary used his position to make a profit for which he is liable to account, irrespective of whether he was well-intentioned or held an honest belief in the bona fides of the impugned transaction.

    Regal (Hastings) Ltd. v Gulliver [1967] 2 A.C. 134 applied.

18. It is a matter of jurisdiction and procedure that a decision of whether to permit amendment to pleadings is governed by the **CPR** and relevant Practice Directions and involves the exercise of a discretion on consideration of an application and affidavit evidence. As to the respondents' contention that the learned judge erred by permitting the claims against the first, second and third respondents to proceed even though they opposed that decision on the ground that no attempts had been made to amend the claim notwithstanding the passage of eleven years since the events giving rise to the claim had arisen, it is a matter of record that the learned judge did not have before him any application to amend the pleadings, and he did not purport to exercise the discretion to allow any such amendment. In those circumstances, it would have been pre-emptive for the learned judge to consider whether, in all the circumstances, it would be just and in furtherance of the overriding objective to grant leave for unspecified and unrequested amendments to the statement of claim. He was entitled to simply note that the option existed and to conclude that in the event that it was explored and resulted in success, further particulars might be forthcoming. By doing so, he did not overstep his remit, and he thereby committed no error of principle which made his decision plainly wrong.

    The **Civil Procedure Rules (Revised Edition) 2023** applied.

JUDGMENT

Introduction

[1] **HENRY JA**: The subject matter of this interlocutory appeal is a property situated at Barnes Bay, West End, Anguilla comprising some thirty-six acres of land on which sits a luxury resort formerly known as The Viceroy Anguilla Resort and Residences, now styled Four Seasons Resort and Residences Anguilla ('the Property'). Prior to July 2011, the Property was owned by Barnes Bay Development Limited ("the Company") a company incorporated in Anguilla. On 27th July 2011 the Property was sold by public auction pursuant to an order of the United States Bankruptcy Court[1] for the District of Delaware approving Procedures for the Auction and Sale of the Debtors' Assets ("Bids Procedure Order") at the instance of the second respondent SOF-VIII Hotel II Anguilla Holdings LLC ("SOF"), to whom the Company was indebted for a sum in excess of US$350,000,000.00. The debt exceeded the Company's assets.

[2] The second respondent held security for its debt over all of the Company's assets including a first charge over the real property at Meads Bay, Anguilla. The Company was insolvent at the time of the public auction, had initiated Chapter 11 Bankruptcy Proceedings in the United States Bankruptcy Court and had placed itself in bankruptcy there by order dated 17th March 2011. It was subsequently placed in liquidation by the High Court in Anguilla in 2012 after a compulsory winding up petition was filed on 6th October 2011 by one of its creditors, Mr. Jonathan Simon. Messrs. John Greenwood and Hadley Clinton were appointed its liquidators without opposition.

[3] On 26th July 2017, Barnes Bay Development Limited (In Liquidation) ("Barnes Bay") sued Starwood Capital Group ("Starwood" or "the first respondent"), SOF, Mr. Bradford Korzen ("the third respondent"), Kor Duo Investment Partners II LP ("KDIP"

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[1] Dated May 19th 2011. See Vol. 1, pgs. 283-285.

or “the fourth respondent”) and Kor Duo II LLC (“Kor Duo II” or “the fifth respondent”) (collectively “the respondents”) seeking:

a) Rescission, alternatively avoidance of the sale of the Property by the appellant to the second respondent.
b) Further or alternatively, an account of profits or damages.
c) Alternatively, an equitable lien over the Property.
d) Such further and other relief as the Court thinks fit.

[4] In its claim, Barnes Bay alleged (and it is not disputed) that the Company entered into a loan and security agreement with Citigroup Global Markets Realty Corp (“Citigroup”) on 13th June 2006 for a sum of money which was secured by the Property and other assets. The loan was to facilitate the development of the Property as an exclusive hotel resort and residential estate. That agreement was subsequently amended and restated several times, including on 30th July 2008 and 17th July 2009.

[5] The outstanding loans were acquired by SOF on 13th October 2010. At that time Mr. Korzen was one of the Company’s directors and had personally guaranteed the loan to the extent of US$150,000,000.00. Pursuant to a commitment agreement dated 16th March 2011, SOF agreed to provide ‘debtor in possession’ financing to the Company in anticipation of Bankruptcy proceedings under the United States Bankruptcy Code. It also entailed indemnification provisions for the third, fourth and fifth respondents. The Company’s directors at that time were Mr. Korzen, a Mr. Victor Duva and a Mr. Jeff Smith. The appellant alleged that the negotiations leading to the Commitment Agreement were conducted on SOF’s behalf by Starwood, principally by its Chief Executive Officer (“CEO”) Mr. Barry Sternlicht.

[6] The appellant alleges that SOF is a subsidiary of Starwood’s. It claims further that the commitment agreement was conceived for the purpose of an anticipated Chapter 11 process in the United States of America.

[7] The appellant pleaded that on or about 16th March 2011, the first and second respondents entered an arrangement agreeing to indemnify the third, fourth and fifth respondents against claims and causes of action including proceedings by purchasers of units in the Property; agreed to procure Mr. Korzen's release from a US$150,000,000.00 guarantee he had given in relation to the Company's indebtedness to the second respondent and agreed a lucrative compensation package to him to continue managing the Property with a view to it being sold at auction. The appellant alleged that in the circumstances its board was conflicted and the decision was made without disclosing to the Company or board the conflicts, and without the Company's knowledge or informed consent of the arrangement.

[8] The kernel of the appellant's case is that the first and second respondents entered into that agreement for the purpose of influencing the third respondent and through him, the Company's Board of Directors to agree the debtor in possession proposal which was designed to give substantial control of the Company's affairs to the first and second respondent with the ultimate objective of achieving a swift progression to an auction and sale of the Property to the second respondent and/or agree that it be sold to the second respondent. The appellant claimed that in the process Mr. Korzen committed a breach of fiduciary duty to the Company which was induced by or knowingly and dishonestly assisted by the other respondents.

[9] Following a series of proceedings in the US Bankruptcy Court that were initiated by the Company under directorship of a Board of which Mr. Korzen was a member, the US Court made an order approving the sale of the Property by auction and expressly permitted credit bidding by SOF. On 27th July 2011, the Property was sold by auction to SOF who was the sole bidder. On motion[2] by SOF for relief from the automatic stay to register its title, an order was made[3] lifting the stay and for the title to the Property to be transferred to the SOF. Title was registered in the Land Registry on 22nd September 2011.

[2] Filed on 15th September 2011. See Vol. 1 Pg. 499-606, pg. 502, paras. 9, 11 and 14.
[3] 20th September 201. See Vol. 1, pg. 608-610.

[10] The appellant contended that the Company's board did not cause the Company to make any effort to market the Property to other prospective bidders and did not retain an investment banker or broker to attempt to solicit higher bids or better offers.

[11] The appellant alleged that it is entitled to rescission or avoidance of the sale of the Property to SOF because Mr. Korzen, by entering into the complained of arrangements between himself, Starwood and SOF had put himself in a position in which his personal interests conflicted with his duty to the appellant. Further, by doing so, he had breached his fiduciary duty to the appellant. Additionally, the appellant claimed that Starwood and SOF had disregarded the fact that Mr. Korzen's entry into the arrangements constituted a breach of his fiduciary duty to the appellant. In those circumstances, the appellant asserted that the sale of the Property was voidable and it elected to rescind the sale by bringing this claim.

[12] In relation to its claim for an account of profits, the appellant grounded it in allegations that the other respondents had, by entering into the impugned arrangements, intentionally induced or knowingly and dishonestly assisted Mr. Korzen in his alleged breach of fiduciary duty. In the case of Starwood and SOF, the charge was that they had conspired to injure the appellant by unlawful means, by virtue of Mr. Korzen's alleged breach of fiduciary duty; that in Starwood's case, this came about by Starwood causing or permitting SOF to enter into the arrangements with Mr. Korzen. The claim for damages relates to any loss suffered by the appellant arising from the transfer of the Property to SOF.

[13] As a further alternative, the appellant claimed an equitable lien over the Property in respect of approximately US$65,000,000.00, being money that it asserted it had expended to acquire and develop the Property, having received same from investors by way of returnable deposits on residences to be built on the Property. The appellant alleged that it held those funds on trust for the investors and was therefore

entitled to an equitable lien over the Property of at least that amount, in exercise of its purported entitlement to assert the investors' beneficial interest in those monies.

[14] By notice of application[4] filed on 13th February 2019, the respondents applied for among other orders, an order striking out the name of Starwood Capital Group as a defendant; leave to amend the claim form and statement of claim to change the first respondent's name in them to "Starwood Group Global LP" instead of "Starwood Capital Group"; orders striking out or staying the claim against them and striking out the claim against the first respondent Starwood Capital Group on the ground that no entity with that name existed. They also sought an order to set aside service of the claim form on the fourth and fifth respondents.

[15] The respondents advanced several grounds as the bases of their applications. Among them was that the claim is an impermissible collateral attack on final orders of the US Bankruptcy Court approving a) the Debtor in Possession financing; b) the sale of substantially all the appellant's assets including the Property; c) the acquisition of the Property by the second respondent and the registration of title. They contended further that the claim does not disclose a good cause of action against them.

[16] By a written decision delivered on 19th August 2022, the learned judge made orders striking out the claim against the fourth and fifth respondents; striking out paragraph 19 of the Statement of Claim by which the appellant claimed an equitable lien over the Property in the sum of US$65,000,000.00 and paragraph 3 in which such a lien was claimed; and striking out paragraph 14 of the Statement of Claim where the appellant sought rescission or alternatively avoidance of the sale ("the strike out orders"). The learned judge also granted a declaration that it would be an abuse of the court's process for the appellant to contest the suitability of procedures approved by the United States Bankruptcy Court for the sale of the property by auction and

[4] Made pursuant to rules 7.7, 9.7 and 9.7A of the Civil Procedure Rules 2000 and the court's inherent jurisdiction.

that a claim premised on such unsuitability would likewise be an abuse of process ("abuse of process orders").

[17] Being dissatisfied with the decision, the appellant on 6th September 2022, applied for leave to appeal. By Order dated 14th October 2022 leave to appeal was granted. The appellant filed this interlocutory appeal against the learned judge's strike out and abuse of process orders on 4th November 2022. It contends that the learned judge erred in law in arriving at his determination and the appeal should be allowed.

[18] The respondents filed a counter-notice of appeal on 21st November 2022. In it, they challenged the learned judge's finding that there were serious issues to be tried on the claims for breach of fiduciary duty, dishonest assistance and conspiracy to injury, on the basis that such a finding is wholly inconsistent with several of his other findings. In that regard, they asserted, among other things, that such finding is diametrically opposed to the learned judge's opinion that evidence existed to show that the directors had regard to what option would be in the Company's best interest in view of the appellant's need for a) bankruptcy protection from creditors pending a proposed re-organisation of its business and operations and b) debtor in possession financing to fund its operations including retaining its workforce.

[19] It was submitted further that although the learned judge correctly ruled that the particulars of a claim for dishonest assistance of breach of fiduciary duty should identify what the defendant is alleged to have done to assist the alleged breaches of fiduciary, there was no such specificity of pleading in the instant case as to what actions of Starwood's constituted knowing and dishonest assistance to Mr. Korzen to enter into the inducements. Likewise, there was no pleading as to Starwood's alleged role in arranging to offer secret benefits to Mr. Korzen.

Factual Chronology

[20] A comprehensive factual matrix is succinctly captured by the learned judge in his judgment. I propose therefore to extract and recite portions of that narrative to

supplement the summary contained in the introductory paragraphs of this judgment and to thereby provide further context within which this dispute arose.

[21] As noted by the learned judge: Barnes Bay [was] (almost) wholly owned by the fourth [respondent] KDIP. The fifth [respondent] Kor Duo II is the General Partner of KDIP. The third [respondent] Mr. Korzen is the managing partner for Kor Duo. Kor Duo II held 95% of the shares in Barnes Bay and at material times was and is KDIP's general partner.

[22] Barnes Bay experienced financial difficulties in the course of its development and operations. One consequence of this situation was that a number of persons who had entered into Purchase and Sale agreements and paid deposits on account of intended purchases of property in the proposed development commenced proceedings against Barnes Bay with a view to terminating their agreements and recovering their deposits. Some of those proceedings were ultimately settled and the terms of the settlement recorded against the title to the property in the Anguilla Land Register.[5]

[23] Another consequence was that Barnes Bay defaulted on its obligations under the loan. As a result, by 16th March 2016 it owed SOF an outstanding balance of roughly US$370,000,000.00.[6]

[24] The appellant's case is that by virtue of being the managing member of Kor Duo II and a director of the Company, 'Mr. Korzen had ultimate control over the Company and its board. It asserted that Mr. Korzen did not disclose to [the Company], his interest in having the Company enter into the commitment agreement and did not recuse himself from making the decision to enter the agreement.'

[5] See paragraph 7 of the judgment in the court below.
[6] See paragraph 8 of the judgment in the court below.

[25] The appellant claimed that these arrangements were entered into by Starwood and/or SOF to influence Mr. Korzen and, by extension the board of Barnes Bay, to agree to the "debtor in possession" proposal, which was designed to give substantial control of the Company's affairs to Starwood and/or SOF, and to achieve a swift progression to an auction and sale of the Property to SOF.

[26] On 17th March 2011 Barnes Bay, KDIP and Kor Duo II ['the petitioners'] filed petitions for relief in the United States Bankruptcy Court for the District of Delaware under Chapter 11 of the United States Bankruptcy Code. Chapter 11 is a bankruptcy option which permits the debtor to remain in possession and operate its business and provides for reorganisation of a corporation or partnership through a plan to keep its business alive and pay creditors over time. An automatic stay halts all actions including pending foreclosure against the debtor's property, real and personal, and remains in effect so long as the property is part of the bankruptcy estate.[7]

[27] Barnes Bay's motion to the United States bankruptcy Court for the District of Delaware was supported by a declaration made by Ms. Deborah Branch, its Restructuring Officer. Her evidence was to the effect that the company had a serious cash flow problem and contemplated Chapter 11 reorganization. She explained that when construction began on the Property in 2005, the project was expected to take two years to complete at a budgeted cost of approximately US$144,000,000. Construction of the Property, however, was difficult almost from the beginning, and by January 2007 the projected cost had swelled to US$327,000,000. A series of labor strikes that slowed the pace of construction further aggravated the situation. The agreement was updated and amended from time to time as further credit was extended to the Company under the facility. On or about 13th October 2010, the outstanding loans under the 2009 Loan Agreement were acquired by SOF-VIII-Hotel II Anguilla Holdings, LLC an affiliate of Starwood Capital Group and the second respondent herein in view of the delays and non-performance of its obligations the Company's (sic) became the subject of several lawsuits. A number of judgments

[7] See paragraph 14 of the judgment in the court below.

were registered against it. Ultimately, the Company took almost five years to complete the project, and cost substantially more than was originally forecast. As a result, Barnes Bay has been unprofitable from the outset, plagued by construction delays and cost overruns that have left the Property overleveraged and unable to service its existing debt obligations. As of the Petition Date, the total outstanding balance owed by Barnes Bay under the 2009 Loan Agreement was approximately US$370,000,000.[8]

[28] Among the applications made in conjunction with the proceedings was [one] to obtain debtor in possession financing from SOF. Ms. Branch explained that the Company needed the proposed debtor in possession financing facility to enable the Debtors to operate effectively and minimize any disruption caused by the commencement of these Chapter 11 cases, to ensure the continuation of the Debtors' cash management system and other business operations without interruption, as well asin general, to maintain employee confidence and morale, and establish certain other administrative procedures to promote a seamless transition into Chapter 11.[9]

[29] The U.S. Court granted the petitioners' motion authorising the continued sale of residential units in the Property and granted their motion on an interim basis for debtor in possession financing.

