

ANGUILLA

IN THE HIGH COURT OF JUSTICE

CLAIM NO. AXAHCV 2017/0055

BETWEEN

[1] BARNES BAY DEVELOPMENT LIMITED (IN LIQUIDATION)

Claimant/Respondent

and

[1] STARWOOD CAPITAL GROUP

[2] SOF-VIII-HOTEL II ANGUILLA HOLDINGS LLC

[3] BRADFORD KORZEN

[4] KOR DUO INVESTMENT PARTNERS II LP

[5] KOR DUO II LLC

Defendants/Applicants

Appearances:

Mrs. Tana'ania Small-Davis with her Mr. D. Michael Bourne of Counsel for the Defendants/
Applicants

Mr. William Hare of Counsel for the Respondents

2021: May 10, 11, 12

2022: August 19.

DECISION

1. **BENNETT. J (Ag.)** By this application, the above-named Defendants/Applicants seek an order setting aside service of the Claim form and ancillary documents served upon them by the Claimant in the above matter.

Background

2. The Claimant Barnes Bay Development Limited (In Liquidation) ("Barnes Bay") is a company incorporated in Anguilla. It was placed in liquidation by the High Court of Anguilla in 2012.
3. Barnes Bay is wholly owned by the fourth Defendant Kor Duo Investment Partners LP. ("KDIP"). The fifth Defendant Kor Duo II LLC ("Kor Duo II") is the General Partner of KDIP. The Third Defendant Brad Korzen ("Mr. Korzen") is the managing partner for Kor Duo.
4. Until on or about 27 July 2011, Barnes Bay was the owner of the property now known as The Four Seasons Resort and Residences (and previously known as The Viceroy Anguilla Resort and Residences) (the "Property")
5. On or about 13th June 2006 Barnes Bay entered into a loan and security agreement with Citigroup Global Markets Realty Corp. ('Citigroup') 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 30th July 2008 and 17th July 2009. The loan was secured against the Property and other assets belonging to Barnes Bay.
6. On or about 13th October 2010 Barnes Bay's outstanding obligation under the Loan Agreement, as restated and amended, were acquired by the Second Defendant SOF- VIII-Hotel II Anguilla Holdings LLC ('SOF') Barnes Bay alleges that SOF is a subsidiary of the First Defendant Starwood Capital Group ("Starwood"). Mr. Korzen was a director of Barnes Bay and had personally guaranteed the loan to the extent of US \$150 million.
7. 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.

8. Another consequence of these difficulties is that Barnes Bay fell in default of its obligations under the loan. As of 16 March 2016, the total outstanding balance owed by Barnes Bay to SOF was approximately US\$370,000,000.
9. On or about 16th March 2011 Barnes Bay entered into a commitment agreement (the Commitment Agreement') with SOF wherein SOF agreed to provide "debtor in possession" financing for the purpose of anticipated Bankruptcy proceedings under the United States Bankruptcy Code. The negotiations respecting the Commitment Agreement, it is alleged, were conducted on behalf of SOF by Starwood and more particularly the Chief Executive Officer of Starwood Barry Sternlicht.
10. At the time the directors of Barnes Bay were Mr. Korzen, a Mr. Victor Duva and a Mr. Jeff Smith.
11. Barnes Bay asserts that by virtue of his being the managing member of Kor Duo II (the General partner of KDIP which held 95% of the shares in Barnes Bay) and a director of Barnes Bay Mr. Korzen had ultimate control over it and its board. It complains that Mr. Korzen did not disclose his interest in having Barnes Bay enter into the commitment agreement nor did he recuse himself from the making of the decision to enter the agreement.
12. Barnes Bay alleges that without knowledge of the foregoing matters or its informed consent in circumstances in which its board was conflicted, it entered an arrangement with Starwood and SOF in consequence of which Starwood and SOF:-

- agreed to indemnify Mr. Korzen against what they described as 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.
 - agreed to provide similar indemnities to the fourth and fifth defendants KDIP and KOR DUO II, which entities Barnes Bay says are companies associated with or controlled by Mr. Korzen.
 - agreed to procure Mr. Korzen's release from a US\$150 million guarantee that he had given in relation to Barnes Bay's indebtedness to SOF; and
 - agreed to what Barnes Bay describes as a lucrative compensation package to Mr. Korzen to continue managing the Property with a view to it being sold at auction.
13. Barnes Bay says that these arrangements were entered into by Starwood and/or SOF in order to influence Mr. Korzen (and, through him, the board of Barnes Bay) to agree to the debtor in possession proposal, which proposal was to give substantial control of the Barnes Bay's affairs to Starwood and/or SOF, and which proposal was designed to achieve a swift progression to an auction and sale of the property to SOF.
14. On 17th March 2011 Barnes Bay, KDIP and Kor Duo II 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 reorganization 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.

15. Barnes Bay's motion to the United States bankruptcy Court for the District of Delaware was supported by a declaration made by 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 \$144,000,000. Construction of the Property, however, was difficult almost from the beginning, and by January 2007 the projected cost had swelled to \$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 October 13, 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 Defendant herein in view of the delays and non-performance of its obligations the Company's became the subject of several lawsuits. A number of judgments 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 \$370,000,000.
16. Among the applications made in conjunction with the proceedings was 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 as, as well as, in general, to maintain employee confidence and morale, and

establish certain other administrative procedures to promote a seamless transition into chapter 11.

17. The U.S. Court granted a motion by the petitioners authorizing the continued sale of residential properties in the Property and granted the motion for debtor in possession financing on an interim basis.
18. In March 2011 a Committee of Unsecured Creditors comprising five representative creditors was appointed by the US Trustee. Shortly thereafter the petitioners Barnes Bay. KDIP and Kor Duo II filed a Joint Chapter 11 plan of Liquidation in which all the agreements now complained of by Barnes Bay as constituting inducements were placed before the U.S. Court. The Plan contemplated a sale of the property by public auction on terms which complied with the US Bankruptcy Code and with Anguillanlaw, specifically **Section 75 of the Registered Land Act of Anguilla**.
19. The Committee of Unsecured Creditors initially filed a motion challenging the residential sales order and sought to appoint a Chapter 11 Trustee over Barnes Bay. Their complaint was essentially that the petitioners Barnes Bay. KDIP and Kor Duo II had proposed a plan which benefitted the secured creditors Starwood and SOF at the expense of the unsecured creditors; had granted Starwood a significant strategic advantage in that it had the right to credit bid at any sale and had made no effort to market the property to other prospective bidders.
20. The petitioners Barnes Bay. KDIP and Kor Duo II subsequently filed a second joint plan of liquidation. Neither plan was approved by the US Court or implemented. The US Court approved the proposed procedures for the auction and sale of the property and made its interim order for debtor in possession financing final. Subsequently, the Committee of Unsecured Creditors withdrew their motions challenging the residential sales order and for appointment of a trustee.

21. On or about 27th July 2011 the Property was sold to SOF at auction for US 105 million. Barnes Bay complains that the sale was defective in that
- 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
 - that consequently SOF was the only bidder at the sale.

The Action

22. On July 26, 2017, Barnes Bay Development Limited (In Liquidation) commenced the instant action. Firstly, Barnes Bay claims rescission, or alternatively avoidance, of the sale of the Property to SOF. It claims to be entitled to such relief on the basis of its assertion that in entering into the complained of arrangements between himself, Starwood and SOF the Third Defendant Mr. Korzen had placed himself in a position in which his personal interests conflicted with his duty to the claimant Barnes Bay and that in so doing he had breached his fiduciary duty to Barnes Bay. Further Barnes Bay asserts that Starwood and SOF had turned a blind eye to the fact that Mr. Korzen's entry into the arrangements constituted a breach of his fiduciary duty to Barnes Bay. Accordingly, it argues that the sale of the property was voidable and that by the instant action it had elected to rescind it.
23. Further or alternatively, Barnes Bay claims an account of profits earned by the Defendants as a result of Mr. Korzen's alleged breach of fiduciary duty and or SOF's acquisition of the property. The basis for this claim is Barnes Bay's contention that by entering into the arrangements complained of with Mr. Korzen the defendants had intentionally induced or knowingly and dishonestly assisted Mr. Korzen in his alleged breach of fiduciary duty; that Starwood and SOF had conspired to injure it by unlawful means, i.e., by means of Mr. Korzen's alleged breach of fiduciary duty or, in Starwood's case by Starwood causing or permitting SOF to enter into the arrangements with Mr. Korzen. Alternatively, Barnes Bay claims damages for loss suffered as a result of the transfer of the Property to SOF.

24. Finally, Barnes Bay says that approximately US\$ 65 million of the money that it expended to acquire and develop the Property was money that it held on trust for investors who had provided returnable deposits on residences to be built on the property. It claims to be entitled to an equitable lien over the property to the extent of that sum in exercise of its claimed entitlement to assert the investors' beneficial interest in those monies.

Preliminary matters-

Application to strike out the First Affidavit of John Greenwood

25. I first consider an application by the Defendants/Applicants to strike out certain parts of the first affidavit of Mr. John Greenwood ("Mr. Greenwood") filed on 29th April 2019 in answer to the Defendants/Applicants' application challenging the court's jurisdiction to hear the Claimants' case and their application to strike out the Barnes Bay's statement of claim.
26. The application is made on the ground that the first Greenwood Affidavit is in breach of **CPR 30.3** in that it contained statements of fact that were not within Mr. Greenwood's personal knowledge and contained matters of information and belief and did not identify the sources of such information and belief.
27. **CPR Part 30.3** provides
- "30.3 (1) The general rule is that an affidavit may contain only such facts as the deponent is able to prove from his or her own knowledge.
- (2) An affidavit may contain statements of information and belief –
- (a) if any of these Rules so allows; and
- (b) if the affidavit is for use in an application for summary judgment under Part 15 or any procedural or interlocutory application, provided that the affidavit indicates –

- (i) which of the statements in it are made from the deponent's own knowledge and which are matters of information or belief; and
- (ii) the source of any matters of information and belief.

28. Accordingly, an affidavit made for use in any procedural or interlocutory application may refer to hearsay evidence so long as it indicates which statements are based on hearsay evidence and identifies the source of those hearsay statements and also identifies which statements are made from the deponent's own knowledge.
29. The Defendants/Applicants' complaint is that the first Greenwood Affidavit purports to confirm Mr. Greenwood's belief in the truth of the facts stated in the affidavit where those facts are within his knowledge and in the truth to the best of his knowledge information and belief of the facts stated in the affidavit which are derived from information. However, he does not state the source of information for the facts and matters referred to at paragraphs 8 - 9, 25 - 26, 28 - 30, 32, 34 - 35, 37 - 38, 43 (i) (ii) (iii) and 44 of his affidavit. The Defendants/ Applicant says that some of the statements contained in the Affidavit are statements of opinion and invite the Court to draw inferences with no evidential basis on which the veracity of such statements could be tested. It further states that some of the statements conflict with the documentary record and/or are merely speculative.
30. The Claimant's position is that the first Greenwood Affidavit contains some 36 references to sources of information. It further says that, out of an abundance of caution Mr. Greenwood produced an additional affidavit which sought to provide more comprehensive referencing in respect of the matters to in the first Affidavit. It contends that many of the matters mentioned in that affidavit were not disputed and had been confirmed in the affidavit evidence produced by the Defendants/Applicants or were matters of public record.
31. I note that the Greenwood Affidavit was filed in opposition to the Defendants/ Applicants application to set aside service of the Claim form and/or to strike out

the action herein. In my view, not only does the affidavit purport to set out the factual basis for the Claimants claims but at certain junctures it seems to advocate the case for the Claimant. Interspersed with the facts set out are statements of opinion based on factual conclusions arrived at by Mr. Greenwood after review of books and documents of the company and other sources.

32. I take the view, however that at this stage of the proceedings the Court is not concerned with making findings of fact. Rather, it is carrying out an evaluative exercise in order to determine whether the Claimants case raises substantial issues which ought to be determined at trial or alternatively whether the case is not fit for trial because the claims made are entirely without substance in law or on the facts and are bound to fail. The underlying rationale for this exercise is that the court should not subject a foreign litigant to proceedings which the defendant would be entitled to have summarily dismissed. In my opinion the importance of the affidavit at this stage is as part of the material upon which the court will determine whether there is a serious issue to be tried between the parties.
33. In assessing the evidence in the affidavit, I keep in mind that that evidence is being considered in the context of an interlocutory application for setting aside service out of the jurisdiction and/or striking out the claim form. As is the case where a court is called upon to decide whether a claim satisfies the summary judgment test of real prospect of success the Court will take into account not only the evidence actually placed before it on the application for summary judgment, but also the evidence that can reasonably be expected to be available at trial. In this regard I note that some parts of the evidence complained of are not disputed and in fact are put forward in affidavits filed in support of the defendants' application. Whatever the technical position might be these assertions point to evidence that will be available at trial, and which might not even be disputed there. In **Okpabi and others v. Royal Dutch Shell plc and another [2021] 1 W.L.R. 1294** a witness deposed to the fact that he had inspected a large number of confidential management documents belonging to a prospective defendant and

had drawn certain factual conclusions from them. The Trial judge had disregarded the testimony as being opinion evidence. On this he was upheld by the Court of Appeal. In the Supreme Court, however that decision was reversed. There Lord Hamblen JSC quoted with approval the dissenting judgment of Sales LJ in the Court of Appeal below:

“125 As for the evidence of Professor Siegel, the Chancellor agreed with Simon LJ in dismissing it as being opinion evidence. As, however, Sales LJ correctly observed at para 169:

‘the point is not that he is an expert regarding Shell’s control systems, but that he is a witness of fact who can say that he has inspected a large number of confidential Shell management documents and that they show a high level of functional control exercised by the centre over SPDC. His evidence goes some way to show that there is a very real prospect that highly relevant documents, which may well be supportive of the claimant’s case, will be forthcoming on disclosure if the action proceeds’.”

34. While the opinions expressed by Mr. Greenwood will not be considered by the Court his evidence does in part encapsulate the factual contentions that the Claimants seek to establish and goes some way to indicate the prospect that further information, relevant documents and other material foreshadowed by the Affidavit could well be forthcoming as the case develops.
35. I also take into account that much of the criticism of the affidavit goes to the credibility of statements in the affidavit rather than to the admissibility of those statements; that Mr. Greenwood has stated a wide variety of sources for the matters of information and belief referenced and that the significance to be accorded to the various matters alluded to in the affidavit must in part depend on the Court’s assessment of the reliability of the sources on which such evidence is based.

36. Having carefully reviewed the affidavit evidence of Mr. Greenwood inclusive of his second affidavit, I decline to strike out any part of that testimony. The affidavit highlights many disputes of fact and differences in perception between the parties in relation to the issues in this case. I do not think that those contradictions should be resolved on affidavit evidence only.