[30] In March 2011, the US Trustee appointed a Committee of Unsecured Creditors comprising five representative creditors. Soon after[10], the petitioners filed a Joint Chapter 11 Plan of Liquidation (or "the Plan") and placed before the U.S. Court all the agreements[11] which the appellant in its claim characterised as inducements. The Plan entailed among other things a proposed sale of the Property by public auction

[8] See paragraph 15 of the judgment in the court below.
[9] See paragraph 16 of the judgment in the court below.
[10] 1st April 2011. See Vol. 1 of the Record of the Appeal pg. 1218.
[11] See Vol. 1, pg. 1268.

on terms which are congruent with the US Bankruptcy Code and allegedly with the laws of Anguilla and specifically section 75 of the **Registered Land Act**[12] ("**RLA**").

[31] On 13th April 2011, the Committee of Unsecured Creditors filed a motion in the US Bankruptcy Court[13] challenging the validity of SOF's registered charge over the Property and the proposed residential sale order. Among other things, it applied for the appointment of a Chapter 11 Trustee over the Company. Their main complaint was that the petitioners had proposed a Plan that benefitted the secured creditors Starwood and SOF at the expense of the unsecured creditors; and that granted Starwood a significant strategic advantage by giving it the right to credit bid at any sale while making no effort to market the Property to other prospective bidders.

[32] On 19th May 2011, the US Bankruptcy Court approved the proposed procedures for the auction and sale of the Property and made its interim order for debtor in possession financing final.[14] The order preserved the right of any interested party to challenge the auction and bidding at the confirmation hearing and the ability of the Official Committee of Unsecured Creditors to contest SOF's right to credit bid.[15] In this regard, the Order provided expressly:-

> "(a)The Court is satisfied that the Bid Procedures are fair, reasonable and appropriate and are designed to maximize the recovery from the sale of the Property; and
>
> (b) All of the Barnes Bay's rights, title and interest in and to the Purchases Assets shall be sold free and clear of all pledges, liens, security interests, encumbrances, claims, charges, cautions, options and interests thereon and there against in accordance with the provisions of the United States Bankruptcy Code and Section 75 of the Registered Land Act."

[33] Between May and June 2011, notice of the auction (scheduled for 27th July 2011) was advertised in the United States, Europe and Asia in their respective editions of

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12 Cap. R.30 of the Laws of Anguilla, Revised Edition 2010.

13 Vol. 1, pg., 1056-1115.

14 Vol. 1, pg. 283, 285-286; paras. 5 and 10.

15 Vol. 1, pg. 289-291.

the Wall Street Journal. Advertisements were also published in the Anguillan newspaper.

[34] On 24th May 2011, the US Bankruptcy Court granted an order lifting the automatic stay to permit certain PSA creditors to pursue claims in Anguilla investigating their rights, if any, in the Residence properties.[16] Its final order for debtor in possession loan and other related orders was made on 14th June 2011.[17] By then the debtor in possession loan amount had increased from US$5,000,000.00 to US$12,500,000.00.

[35] On 22nd June 2011, the Committee of Unsecured Creditors withdrew their motions for appointment of a trustee and challenge to the residential sales order. The petitioners filed a second Joint Plan of Reorganization and Disclosure Statement on 28th June 2011.[18] Neither the first nor the second Plan was approved by the US Bankruptcy Court or implemented.

[36] In furtherance of the order approving the sale, the Property was at auction sold to SOF for US$105,000,000.00. SOF was the sole bidder. The appellant claimed that the sale was defective by reason that a) its board did not cause it to make any effort to market the Property to other prospective bidders or engage a broker or investment banker to attempt to solicit better or higher offers; and b) consequently SOF was the only bidder at the sale.

[37] On 14th September 2011, the US Bankruptcy Court held the hearing of the Motion for approval of the second Amended Joint Plan of Reorganization.[19] Lead Counsel for the Committee of Unsecured Creditors, Mr. Edward Weisfelner testified as to the investigation conducted regarding allegations made in the Motion for appointment of a Trustee; efforts made to obtain financing or sale of the Property by private treaty

[16] Vol. 1, pg. 447, Disclosure Statement.
[17] Vol 1, pgs. 299 and 305.
[18] Vol. 1, pg. 1411.
[19] Vol. 1, pg. 611 – Transcript.

and that no lender would lend and no investor showed any interest in the Property; as to the Property's value of US$165,000,000.00 with a debt of US$398,000,000.00 to SOF; about negotiations held with SOF to obtain funding for the PSA creditors; and the decision to withdraw the Motion for appointment of a Trustee and supporting the Plan of Reorganisation.

[38] The Chief Restructuring Officer Mr. Kevin Nystrom who was appointed by the Court of oversee the Plan of Reorganisation also testified. He averred that the sale of the Property to SOF and proposed Plan of Reorganisation was the best arrangement for the creditors and that without agreement on the Plan of Reorganisation the creditors would receive nothing; that the only alternative to the Plan is Chapter 7 liquidation and a further consideration is that SOF could foreclose on the Property outside of bankruptcy proceedings and that under such a scenario the creditors would get nothing. Two PSA creditors also testified at the hearing.

[39] On 20th September 2011, the US Bankruptcy Court conducted a hearing regarding the lifting of the automatic stay against registration of title to the Property to SOF.[20] PSA creditors Mr. Jonathan Simon and W.O. Viceroy I Ltd. objected. Mr. William Hare supplied evidence on Anguilla law.[21] At the conclusion of the hearing the Court ordered that the automatic stay be lifted to permit SOF to register its ownership title to the Property.[22]

[40] By order dated 3rd October 2011, the US Bankruptcy Court vacated the automatic stay to allow Mr. Jonathan Simon, W. O. Viceroy I Ltd and other creditors of the Company to file claims; and denied the motion to set aside the order granting permission to SOF to proceed with registering transfer of the Property.

[20] Vol. 1, pgs. 952-1053 and 1044.
[21] Vol. 1, pgs. 958-962.
[22] Vol. 1, pgs. 608-610.

[41] On 2nd December 2011, the US Bankruptcy Court dismissed the Chapter 11 cases filed by the petitioners. By letter dated 5th October 2012, SOF's lawyer wrote to liquidator Mr. Hadley Chilton and submitted its claim for its outstanding secured debt of US$240,000,000.00 and unsecured debt of US$13,000,000.00 in the liquidation and PSA Creditor debt of US$19,000,000.00. It was against this backdrop that the learned judge was required to consider the subject multi-pronged application.

Findings by the learned judge

[42] The learned judge granted the appellant's application to amend the claim form and statement of case to change the first respondent's name in the claim form and statement of case to 'Starwood Group Global LP'. He held further that Anguilla was the appropriate forum for trial of the matter.

[43] The learned judge made a declaration that it would be an abuse of the process of the court for the appellant to contest the suitability or adequacy of procedures approved of by the United States Bankruptcy Court for sale of the Property by auction; and, further, that to the extent that such a claim was premised on the inadequacy of the procedures so approved, it would be an abuse of process for the appellant to now pursue a claim against any of the respondents for breach of a duty to take reasonable steps to obtain a proper price for the Property ("the abuse of process declaratory orders").

[44] The learned judge denied the respondents' applications for a) declaration that the Court has no jurisdiction with respect to the Claim or, alternatively, that the Court decline to exercise such jurisdiction as it may have; b) an Order setting aside service of the Claim Form, Statement of Claim and ancillary documents on them for material non-disclosure; and c) to set aside service of the Claim Form, Statement of Claim and ancillary documents on the first, second and third respondents.

[45] He made orders striking out the case against the fourth and fifth respondents and setting aside service of the Claim Form, Statement of Claim and ancillary documents on them ("the KDIP and Kor Duo II strike out orders").

[46] Against the respondents' contentions, the learned judge ruled that the doctrines of *res judicata* and estoppel are not applicable to the issues in the instant claim, so far as the allegations of breach of fiduciary duty, dishonest assistance and unlawful means conspiracy are concerned. He opined that the proceedings in the US Bankruptcy Court did not directly address any questions regarding whether Mr. Korzen had breached the fiduciary duties imposed on him in relation to the appellant, or whether the other respondents had dishonestly assisted him in any such alleged breach or whether Starwood and/or SOF had unlawfully conspired to injure the Company as alleged. He noted too, that neither the parties to the present proceedings nor the issues in it are identical to the those in the US Bankruptcy Court. He found further that the doctrine of *res judicata* has no applicability in relation to the part of the claim regarding the sale of the Property by auction.

[47] He struck out the appellant's statement of claim relative to and for relief by way of an equitable lien over the Property, as well as those related to rescission and avoidance of sale ("the lien strike out orders").

Appellant's Grounds of Appeal

[48] The appellant advanced several grounds of appeal, namely: -

In relation to the abuse of process declaratory orders

(1) The court erred in purportedly finding that it was unarguable that the claimant had not given informed consent to the U.S. Proceedings or had otherwise submitted and engaged in those proceedings in a proper manner, such that the claimant was precluded from thereafter contending that a sale conducted in accordance with procedures sanctioned in the U.S. Proceedings were invalid under Anguillan law. In this regard, the court erred by making this determination on the limited evidence before

it; in failing to consider the breadth and impact of the inducements, which affected all members of the Board, particularly Mr. Korzen, but not just Mr. Korzen which rendered them hopelessly conflicted and in the absence of specific disclosure of such conflicts and/or appointment of unconflicted directors rendered them in breach of their fiduciary duties under Anguillan law.

(2) The court erred in finding that the decision to enter the U.S. Proceedings could not be shown to be invalid or ineffective. The court was not in a position to so find on the basis of the limited evidence provided at this preliminary stage. This is especially so since it found that there were serious issues to be tried on the merits of claims relating to breach of fiduciary duty, dishonest assistance and conspiracy to injure by unlawful means.

(3) Even if it were possible to determine that the inducements were operative solely on Mr. Korzen, the court erred in failing to consider the evidence that Mr. Korzen was one of only two (not three) directors who signed the (inaccurately-titled) "Unanimous Written Consent of the Board of Directors of Barnes Bay Development Ltd" dated 16th March 2011. Therefore, the court erred in concluding that, even if Mr. Korzen alone was conflicted, the presence of two other directors on the board (which the court incorrectly assumed, against the admitted evidence of Mr. Greenwood were non-conflicted) could remedy any defect in the decision to instigate the U.S. Proceedings. This is because only one other director, on the face of the evidence available at present, in fact, participated in that decision, such that there cannot have been an unconflicted majority.

(4) The court erred in failing to conclude that it was at least arguable that the evidence strongly indicated that Mr. Korzen and his fellow directors did

not disclose the benefits they and their affiliates received to the Board or U.S. Court when the U.S. Proceedings were instigated and also failed to recuse themselves from company decisions/actions in which they were conflicted.

(5) The court was mistaken in failing adequately to consider why Starwood would offer a series of wide-ranging, carefully-drafted, benefits worth potentially hundreds of millions of dollars to Mr. Korzen and the other directors, if it did not expect anything in return; and by failing to draw the obvious inference there was such an expectation and by not concluding that at the very least, it was arguable that the Board's decision to commence the U.S. Proceedings may be impugned.

(6) The court erred in apparently concluding that the procedures employed for the sale of the Property were in accordance with Anguillan law; it being arguable that SOF failed in its duties under Anguillan statutory and common law as chargee and lender to act in good faith with reasonable skill and care and to act fairly towards the appellant as a borrower to achieve the best price reasonably available for the Property. The court failed properly to consider the blatant defects in the auction process.

(7) The court failed to have regard to the fact that, under Anguillan law, the date of the commencement of the Anguilla winding up proceedings is the date of the filing of the winding up petition. This pre-dated the purported auction of the Property in Anguilla. The fact that a parallel insolvency proceeding had been commenced in the United States (even if valid, which the appellant contends it was not), cannot vitiate the applicability of Anguilla law to the disposal of property situated in Anguilla in that liquidation. This is a fortiori the case in circumstances where the U.S. insolvency proceedings had not been recognised in Anguilla (and still have not been recognised in Anguilla). One aspect of this ground of

appeal was that a claim by an Anguillan liquidator, contending for the application of Anguilla law to the disposition of Anguilla-situated property during the period of an Anguilla court-supervised liquidation, cannot be an 'abuse of process' by virtue of whatever may have happened in a non-domesticated foreign insolvency proceeding: on the contrary, it is simply a contention for the applicability of Anguilla law. Notably, at the hearing of the appeal, the appellant withdrew this limb of this ground of appeal. Accordingly, it will not be analysed and the related grounds[23] stand dismissed.

(8) The final ground of appeal in respect of the declaratory orders expressly stated: 'Accordingly, for any and all of those reasons, the conclusion that any claim based on a critique of the suitability of such sale procedures sanctioned by the U.S. Proceedings were an abuse of process is erroneous.'

With respect to the KDIP and Kor Duo II strike out orders

(9) The court erred in concluding that the claim against the fourth and fifth respondents was so tenuous as to merit strike-out against them on the grounds that the Statement of Claim does not go into detail about the positive actions that these respondents took to participate in the various wrongs.

In relation to the strike out of the equitable lien claims

(10) The court erred in striking out the equitable lien claim because the court failed properly to consider (or accurately identify) the complete factual and legal matrices surrounding the payment of returnable deposits. In this regard, the court failed properly to analyse the purchase and sale agreements to identify that the deposits were refundable deposits.

[23] Numbered 33 and 34 in the Notice of Appeal.

<u>As regards the striking out of rescission or avoidance of sale claims</u>

(11) The court erred (or arguably erred) in ordering strike-out of the claims for rescission or alternatively avoidance of the sale on the bases outlined in paragraph 152 that (i) the claimant was not a party to the agreement for sale; and (ii) based on a particular interpretation of the **RLA**. The court also erred or arguably erred in its approach towards statutory interpretation of the **RLA**. This includes the court's consideration of section 75(3) which the court incorrectly concluded, or arguably incorrectly concluded, limited the nature of the remedy (damages) rather than the identity of the person against whom a damages remedy could be sought (the Chargor and not the Registrar).

Respondent's Grounds of Appeal

[49] In their counter notice of appeal, the respondents listed three grounds of appeal. Ground one contained twenty-one separate items. I list them almost verbatim in the succeeding sub-paragraphs.

1. The learned judge's finding that there are serious issues to be tried on the claims for breach of fiduciary duty, dishonest assistance and conspiracy to injury is wholly inconsistent with his other findings that:

   (i) By all accounts the decision for the appellant to initiate proceedings for Chapter 11 Bankruptcy proceedings in the US and to enter into the debtor in possession financing arrangement with the 2nd respondent was made by the Board and even assuming that the 3rd respondent was conflicted, that would not prevent the decision of the Board from being effective and binding on the company [para 69];

   (ii) There is evidence that the directors gave actual consideration to what course of action was in the best interest of the Company, specifically, that the appellant needed bankruptcy protection from its creditors pending an intended reorganisation of its business and operations and that it needed debtor in possession financing to fund its operations and retain its workforce on an interim basis. There was Unanimous Written Consent by the Board in which the Board deemed it desirable and in the best interest of the Company, its creditors and other interested parties that a petition be filed seeking Chapter 11 relief under the US Bankruptcy Code. The Board unanimously ratified any actions taken by any officer or director of the Company prior to 16th March 2011 to carry out the purposes of the resolutions and transactions contemplated [para. 97];

(iii) The particulars of claim in a claim for dishonest assistance of breach of fiduciary duty should identify what the defendant did to assist the alleged breaches of fiduciary duty. An allegation of dishonesty must be pleaded clearly and with particularity. The facts, matters and circumstances relied on to show that the defendant was dishonest and the knowledge relied on in support of the alleged dishonesty must be explicitly pleaded [paras. 110 and 111];

(iv) There is no indication in the pleadings as to what actions by the 1st respondent were alleged to have amounted to its knowingly and dishonestly assisted the 3rd respondent to enter into the inducements. There is no indication in the pleadings as to the 1st respondent's role in arranging to offer secret benefits to the 3rd respondent [para.113];

(v) The pleaded case at paragraph 30 of the statement of claim that the 1st respondent had orchestrated the Chapter 11 Bankruptcy proceedings does not point unequivocally to dishonesty nor was there anything intrinsically dishonest in negotiating a loan between an affiliated company and a borrower [para. 115];

(vi) There was nothing inherently wrong for a company experiencing financial difficulties to seek to reorganise itself [para. 116];

(vii) A decision to cause a distressed company to seek to reorganise itself under Chapter 11 of the US Bankruptcy Code is not indicative of any ulterior motive or breach of fiduciary duty on the part of its directors. For the 1st respondent to provide "guidance" to the appellant in that endeavour is not in itself evidence of impropriety or blameworthiness. Further the normal effect of foreclosure and consequent sale by auction is that the property sold is "cleansed of liabilities". There was no need to secure the appellant's engagement in the Chapter 11 process to achieve that result [given its indebtedness to the 2nd respondent and the 2nd respondent's right to enforce the security pursuant to section 72 of the **RLA**] [para. 117];

(viii) The alternative pleading that if the 1st respondent was not a party to the inducements it was at least aware of them and had caused the 2nd respondent to enter them is deficient. There is no indication in the particulars as to what the 1st respondent is alleged to have done to have caused the 2nd respondent to enter into the inducements. There is no general duty on a holding company t (sic) prevent its subsidiary or affiliate from causing damage to a third party [para. 119];

(ix) The appellant has not asserted or established that the 1st respondent was under a duty of care to it to prevent the 2nd respondent from acting as it did [paras. 120 and 122];

(x) There is no indication in the pleadings as to what actions by the 1st respondent were alleged to have done to have entered into the inducements [para. 121];

(xi) There is no indication in the pleadings as to what the 1st respondent is alleged to have done to have caused the 2nd respondent to have entered into the inducements [para. 122];

(xii) A pleading of allegations of unlawful means conspiracy or dishonest assistance must be clearly pleaded and cannot be made on mere suspicion [para. 124];

(xiii) The case against the 1st respondent for unlawful means conspiracy as presently pleaded is marginal at best [para. 124];

(xiv) It is for the appellant to prove the negative proposition that the 3rd respondent failed to disclose the benefits of the alleged inducements to the appellant [para. 129-130];

(xv) The 2nd respondent was a secured creditor with a first charge over the Property. It had the right to foreclose upon the Property without being concerned with any liquidation process [para. 132];

(xvi) The reason why the debtor in possession financing would have given the lender (the 2nd respondent) control over the affairs of the appellant company is not spelled out in the pleadings nor were addressed in submissions. There is no explanation why the additional US$12,000,000.00 in debtor in possession financing to the appellant would give the 2nd respondent leverage over the appellant's affairs that the 2nd respondent would not otherwise already have by reason of its previous charge and that the appellant was already indebted to the 2nd respondent in a sum in excess of US$370,000,000.00 [para. 134].

2. The learned judge erred in permitting the claims for fiduciary duty, dishonest assistance and conspiracy to injure by unlawful means, which were based on alleged inducements made in order to influence the 3rd respondent to agree to the debtor in possession proposal which gave substantial control of the appellant's affairs to the 1st and 2nd respondents and which allegedly 'was designed to achieve a swift progression to an auction and sale of the Property to the 2nd respondent and/or to agree to the sale of the Property to the 2nd respondent' to stand, when on the facts, there was no injury or damage to the appellant company caused by the Chapter 11 Bankruptcy proceedings given that the 2nd respondent was entitled to proceed to sale by public auction as from 24th April 2011 without further reference to the appellant and that would have been a much more expedited process to enforce its security.

3. The learned judge erred in permitting the claims for breach of fiduciary duty, dishonest assistance and conspiracy to injure by unlawful means to stand when the pleaded case, filed on the very last day before expiration of the limitation period and five years after the Liquidators had been appointed was so severely deficient, particularly taking into account that the appellant had not taken any steps to amend its pleading in the five years since it had been filed. Further, the learned judge ought to have concluded that no such amendment to the appellant's pleaded case could justly be permitted eleven years after the matters giving rise to the claim.

Issues

[50] Based on the grounds of appeal, the issues that arise for consideration may be conveniently summarised as:-

1. Whether the learned trial judge erred in law by finding that any claim based on a critique of the suitability of the sale procedures sanctioned by the U.S. proceedings was an abuse of process and whether in arriving at that conclusion he erred in principle by misconstruing parts of the evidence, by having regard to irrelevant matters and/or by not taking into account material elements of the law and/or evidence; and/or by making or drawing erroneous findings or inferences of fact. ("the abuse of process point");

2. Whether the learned judge erred in the exercise of his judicial discretion by striking out the:

   (a) claims against the fourth and fifth respondents; ("the strike out point")

   (b) equitable lien claims; ("the equitable lien point") and/or

   (c) rescission or avoidance of sale claims. ("the rescission point");

3. Whether the learned judge erred by finding that there are serious issues to be tried on the claims for breach of fiduciary duty, dishonest assistance and conspiracy to injury since he made other findings that according to the respondents are inconsistent with such a determination ("the irreconcilable findings point");

4. Whether the learned judge erred in law by allowing the claims for breach of fiduciary duty, dishonest assistance and conspiracy to injure by unlawful means to proceed to trial, notwithstanding the respondents' contentions that:
    (a) on the facts, there was no injury or damage to the appellant company caused by the Chapter 11 Bankruptcy proceedings; and/or
    (b) no steps had been taken to amend the claim described by the respondents as being severely deficient, - during the protracted period of eleven years since the occurrence of the events giving rise to the claim. ("the viability of claims point")

[51] Mixed questions of law and fact arise from these grounds of appeal. In considering them, the Court is guided by well-established principles of law regarding the appellate court's approach to the determination of such matters. In this regard, I remind myself of the settled legal principle that an appeal court is slow to interfere with a finding of fact or inferences of fact arrived at by a lower court and would do so only in exceptional cases if satisfied that the court at first instance made a decision which was plainly wrong. A finding of fact may be characterised as plainly wrong where there is no evidential basis for such finding or if arrived at based on an incorrect understanding of the evidence or if it is one that no reasonable judge could have made. These principles are well-known having been articulated in judgments from this court and the apex court including in **Beacon Insurance Co Ltd v Maharaj Bookstore Ltd** [24].

[52] In similar vein, it is trite law that when considering an appeal challenging a finding in law, an appellate court would disturb such a finding only if the lower court made an error in law in arriving at its decision.

[53] Those grounds of appeal that challenge the strike out orders seek to impugn the manner in which the learned judge exercised his discretion. On this score, it is

[24] [2014] UKPC 21.

settled law that an appellate court seldom disturbs a ruling made by a judge in exercise of his judicial discretion, and would do so only if satisfied that the judicial officer committed an error of principle by taking into account irrelevant matters, disregarding relevant matters or giving too much or not enough weight to them and as a consequence of such error or degree of such error made a blatantly wrong decision which falls outside of the generous ambit within which reasonable disagreement is possible: **Michel Dufour and others v Helenair Corporation Limited and others**[25]. The foregoing legal principles will be brought to bear in consideration of the several issues in this appeal.

Fresh Evidence

[54] Before turning to the merits of the appeal and counter notice of appeal, it is necessary to refer to the respondents' application to adduce fresh evidence. When the matter came on for hearing before this Court on 15th April 2024, the respondents made an application to adduce as fresh evidence on the appeal, the letter of resignation as director of Mr. Victor Duva dated 31st March 2010 addressed to Barnes Bay Development Ltd. Leave was granted to the respondents to admit it as fresh evidence for the purposes of the appeal. I shall return to address the contents and import of the letter as necessary during the course of this opinion.

Abuse of Process and Rescission & Avoidance of Sale
Appellant's submissions

[55] I propose to deal with the abuse of process and rescission points together because they are linked and are more conveniently addressed at the same time. The appellant pretty much restated its grounds of appeal in its outline written submissions[26]. Its legal counsel Mr. William Hare elaborated on them at the appeal

[25] (1996) 52 WIR 188.

[26] Filed on 4th November 2022.

hearing. As regards the abuse of process point, the appellant submitted that the court erred in finding that it was unarguable that the appellant had not given informed consent to the proceedings before the United States Bankruptcy Court or had otherwise submitted and engaged in those proceedings in a proper manner, such that the appellant was precluded from thereafter contending that a sale conducted in accordance with procedures sanctioned in the U.S. Proceedings were invalid under Anguillan law.

[56] It is submitted further that the court erred in failing to consider the breadth and impact of the inducements, which affected all members of the Board, and particularly Mr. Korzen. In this regard, the appellant contended that the giving of indemnities worth tens of millions of dollars among other things, plainly made it at least arguable that a director receiving such an indemnity was conflicted in making a decision on which the indemnity depended. Consequently, the court erred in finding that the decision to enter the U.S. Proceedings could not be shown to be invalid or ineffective. The appellant reasoned that if (i) it was a decision of a conflicted board and/or (ii) not taken for a proper purpose it was both invalid and ineffective, or at least arguably so.

[57] Learned counsel Mr. Hare submitted that the court erred in finding that 'the Barnes Bay Board was comprised of three directors Mr. Korzen being one and the other two being a Mr. Jeffrey Lynn Smith and a Mr. Victor Duva. Even assuming for the sake of argument that Mr. Korzen was conflicted that fact would not by itself prevent the decision of the Board from being effective and binding on the Company.' Learned counsel argued that there being no account from Mr. Korzen on this, such finding ignored the evidence, that he was one of only two (not three) directors who signed the 'Unanimous Written Consent of the Board of Directors of Barnes Bay Development Ltd' dated 16th March 2011. Therefore, on the face of the available evidence since there was only one other director who participated in that decision the court further erred in concluding that, even if Mr. Korzen alone was conflicted, the presence of two other directors on the Board could remedy any defect in the

decision to instigate the U.S. Proceedings, because on the evidence only one other director, participated in that decision.

[58] It was argued that in the prevailing circumstances, there was no majority of unconflicted directors, and the court erred by finding that there was. Learned counsel contended that in any event, given the multi-million dollar indemnities which had been granted, and the fact that evidence was being filed on this point at all, it was wrong in principle summarily to determine without proper evidence at trial whether that was or was not a decision of an unconflicted board.

[59] As regards non-disclosure of the inducements, it was submitted that the court erred further by not finding that the evidence in the various pre-petition agreements strongly indicated that Mr. Korzen and his fellow directors did not (i) disclose to the Board or the U.S. Court the benefits they and their affiliates received or (ii) recuse themselves from company actions in which they were conflicted. A further argument is that at a minimum these are arguable contentions not amenable to determination against the appellant without hearing and determining evidence. Accordingly, the learned judge failed in finding that the decision to enter the U.S. Proceedings could not be shown to be invalid or ineffective. Additionally, if (i) it was a decision of a conflicted board and/or (ii) not taken for a proper purpose it was both invalid and ineffective, or at least arguably so.

[60] In similar vein, the appellant argued that by failing to consider the breadth and impact of the inducements, which affected all members of the Board and particularly Mr. Korzen, the learned judge erred further.

[61] It was submitted that the granting of indemnities among other benefits, worth tens of millions of dollars plainly made it at least arguable that a director receiving such an indemnity was conflicted in making a decision on which the indemnity depended. Additionally, the appellant took the point that the court erred in failing adequately to consider the overarching question as to why Starwood would offer a series of wide-

ranging, carefully-drafted benefits worth potentially hundreds of millions of dollars to Mr. Korzen and the other directors, if Starwood did not expect anything in return and the learned judge erred in failing to draw the obvious inference that Starwood did expect this.

[62] Learned counsel submitted that Bennett J's finding of **Henderson** abuse is inconsistent with his finding of there being no *res judicata*. He argued that the learned judge was correct that *res judicata* did not apply. By the same token, a finding of abuse of process is unsound. He concluded that for all of those reasons, the court erred in ruling that any claim based on a critique of the suitability of sale procedures sanctioned by the U.S. Proceedings was an abuse of process.

Respondents' submissions

[63] On behalf of the respondents, learned King's Counsel Mrs. Tana'ania Small-Davis submitted that while the appellant characterised the Company's entry into Chapter 11 Bankruptcy as a breach of fiduciary duty by the 'tainted board, the learned judge correctly held that the appellant had failed to plead any legal, factual or other basis upon which to make such a case and furthermore, no evidential support for so finding was adduced by the liquidator Mr. Greenwood. Learned King's Counsel argued that in fact, the learned judge pointed out that Mr Greenwood's evidence contradicted the pleadings. In this regard, while the appellant pleaded that Mr. Korzen's failure to disclose the inducements to the Company meant that the Company did not give informed consent to the initiation of the Chapter 11 Bankruptcy proceedings, his evidence is that the entire board accepted the inducements and put themselves in a position where their personal interests were not aligned with the Company's interests. This constituted a divergence between the evidence and submissions on the one hand and the pleaded claim on the other in circumstances where no attempt was made to amend the pleadings.

[64] Learned King's Counsel stated that if the entire board was tainted as alleged, it follows that there was informed consent by the Company since it was represented

by a fully informed board, which would be voting on the basis of common knowledge thereby ruling out any question about the board being conflicted. She said that the appellant's pleaded assertions that the purpose of entering into the Chapter 11 Bankruptcy proceedings was to give substantial control of the Company's affairs to Starwood and was designed to achieve a swift progression to an auction and sale of the Property to the SOF cannot withstand scrutiny.

[65] As to the appellant's allegations of improper purpose, learned King's Counsel submitted that the directors were entitled to consider whether it was in the best interests of the company and of its creditors, for it to attempt a reorganisation, rather than a straight winding up. In addition, the decision was not solely made by the Company's directors, but was influenced by Ms. Deborah Branch, the restructuring officer who was hired to advise the Company. In this regard, Ms. Branch stated that it was the only viable option for a chance at the Company's survival. Likewise, this position was endorsed by the independent restructuring professionals Zolfo Cooper and Mr. Nystrom who were appointed by the US Bankruptcy Court, both of whom supported the Plan of Reorganisation.

[66] Regarding the evidence presented during the US proceedings, it was pointed out that Mr. Nystrom testified that he, as the court's officer, played an active role in formulating the Plan of Reorganisation which was the result of hard-fought negotiations amongst the Company, the Official Committee of Unsecured Creditors, and SOF. According to learned King's Counsel, he remarked that it represented the best available outcome considering the Company's circumstances. In his view, the only alternative to the Plan was conversion to Chapter 7 Bankruptcy or dismissal, which was not in the best interests of unsecured creditors because in a Chapter 7 Bankruptcy there would be no assets available for unsecured creditors. Dismissal could potentially result in the Company as the holder of a first charge on the Property deciding to exercise its power of sale on the Property under the **RLA**, which would likewise result in no assets for division among the unsecured creditors.

Discussion
Abuse of Process

[67] Resolution of the abuse of process issue necessarily entails a critical examination of relevant aspects of the pleadings, evidence relied on and the learned judge's factual and legal findings. A central element of the appellant's first ground of appeal is that the learned judge erred by finding that it was not arguable that the Company had neither given informed consent to the US Chapter 11 Bankruptcy proceedings nor submitted to or engaged in them in a proper manner. On this point, the appellant contends further that this error arose because he either did not consider material evidence or he misconstrued the evidence regarding the alleged conflict of interest and alleged breach of fiduciary duty by the directors arising from the allegations of inducements and the lack of disclosure. At the centre of this contention is the assertion that the learned judge erred by finding that there were three and not two directors when the decision to pursue US proceedings was taken by the Company's board.