Application to correct a mistake as to the name of the First Defendant

37. By application dated 9th May 2019 Barnes Bay applied to amend the name of "Starwood Capital Group" appearing in the claim form and statement of case to "Starwood Grau Global LP. The application is made pursuant to **CPR 20.2(3)**.
38. Barnes Bay says that it, intending to sue the parent company of the Second Defendant Company SOF commenced the instant legal proceedings against that entity which it described as "Starwood Capital Group". In fact, the correct name for the First Defendant is "Starwood Capital Group Global L.P." It has applied to amend its statement of case to correctly name First Defendant. The action was filed on the last day prior to the expiration of the relevant limitation period and that period has long expired. An amendment to the statement of case will require an order of the Court.
39. **CPR Part 20.2** applies to applications for a change in a statement of case after the end of a relevant limitation period. By **Section 20.2 (3)**
- “(3) The court may allow an amendment to correct a mistake as to the name of a party but only where the mistake was –
- (a) genuine; and
 - (b) not one which would in all the circumstances cause reasonable doubt as to the identity of the party in question.”
40. The Court will permit a Statement of Case to be amended to reflect the correct name of a party to a suit after the expiration of a limitation period in

circumstances of mere misnomer, i.e. where the party whose name is sought to be corrected is indeed the party that was intended to be made party to the litigation but had been incorrectly named if (a) the misnomer resulted from a genuine mistake as to the correct name and (b) the mistake was not such as to cause any doubt as to the identity of the relevant party, see: **Owners of the Sardinia Sulcis v Owners of the Al Tawwab [1991] 1 Lloyd's Rep. 201**

41. I accept that the present case is one of misnomer in which the Claimant made a genuine mistake as to the name of the intended First Defendant rather than as to the identity of that party, I also accept that no party to the action was misled by the mistake. Accordingly, I will grant the application to amend the name of the First Defendant.

The Principal Applications

42. By the current application the Defendants seek orders
- (a) declaring 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) Setting aside service of the Claim Form Statement of Claim and ancillary documents on the Defendants
 - (c) Striking out the claim or alternatively staying the claim against all of the Defendants
 - (d) Striking out the case against the first Defendant Starwood on the basis that an entity with that name did not exist

The Application for a declaration that the Court has no jurisdiction with respect to the Claim

43. The Defendants/Applicants seek a declaration that the Court has no jurisdiction over the claim based on their assertion that the matters have already been decided between the parties in another forum that is. the United States Bankruptcy Court for the District of Delaware. The doctrine of res judicata operates as a bar on the

jurisdiction of a court to try a suit which has been conclusively decided by a court of competent jurisdiction between same parties in relation to the same subject matter. It is a bar on the jurisdiction of an otherwise competent court.

44. Here the Defendants/Applicants say that the Claimant Barnes Bay invoked the jurisdiction of the United States Bankruptcy Court for the District of Delaware and participated in Chapter 11 Bankruptcy proceedings there. The US Bankruptcy Court was seized of the allegations that the Claimant now asserts and made final orders, including for the sale of the Claimant's assets.
45. In this regard, the Defendants/ Applicants contend that the issues raised in the claim, namely breach of fiduciary duties, dishonest assistance and conspiracy as well as the concept of an equitable lien against the Property by certain creditors have all been floated in the Bankruptcy Court by the Official Committee of Unsecured Creditors. ("the Committee"). Essentially the same points being raised by the Claimant in these proceedings were canvassed before the US Court in the course of a Motion to Appoint a Trustee brought by that Committee. The Committee used the extensive resources that were at its disposal to cause a thorough and wide-ranging investigation into the Claimant, its officers, the 2nd Defendant etc. in pursuit of any potential claims that could be brought against the Claimant and its officers and the Defendants. After rigorous investigation which did not produce any viable claims, the Committee withdrew the motion on 22 June 2011. Having incurred professional fees (for lawyers, investigative accountants, etc.) in the sum of US\$6.5 million, the Committee conceded that there was no arguable claim against the Claimant or its officers and connected parties for breach of fiduciary duty **[SMB3 TAB 12]. (Pages 1600 - 1601)**
46. Based on the foregoing assertions of fact it is argued on behalf of the Defendants/Applicants that Court has no jurisdiction over the claim. The Defendants/Applicants submit that a foreign judgment in proceedings between the same parties creates an issue estoppel in Anguilla, provided that the foreign

judgment is of a court of competent jurisdiction, final and conclusive and on the merits, see **BVIHC (COM) Norsk Tillitsmann ASA v Norinvest Ltd**. They remind the Court that the principle applies not only where the remedy sought and the grounds therefor are the same in successive actions between the parties but also where, the subject matter of the two actions being the same, it is sought to raise in the second action matters of fact or law directly related to the subject matter which could have been but were not raised in the first action. Moreover, they point out that issue estoppel may arise where a particular issue forming a necessary ingredient in a cause of action has been litigated and decided in an action between the parties if one party seeks to re-open the issue in subsequent proceedings between the same parties involving a different cause of action to which the same issue is relevant.

47. Regarding the sale by auction of the property the Defendants/ Applicants point out that the procedures and terms of the sale including the provision for credit bidding and for reserve price had been approved by the United States Bankruptcy Court in proceedings initiated by the Claimant Company, Barnes Bay. They say that the validity and propriety of the sale procedures used and the issue of whether those procedures were in compliance with Anguillian law had been settled by the decision of the United States Bankruptcy Court which had granted its approval of the sale procedures on the basis of that determination. Accordingly, the Defendants/Applicants say that Barnes Bay is estopped from relitigating that issue before the High Court in Anguilla.
48. The Claimant/ Respondent says that the United States Bankruptcy Court was not called upon to decide nor did it determine the issues now sought to be raised in these proceedings. No issues relating to breach of fiduciary duties, dishonest assistance or conspiracy to injure by unlawful means were required to be decided by that Court. They take the position that the proceedings before the US Court considered specific Chapter 11 procedures, which were framed by the Defendants/ Respondents. They concede that the motion to appoint an

independent trustee which was brought by the Official Committee of Unsecured Creditors did seek to address some of the factual issues underlying this claim but point out that the motion was abandoned (without prejudice to any rights) as a result of a compromise which improved the position of some of the unsecured creditors within the Committee. Thus, no issue relevant to the instant proceedings had been litigated and decided by or during litigation before the United States Bankruptcy Court.

49. I agree. The proceedings before the United States Bankruptcy Court were concerned with the terms of the proposed Plan of Liquidation and specific matters relating to the proposed reorganisation and related bankruptcy procedures. In those proceedings Barnes Bay did not make claims against other parties, including against its directors, nor did the U.S. Court adjudicate upon the question of whether Barnes Bay's decision to commence the U.S. proceedings was one to which Barnes Bay's board of directors gave informed consent. It seems to me that the proceedings before the United States Bankruptcy Court for the District of Delaware did not directly address any questions as to whether Mr. Korzen had breached the fiduciary duties imposed upon him by law in relation to Barnes Bay, whether the First, Second, Fourth and Fifth Defendants had dishonestly assisted him in the alleged breach of his fiduciary duties and whether Starwood and/ or SOF, the secured creditor who held first charge over all the assets of Barnes Bay had unlawfully conspired to injure that company by procuring its entry into a commitment agreement with SOF under which SOF "...agreed to provide 'debtor in possession' financing for the purpose of an anticipated Chapter 11 process to be entered into by the Claimant under the United States bankruptcy Code..." (and this with a view to SOF gaining control over its property and affairs). There was no complete identity between the parties to those proceedings and to the present proceedings nor is there identity of issues in the two sets of proceedings. Accordingly, in my judgment the doctrines of res judicata and issue estoppel do not apply to the issues in this case relating to alleged breaches of fiduciary duty, dishonest assistance and unlawful means conspiracy.