[68] On these matters, the learned judge stated:

> "67. I have considered the argument advanced on behalf of Barnes Bay that proceedings before the Bankruptcy court (and consequently the motion brought by Barnes Bay for approval of the proposed sales procedures) was itself procured by a board which had been improperly influenced by a conflicted director acting in breach of his fiduciary duty to the company. On reflection I do not see this as a determinative factor. The terms of sale which were approved were those put forward by the debtor Barnes Bay. The argument, as I understand it, is that Barnes Bay could not have put forward the terms that it now urges to be appropriate because at the time it was under the control of a Board of Directors one of whom was conflicted and for that reason were willing to propose an auction sale of the Property on terms complained of and in circumstances where it was inadequately marketed.
>
> 68. There is less to that argument than initially meets the eye. At the heart of Barnes Bay's case is the assertion that Starwood and SOF had offered to bestow lucrative benefits upon Mr. Korzen and his associated companies with a view to inducing him to procure Barnes Bay's agreement to enter into a supposedly disadvantageous "debtor in possession" financing arrangement with SOF. Barnes Bay says that by accepting those benefits ("the inducements") Mr. Korzen placed himself in a position where his duty to the company conflicted with his personal

interest (paragraph 12 of the Statement of Claim) and since the inducements had been undisclosed to the company his acceptance of the same constituted a breach of fiduciary duty (paragraphs 12-13 of the Statement of Claim).

69. **By all accounts however the decision for the Claimant Company to initiate proceedings in the United States for reorganization of the company under Chapter 11 of the United States Bankruptcy Code and to enter the impugned "debtor in possession" financing arrangements with SOF was made by the Board of Directors of Barnes Bay. The Barnes Bay Board was comprised of three directors Mr. Korzen being one and the other two being a Mr. Jeffrey Lynn Smith and a Mr. Victor Duva**. Even assuming for the sake of argument that Mr. Korzen was conflicted that fact would not by itself prevent the decision of the Board from being effective and binding on the company. In **Colin Gwyer & Associates Ltd v London Wharf (Limehouse) Ltd 2003 B.C.C. 885** Mr. Leslie Kosmin QC, acting as a Deputy High Court Judge stated at paragraph 92:

> "92. I can well understand that in relation to a board of directors comprising several persons, the fact that one director acted in breach of fiduciary duty when exercising his vote on a resolution should not invalidate the resolution if the other directors acted in accordance with their duties. The vote of the single director will simply be disregarded."

70. Unless the meeting was rendered inquorate by the deemed absence of the director acting in breach of fiduciary duty, a resolution taken at the meeting will stand. **I also bear in mind that by the time of the hearing of the motion for sanction of the sale and sales procedures the alleged inducements had already been disclosed by the Claimant company to the Bankruptcy Court as part of the proposed Plan of Reorganization submitted for approval. The fact is that the decisions and actions now complained of were made by the duly appointed Board of Directors and have not been shown to be invalid or ineffective.**

71. I do not disregard the allegation made in Paragraph 8 of the First Greenwood Affidavit that the so-called inducements were offered to the Board and related entities and that the entire Board ".. .by accepting these inducements deliberately put themselves in a position whereby their personal interests were unaligned with the interests of the Claimant." **I simply note that it is inconsistent with the Claimants pleaded case, which is that (a) the alleged inducements were offered to Mr. Korzen (b) who failed to disclose them to the Company (i.e., the Board) (c) and was therefore in breach of his fiduciary duty to the company. There is no allegation in the pleadings that any other director was conflicted or had breached his fiduciary duty to the Claimant. I also note that this would, at best be an indication that the other directors were aware of**

the inducements offered to Mr. Korzen prior to making the decision now complained of. This would negate an essential requirement of the Claimants case the necessity to show that the inducements had been undisclosed and constituted a secret commission as alleged in paragraph 12 of the Statement of Claim.

72. **For the foregoing reasons I hold that it would be an abuse of process for Barnes Bay to contest the suitability or adequacy of procedures approved of by the United States Bankruptcy Court such as the right of SOF to credit bid at the auction sale of the Property, the sufficiency of the reserve price set for the sale of the Property at auction, or the suitability of the arrangements for the publication of the notice of the auction. Having proposed those terms and procedures as being reasonable and appropriate it would be an abuse of process for Barnes Bay to now pursue a claim against any of the Defendants for breach of a duty to take reasonable steps to obtain a proper price premised on the proposition that those procedures (which had been sanctioned by the court upon Barnes Bay's motion)** were inadequate and that the Defendants were required to take further and other steps to ensure that the sale was valid under the laws of Anguilla. This is even more so in circumstances where the first expression of any dissatisfaction with the marketing of the property was made some six years after the property had been sold."[27] (Underlining added)

[69] The fresh evidence that was admitted for purposes of the appeal is germane to resolution of this issue. It diverges from the learned judge's finding that the Board comprised three directors when the decision was made to proceed in the US Bankruptcy Court to secure the approval of a plan for sale of the Property. Mr. Duva's resignation from serving on the Board meant that only Mr. Smith and Mr. Korzen were directors when the impugned decisions were made. In fact, this new evidence compellingly supports such a finding because there is no evidence that any other directors were appointed or served during the material times. The learned judge therefore erred by finding that there were three directors at the time.

[70] The question is whether this reduced number of directors placed the learned judge's related findings outside the realm of reasonable disagreement and resulted

[27] Paras. 67-72 of the judgment in the court below.

in him being blatantly wrong in holding that there was informed consent; that it was not arguable that the decision was invalid and ineffective and ultimately that any claim based on a critique of the suitability of the sales procedures was an abuse of process.

Informed Consent

[71] The appellant's first criticism of the learned judge on the abuse of process point is that he made a finding that it was unarguable that the appellant had not given informed consent to the US proceedings or unarguable that it had not engaged in them in a proper manner. Informed consent is a material consideration for any court that is required to determine disputes surrounding allegations of breach of fiduciary duty because informed consent is a defence to such a claim.

[72] It is useful at this juncture to summarise the legal principles that are applicable to a determination of liability for breach of fiduciary duty. Breach of fiduciary duty by a company's director arises in a number of circumstances at common law or in contravention of a statutory duty. Broadly speaking, it occurs where a director fails to act in the company's best interest; acts for an improper purpose or fails to act in good faith. A director of a company is duty bound to use his best efforts for the benefit of the company and disregard his own private interests in favour of the company's, whenever a conflict arises between the two. If, contrary to this duty, a director nonetheless makes a decision in furtherance of his private interests in preference to those of the company without the company's informed consent and/or approval such conduct constitutes a breach of fiduciary duty. Informed consent as a concept affords a defence to a director who, before voting at a board of director's meeting on a matter involving such conflict of interests, makes full and frank disclosure to the board and/or the company's shareholders and receives their consent to the proposed decision - section 97 of the **Companies Act**[28], **Imperial**

[28] Cap. C65 of the Laws of Anguilla, Revised Edition 2010. It has since been replaced by the Business Companies Act No. 2 of 2022 which is not applicable in this case, having been enacted after the claim was filed.

Mercantile Credit Association (Liquidators) v Coleman[29] and **Regal (Hastings) Ltd. v Gulliver**[30].

[73] The **Companies Act** has codified the principles of law underlying the equitable concept of a fiduciary duty being owed to a company by its directors. In this regard, section 97 provides:

> "**Duty of care of directors and officers**
>
> 97. (1) Every director and officer of a company in exercising his powers and discharging his duties shall—
>
> (a) act honestly and in good faith with a view to the best interests of the company; and (b) exercise the care, diligence and skill that a reasonably prudent person would exercise in comparable circumstances.
>
> (2) In determining what are the best interests of a company, a director shall have regard to the interest of the company's employees in general as well as the interests of its shareholders
>
> .
>
> (3) The duty imposed by subsection (2) on the directors of a company is owed by them to the company alone and the duty is enforceable in the same way as any other fiduciary duty owed to a company by its directors."

[74] In **Imperial Mercantile Credit Association (Liquidators) v Coleman**, Malins V.C. at first instance explained:

> "It is of the highest importance that it should be distinctly understood that it is the duty of directors of companies to use their best exertions for the benefit of those whose interests are committed to their charge, and that they are bound to disregard their own private interests whenever a regard to them conflicts with the proper discharge of such duty."

[75] This pronouncement was approved by the House of Lords which affirmed the principle at common law that a director of a company is regarded as a fiduciary of the company and his liability arises by reason that a director stands in a fiduciary relationship with the company. It is noteworthy that the statutory provisions have done no violence to the common law principles. Consequently, by virtue of the

[29] (1870) 6 Ch. App. 563.
[30] [1967] 2 A.C. 134.

equitable principle applicable to fiduciaries, a company director is accountable as a fiduciary to the company for any profits which accrue to him from any advantage he may have gained through the office of directorship in that company.

[76] From the foregoing, it is clear that the requirement for informed consent imposes on the director a duty to make full and frank disclosure to the company through its directors of any interest the director has in a proposed transaction or arrangement involving the company and to obtain prior authorisation from the board of directors at a meeting which is quorate (excluding the vote or other input from the conflicted director).

[77] I remain mindful of the referenced legislative provision and principles as illustrated by case law in addressing the grounds of appeal. In relation to the appellant's first criticism that the learned judge erred by finding that it was not arguable that the appellant had not given informed consent to the proceedings in the US Bankruptcy Court,[31] his pronouncements regarding voting by the board are germane.

[78] Of particular relevance is his statement (at paragraph [70] of the judgment) that the proposed Plan of Reorganisation as submitted to the US Bankruptcy Court, contained details of the 'inducements' so that there can be no doubt that the US Court was notified of the same before making the Bids Sale Procedure Order. On the subject of whether the Board had granted informed consent for the Company to proceed with the proceedings in the US Bankruptcy Court, the learned judge reserved that dispute for consideration and resolution at the trial, by stating:

> "[131] From the foregoing it is clear that a triable issue arises between the parties as to whether the benefits allegedly conferred on the (sic) Mr. Korzen were in fact received by him, **whether the offer and/or receipt of such benefits had been, disclosed to Barnes Bay** and whether he had placed himself in a position of conflict of interest with that company so as to have breached his fiduciary duty to it…

[31] Para. 19 of notice of interlocutory appeal and para. 8 of appellant's written submissions.

> [174] The fundamental matters in dispute in the action- whether the so-called inducements offered to Mr. Korzen were in fact undisclosed to the Company and member of its board; … or whether as the Claimant alleges Mr. Korzen acted in his own interest in response to the so-called inducements, thereby breaching his fiduciary duty to the company - seem to me to be strongly reliant on the testimony of United States individuals for the most part. The significance of this factor lies in my perception that determination of the above disputes will involve factual findings to a greater extent than legal analysis."[32] [Emphasis added]

[79] In the entire judgment, it seems to me that those three paragraphs (70, 131 and 174) are the only portions which could even remotely be taken to suggest that the learned judge ruled that informed consent had been obtained but even then it would be quite a stretch. The appellant regrettably did not indicate from where that impression or sentiment could be culled. It cannot be said that the learned judge made findings anywhere in the judgment that the appellant had given informed consent to the US proceedings or had not engaged in them in a proper manner despite the appellant's criticism that the judge made such findings on the abuse of process point.

[80] A further criticism is that the learned judge erred by holding that it was not arguable that the appellant had otherwise submitted to and engaged in the US proceedings in a proper manner so that the appellant was subsequently precluded from contending that the sale conducted in accordance with the procedures ordered by the US Bankruptcy Court were invalid under the laws of Anguilla.

[81] As I understand the learned judge's pronouncements at paragraphs [129] and [131] of the judgment, he noted that the learning in **Cavendish-Bentinck v Fenn**[33] imposes a duty on a claimant who alleges absence of informed consent to prove the same. In this regard, he explained at paragraphs [68] to [70] of the judgment

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[32] Paragraphs 131 and 174.

[33] (1887) 12 App. Cas. 652

(reproduced above) that on the available evidence, it was not open to him to find that informed consent was lacking.

[82] He proffered two reasons, the first of which included the erroneous finding of fact that there were three directors (para. [69]. In his second reason (at paras. [69] and [70]), he noted that even if Mr. Korzen was conflicted the Board's decision would not necessarily be invalidated, if the meeting was quorate and the votes validly cast. He cited **Colin Gwyer & Associates Ltd. v London Wharf (Limehouse) Ltd**[34] in support.

[83] In **Colin Gwyer**, it was held that the meeting was quorate having been attended by the company's two directors both of whom were entitled to vote, however the court held that they voted in breach of their fiduciary duties rendering the impugned resolution void.[35] The court also made a distinction between on the one hand, a case where the board is made up of several directors who attend the meeting and are not disqualified by some personal interest from voting on the resolution and who form the majority when the disqualified director(s) is excluded from voting; to a case on the other hand, where the majority of directors present and constituting the quorum are interested in the subject matter of the resolution and the remaining directors are insufficient to comprise a quorum. In the latter case, the absence of enough independent directors translates to the lack of a quorum and consequently the company's business cannot be conducted until additional independent directors are appointed. In such circumstances, the director(s) with a personal interest in the resolution 'should be treated as incapable of voting … and therefore not taken into account for the purpose of ascertaining whether a quorum was present.' Unless this is done the resolution is rendered invalid having been made at a meeting that is inquorate.[36]

[34] 2003 B.C.C. 885.
[35] At para. 96.
[36] At paragraphs [92] and [93].

[84] In the case at the appeal bar, if, as alleged Mr. Korzen's vote on the resolution cannot be taken into account, Mr. Smith's vote would seemingly be valid for all intents and purposes and would carry the resolution, comprising as it would 100% of the valid votes cast on the motion depending on whether a single director constituted a quorum for that company at that time. This would be the case only if the Company's by-laws or articles provide for a quorum of one. In this regard, sections 77, 80 and 84 of the **Companies Act** respectively provide that a) subject to the quorum of directors set by the company's articles or by-laws a majority of them or the minimum number prescribed by the articles constitutes a quorum; b) a quorum for a company with only one director is that one director; and c) a written resolution signed by all the directors entitled to vote on it is valid as if passed at a meeting of directors.

[85] There is no evidence before this Court on which to determine the quorum set by the articles or by-laws of the appellant. It could be that a quorum of one director was established in which case, Mr. Smith's vote would carry the resolution making it valid and effective. At the same time, it may well be that a quorum of two or even three directors was set by the appellant. In the absence of this and other salient pieces of evidence, the court below and this Court are hampered in making any determination about the effectiveness or validity of the impugned resolution to initiate the US proceedings.

[86] It follows that the posture adopted by the learned judge is defensible, since he made no finding one way or the other about the validity of the votes cast by the directors. His statement that the resolution would not necessarily be invalidated if Mr. Korzen was conflicted accords with the law, with one caveat – that Mr. Korzen could not be counted for purposes of the quorum and he was disqualified from voting if a conflict of interests arose from the facts. It seems to me that the appellant appears to have misunderstood or misconstrued the learned judge's findings.

[87] Moreover, for these reasons, it cannot be said that the learned judge erred by finding that he did not consider it to be a determinative factor that the subject motion was procured by a board that was improperly influenced by a conflicted director. On the materials before him and the law, it was open to him to so find. More importantly, he made no ruling that it was not arguable that the Company had properly submitted to and engaged in the US proceedings. He concluded merely that the impugned decisions and actions about which the appellant complains, were not shown to be invalid or ineffective. He was entitled to so find and I would not disturb that ruling. Those appear to me to be matters which are properly reserved for the trial.

[88] Another challenge to the Court's determination is the appellant's contention that the board of directors were hopelessly conflicted, having all received inducements and failing to disclose them or have independent directors appointed to vote on the resolution in their place.

[89] The respondents' principal rebuttal is that this allegation or contention was simply not pleaded or supported by evidence. Furthermore, those were matters that could properly and should have been raised in the US Bankruptcy Court proceedings and it is an abuse of process to seek to litigate that issue at this stage.

[90] The claim of breach of fiduciary duty is set out at paragraphs 9 and 10 of the statement of claim and so far as relevant state:

> "9. Also on or about 16 March 2011 the First and/or Second Defendants entered into an arrangement **that was not disclosed to the Claimant and/or to which the Claimant did not give informed consent** by which they:
>
> (a) Agreed to indemnify the Third Defendant against a broad set of claims and causes of action, including proceedings by purchasers of units in the Property who had given deposits and other purchasers who had obtained judgments in relation to their deposits;
>
> (b) …;
>
> (c) …; and

(d) Agreed a lucrative compensation package for the Third Defendant to continue managing the Property with a view to it being sold at auction.

10. The agreements referred to in paragraph 8 above (the "Inducements") were **entered into by the First and/or Second Defendants in order to influence the Third Defendant (and, through him, the board of the Claimant) to agree to the debtor in possession proposal relating to the Claimant,** which proposal was to give substantial control of the Claimant's affairs to the First and/or Second Defendant, and which proposal was designed to achieve a swift progression to an auction and sale of the Property to the Second Defendant and/or to agree to the sale of the Property to the Second Defendant."[37]

[91] At paragraph 71 of the judgment (reproduced earlier) the learned judge dealt succinctly with the appellant's argument. He roundly rejected it as having not been pleaded. I agree that lack of pleading is a complete rebuttal to such claim; and it is to this aspect of the appeal.[38]

[92] Turning next to the appellant's contention that the learned judge erred in failing to conclude that the evidence supports a finding that Mr. Korzen and the other directors did not disclose the benefits they received to the Board or the US Court, I note that the respondents countered that the weight of the evidence is against such a conclusion.

[93] For his part, the learned judge explained that he understood the appellant's case to be that the alleged breach of fiduciary duty arose by virtue of Mr. Korzen's acceptance of the inducements, that he did not disclose them to the other members of the Board, which negated informed consent by the appellant to the proposed auction sale; and further that Mr. Korzen did not disclose that information to the US Bankruptcy Court and consequently made a secret profit which placed him in a

[37] Subparagraphs b and c are omitted because the substance is set out in the introductory paragraphs of this judgment.
[38] See East Caribbean Flour Mills Limited v Ormiston Ken Boyea SVGHCVAP2006/0012 (delivered 16th July 2007, unreported).

conflicted position that invalidated the Board's decision to proceed with the US proceedings and ultimately contaminated the procedures adopted to secure the Bid Sales Procedure Order invalidating the auction sale. He concluded that appropriate and adequate disclosure had been made to the Board and to the US Bankruptcy Court.

[94] The evidence in support of the appellant's case at the hearing before the learned judge was supplied in the affidavits of its Liquidator Mr. John Greenwood filed respectively on 1st April 2019 and 9th May 2019 ("Greenwood 1" and "Greenwood 2" respectively). Regarding non-disclosure and disclosure to the Board and the US Bankruptcy Court he averred:

> "26. **The Inducements were ultimately revealed in May 2011 to the U.S. Court in the context of an application by the unsecured creditors to have a Trustee appointed but it appears that few, if any, of the underlying agreements which constituted the Inducements were furnished to the U.S. Court**."[39]

> "28. **The decision to agree the DIP Commitment Letter and to commence the U.S. Proceedings was made on behalf of Barnes Bay by Mr Korzen, who had controlling influence over each of the Debtors**. My review of the books and records of Barnes Bay **does not demonstrate that Mr Korzen disclosed his conflict of interests or abstained from influencing these decisions**." [Emphasis added)

[95] On the strength of this testimony undoubtedly and in view of the other documents including the Disclosure Statement that was before the US Bankruptcy Court when it considered the application to make the Bids Procedure Order (having been disclosed previously as underlying documents in support of the Plan of Reorganization) the learned judge noted (at paragraph 70 of the judgment) that he had not lost sight of the fact that the US Bankruptcy Court by then had sight of and was aware of the documents relating to the alleged inducements.

[96] He made no relevant comment or ruling with respect to disclosure to the Board. I do not find that his failure to do so assists the appellant, for the simple reason that the

[39] Para. 26 – Greenwood 1.

learned judge was not required to make a conclusive determination on those matters in order to judicially resolve the applications under consideration. No reasons have been advanced why it was necessary for him to have done so. It was sufficient for him to note that those are factual concerns which are properly reserved for determination at the trial when more fulsome particulars and testimony tested by cross-examination would better assist the court in its deliberations and I am satisfied that the learned judge did not err in this regard.

[97] As for the appellant's contention that the learned judge erred by not considering the breadth and impact of the inducements which affected all members of the Board particularly Mr. Korzen, it ignores the fact that the appellant's pleadings did not allege that all three directors benefited from the inducements. The learned judge's analysis demonstrated that as far as Mr. Korzen was concerned he had regard to the possibility that Mr. Korzen might have been conflicted as alleged but chose to reserve for trial the full issue of whether he was liable for breach of fiduciary duty, the consideration of which would interrogate and determine those related concerns. For those reasons, it was therefore not necessary for the learned judge to consider the breadth and impact of the inducements in relation to any of the directors for purposes of disposing of the applications before him. In my estimation he did not err as contended by the appellant.

[98] One contention which was repeatedly advanced by the appellant is that the court erred by not finding that directors other than Mr. Korzen were implicated and chargeable with allegations of breach of fiduciary duty. It bears repeating that this was not pleaded and need not have troubled the learned judge. Additionally, as noted earlier the learned judge properly deferred for consideration at trial whether Mr. Korzen is liable for breach of fiduciary duty which would entail an analysis of the evidence and law to determine if he had a duty to recuse himself from company decisions in respect of which he was conflicted. Therefore, the appellant's submission that the learned judge erred by failing to make a finding on that issue does not find favour with me.

[99] The appellant invited the Court to find that the learned judge erred by not entertaining the wholly speculative query of why Starwood offered the alleged inducements to Mr. Korzen (and the other directors), and by not drawing an inference that Starwood expected something in return. The appellant failed to indicate how such musings would be relevant to resolving the issues that the learned judge had to determine. The fact of the matter is that Starwood's expectations of Mr. Korzen were not essential factors that needed to be explored to properly determine the applications that were before the learned judge. There was accordingly no justifiable reason for the learned judge to venture down that particular rabbit hole.

[100] The appellant's final argument on this abuse of process issue is that the learned judge misunderstood and misapplied the legal principles relative to *res judicata* and Henderson abuse of process in failing to appreciate that they were identical legal constructs. The learned judge's treatment with this issue starts at paragraph [43] of the judgment and ends at paragraph [66].

[101] Relying on **Norsk Tillitsmann ASA v Norinvest Ltd.**[40] which was cited by the appellant, the learned judge held in relation to *res judicata* that it did not apply in the instant case. He stated:

> "[56] Res judicata only arises if the same claim or the same issue has previously been decided by a court in proceedings between the same parties or their privies. That is clearly not the position in the present case. The United States Bankruptcy Court did not purport to adjudicate upon or to decide between the parties to the instant proceedings whether any of them had been in breach of a duty to take reasonable care to obtain a proper price or whether any party had suffered damage in consequence of the irregular exercise of a chargee's power of sale by auction."[41]

[40] BVIHC(COM) 48 of 2011 (delivered 27th July 2011, unreported).
[41] At para. [56] of the judgment.

[102] The learned judge then cited and went on to consider what he referred to as **Henderson v Henderson**[42] estoppel, so-called based on the name of the authority in which the principle was propounded. Quoting from the decision in that case as replicated in **Takhar v Gracefield Developments Ltd**[43], he noted that the **Henderson** estoppel differs from the traditional *res judicata* concept although there was some overlap between the two which are both inherently invoked to prevent an abuse of the court's process.

[103] The well-known exposition of what constitutes **Henderson** type estoppel was first articulated in **Henderson v Henderson**. The rule was re-stated in **Takhar** by Lord Sumption as follows:

> "62. The rule, originally stated by Wigram V-C in Henderson v Henderson (1843) 3 Hare 100, 115, that a party is precluded from raising in subsequent proceedings matters which were not but could and should have been raised in the earlier ones, is commonly treated as a branch of the law of res judicata. It has the same policy objective and the same preclusive effect. But it is better analysed as part of the juridically distinct but overlapping principle which empowers the court to restrain abuses of its process. The relationship between the two concepts was examined by this court in Virgin Atlantic Airways Ltd v Zodiac Seats UK Ltd (formerly Contour Aerospace Ltd) [2014] AC 160, paras 22—25. Whereas res judicata is a rule of substantive law, abuse of process is a concept which informs the exercise of the court's procedural powers. These are part of the wider jurisdiction of the court to protect its process from wasteful and potentially oppressive duplicative litigation even in cases where the relevant question was not raised or decided on the earlier occasion. Since the decisions of the House of Lords in Arnold v National Westminster Bank plc [1991] 2 AC 93 and Johnson v Gore Wood & Co [2002] 2 AC 1 it has been recognised that where a question was not raised or decided in the earlier proceedings but could have been, the jurisdiction to restrain abusive relitigation is subject to a degree of flexibility which reflects its procedural character. This allows the court to give effect to the wider interests of justice raised by the circumstances of each case."[44]

[42] (1843) 67 ER 313
[43] (SC(E)) [2019] 2 WLR 984 at paragraph 62.
[44] Ibid. at para. 62.

[104] The learned judge explained that the case of **OJSC Oil Company Yugraneft (In Liquidation) v Abramovich, and Others**[45] is illustrative of how **Henderson** estoppel operates. In that case, the claimant unsuccessfully maintained in the lower court, in proceedings in the British Virgin Islands (BVI) in the Court of Appeal, that Russia was not the appropriate forum for the matter to proceed and that BVI law applied. The BVI court dismissed the claims against the defendants who had applied to strike out the claims on the ground that Russian law was applicable, and no cause of action existed under Russian law against them. Subsequently, the claimant tried to relitigate the issue by bringing a claim in England through its subsidiary and privy against one of the same defendants premised on the argument that the receipt of property on which the BVI proceedings were predicated was unlawful under Russian law. That part of the claim was dismissed because the claimant was now advancing a claim diametrically opposed to its stance in the BVI and it would be an abuse of process to permit that.

[105] The learned judge concluded that the appellant in the case at the appellate bar is in a similar position as that claimant because in the US proceedings it had applied albeit through the directors, for the court to sanction the bidding and sales procedures which included permission for the second respondent to credit bid. It could not now be heard to renege from that posture and was bound by the Bids Procedure Order of the US Bankruptcy Court. I agree with the learned judge for the reasons outlined in his judgment.

[106] I am satisfied that the learned judge identified and outlined the correct principles of law vis-à-vis *res judicata* and **Henderson** estoppel. His application of the circumstances of this case to the legal principles is impeccable and affords no legitimate basis for interference by this Court. I would not interfere with his decision and would dismiss this limb of the appeal. I make the further observation for what it is worth, that the US Bankruptcy Court issued a Clarifying Order subsequent to the

[45] [2008] EWHC 2613 (Comm).

Bids Procedures Order and in it expressly directed that the appellant and the Liquidators were bound by both Orders.

Rescission or avoidance of sale

[107] As I understand it, the appellant's complaint with respect to the 9th order made by the learned judge is that when striking out of the claims for rescission or alternatively avoidance of the sale, his ruling was based on three erroneous premises including that the appellant was a party to the 'agreement for sale'. The appellant contends that this is erroneous or arguably so because it was the title holder and owner of the Property being sold at an auction organized by Starwood in circumstances where Starwood was the sole credit bidder. The appellant submitted that under these circumstances it is entitled to seek rescission of the auction sale.

[108] The appellant argued that the second error made by the learned judge was in concluding that the sale was conducted pursuant to or in accordance with section 75(3) of **RLA**. Thirdly, and related to the second, is the argument that contrary to the learned judge's finding, the wording of section 75(3) does not or arguably does not preclude any claims other than claims for damages, because (i) that would only be relevant if section 75(3) governed the sale, (ii) it would only be relevant if the sale accorded with section 75(3), and (iii) the restriction to damages would only apply in relation to claims brought against 'the person exercising the power' and not against anyone else or arguably so.

[109] The respondents submitted among other things that Section 75 of the **RLA** expressly provides that the chargee sets the terms and conditions of the sale by public auction. Further, as found by the learned judge (paragraph 59 of the judgment) on the undisputed facts, SOF the holder of a first charge on the Property and all the rights to exercise power of sale under section 75 of the **RLA** submitted to the US Bankruptcy Court and relinquished its autonomy to set the terms of sale. Furthermore, the appellant did not plead any specific allegations of breach of section 75 of the **RLA**. Further, the sale of the Property by public auction was conducted in

accordance with section 75 of the **RLA** and is unimpeachable, a court of competent jurisdiction having considered the process from start to finish and approved each step.

Discussion

[110] The appellant's first contention is a short point. It may be answered by reference to the Bids Procedure Order and 75(1) of the **RLA.** At paragraph A of the Bids Procedure Order, it is noted that the sale by auction is to be conducted under Anguilla law including sections 72 and 75 of the **RLA** and that SOF was thereby exercising its power of sale pursuant to section 75 of the **RLA**.

[111] Section 75(1) provides:

> '(1) **A chargee exercising his power of sale** shall act in good faith and have regard to the interest of the chargor, and may sell or concur with any person in selling the charged land, lease or charge, or any part thereof, together or in lots, by public auction for a sum payable in one amount or by installments **subject to such reserve price and conditions of sale as the chargee thinks fit, with power to buy at the auction** and to resell by public auction without being answerable for any loss occasioned thereby.' [Emphasis provided]

[112] It is trite law that inherent in the power of sale conferred on a chargee is the recognition that in law the chargee's right, title and interest in the charged property corresponds to the chargee's equity by virtue of and by reference to the outstanding amount of the debt under the charge. In other words, until the debt incurred by the charge has been fully satisfied, the charge holds a beneficial and legal interest in the charged property commensurate with the proportion of the unpaid balance of the loan. It is this interest which confers on the chargee the right to exercise a power of sale over the charged property without further recourse to or communication with the chargor.

[113] In practical terms, although the registered title is recorded in the name of the chargor, the sale of the property by a chargee in exercise of its power of sale being as it is at the chargee's election does not involve the chargor as an active participant. Therefore, for all intents and purposes, the sale is not being effected by the chargor as registered title

holder, but rather by the chargee as beneficial owner of an interest in the subject property with a statutory and contractual power of sale. In such circumstances, it is fallacious to say that the chargor is a party to the agreement for sale, except as required in the formal sense to effectuate the transfer of title from the chargor to the new owner. Even more fundamentally, the prescribed form to be utilised and completed by a charge to effect a transfer in exercise of a power of sale[46] provides for the chargee and not the registered owner to sign as transferor. Therefore, for these reasons, to the extent that the learned judge's determination may be interpreted as conveying the notion that the appellant is not a party to the agreement for sale, he did not thereby err in law or in fact.

[114] The appellant's sole pleaded basis for arguing that the sale of the Property was not conducted in accordance with section 75(3) of the **RLA** is set out at paragraph 11 of the statement of case and was reproduced earlier. Essentially, it is that no effort was made to market the Property to other prospective bidders; no investment banker or broker was retained, and SOF was permitted to credit bid at the auction.

[115] As to the propriety and legality of SOF being permitted to credit bid at the auction, section 75(1) of the **RLA** expressly permits a chargee to make a credit bid. As explained by the learned judge[47] this approach is quite opposite to the position at common law as exemplified in **Tse Kwong Lam v Wong Chit Sen**[48]. The practice of credit-bidding, governed in Anguilla as it is by statute is not objectionable in law. It is self-evident that the learned judge did not err in his consideration of this issue.