50. Nor could the doctrine of res judicata be applicable to the claims relating to the sale of the property by auction. Barnes Bay's case is that Starwood and the Chargee SOF had offered benefits to Mr. Korzen in order to influence him, and through him the Board of Barnes Bay to procure that Barnes Bay initiated the process of seeking reorganization under Chapter 11 of the United States Bankruptcy Code. This they say was done with a view to achieving a swift progression to an auction and sale of the property to SOF by a process in which SOF was permitted to credit bid.
51. It is a fundamental principle of property law that any person disposing of assets not belonging to him comes under a duty of care to take reasonable steps to obtain a proper price, see: **Re Charnley Davies limited (No.2) [1990] B.C.C. 605 per Millett J** (as he then was) at 618. Where a mortgagee chooses to exercise his power of sale, he owes the mortgagor a specific duty to take reasonable care to obtain the true market value of the property at the time of the sale, see: **Credit Suisse AG (Cayman Islands Branch) v Anguilla masonry Products [2010] ECSCJ No.316 (AXAHCV 0046/2010)** per Blenman J who went on to note that in **Caribbean Banking Corporation v Alpheus Jacob CA 10 of 2004 (Antigua)** the duty had been held to extend to a requirement for sufficient advertisement of the sale.
52. Paragraph 11 of the **Statement of Claim** complains of the Company's failure to properly market the property to prospective bidders, to retain an investment banker or to attempt to obtain higher or better offers. These statements lay the groundwork for a claim for breach of a duty to take reasonable steps to obtain a proper price. It is important to note however that, notwithstanding that Claimant/Respondent's Counsel has addressed these matters in oral and written submissions, and that the matter was referred to in the First Affidavit of John Greenwood, no actual claim has been made in the pleadings for breach of such a duty. Nor is there any express assertion in the pleadings that the Property was sold at an undervalue. Moreover, the Claimant has not presented the Court with any alternative valuation

which could form the basis for such an assertion.

53. In this case Barnes Bay had petitioned the United States Bankruptcy Court for protection and to be permitted to reorganise under Chapter 11 the United States Bankruptcy Code. In the course of the Chapter 11 proceedings, it submitted to and participated in a process whereby the Bankruptcy Court after considering the interests of various representative unsecured creditors, and after hearing evidence as to the statute and case law of Anguilla relating to such sales approved detailed procedures concerning the sale of the property in purported compliance with the laws of Anguilla. The procedures approved by the Bankruptcy Court contemplated, inter alia

- the sale of the assets under Anguilla law including without limitation **Sections 72 and 75 of the Registered Land Act.**
- a Notice of Auction relating to the Property and approved by the Court to be served on, inter alia, listed public officials such as the U.S. Trustee for the District of Delaware, all creditors or their counsel known to the debtors to have an interest in or to have asserted a lien or security interest against the Property; counsel for the lending institutions and for any statutory committee.
- the establishment and maintenance of an electronic data room containing information and documents relevant to the property
- provision for a bidder's deposit of \$250,000 and for a reserve price of US\$165,000,000
- the right of the Chargee to credit bid at the sale subject to the ability of representative creditors to challenge the Chargee's right to do so.

54. The debtor, Barnes Bay proposed that in order to ensure that the Notice of Auction relating to the Property was widely disseminated, the seller would publish the Auction Notice once in the Wall Street Journal, twice in the Financial Times and weekly in the Anguillian and St. Maarten newspapers until the date of the Auction. In relation to this proposal the order of the Bankruptcy Court was that "The debtors

proposed notice of... the Auction is appropriate and reasonably calculated to provide all interested parties with timely and proper notice and no other or further notice is required” see; **Record Vol.1B page 0472**

55. In my view the fact that in judicial proceedings initiated by the Claimant company Barnes Bay, its holding company KDIP and Kor Duo II the sanction and approval of the United States Bankruptcy Court had been sought in relation to proposed sale procedures and that the Court had by order dated 19 May 2013 approved the same was (a) judicial confirmation made in proceedings to which all relevant parties had voluntarily submitted that the sale of the property by SOF using the procedures so approved would be a fair, reasonable and appropriate exercise of the chargees power of sale and (b) that the procedures so approved were compliant with Anguilla law. In my opinion, however, the exercise for the court in examining and approving of proposed procedures for sale of a property by auction is different from evaluating after the event whether there was a breach of a duty of care to take reasonable steps to obtain a proper price or even whether the sanctioned procedures had been carried out in a way which was compliant with Anguilla law.
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.
57. Notwithstanding the foregoing the facts and circumstances give rise to a question of abuse of process in circumstances which had traditionally been referred to a Henderson v Henderson estoppel. In **Takhar v Gracefield Developments Ltd (SC(E)) [2019] 2 WLR 984** at **paragraph 62** Lord Sumption summarised the modern position 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.”

58. Barnes Bay’s claim in the instant case, as spelt out in submissions made by its Counsel relating to the sale of the property is that the advertisement for the auction sale was inadequate and that there was no real effort to market the property to any prospective bidder other than SOF. Accordingly, it is argued that the Chargee SOF had breached its duty to take reasonable steps to obtain the true market value of the Property.

59. Under the Registered Land Act in force in Anguilla, the chargee in exercising its

power of sale had the right to set the terms of sale, reserve price etc. without recourse to any authority, judicial or otherwise. It is, of course required to have regard to the interests of the chargor and to take reasonable steps to obtain a proper price. In the facts under review, however, it was not left to the chargee to set the terms of sale. Here the procedure adopted by the parties was that Barnes Bay initiated proceedings for protection and reorganisation under Chapter 11 of the United States Bankruptcy Code and in the course of those proceedings the chargee SOF acquiesced to having its power of sale subjected to the close supervision of the United States Bankruptcy Court. The point of the requirement for the sale process to be carried out under the supervision of the Bankruptcy Court and for the scheduling of the auction and the sales procedures to be subject to the approval of the court, was to ensure that the foreclosure and the terms on which the property was to be sold were fair reasonable and appropriate in the circumstances having regard to the best interests of the Claimant, its creditors and other persons having a legitimate interest in the sale. It was also to ensure that the sale was carried out in a manner which was compliant with all applicable laws including the laws of Anguilla. The terms by which these objectives were to be achieved were those proposed by Barnes Bay in its motion to the court.

60. In its motion in the United States Bankruptcy Court Barnes Bay put forward terms and sales procedures, which it argued were fair and appropriate for the sale of the Property. Included in such proposals was provision for credit bidding by the chargee SOF. In submitting such terms and procedures for approval Barnes Bay did not raise any issues as to the inadequacy of the marketing effort for the Property or the failure of the defendants or any of them to retain marketing professionals or to attempt to obtain higher or better offers. As I see it, any questions as to whether in the circumstances the steps taken by SOF in the overall marketing effort for sale of the property were reasonable and adequate, or any objection to the sale on the basis that the sales process was deficient could and should have been raised at that time before the United States Bankruptcy Court. That is because those issues went directly to the propriety, fairness and adequacy of the proposed

arrangements for auction of the property, which was the very matter that Barnes Bay had by its motion submitted to the court for its approval.

61. The evidence before me is that the United States Bankruptcy Court, as it was duty bound to do carefully considered the utility and appropriateness of the proposals put before it with a view to securing the best outcome for the Company and its creditors and with a view to satisfying itself that the sale procedures proposed complied with applicable laws, specifically the laws of Anguilla. In this connection I note that the "Order Approving the Procedures for the Auction and Sale of the Debtor's Assets" dated 19th May 2011 and made by the United States bankruptcy Court specifically recited that the orders were made "...after due deliberation the Court having determined that the relief requested in the Motion is in the best interests of the Debtors, their estates and their creditors"
62. In my judgment Barnes Bay having submitted proposed terms of sale and sales procedures to the United States Bankruptcy Court for its approval on the basis that those terms and procedures were fair, appropriate and in compliance with the law of Anguilla and having obtained the sanction of the Court for those terms and procedures on that basis was precluded from thereafter contending that a sale conducted in accordance with those sanctioned procedures was invalid under Anguilla law. In my view SOF was entitled to assume that a sale conducted in accordance with the sanctioned procedures would not be challenged by Barnes Bay on the ground that it constituted a breach of the Chargees duty to take reasonable steps to obtain a proper price.
63. If a party successfully persuades a court to adopt a particular position in legal proceedings it can be an abuse of process for that same party to make a claim based on an inconsistent position of law or fact in a subsequent proceeding before another tribunal.
64. The case of **OJSC Oil Company Yugraneft (in liquidation) v. Abramovich, and**

Others [2008] EWHC 2613 (Comm) illustrates the operation of this principle. The background to that case is that in proceedings commenced in the British Virgin Islands ((**BVI Civil Appeal No.26 of 2005 Sibir Energy Plc v Gregory Trading S.A and others**)) six Defendants to a claim for knowing receipt of unlawfully obtained property applied to strike out the claim on the ground that Russian law applied to that claim and that there was in Russian law no cause of action for knowing receipt. The Claimant resisted the application on the basis that BVI law applied. It argued that Russia was not the appropriate forum because under Russian law neither it nor its subsidiary had any claim against the defendants for knowing receipt. It claimed that it was unjust that it should be forced to bring proceedings in a jurisdiction where it had no arguable case against the defendants against whom the claim had been made for knowing receipt. It was not successful in resisting the application. The BVI court dismissed the claims against the defendants on the basis that Russian law was applicable and that it was common ground that there was, under Russian law no cause of action against them.