[116] The contention that the sale was not conducted in accordance with section 75(3) of the **RLA** featured in arguments before the court below and was addressed extensively by the learned judge in paragraphs 51-63 and 152 of his judgment. In summary, the learned judge found that the appellant had not made a claim for breach of duty by the Company to take reasonable steps to obtain a proper price; it was not expressly alleged

[46] Form 4 of the Registered Land Rules, Cap. R.30.
[47] Paragraph 153 of the judgment.
[48] [1983] 1 W.L.R. 1349.

that the Property was sold at an undervalue and no alternative valuation was presented. Further, the evidence shows that the auction was advertised internationally and regionally in the Wall Street Journal, the Financial Times and in the Anguilla and St. Maarten newspapers and was declared by the US Bankruptcy Court to be adequate notice of the sale to interested parties.

[117] Quite tellingly and judiciously, the learned judge remarked that a court that is called on after the fact to determine whether procedures for sale were compliant with the law or in breach of a duty of care to take reasonable steps to obtain a proper price conducts an exercise which is different from that undertaken by a court that is examining and approving procedures for sale by auction.

[118] Ultimately, he ruled that the issue of whether the overall marketing efforts for the sale of the Property were reasonable, adequate or deficient were properly to be made to the US Bankruptcy Court to which the Company had submitted itself for such purposes. The appellant was therefore precluded from contending otherwise in the Anguilla Courts and is therefore an abuse of the court's process. The upshot of this treatment by the learned judge is that contrary to the appellant's contention, he made no finding as to the appropriateness, completeness or legality of the procedures for sale that were approved by the US Bankruptcy Court, specifically as it relates to the duty to take reasonable care to obtain a proper price. The argument that he erred in doing so is not sustainable.

[119] Consideration of whether the learned judge erred by seeming to find that section 75(3) of the **RLA** precludes claims other than claims for damages invites consideration of what the learned judge actually found and an examination of section 75(3) of the **RLA.**

[120] The learned judge's finding is at paragraph 152 of the judgment where he stated:

> "… In any event where, as is the case under consideration, it is contended that the chargee had failed in its duty to take reasonable steps to obtain the true market value of the Property or that the sale had been conducted in a defective way **Section 75 (3) of the Registered Land Act** provides that . . .any person suffering damage by an irregular exercise of [the chargee's

power of sale] shall have his remedy in damages only against the person exercising the power ... Barnes Bay is not entitled to have the sale set aside based on such a challenge. I would strike out the claim for rescission, or alternatively avoidance of the sale."

[121] Section 75(3) of the **RLA** states:

> "(3) A transfer by a chargee in exercise of his power of sale shall be made in the prescribed form, and the Registrar may accept it as sufficient evidence that the power was duly exercised, and **any person suffering damage by an irregular exercise of the power shall have his remedy in damages only against the person exercising the power**." [Emphasis added]

[122] The language of the provision does not in my view appear to be ambiguous and it is not alleged by the appellant that it is. It is settled law and well-known that when interpreting a statute, a court must give effect to the natural and ordinary meaning of the words used in the statute unless to do so would lead to absurdity and a result contrary to the legislature's intent. This proposition of law has been repeated by this Court in a number of cases including **Joseph Cadette v St. Lucia Motor v. General Insurance Company Limited**.[49]

[123] In my estimation, the words used by the legislative drafter in subsection (3) of section 75 of the **RLA** are not ambiguous and must therefore be accorded their ordinary and natural meaning. It follows that it is properly interpreted to mean that in any case where a claimant alleges that he has suffered damage as a consequence of the irregular exercise of a power of sale, such a claimant's remedy is limited to damages against the chargee. This seems reasonable in view of the fact that sale of property pursuant to the exercise of a power of sale quite often results in the property being transferred to a third party and not to a chargee. The subsection under contemplation makes no exception even in such instances. In my opinion, the learned judge's determination that in light of section 75(3) the appellant is not entitled to have the sale rescinded or avoided is sound. I would therefore dismiss this ground of appeal ("rescission point").

[49] SLUHCVAP2018/0039 (delivered 22nd February 2021, unreported).

The Strike Out Point – Claims Against fourth and fifth Respondents
Appellant's submissions

[124] In relation to the strike out orders, the appellant submitted that the court erred in concluding that the claim against the fourth and fifth respondents was so tenuous as to merit striking it out against them. Learned counsel argued that paragraphs 15 and 17 of the statement of claim assert valid causes of action, and even if it were the case that further particulars might be appropriate in due course, these claims are not amenable to striking out without the appellant being afforded an opportunity to test the evidence at trial. Accordingly, the court erred in striking them out and setting aside service of the claim form on them.

Respondents' submissions

[125] The respondents countered that the claim against the fourth and fifth respondents is that they are part of the conspiracy to injure the Company by unlawful means (to Barnes Bay) and they knowingly and dishonestly assisted and induced Mr. Korzen's breach of fiduciary duty, being the unlawful means. They submitted further that it is a strict requirement that such allegations must be clearly pleaded and were not. Furthermore, although six years have elapsed since the filing of the claim, the appellant has not amended the pleadings. They submitted that the learned judge quite properly struck out the claims against the fourth and fifth respondents on the basis that the appellant did not plead any particulars in relation to what those respondents are alleged to have done to participate in the conspiracy or to give knowing and dishonest assistance regarding the same.

[126] As to the appellant's submissions that further particulars may be provided upon discovery, the respondents countered that if the appellant is unaware of its claim at this stage, having had access to the entirety of the bankruptcy proceedings, it is clear the claim is speculative and the appellant has simply drawn a wide net, with no idea what it is in a position to plead far less prove.

Discussion

[127] The court is empowered by the Civil Procedure Rules (Revised Edition) 2023 ("**CPR**") 26.3(1)(b) to strike out a statement of case or part of it, if it discloses no reasonable ground for bringing a claim. This is one of many case management powers conferred on a judicial officer for progressing proceedings. The rule provides expressly:

> "26.3(1) In addition to any other power under these Rules, **the court may strike out a statement of case or part of a statement of case** if it appears to the court that –
> (a) …
> (b) the statement of case or the part to be struck out does not disclose any reasonable ground for bringing or defending a claim;" (underlining added)

[128] It is well-established that the discretionary power conferred on the court pursuant to **CPR** 26.3(1)(b) must be exercised judicially. A judicial officer charged with this function is enjoined by **CPR** 1.2 to have regard to the overriding objective to do justice between the parties. It is settled to the point of almost being trite law that the authority vested in the court to strike out a claim must be deployed sparingly and only in the most obvious of cases where the court is satisfied that the claimant has not advanced a viable claim on the pleadings, whether because the claim is incurably bad, has no real prospect of succeeding, is an abuse of the court's process or is otherwise unsustainable. If, however, the statement of case raises a serious issue of fact which may be properly determined at trial on receipt of evidence, it would not be just to strike out such a pleading. In carrying out its evaluation, the court is not required to conduct a mini trial of the issues but only an analysis of the statement of case to assess whether it discloses a reasonable cause of action.[50]

[129] The learned judge outlined these guiding principles at paragraph 89 where he compared the test to be applied to the test for summary judgment. He explained:

> "Essentially the court must determine whether the claim is "bound to fail" the analytical focus being on the particulars of claim and premised on the assumption that the facts there alleged are true unless otherwise shown. In considering whether the test is satisfied the court should not engage in a

[50] See Tawney Assets Limited v East Pine Management Limited and others BVIHCVAP2012/007 (delivered 17th September 2012, unreported).

> mini trial on the merits: without discovery and without oral evidence. The need for caution before striking out a claim is even more important where the disputed facts are particularly complex: Questions as to the relative weight of evidence or the relative credibility of competing narratives are, in such circumstances, for the trial judge."

[130] The appellant identified paragraphs 15 and 17 of its statement of claim as the pleadings that encapsulate the claims against the fourth and fifth respondents for (a) knowingly and dishonestly assisting and inducing a breach by Mr. Korzen of his fiduciary duties and (b) conspiring with Mr. Korzen to injure the appellant by unlawfully committing a breach of fiduciary duties by entering the inducements. Those paragraphs state:

> "15. Further or alternatively, **by entering into the Inducements** the First and/or Second and/or **Fourth and/or Fifth Defendant knowingly and dishonestly assisted and induced a breach of the Third Defendant's fiduciary duties**. …
>
> 17. Further or alternatively, the First, Second, **Fourth and/or Fifth Defendants conspired with the Third Defendant** to injure the Claimant **by unlawful means** (the unlawful means being the breach of fiduciary duties), **by entering into the Inducements** (alternatively, in the First Defendant's case, by causing or permitting the Second Defendant to enter into the Inducements)." [Emphasis added]

[131] The learned judge noted that this part of the statement of case alleged that the fourth and fifth respondents are liable to the appellant for dishonest assistance of breach of fiduciary duty and unlawful means conspiracy. He accurately described the alleged causes of action against the fourth and fifth respondents thus:

> "The only allegations against KDIP and Kor Duo II are that "by entering into the inducements the . . .Fourth and/or Fifth Defendant knowingly and dishonestly assisted and induced a breach of the Third Defendants fiduciary duties" **see paragraph 15 of the Statement of Claim**; and that ". . .Alternatively the First, Second Fourth and/or Fifth Defendants conspired with the Third Defendant to injure the Claimant by unlawful means.. .by entering into the inducements" see **paragraph 17 of the Statement of Claim**. The Claimant gives no particulars as what KDIP, and Kor Duo II are alleged to have done to 'enter into the inducements' or to otherwise participate in a conspiracy to induce Mr. Korzen to breach his fiduciary duties to Barnes Bay or to assist the alleged breaches of fiduciary duty. Indeed, the only specific allegation made about them in relation to the alleged inducements seems to be that they benefitted from the proposed

arrangement between SOF and Mr. Korzen in that the indemnities said to have been offered to Mr. Korzen were to be extended to them."[51]

[132] He highlighted the constituent elements of unlawful means conspiracy, having earlier indicated what particulars must be set out in a claim for dishonest assistance. Ultimately, the learned judge concluded:

> "In my view Barnes Bay's case against KIIP and Kor Duo II is so tenuous that there is really no serious issue between them to be tried on the merits. Accordingly, I would strike out the claim against KDIP and Kor Duo II."[52]

Self-evidently, his decision to strike out both claims was grounded in his view that the pleadings were deficient by not stating what conduct of the fourth and/or fifth respondents constituted entering into inducements, participating in a conspiracy or assisting with the alleged breach of fiduciary duties.

[133] With respect to dishonest assistance of breach of fiduciary duties, the learned judge had earlier considered what must be contained in the pleadings. He relied on **Cavendish- Bentinck v Fenn** as authority for what constitutes breach of fiduciary duty. Citing and quoting from **Belmont Finance Corp Ltd v Williams Furniture Ltd.**[53] he noted correctly that an allegation of dishonesty must be pleaded clearly. He relied further on **Lipkin Gorman v Karpnale Ltd.**[54].

[134] In similar fashion, he opined that where a claimant alleges that an unlawful means conspiracy was embarked on or dishonest assistance rendered by a defendant, it must be specifically pleaded and established through compelling evidence. In this regard, he relied on **Jarman and Platt Ltd v I Barget Ltd**.[55] in which Megaw LJ stated:

> "... a charge of conspiracy in civil proceedings is generally to be regarded as a grave charge; and that... such an allegation, equally with an allegation

[51] Para. 140 of the judgment.
[52] Para. 14 of the judgment.
[53] [1979] Ch. 250.
[54] [1989] 1 WLR 1340.
[55] [1977] F.S.R. 260.

> of fraud, must be clearly pleaded and clearly proved by convincing evidence."[56]

[135] As to breach of fiduciary duty, the learned judge explained that **Cavendish-Bentinck v Fenn** is authority for the proposition that the onus rests on the claimant to prove the negative proposition that there has been no disclosure by a company director of a benefit received by him that creates a conflict between his private interest and the company's in the exercise of his powers as a director; thereby constituting a breach of his fiduciary duty to his principal - the company. In **Cavendish** Lord Hershell stated:

> "The misfeasance, if it exists at all, must be in this, that he enters into such a transaction without communicating to his co-directors the fact that he has such an interest. It seems to me that it must rest with those who allege the misfeasance to prove that element, which is an essential element to make out misfeasance at all."[57]

[136] The law is clear as to what is required when setting out a claim of dishonesty. Although no specific formulation is prescribed, the factual allegations must, without necessarily using the term 'dishonesty', plainly and explicitly articulate that dishonesty is being imputed to the defendant. As stated by Buckley LJ in **Belmont Finance Corp. Ltd v. Williams Furniture Ltd.**:

> "An allegation of dishonesty must be pleaded clearly and with particularity. That is laid down by the rules and it is a well-recognised rule of practice. This does not import that the word 'fraud' or the word 'dishonesty' must be necessarily used. The facts alleged may sufficiently demonstrate that dishonesty is allegedly involved, but where the facts are complicated this may not be so clear, and in such a case it is incumbent upon the pleader to make it clear when dishonesty is alleged. If he uses language which is equivocal, rendering it doubtful whether he is in fact relying on the alleged dishonesty of the transaction, this will be fatal; the allegation of its dishonest nature will not have been pleaded with sufficient clarity."[58]

[137] The foregoing pronouncements in **Belmont Finance** echo the stipulations set out in **CPR** rules 8.7 and 8.7A. Those rules collectively embody the claimant's duty to set out his or her case by shortly stating all of the facts on which he or she relies and

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[56] Ibid at p. 267.
[57] Supra n. 34.
[58] Supra n. 55 at pg. 268.

identifying any document considered necessary to the case. Rule 8.7A makes it abundantly clear that a claimant will not be permitted to rely on any factual allegation or argument that is not outlined in the statement of case, unless the parties agree or the court orders otherwise.

[138] In **East Caribbean Flour Mills Limited v Ormiston Ken Boyea**[59], this Court provided guidance regarding the practical application of these rules with the advent of the use of witness statements which afford opportunities for litigants to elaborate on and flesh out the substance of their claims more fulsomely prior to trial. In delivering the judgment of the Court Barrow JA adopted Lord Hope of Craighead's caution in **Three Rivers District Council and others v Bank of England (No 3)**[60] that:

> "51. … it is clear that as a general rule; the more serious the allegation of misconduct, the greater is the need for particulars to be given which explains the basis for the allegations. This is especially so where the allegation being made is of bad faith or dishonesty. The point is well established by authority in the case of fraud."

[139] Lord Hope continued this thought by endorsing from **Bullivant v Attorney General for Victoria**[61] dictum in which Earl of Halsbury, by reference to claims of fraud and dishonesty, exemplified how pleadings must capture the particular facts relied on in such matters. He explained:

> "… As the Earl of Halsbury LC said in Bullivant v Attorney General for Victoria [1901] AC 196 at 202 where it is intended that there be an allegation that a fraud has been committed, **you must allege it** and you must prove it. **We are concerned at this stage with what must be alleged**. **A party is not entitled to a finding** of fraud **if the pleader does not allege** fraud **directly and the facts on which he relies are equivocal. So too with dishonesty**. **If there is no specific allegation of dishonesty it is not open to the Court to make a finding to that effect if the facts pleaded are consistent with conduct which is not dishonest such as negligence**. As Miller LJ said in Armitage v Nurse (1997) 2 AER p. 705 at 715 "it is not necessary to use the word "fraud" or "dishonesty if the facts which make the conduct fraudulent are pleaded but this will not do if language used is equivocal (see Belmont Finance Corporation Ltd v

[59] SVGHCVAP2006/0012 (delivered 16th July 2007, unreported).
[60] [2001] 2 All ER 513.
[61] [1901] AC 19 at 202.

Williams Furniture Limited (1979) 1 AER p 118 at 311). In that case it was unclear from the pleadings whether dishonesty was being alleged. As the facts referred to might have inferred dishonesty but were consistent with innocence, the allegation of fraud, dishonesty or bad faith must be supported by particulars: The other party is entitled to notice of the particulars on which the allegation is based. If they are not capable of supporting the allegation, the allegation itself must be struck out."[62] (Emphasis added)

[140] Barrow JA highlighted two other passages from Lord Hope's opinion which are relevant to the issue under consideration. Of particular relevance are paragraphs 49 and 50 of the judgment. In paragraph 49 Lord Hope makes the point that:

> "49. … a balance must be struck between the need for fair notice to be given on the one hand and excessive demand for detail on the other. In British Airways Pension Trustees Ltd v Sir Robert McAlpine & Sons Ltd (1994) 72 BLR 26, 33-34 Saville LJ said: "The basic purpose of pleadings is to enable the opposing party to know what case is being made in sufficient detail to enable that party properly to prepare to answer it."

He noted at paragraph 50 that while the preceding pronouncement addressed the position under the old rules of procedure, it was still apposite under the new regime. He remarked:

> "50. … the same general approach to pleadings under the CPR was indicated by Lord Woolf MR in McPhilemy v Times Newspapers Ltd [1993] 3 All ER 775, 792J-793A:
>
> > "The need for extensive pleadings including particulars should be reduced by the requirement that witness statements are now exchanged. In the majority of proceedings identification of the documents upon which a party relies, together with copies of that party's witness statement, will make the detail of the nature of the case the other side has to meet obvious. This reduces the need for particulars in order to avoid being taken by surprise. **This does not mean that pleadings are now superfluous. Pleadings are still required to mark out the parameters of the case that is being advanced by each party. In particular they are still critical to identify the issues and the extent of the dispute between parties. What is important is that the pleadings should make clear the general nature of the case**

[62] At paragraph 55 of Three Rivers District Council, quoted by Barrow JA at paragraph 39 of East Caribbean Flour Mills.

> **of the pleader.** This is true both under the old rules and the new rules." (Emphasis added)

[141] Rules 8.7 and 8.7A establish while the referenced authorities illustrate that a statement of case must set out unequivocally, concisely and explicitly the general nature of the case being pursued by the claimant or defendant and must include allegations of fact that adequately particularise the issues in dispute. Bare assertions without factual underpinnings would not suffice unless the documentation appended to the pleading provides the necessary details. With respect to a claim involving some element of dishonesty, the facts pleaded must support a finding of dishonesty and not some other unrelated tort or wrong.

[142] Applying this learning to the pleadings under consideration, it is obvious that the appellant is alleging broadly (by paragraphs 15 and 17 of its statement of claim) that the fourth and fifth respondents are liable to it for the torts of a) knowingly and dishonestly assisting and inducing breaches of fiduciary duty by Mr. Korzen; and b) conspiring with the other three respondents to injure the appellant by the unlawful means of breach of fiduciary duties by entering into the inducements. However, as found by the learned judge, the appellant did not include any factual assertions as to what conduct was allegedly engaged in by the fourth and/or fifth respondent that amounts to such knowing and dishonest assistance or conspiracy to injure by unlawful means. Contrary to the prescriptions of **CPR** rules 8.7 and 8.7A the appellant did not include a concise statement of the facts relied on or annex supporting documentation from which such particulars could be ascertained. Furthermore, Greenwood 1 and 2 shed no light on the appellant's case against the fourth and fifth respondents that would suggest that further particulars might be forthcoming.

[143] I am therefore led ineluctably to the conclusion that the learned judge got it right when he ruled that the appellant's case against the fourth and fifth respondents was not particularised and as a consequence those claims disclosed no reasonable case or serious issue to be tried against them on the merits and by extension that the claim forms against them ought to be struck out. In my view, the learned judge applied the

relevant legal principles in arriving at his determination and did not err by considering irrelevant matters or by not considering pertinent factors. His decision falls within the generous ambit within which reasonable disagreement is permissible, is defensible and is not palpably wrong. I would not interfere with his ruling.

Equitable Lien Strike Out

Appellant's submissions

[144] I turn next to consider the appellant's contention that the learned judge erred in striking out the equitable lien claim and in so doing erroneously misconstrued (i) the purchase and sale agreements and (ii) the role of the escrow agent in the purchase contracts. It is submitted that the court erred by making erroneous assumptions about the mechanics and meaning of real estate contracts generally and therefore made the wrong decision, without hearing any evidence on the point. Learned counsel stated that the court was not entitled to take judicial notice of such matters since they can and do vary widely. He stated that contrary to the learned judge's erroneous conclusions, it is the case or at least arguably the case that the deposit monies were held on trust, and that, if, in breach of trust these sums are used in the development, one may trace or follow the trust monies into the development. He submitted that the court erred in finding that the deposit monies were held by the 'Escrow Agent' as stakeholder, and not as the vendor's agent. Further, it is submitted that the court erroneously failed to consider what possible reason there could be for having an escrow agent in a purchase agreement other than to hold the purchaser's deposit money on trust pending completion of the contract in accordance with its terms.

Respondents' submissions

[145] The respondents noted that the appellant's claim to the benefit of an equitable lien over the Property is grounded in its assertion to entitlement to an equitable lien over the Property on behalf of the persons (PSA creditors) who had entered into purchase agreements with the Company and paid deposits and that these deposits were held on trust for the PSA creditors. The respondents contended further that if there were equitable liens that the appellant was in a position to assert on behalf of the PSA creditors, they would be subordinate to SOF's first legal charge over the Property,

because as set out in section 75 (4) of the **RLA**, all subordinate liens are erased upon registration of the transfer. Furthermore, by virtue of section 76 of the **RLA**, following the sale of charged property, payments to the holders of any subordinate liens or charges occurs only after satisfaction of the first charge and certain statutory debts.

[146] Learned King's Counsel Mrs. Small-Davis stated further that given that the successful bid at the auction sale was not even sufficient to satisfy SOF's charge, there were no funds remaining from the sale to pay the subordinate liens and charges. Noting further that the appellant relies heavily on the deposits being refundable and that the purchase agreements provided for an escrow agency to hold the deposits, learned King's Counsel argued that although the appellant contends that the purchasers were investors and the deposits were investments into the Property, which creates an equitable interest in the Property to the extent of those sums, contrary to those assertions, the PSA creditors agreed to the release of the deposits to the Company to fund ongoing construction and operating expenses and the agreements did not provide that in agreeing to the Company's access to the deposits the PSA creditors were transformed into investors. Therefore, the claim[63] that the 'investors', (by which the appellant is referring to the PSA creditors) have an equitable lien against the Property is an issue that would have to be litigated as between each PSA creditor and the appellant and not by or on behalf of the appellant against SOF, being a third party.

[147] Additionally, learned King's Counsel stated that in any event, the Company's breach of contract could only be enforced by a judgment in the PSA creditors' favour against the Company. She noted that evidence was led in the US Bankruptcy proceedings that several PSA creditors had filed suit in Anguilla against the Company who then filed defences and counterclaims in several of them. She added that notably, in none of those Anguilla claims did any of those PSA creditors claim that they were investors or that they were entitled to an equitable lien over the Property. Therefore, the appellant cannot now advance a legal position inconsistent with the claims advanced by the PSA creditors themselves and adverse to the facts known to the Company.

[63] At paragraph 19 of the Statement of Claim.

Moreover, none of those PSA creditors' claims is live in Anguilla and more importantly they would not now be permitted to amend their claims to add a new cause of action after the limitation period has passed.

Discussion

[148] The equitable lien claim was set out in paragraph 19 of the statement of claim as follows:

> "**Equitable Lien**
> "19. Alternatively, of the money that the Claimant used to acquire and develop the Property, approximately US$65 million represented money that **the Claimant held on trust** for **investors who had provided returnable deposits on residences to be built at the Property**. In the premises:
> (a) the investors held an equitable interest in the Property in the amount of their investment;
> (b) the Second Defendant took the Property subject to the investors' equitable interest because it was not a bona fide purchaser, for the reasons set out above and/or because it is to be inferred that it had notice of the investors' equitable interests;
> (c) **the Claimant (as trustee) is entitled to assert the investors' equitable interest on their behalf** and accordingly claims an equitable lien over the Property in the amount of US$65 million or such other amount as is held to represent the investors' equitable interest in the Property." (Emphasis added)

[149] It is noteworthy that the appellant did not disclose in pleadings or evidentially, whether the deposits were paid directly to it by the investors or if they were deposited with an escrow agent and subsequently transferred to the appellant. The appellant did not attach to the statement of claim or its affidavits, any of the pertinent agreements from which this information could be gleaned.

[150] The appellant simply did not tender into evidence any of the agreements whereby it is alleged that moneys were deposited by "investors" as payment for units at the Property. Rather it relied on Mr. Greenwood's account. He averred:-

> "20. During the construction process, Barnes Bay actively marketed and sold the private villas and oceanfront residences, collecting approximately $65,000,000 in deposits from residence purchasers (the "Deposits").

> 21. The agreements concerning the Deposits were governed by Anguillian (sic) law. As far as I am aware, the agreements governing the Deposits were not disclosed in the U.S. Proceedings detailed below. Some purchasers obtained guarantees from various third party affiliates of the Debtors (the "Deposit Guarantees"), totaling (sic) $6,400,000."[64]

[151] In response, on the respondents' behalf Mr. Stuart Brown acknowledged that as stated by Ms. Deborah Branch the deposits '… collected by Barnes Bay … [were] used to fund ongoing construction and operating expenses'[65] but were not secured by registered liens against the corresponding units. He indicated that the two reorganisation plans that were not approved by the US Bankruptcy Court contained provisions which included options for the investors to pursue and enforce individual claims against third parties to recover their deposits; a cash option for those who did not wish to close on the purchase of their units or a purchase option for those who desired to buy their units at a discounted price while receiving 100% credit for their deposits. Mr. Brown explained that these options fell away with the decision by the US Bankruptcy Court not to approve either plan.

[152] Mr. Brown averred further:

> "By the terms of the purchase and sale agreements for the villas and condos, the deposit paid by the PSA purchasers were released to the Claimant and used by Claimant in the construction of the Property. The Claimant cannot now take a position as the Liquidators are doing, that the purchasers were investors and the deposits were investments into the Property, which creates an equitable interest in the Property to the extent of those sums. The Liquidators, who stand in the shoes of the Claimant, are bound by the admissions made in various correspondence and in court documents."[66]

[153] As regards the evidence presented to the court, the learned judge noted that the appellant produced nothing to show that the investors had made any express or implicit agreement with the appellant regarding the payment of the deposits that could constitute some special arrangement creating a trust; advanced no other reason why

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64 Paragraphs 20 and 21 of John Greenwood's affidavit filed on 1st April 2019 – pg. 1129 of HB 1.

65 Paragraph 36 of Stuart Brown's affidavit filed on 13th February 2019 in support of the Application disputing jurisdiction.

66 Paragraph 42 of his affidavit filed on 13th February 2019.

the creation of a trust should be inferred from the fact of receipt of the deposits; and observed that the appellant described no circumstances from which a finding could be made that it has the standing to enforce a trust in respect of funds held by a third party in favour of the investors, even if such a trust existed.

[154] In evaluating this aspect of the appellant's case, the learned judge nevertheless took into account industry practices and based his determination on the premise that the relationship between the investors and the appellant probably followed such standard procedures. The appellant's legal contentions set out at paragraph 19 of its statement of case did not find favour with the learned judge. He reasoned that contrary to the appellant's case:

> "Moneys paid to the vendor or to an agent of the vendor on account of the purchase price of property are not normally and without more, held on trust. A deposit towards the purchase of property has a dual nature. It is (a) a good faith payment to demonstrate the seriousness of the purchaser's intention to purchase the property; and (b) a part payment on account of the purchase price. If the purchaser failed to complete the sale the deposit could be forfeited to the vendor as liquidated damages. Where, as here, through no fault of the purchaser the sale does not progress to completion, the vendor is normally obliged to refund the purchase money. That is because, in default of agreement to the contrary the transaction would have failed for want of consideration. The vendors (sic) obligation to retain or to repay the deposit in the event of non-completion of the sale arises in contract, see**: Gribbon v Lutton and another**[67] per Laddie J at paragraphs 31-32."[68]

[155] Noting the existence of a Torrens system of land registration in Anguilla governed by the **RLA**, the learned judge pointed out that even if a purchaser's lien was created by the payment of the purchase monies to the vendor or to a third party as agent for the vendor, it would have no effect on the rights or interest of the holder of a legal charge on the property. He noted further that pursuant to section 23 of the **RLA**, a registered owner of land in Anguilla receives title to the subject property unencumbered by equitable liens; '… free from all other interests and claims whatsoever, but subject to the leases, charges and other incumbrances and to the conditions and restrictions, if

[67] [2002] QB 902.
[68] At paragraph 144 of the judgment.

any, shown in the register'; and those unregistered overriding interests to which the land is subject under section 28 of the **RLA**.

[156] Citing **Creque v Penn**[69], the learned judge stated that notwithstanding the legal inability of an "equitable purchaser's lienholder" to attack the title or interest of a registered proprietor, he is nonetheless entitled to seek redress by way of a personal claim which does not attempt to impugn the indefeasibility of title conveyed to a third party. He found that in the circumstances of this case, such a claim could not be brought against the respondents who were not party to the agreement whereby the deposits were paid. Rather, their relief would be against the appellant. Moreover, the appellant had no standing to assert a claim against SOF on the investors' behalf.

[157] The learned judge's determination that the claim based on the assertion of an equitable lien was unsustainable was grounded in (a) the absence of evidence outlining how the alleged trust was created or from which one could be inferred; and (b) the appellant's failure to demonstrate on what basis it acquired the requisite standing to pursue for the investors' benefit, a claim to recover trust monies held by a third party in favour of the investors.

[158] A review of the appellant's pleaded case illustrates that the appellant made a bald assertion that it held the returnable deposits on trust for the investors. It is not stated to whom the deposits were paid and no indication was given as to how the alleged trust was created or the circumstances from which it could legitimately be inferred that a trust was created or other contractual obligation thereby effected, that conferred any entitlement on the appellant to sue to recover the deposits on the investors' behalf. The appellant did not plead that it was the beneficiary of the alleged trust and did not allege that it was party to any agreement under which the deposits were paid.

[69] [2007] UKPC 44.

[159] Against this background, assessing whether the appellant's statement of case on this issue disclosed a reasonable ground for bringing the claim necessitates that regard be had to the principles of law relating to the creation of trusts and with respect to who may sue on the basis of a trust which gives rise to an equitable lien to property. The law is that a trust may be created orally, in writing, by conduct, operation of law or other manner, save that a trust respecting land in Anguilla (other than one created by operation of law) is unenforceable unless evidenced in writing.[70]

[160] It is not clear from the appellant's statement of case whether the alleged trust arose by operation of law, orally, in writing or otherwise. However, what is beyond dispute is that the appellant received from someone unknown, funds collected from prospective purchasers of units at the Property as deposits towards the purchase price. It is not disputed that the Company utilised those deposits in construction of the Property. In the absence of the sale and purchase agreements executed between the prospective purchasers and the Company, or firm averments as to what was agreed about how the deposits were to be handled; and/or whether an escrow agent was engaged or not, much is left to speculation. This posed a difficulty for the learned judge who proceeded to consider the usual scenarios which surround such projects. In my opinion, this exercise was inherently speculative, albeit well-intentioned and well-reasoned.

[161] Citing **Gribbon v Lutton and another**[71] and **Potters (A Firm) v Loppert**[72] the learned judge extracted the well-established principles that a vendor's obligation to refund a purchaser deposits on the sale price, where a sale is not completed, arises in contract. He noted that where a stakeholder/escrow agent is involved in the arrangement, the contract is tripartite in nature and involves the vendor, purchaser and escrow agent, the latter of whom holds the funds not as agent for either party or as trustee but as a full party to the contract. In such a case, an aggrieved purchaser's claim to recover

[70] Section 4 of the Trusts Act, Cap. T70 of the Laws of Anguilla Revised Edition 2022.
[71] [2002] QB 902.
[72] (1973) 1 Ch. 399.

the deposit is against the stakeholder for breach of contract or presumably breach of trust and not against the vendor. Additionally, on the authority of **Combe v Lord Swaythling**[73] no lien is created in the vendor's favour which entitles him to bring a claim on the purchaser's behalf either in contract or for breach of trust.