65. In the proceedings subsequently brought in England, however the Claimant through its subsidiary and privy sought to bring a claim against one of the other Defendants to the suit and others on the premise that the receipt of the property which had been the subject of the BVI proceedings was unlawful in Russian law, Christopher Clarke J dismissed that aspect of the claim holding, in effect that the Claimant having advanced the argument in the BVI that no cause of action existed it would be an abuse of process for its privy to perform a volte face and argue the opposite. In coming to this conclusion, he observed-

“Sibir mounted a claim based on the contention that the receipt by the six offshore companies of the participation interests (knowingly assisted by Mr Abramovich) was unlawful. It failed in that attempt since the BVI Courts, held that the relevant law is the law of Russia, by which law Sibir has no claim. They did so as a result of Sibir's own contention that there was no claim in Russian law by Sibir (or Yugraneft). Now through Yugraneft, its

privy, it seeks to bring a claim in knowing receipt against Mr Abramovich and Millhouse, on the footing that the receipt was unlawful in Russian law. Yugraneft also seeks to bring a claim in knowing assistance against Mr Abramovich when Sibir had previously claimed that the BVI court should refuse a stay on the ground that neither it nor Yugraneft had any claim. That seems to me an abuse of the process of the courts. Part of the rationale for the doctrine is the protection of the Court's process and avoidance of the harassment of defendants. Sibir's changes of tack and jurisdiction, alleging, at one moment, that the claims are governed by BVI law as the place of receipt, then BVI law as the law of the forum, then English law as the place of enrichment, and that Russian law (a) does not and (b) does afford a remedy, seems to me to offend on both counts."

66. It seems to me those similar considerations apply in the instant case. In the facts under review the Claimant Barnes Bay had by its own motion sought and obtained the sanction of the United States Bankruptcy Court for the proposed sale procedures including the approval of the Court for the Chargee SOF to credit bid at the sale. That order was made on the basis that the procedures so approved were compliant with Anguilla law. Barnes Bay is bound thereby.
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.

Material non-disclosure

73. The Defendants/Applicants seek an order setting aside service of the claim form on the basis that that Barnes Bay failed in its duty to make full and frank disclosure of material facts in its ex parte application for service out of the jurisdiction.
74. The power to grant a stay of proceedings is discretionary and should only be exercised in rare and compelling circumstances, see: **Siong Beng Seng and others. v Caldicott Worldwide Ltd BVIHCMAP2020/0020**. Additionally, the duty of disclosure on an application for permission to serve outside the jurisdiction is less stringent than the equivalent duty on an application for, e.g., a freezing injunction, see: **DSG Retail Ltd and another v MasterCard Incorporated and others [2015] CAT 7** (cited with approval by Webster, JA [AG] in **Siong Beng Seng (supra)** where Roth J said at **Paragraph 44** that

“The duty does not require disclosure to the same degree as on an application for a without notice injunction, such as a freezing order, where granting the application has immediately and potentially serious consequences for the defendant. The factors relevant to an application to serve out are only those which relate to the limited inquiry the Tribunal carries out in determining whether to grant such permission. Nonetheless, within the limited scope of that inquiry, if the claimant is aware of such factors as might cause a Tribunal to doubt whether permission should be granted, this should be clearly disclosed.”

75. In the present case the claim for which permission was sought to serve out included a claim for rescission or avoidance of the sale of the Property on the premise that the sale had been procured as the result of improper arrangements resulting from a conspiracy. The purpose to which the conspiracy was said to be directed was securing the agreement of Barnes Bay to a proposal for debtor in possession financing to be made within the framework of anticipated proceedings to be brought by it under Chapter 11 of the United States Bankruptcy Code. The proposal, it is said, was intended "...to give substantial control of [Barnes Bay's] affairs to [Starwood and SOF] and which proposal was designed to achieve a swift progression to auction and sale of the Property to [SOF] and/ or to agree to the sale of the property to [SOF]" (**Statement of Claim paragraph 10**). The substance of the allegation against Starwood is that it had conferred lucrative benefits on the third Defendant Mr. Korzenin order to induce him and through him, the other members of the Barnes Bay Board to agree to the proposal; that in causing Barnes Bay to implement the proposal Mr. Korzen had breached his fiduciary duty to that company and that Starwood had knowingly and dishonestly assisted him in the breach of his fiduciary obligation (presumably because negotiations on behalf of SOF for provision of the debtor in possession financing had been conducted by Starwood's chief executive officer). Against all defendants it is alleged that they had conspired to injure Barnes Bay by unlawful means because they had "...entered into the inducements" which had procured Mr. Korzen's alleged breach of fiduciary duty.

76. In seeking permission to serve the statement of claim out of the jurisdiction the Claimant had failed to disclose to the court

- that in proceedings initiated by Barnes Bay before the United States Bankruptcy Court for the District of Delaware that company had led testimony to the effect that it had entered into an agreement with SOF to obtain Debtor in Place financing because it was then experiencing serious financial difficulties and required additional loan monies to continue to fund its operations.

- that Barnes Bay had been indebted to SOF in an amount in excess of US \$320 million which debt had been secured by a first legal charge on the property;
- that Barnes Bay had defaulted on its obligations under that charge.
- that in the circumstances SOF was entitled under the terms of the charge and by Sections 72 and 75 of the Registered Land Act to sell the property at auction “...subject to such reserve price and conditions of sale as [it] thought fit, with power to buy in at the auction” and that the Property had been sold by SOF in exercise of that power; and
- that the terms of sale had been approved by the United States Bankruptcy Court for the District of Delaware a court to the jurisdiction of which all relevant parties had submitted, on a motion brought by Barnes Bay in proceedings in which all relevant parties had participated.

77. The principles relating to non-disclosure in the context of an application for permission to serve defendants outside the jurisdiction were summarized by WebsterJA [AG] in **Siong Beng Seng (supra)** at [23] as follows:

- (i) The applicant, on an ex parte application for permission to serve out, must make full and frank disclosure of all material matters relevant to the decision whether or not to grant the application.
- (ii) The test of materiality is whether the matter might reasonably be taken into account by the judge in deciding whether or not to grant the application.
- (iii) Materiality is decided by the court and not by the assessment of the applicant or his legal advisers.
- (iv) The duty of candour is a heavy one. It extends to additional facts that the applicant would have known had he made proper enquiries. The applicant is under a duty to present fairly the facts disclosed. Observance of the duty is essential to secure the integrity of the court process and to protect those

potentially affected by whatever order the court is invited to make.

- (v) A balance must be maintained between marking the court's displeasure at the non-disclosure and doing justice between the parties.
- (vi) A distinction should be drawn between non-disclosure which amounts to an attempt to deceive the court, and a negligent failure to state certain facts which should have been stated.
- (vii) If there is a finding of material non-disclosure the court may discharge the order granted even though the applicant may be able to make another application that would succeed.
- (viii) In exercising its discretion, the court should assess the degree and extent of any culpability on the part of the applicant. Whether the fact not disclosed is sufficiently material to justify setting aside the order for service out will depend on the importance of the fact that the issues which were decided on the application. The decision to set aside is essentially one of degree and the judge's view should carry great weight.

78. In my view, in a case in which a claim had been made for the rescission or setting aside of a sale of property on the basis that such a sale had been procured by wrongful acts amounting to a conspiracy to injure the Claimant by unlawful means it was clearly a material fact (a) that the property so sold had been charged to secure the repayment of a debt owed by the Claimant Barnes Bay to the Second Defendant SOF as chargee; (b) that Barnes Bay was in default of its obligations under the charge; and (c) that the land had been sold by SOF in lawful exercise of the chargee's power of sale. The unlawful means supposedly used by the alleged conspirators was the procurement of a breach of fiduciary duty on the part of a director to the company- the director, it was alleged, had been induced by a bribe to cause Barnes Bay to enter into a debtor in possession financing arrangement

with SOF with a view to giving SOF substantial control over Barnes Bay's affairs. The Court was not advised of the financial difficulties facing Barnes Bay at the time, which might have necessitated its seeking of loans to enable it to continue its operations. Again, in asserting that the marketing of the Property had been deficient the Claimant did not disclose to the Court that it had had by its own motion sought and obtained the sanction of the United States Bankruptcy Court for the sale of the property and for the proposed sale procedures some of which were now characterised as being inadequate or non-compliant with the applicable law. The inevitable result of the Claimant's failure to disclose these matters was that the sale was presented to the Court as a wholly illegitimate transaction which had been brought about by bribery, dishonesty and a conspiracy between the defendants to cause Barnes Bay to sustain injury by unlawful means.

79. The Claimant's failure to disclose this information was a matter which went to the question of whether in relation to the Claimant and each Defendant there was a serious issue to be tried on the merits.
80. The remaining question is whether the facts not disclosed are of sufficient materiality that '... if the full facts had been before the Court, would the Court have given permission?' I conclude that the Court would have given permission. Had the full facts been before the Court it would have determined not that the relevant claims were bound to fail but that the Claimants case faced greater challenges in establishing its case than had been apparent from the facts disclosed.
81. For this reason, I decline to set aside service on the service of the claim for material non-disclosure.

The Application to set aside service out of the jurisdiction

82. **Section 7.7 of the Civil Procedure Rules 2000 ("CPR")** provides

7.7 (1) Any person on whom a claim form has been served out of the jurisdiction under rule 7.3 may apply to set aside service of the claim form.

(2) The court may set aside service under this rule if –

(a) service out of the jurisdiction is not permitted by the rules.

(b) the claimant does not have a good cause of action; or

(c) the case is not a proper one for the court's jurisdiction.

83. The applicable principles relating to service out of the jurisdiction were set out, with references to the prior authorities, in **AK Investment CJSC v Kyrgyz Mobil Tel Ltd**[2011] UKPC 7; [2012] 1 W.L.R. 1804, at [71], per Lord Collins. On an application for service out of the jurisdiction, three requirements have to be satisfied. First, the claimant must satisfy the court that in relation to the foreign defendant there is a serious issue to be tried on the merits, i.e., a substantial question of fact or law, or both. Second, the claimant must satisfy the court that there is a good arguable case that the claim falls within one or more classes of case in which permission to serve out may be given, i.e., that the claimant has the better of the argument that the case falls within one of the gateways specified in paragraph 7.3 of the CPR. Third, the claimant must satisfy the court that in all the circumstances the forum which is being seized (here the BVI) is clearly or distinctly the appropriate forum for the trial of the dispute, and that in all the circumstances the court ought to exercise its discretion to permit service of the proceedings out of the jurisdiction.

‘Reasonable prospect of success’

84. The Defendants/Applicants contend however that there is no serious issue to be tried between the Claimant and themselves.
85. In **Seaconsar Far East Ltd v Bank Markazi Jomhouri Islam Iran** [1994] 1 A.C. 438, HL the House of Lords held (p.456 - 457) that in determining the question

whether the claimant has established a sufficiently strong case on the merits of his claim, .to justify permission for service out (sometimes called “the merits threshold”) it was sufficient for the claimant to establish that there was “a serious issue to be tried” in that there was a substantial question of fact or law or both arising on the facts disclosed by the written evidence that the claimant bona fide desired to have tried. The “merits threshold” under this test is the same as if the claimant were resisting an application by the defendant for summary judgment under **CPR Part 15**. This is reflected in the terms of **CPR Part 7.5 (1) (a) and (b)** which impose on the applicant for permission the obligation of setting out in his application evidence on affidavit (a) as to the grounds on which the application is made and (b) that he believes that his claim has “a reasonable prospect of success.”

86. In **Carvill America Inc v Camperdown UK Ltd [2005] EWCA Civ 645; [2005] 2 Lloyd’s Rep. 457**, Lord Clarke LJ observed CA, at [24]

“It is common ground between the parties that the merits test under CPR 6.20 is in substance no different from the test of a real prospect of success under CPR 3.4 or 24.2: see e.g., *De Molestina v Ponton* [2002] 1 Lloyd’s Rep. 271 per Colman J at p281 and *MRG v Engelhard Metals Japan* [2004] 1 Lloyd’s Rep 731 per Toulson J at p 732. As Toulson J put it, the underlying rationale is that the court should not subject a foreign litigant to proceedings which the defendant would be entitled to have summarily dismissed. It is, however, important in my opinion to have in mind that the test is not a high one. A claimant has a real prospect of success if its chances of success are not fanciful.”

Scope of the inquiry into merits

87. I pay particular attention to the admonition of **Lord Briggs JSC** in the case of **Lungowe and others v Vedanta Resources plc and another [2020] AC1045** where he stated at [9] that

“Jurisdiction challenges frequently raise questions about whether the claim against one or more of the defendants raises a triable issue. As it is now common ground, this broadly replicates the summary judgment test. Issues of this kind are, regardless of whether contained within jurisdiction disputes, subject to a similar requirement for proportionality, the avoidance of mini-trials and the exercise of judicial restraint, in particular in complex cases, as was emphasised in the following well known passage from the speech of Lord Hope of Craighead in *Three Rivers District Council v Governor and Company of the Bank of England (No 3)* [2003] 2 AC 1:

94. For the reasons which I have just given, I think that the question is whether the claim has no real prospect of succeeding at trial and that it has to be answered having regard to the overriding objective of dealing with the case justly. But the point which is of crucial importance lies in the answer to the further question that then needs to be asked, which is-what is to be the scope of that inquiry?
95. I would approach that further question in this way. The method by which issues of fact are tried in our courts is well settled. After the normal processes of discovery and interrogatories have been completed, the parties are allowed to lead their evidence so that the trial judge can determine where the truth lies in the light of that evidence. To that rule there are some well-recognised exceptions. For example, it may be clear as a matter of law at the outset that even if a party were to succeed in proving all the facts that he offers to prove he will not be entitled to the remedy that he seeks. In that event a trial of the facts would be a waste of time and money, and it is proper that the action should be taken out of court as soon as possible. In other cases, it may be possible to say with confidence before trial that the factual basis for the claim is fanciful because it is entirely without substance. It may be clear beyond question that the

statement of facts is contradicted by all the documents or other material on which it is based. The simpler the case the easier it is likely to be to take that view and resort to what is properly called summary judgment. But more complex cases are unlikely to be capable of being resolved in that way without conducting a mini trial on the documents without discovery and without oral evidence. As Lord Woolf said in *Swain v Hillman* [2001] 1 All ER 91, 95, that is not the object of the rule. It is designed to deal with cases that are not fit for trial at all.