[162] It is trite law that a court is empowered to order the repayment by a vendor to a purchaser of land the deposit paid directly to the vendor towards the purchase. However, the court may only do so having regard to the terms of the contract and all other circumstances. Without pleadings or evidence as to the terms of the sale and purchase agreements between the appellant, it is highly doubtful that the appellant's case to enforce an equitable lien against the respondents on the investors' behalf is a reasonable ground for bringing this claim.

[163] It is now settled law that while a lien is created against the subject property, in the purchaser's favour where he pays a deposit to the vendor towards the purchase price, no such lien is created in respect of such deposits paid to a stakeholder. The necessary corollary is that the lien arises in contract as held in **Gribbon v Lutton**; is personal to the purchaser and does not transfer to and cannot be exercised by the vendor. Accordingly, in the instant case, the appellant is not in a position to proceed on the basis articulated in its statement of case. Undoubtedly, a vendor who is appointed as an agent for an aggrieved purchaser may bring an action on such basis, but that is not alleged and is not what happened in this case.

[164] The Court of Chancery made a relevant and fundamental point in **Combe v Swaythling**. In that case, the conditions of sale provided that the purchaser pay a deposit to the vendor's solicitors as stakeholder, which they did. The contract 'went off' due to no fault of the purchaser's. He sought to recover the deposit from the vendor in a counterclaim to the vendor's action for specific performance. Citing **Rose v Watson**[74], Wynn-Parry J explained:

[73] [1947] Ch. 625.
[74] (1864) 10 H.L. 672.

> "The basis of the undoubted right of a purchaser, who has paid a deposit to a vendor, to a lien for his deposit if the contract goes off otherwise than through the purchaser's default is, in my judgment, that the purchaser is to be regarded, in respect of that deposit, as a secured creditor. That, in my view, emerges clearly from the speeches of Lord Westbury L.C. and Lord Cranworth in Rose v. Watson. … I cannot see how a purchaser has any right to a lien until it can be postulated of him that he is a secured creditor. It follows, therefore, in my judgment, that the purchaser in the present case - who could not, on his counterclaim, have sued for return of the deposit and for a declaration of lien in respect of it - is not entitled to a lien for his costs of this action."[75]

[165] In **Gribbon v Lutton and another**, Laddie J., writing for the English Court of Appeal explained at para 19:

> "[19] … The payment of a deposit to a stakeholder is not a gift by the purchaser to the vendor and the vendor does not acquire title. Furthermore, this conclusion cannot be avoided by treating the stakeholder as an agent for the vendor. As Millett LJ said in *Manzanilla*:
>
> > 'The relationship between the stakeholder and the depositors is contractual, not fiduciary. The money is not trust money; the stakeholder is not a trustee or agent; he is a principal who owes contractual obligations to the depositors: *Potters v Loppert* [1973] Ch 399, 406; *Hastingwood Ltd v Saunders Bearman* [1991] Ch 114, 123. The underlying relationship is that of debtor and creditor, and is closely analogous to the relationship between a banker and his customer."[76]

[166] From the foregoing, it is obvious that the route taken by the learned judge to arrive at his decision is sound. His reasoning is impeccable and in line with the cited authorities. In my estimation, he applied correct principles of law to the circumstances of this case and cannot be said to have made a blatantly wrong decision consequent on considering and applying incorrect principles or misapplying correct principles of law.

[167] In passing, I make the further observation that, the pleaded case as to the alleged creation of an equitable lien was deficient in my view, in that it did not supply enough facts about the bilateral and/or tripartite contractual arrangements between the

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[75] Ibid at pgs. 628 -629.
[76] Supra n. 68.

appellant and the investors and any escrow agent or stakeholder that would enable the court to conclude that industry practice is inapplicable to the parties in this case and further that some other agreement or arrangement was in place from which it could be arguable that a trust was created by the payment of the deposit, on the basis of which the appellant could legitimately pursue the claim for an equitable lien. For the foregoing reasons and this additional reason, I would dismiss this ground of appeal.

Respondent's Counter Appeal
Irreconcilable findings

[168] I propose to treat seriatim with each of the alleged irreconcilable findings. The appellant largely did not engage with the respondents' contentions by way of written or oral submissions.

[169] As stated earlier in this judgment, the learned judge's conclusion that even if Mr. Korzen was conflicted did not translate to a finding that the Board's decision was not effective and binding, must be interpreted within the context of whether the Board was quorate at the time and also whether the decision was made by a majority of validity cast votes. In other words, the learned judge was not making a pronouncement that the decision was effective and binding, but merely observing that it could be depending on whether the voting was done in accordance with the law. I perceive no inconsistency between that finding and his determination that there were serious issues to be tried on the claims for breach of fiduciary duty, dishonest assistance and conspiracy to injure.

[170] In relation to the respondents' argument that it is contradictory that the learned judge was satisfied that there was evidence that the Board considered among other things what course of action was in the best interests of the Company yet found that there were serious issues to be tried on breach of fiduciary duty and other torts, suffice it to say that the learned judge noted that in some instances the allegations were not fully particularised, a cause of action was nonetheless sketched out which could be cured by amendment. In this regard, he noted in relation to the claim against Starwood:

"124. In my opinion there are serious issues to be tried between the parties. The case against Starwood, as presently pleaded, is marginal at best and will require further particulars. I cannot however conclude that those claims are bound to fail."[77]

[171] In relation to Mr. Korzen, the learned judge remarked:

"131. From the foregoing it is clear that a triable issue arises between the parties as to whether the benefits allegedly conferred on Mr. Korzen were in fact received by him, whether the offer and/or receipt of such benefits had been, disclosed to Barnes Bay and whether he had placed himself in a position of conflict of interest with that company so as to have breached his fiduciary duty to it."[78]

[172] Regarding the conspiracy claim, the learned judge stated:

"134. … The theory of the case gives rise to a number of questions. Why was there a need for SOF to go to the trouble of bribing Mr. Korzen to have Barnes Bay seek Chapter 11 protection in order to secure a sale of the Property on terms sought by SOP when SOF was already entitled to sell the Property subject to such reserve price and conditions of sale as it thought fit, without the need for permission from any court or other authority? Why, if Starwood and/or SOP's hidden objective was to achieve a swift sale of the Property to SOF on terms advantageous to it, would SOP have consented to have its power to foreclose subjected to the supervision and veto of an institution beyond its control, namely the United States Bankruptcy Court? These matters will have to be resolved after full consideration of the evidence.

135. The inherent probability or improbability of an event is itself a matter to be considered when deciding whether, on balance, the event occurred. That however is not the function of the Court at this interlocutory stage of the proceedings. The evaluation of the weight of the evidence and the exercise of a judgment based on that evidence is for the Judge at trial who has had the advantage of hearing the evidence and observing the witnesses."[79]

[173] He remarked further:

"136. Clearly there are difficulties that Barnes Bay will need to surmount in order to prove its case regarding claims for breaches of fiduciary duty, dishonest assistance and conspiracy to injure by unlawful means. Furthermore, the Claimant's case as pleaded may require some

[77] Paragraph 124 of the judgment.

[78] Paragraph 131 of the judgment.

[79] Paragraphs 134 and 135 of the judgment.

amendment and/or further particularisation. Notwithstanding these difficulties I cannot conclude on the basis of the evidence before me that the Claimant's chances of success on those claims are fanciful or that those claims are entirely without substance. Clearly there are serious issues be tried between the parties on the merit of these claims."[80]

[174] As to the principles to be applied where objection is made to an application to serve proceedings out of the jurisdiction on a foreign defendant, the learned judge opined:

> "Thus, in **Okpabi and others v. Royal Dutch Shell plc and another (supra)** [[**2021] 1 WLR 1294**]] Lord Hamblen JSC observed at **paragraph 103 et seq** "103 This was a jurisdiction challenge and concerned whether it was appropriate to grant permission to serve proceedings out of the jurisdiction on a foreign defendant. Those proceedings were meant to be as defined in the particulars of claim for which permission to serve out was sought. In this case the challenge was made on the grounds that the claimants had no arguable case against the anchor defendant. Where, as in this case, there are particulars of claim, that is an issue which should ordinarily fall to be addressed by reference to the pleaded case.... 105 In the present case, not only did the parties choose to swamp the court with evidence, but it appears that the claimants chose not to update their pleadings to reflect the evidence... 107. The result is that instead of focusing on the pleaded case and whether that discloses an arguable claim, the court is drawn into an evaluation of the weight of the evidence and the exercise of a judgment based on that evidence. That is not its task at this interlocutory stage. The factual averments made in support of the claim should be accepted unless, exceptionally, they are demonstrably untrue or unsupportable."[81]

[175] Far from supporting the respondents' claims of inconsistencies in the learned judge's findings, the referenced passages of the judgment highlight his reservations about the adequacy of pleadings on the one hand while critically analysing the claim and concluding that there was enough in them to save them from being struck out. He accurately identified and applied the applicable principles of law. Moreover, the learned judge quite properly avoided making determinations on factual issues which ought appropriately to be left for trial and demonstrated by doing so that he understood that his role at the interlocutory stage was not to conduct a mini-trial of the issues. These are not inconsistencies as alleged but a part of the balancing

[80] At paragraph 136 of the judgment.
[81] At paragraph 106 of the judgment.

exercise necessary in resolving the limited and purely interlocutory issues that were before the learned judge.

[176] Although the respondents claim among other things that the learned judge made a finding that there was unanimous written consent by the Board agreeing the decision to engage in the US proceedings with a view to securing the sale of the Property, he made no such finding. Instead, he simply referred to the respondents' assertion of such unanimous consent. He stated:

> "97. … In this regard **the Defendant/Applicants point to the fact that the Unanimous Written Consent by the Board of Directors of Barnes Bay Development Ltd** dated 16 March 2011 was appended to the Voluntary Petition by which the proceedings in the United States Bankruptcy Court were commenced."[82] [emphasis added]

[177] By reference to paragraphs 110, 111, 113, 115, 116, 117, 119, 120, 121, 122, 124, 129-130, 132 and 134, the respondents highlighted commentary and analysis by the learned judge which they allege were positive findings by the learned judge which contradict his determination that there were serious issues to be tried between the appellant and the first, second and third respondents. I am satisfied that they are not.

[178] In all of those instances, the learned judge quite carefully explained either what is required to plead a particular cause of action (e.g. paragraphs 110 and 111) or that the pleading is not fully particularised (e.g. in paragraphs 113), but nonetheless (e.g. in paragraph 124) there is room and opportunity for amendment to supply the flagged details. I do not consider those statements by the learned judge to be inconsistent with his ultimate determination that there are serious issues to be tried and would therefore dismiss this ground of the respondents' cross appeal.

[82] Paragraph 97 of the judgment.

Validity of claims

[179] The respondents took issue with the learned judge's finding that there is a triable issue as to whether the benefits conferred on Mr. Korzen were received by him, disclosed and placed him in a conflict of interest position resulting in a breach of his fiduciary duty to the Company. On this score, the respondents argued that the statement of claim is deficient in that it contained no pleadings as to any pecuniary loss occasioned by the alleged inducements to Mr. Korzen. They argued further that on the authority of **Re Welfab Engineers Ltd**[83], the learned judge ought to have accepted that the claim did not plead any facts as to any pecuniary loss sustained by the Company as a result of the directors entering into Chapter 11 bankruptcy.

[180] In those circumstances, despite its best efforts to prevent the Company's ultimate demise, SOF's realised that the exercise of its powers of sale was inevitable. Learned King's Counsel submitted that the main element of misfeasance is that the director or other officer of the company has caused loss to the company through retaining or misapplying its assets or through breach of duty. In the instant case, since the essence of the proceedings is compensatory, it has been held that there is no jurisdiction to make a compensation order unless a pecuniary loss to the company is proved: **Re Etic Limited**[84].

[181] Citing **Regal Hastings v Gulliver**, the appellant submitted that in pursuing a claim against a fiduciary including a director it is not necessary to plead or prove that the director acted with an absence of bona fides or that the company suffered loss. I agree with the appellant.

[182] I can do no better than extract the relevant legal principle from the House of Lord's elucidation in **Regal Hastings**. There, Lord Russell of Killowen said:

> "The rule of equity which insists on those, who by use of a fiduciary position make a profit, being liable to account for that profit, in no way depends on fraud, or absence of bona fides; or upon such questions or considerations

[83] [1990] BCC 600.
[84] [1928] Ch 861.

> as whether the profit would or should otherwise have gone to the plaintiff, or whether the profiteer was under a duty to obtain the source of the profit for the plaintiff, or whether he took a risk or acted as he did for the benefit of the plaintiff, or whether the plaintiff has in fact been damaged or benefited by his action. The liability arises from the mere fact of a profit having, in the stated circumstances, been made. The profiteer, however honest and well-intentioned, cannot escape the risk of being called upon to account."[85]

[183] On the authority of **Regal Hastings**, it is settled that a claimant with a claim for breach of fiduciary duty need not plead or prove that he has been injured or benefitted from the actions of the fiduciary. It suffices if he simply pleads and establishes that the fiduciary used his position to make a profit for which he is liable to account, irrespective of whether he was well-intentioned or held an honest belief in the bona fides of the impugned transaction. This principle is a full answer to this ground of appeal by the respondents.

[184] The final question which arises on the respondents' cross appeal is whether the learned judge erred by permitting the claims against the first, second and third respondents to proceed even though the respondents opposed that decision on the ground that no attempts had been made to amend it notwithstanding the passage of eleven years since the events giving rise the claim had arisen. The first observation I wish to make is that the learned judge did not have before him any application to amend the pleadings, and he did not purport to exercise the discretion to allow any such amendment.

[185] Secondly, it is a matter of jurisdiction and procedure that a decision of whether to permit amendment to pleadings is governed by the **CPR** and relevant Practice Directions and involves the exercise of a discretion on consideration of an application and affidavit evidence. In those circumstances, in my opinion, it would have been pre-emptive for the learned judge to consider whether, in all the circumstances, it would be just and in furtherance of the overriding objective to grant leave for unspecified and unrequested amendments to the statement of claim. He was entitled to simply note

[85] [1967] 2 AC 134 at pg 144-145.

that the option existed and to conclude that in the event that it was explored and resulted in success, further particulars might be forthcoming. By doing so, he did not overstep his remit and he thereby committed no error of principle which made his decision plainly wrong. I would accordingly dismiss this ground of appeal.

Costs

[186] The appellant and respondents have not prevailed on their respective appeal and cross appeal. The appellant was wholly unsuccessful on all grounds of its appeal which raised several substantive challenges to the learned judge's judgment and orders. On the other hand, the respondents' counter-appeal was limited to three, less consequential areas of concern. In the premises, I would award the respondents' 75% of their costs on appeal and 25% of costs to the appellant.

Disposition

[187] For the foregoing reasons,

(1) I would dismiss the appellant's interlocutory appeal against the decision of the learned judge delivered on 19th August 2022 and affirm the orders made at paragraph 179 of his decision.

(2) I would dismiss the respondents' counter notice of appeal.

(3) I would award the respondents 75% of their costs on the appeal and the appellant 25% of costs to be assessed within 21 days, if not agreed.

[188] I wish to thank counsel on both sides for their assistance in this matter. The completion of this decision took longer than anticipated. The parties have been patient and understanding during that time. The Court wishes to record its appreciation for their forbearance.

I concur.
Vicki Ann Ellis
Justice of Appeal

I concur.
Gerard St.C Farara
Justice of Appeal [Ag.]

By the Court

Chief Registrar