96. In *Wenlock v Moloney* [1965] 1 WLR 1238 the plaintiff's claim of damages for conspiracy was struck out after a four-day hearing on affidavits and documents. Danckwerts LJ said of the inherent power of the court to strike out, at p 1244B—C: this summary jurisdiction of the court was never intended to be exercised by a minute and protracted examination of the documents and facts of the case, in order to see whether the plaintiff really has a cause of action. To do that is to usurp the position of the trial judge, and to produce a trial of the case in chambers, on affidavits only, without discovery and without oral evidence tested by cross-examination in the ordinary way. This seems to me to be an abuse of the inherent power of the court and not a proper exercise of that power.' "

88. In **Okpabi and others v. Royal Dutch Shell plc and another** [2021] 1 W.L.R. 1294 Lord Hamblen JSC observed at **paragraph 22**

"Where, as will often be the case where permission for service out of the jurisdiction is sought, there are particulars of claim, the analytical focus should be on the particulars of claim and whether, on the basis that the facts there alleged are true, the cause of action asserted has a real prospect of success. Any particulars of claim or witness statement setting out details of

the claim will be supported by a statement of truth. Save in cases where allegations of fact are demonstrably untrue or unsupportable, it is generally not appropriate for a defendant to dispute the facts alleged through evidence of its own. Doing so may well just show that there is a triable issue. 23 At para 22 of his judgment Simon LJ recognised the importance of the pleaded factual case and stated that parties should not be allowed to file large quantities of evidential material. At paras 17 and 18 he deplored the amount of evidence filed in this case, with witness statements running to over 2,000 pages of material, and eight files of exhibits.”

89. In summary, the test of a real issue to be tried is the same as the test for summary judgment, that test is set deliberately low. 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 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.

The claims sought to be struck out / service set aside

90. With that guidance in mind, I turn to the respective claims contained in the Claim form the service of which is sought to be set aside and to the claims sought to be stayed or struck out in the Statement of Case served therewith.
91. Barnes Bay’s principal case is that the First and Second Defendants Starwood and /or SOF entered into an arrangement with the third Defendant Mr. Brad Korzen, one of its directors whereby they agreed to confer a number of benefits upon Mr. Korzen and his associated companies with a view to inducing him to procure that the company commence Chapter 11 Bankruptcy proceedings in the United States

and in connection with those proceedings enter into a commitment agreement with SOF for it to provide "debtor in possession" financing. Barnes Bay asserts that the arrangements complained of were intended to expedite the sale of the Property by auction to SOF on terms approved by the US Bankruptcy Court which terms were advantageous to SOF. It says that in accepting the inducements the third Defendant Mr. Korzen placed himself in a position in which his personal interest in the transaction and arrangements conflicted with that of the Claimant company and amounted to a breach of his fiduciary duty to the company in which breach he was dishonestly assisted by the other Defendants. It contends that Starwood, SOF, KDIP and Kor Duo II had conspired to injure it by unlawful means. Further it asserts that the sale of the property on the terms complained of was voidable and that it had, by the institution of this action elected to avoid the sale.

92. Specifically, regarding the sale Barnes Bay urges, on the authority of **Downsview Nominees Ltd. v. First City Corpn. Ltd. (P.C.) [1993] A.C. 295** that a lender exercising a power of sale has a duty to act in good faith with reasonable skill and care and to act fairly towards the borrower by taking reasonable steps to obtain a proper price for the asset. It says that this was not done in the present case because the auction sale process appeared to have been conducted in an unduly rushed and manner. It complains that the only publicity for the sale was by three advertisements the first of which appeared in the back pages of the supplement to the Wall Street Journal on 27 May, advertising to an auction which was to take place a mere two months later on 27 July. No estate agents or property professionals were employed to conduct a marketing campaign and there is no evidence of any direct contact with any potential buyers other than the Second Defendant SOF; there is no evidence of any professional valuation of the property notwithstanding the setting of a reserve price of US\$165 million. Further it complains that no sales prospectus was drawn up. It argues the inadequacy of these procedures is evidenced by the fact that the Property was purchased by the chargee SOF at an auction for which it had set the terms and conditions including its entitlement to credit bid, and at which it was the only bidder. It points out that the

property was sold for the reserve price that the chargee and successful bidder had set and somewhat vaguely suggests that had a different sales process been pursued a higher value might have been realized. It has not produced any suggestion or evidence as to what that higher value might be. Moreover, it must be noted that the principal terms of the sale, including the reserve price set for the sale of the Property and the arrangements for dissemination of notice of the auction had been approved by the United States Bankruptcy Court for the District of Delaware on a motion brought by the Claimant itself and by which, in my opinion it continues to be bound.

93. I have already expressed the view that it would be an abuse of process for the Claimant to pursue a claim against any of the Defendants for breach of a duty to take reasonable steps to obtain a proper price on the basis of the above allegations.

94. With regard to the claim against Mr. Korzen for breach of fiduciary duty and against the other defendants for dishonest assistance in that breach and unlawful means conspiracy the Defendants/Applicants deny that the facts put forward by the Claimant company could reasonably support a postulation that the third Defendant Mr. Korzen had any interest which conflicted with that of the company or that he acted in breach of his fiduciary duty to Barnes Bay. **The Anguilla Companies Act No. C65 of the Revised Statutes of Anguilla** provides in **Section 97 (1)** that

“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."

95. The duty of good faith focuses on a fiduciary's subjective intentions. Thus, in **Regentcrest Plc v Cohen [2001] B.C.C. 494 Jonathan Parker J.** explained (at [120]):

"The duty imposed on directors to act bona fide in the interests of the company is a subjective one. The question is not whether, viewed objectively by the court, the particular act or omission which is challenged was in fact in the interests of the company; still less is the question whether the court, had it been in the position of the director at the relevant time, might have acted differently. Rather, the question is whether the director honestly believed that his act or omission was in the interests of the company. The issue is as to the director's state of mind. No doubt, where it is clear that the act or omission under challenge resulted in substantial detriment to the company, the director will have a harder task persuading the court that he honestly believed it to be in the company's interest; but that does not detract from the subjective nature of the test"

96. Where there is no evidence of actual consideration of the best interests of the company (or creditors), or where there is a very material interest which is overlooked and not taken into account without objective justification the test of the duty to act in the best interests of the company is an objective one, see **Re HLC Environmental Projects Ltd [2014] B.C.C. 337 at 363** where **HH John Randall QC** acting as a deputy judge stated at [92](b)

"...(b) As Miss Leahy submitted, the subjective test only applies where

there is evidence of actual consideration of the best interests of the company. Where there is no such evidence, the proper test is objective, namely whether an intelligent and honest man in the position of a director of the company concerned could, in the circumstances, have reasonably believed that the transaction was for the benefit of the company (Charterbridge Corp Ltd v Lloyds Bank Ltd [1970] Ch. 62 at 74E–F, (obiter), per Pennycuik J.; Extrasure Travel Insurances Ltd v Scattergood [2003] 1 B.C.L.C. 598 at [138] per Mr Jonathan Crow).”

97. In the instant case there is evidence that the directors gave actual consideration to what course of action was in the best interest of the company. The reason given by the directors of the company for commencing the Chapter 11 process was that Barnes Bay needed bankruptcy protection from its creditors pending an intended reorganization of its business and operations. Further, it needed debtor in place financing to fund its operations and retain its work force on an interim basis. In this regard, the Defendants/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. The Board Resolved that it deemed it desirable and in the best interests of the Company, its creditors and other interested parties that a petition be filed seeking relief under the provisions of Chapter 11 of the United States Bankruptcy Code. By that document the Board unanimously ratified any actions taken by any officer or director of the Company prior to 16 March 2011 to carry out the purposes of the relevant resolutions and transactions contemplated (i.e., generally the resolutions facilitating the petition for relief under the provisions of Chapter 11 of the United States Bankruptcy Code)
98. The question for the Court in such circumstances is whether the directors, particularly the third Defendant Mr. Korzen genuinely believed that their decision to commence Chapter 11 Bankruptcy proceedings in the United States and to seek to enter into an agreement with SOF for it to provide "debtor in possession"

financing was in the best interest Barnes Bay.

99. In this regard in the case of **Colin Gwyer & Associates Ltd v London Wharf (Limehouse) Ltd (supra)** Mr. Leslie Kosmin QC, acting as a Deputy High Court Judge noted at **paragraph 76** that

“76. The mere fact that a decision taken by directors in good faith in the interests of the company also promotes their own interests does not invalidate the exercise of their discretion. However, any court in which the decision is challenged should examine the directors' conduct with particular care: see Gore-Browne on Companies (44th ed., Jordans), para. 27.3.”

100. Where it can be shown that the director received an undisclosed benefit, however it will be presumed that the director was in fact induced by the payment to act in favour of the person conferring the benefit, see: **Fiona Trust & Holding Corporation and Others. v. Yuri Privalov and others [2010] EWHC 3199 (Comm)**, per Andrew Smith, J. at **para. 72** “If a bribe is paid to an agent, it does not assist the briber or the agent to show that in fact the agent acted in his principal's best interests”.

101. That the benefit was conferred and received secretly is an essential factor in establishing a breach of fiduciary duty, because it is that factor which amounts to a breach of the duty of loyalty that the company is entitled to expect. Full disclosure of the “benefit” is a defence. In this connection the Defendants/Applicants say that it is implausible that that the Board and Barnes Bay itself were unaware of the Pre-Petition Agreements. They point out that Barnes Bay is 99.7% owned by the fourth and fifth Defendants KDIP and Kor Duo II and that Mr. Korzen was the managing member of Kor Duo II (the General partner of KDIP which held 95% of the shares in Barnes Bay). Their knowledge was the knowledge of 99.7% of the shareholders. They further point out also that that all the Pre-Petition Agreements now

complained of by BarnesBay as constituting inducements were placed before the U.S. Court in the Bankruptcy proceedings. They were exhibited to the Disclosure Statement in Support of the Second Amended Joint Chapter 11 Plan of Liquidation dated 28 June 2011. At no time prior to or since this disclosure has any member or director of the company made any complaint or objection to the content or scheme of those agreements. Moreover, Defendants/Applicants say that the agreements said to constitute and contain the alleged 'inducements' were never implemented as the proposed plan of reorganization was never adopted.

102. Chapter 11 of the United States Bankruptcy Code is a bankruptcy option tailored to business owners and some individual debtors. This type of bankruptcy allows a debtor to reorganize its debt, rather than discharge or wipe it out. A debtor will need to file a "plan of reorganization.". An automatic stay halts all actions including pending foreclosure against the debtor's property, real and personal, and remains in effect as long as the property is part of the bankruptcy estate. The Defendants/Applicants urge that there are credible reasons why a director of a company in the position of the Claimant, Barnes Bay acting in good faith might wish to seek bankruptcy protection and file for Chapter 11 Bankruptcy. The evidence is that the company needed financing to continue its operations and that all its assets were already charged to secure its debt to the 2nd Defendant. They argue that there is nothing to indicate that the company could not benefit from debtor in place financing.

103. Moreover, they say that the Second Defendant SOF, the holder of a charge over the Company's property could obtain no practical advantage from Barnes Bay seeking protection under Chapter 11 of the United States Bankruptcy Code. **Section 72 of the Registered Land Act No. R 30 of the Revised Statutes of Anguilla** provides in part-

72 (1) If default is made in payment of the principal sum or of any interest or any other periodic payment or of any part thereof or in the performance

or observance of any agreement expressed or implied in any charge, and continues for one month, the chargee may serve on the chargor notice in writing to pay the money owing or to perform and observe the agreement. As the case may be

(2) If the chargor does not comply. Within three months of the date of service with a notice served on him under subsection (1) the chargee may---

(a) appoint a receiver of the charged property; or

(b) sell the charged property

104. **Section 75** provides

75. (1) A chargee exercising his power of sale shall act in good faith and have regard to the interests 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 instalments, subject to such reserve price and conditions of sale as the chargee thinks fit, with power to buy in at the auction and to resell by public auction without being answerable for any loss occasioned thereby

(2) Where the chargor is in possession of the charged land or the land comprised in the charged lease, the chargee shall become entitled to recover possession of the land upon a bid being accepted at the auction sale

(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 has been 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.

- (4) Upon registration of such transfer, the interest of the chargor as described therein shall pass to and vest in the transferee freed and discharged from all liability on account of the charge, or on account of any other incumbrance to which the charge has priority (other than a lease, easement or profit subsisting at the time the charge was affected or to which the has consented in writing).

105. The Defendants/ Applicants say that at the material time Barnes Bay was by its own admission in default of its obligations under a loan agreement secured by a charge on the Property in favor of the Defendant SOF. In consequence of that default SOF was entitled to foreclose and to exercise its power of sale over the Claimant's Property pursuant to section 72 and 75 of the Registered Land Act without the intervention or permission of a court. Nothing in the Chapter 11 Bankruptcy process put the Lenders in a better position to conduct the sale as they chose than if they had exercised their right to foreclose under **Section 75 of the RLA**. By **section 75** a Chargee exercising its power of sale is entitled to sell the charged property "...subject to such reserve price and conditions of sale as the chargee... thinks fit", There was no need to persuade the Board of Barnes Bay to permit the sale of the Property by auction on terms set by Starwood and SOF and no reason to persuade Mr. Korzen to apply to the United States Bankruptcy Court to permit the sale to be on terms approved by that Court. They say that Barnes Bay's application to the US Bankruptcy Court had the potential to unduly restrain the Second Defendant SOF as a secured creditor. In particular the automatic stay imposed in consequence of the application was a fetter upon the secured creditor SOF which company was by the **Anguilla Registered Land Act** entitled to sell the charged property without any requirement for judicial sanction subject to such reserve price and conditions of sale as it thought fit"

Discussion

106. Where an application to serve proceedings out of the jurisdiction on a foreign defendant is contested the issues fall to be addressed by reference to the pleaded

case. Thus, in **Okpabi and others v. Royal Dutch Shell plc and another (supra)** 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.”

107. The issues as they arise on the pleadings include

The alleged conspiracy

108. Barnes Bay's case is that on or about 16 March 2011, the first Defendant Starwood and/or the Second Defendant SOF entered into an arrangement with the third Defendant Mr. Brad Korzen, one of its directors whereby they agreed to confer a number of benefits upon Mr. Korzen and his associated companies. This arrangement was not disclosed to Barnes Bay. The Barnes Bay further says that the benefits were conferred upon Mr. Korzen to induce him to procure its agreement to a debtor in possession proposal which was being made in the context and in furtherance of a contemplated reorganization of the company under

Chapter 11 of the United States Bankruptcy Code. Barnes Bay's entry into the proposed debtor in possession arrangement with SOF was intended "...to give substantial control of [Barnes Bay's] affairs to [Starwood and SOF] the proposal having been designed "...to achieve a swift progression to auction and sale of the Property to [SOF] and/ or to agree to the sale of the property to [SOF]" (**Statement of Claim paragraph 10**).

109. It says that Starwood and/or SOF knew or turned a blind eye to the fact that by entering into the impugned arrangements with them Mr. Korzen breached of his fiduciary duties to Barnes Bay.

Dishonest assistance

110. To plead a claim for dishonest assistance of breach of fiduciary duty the particulars of claim should identify what it was the defendant did to assist the alleged breaches of fiduciary duty. An allegation of dishonesty must be pleaded clearly and with particularity. **Belmont Finance Corp Ltd v Williams Furniture Ltd [1979] Ch. 250 per Buckley LJ at 268** where he stated.

"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."

111. 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: **Lipkin Gorman v Karpnale [1989] 1 W.L.R. 1340 at 1352**.

112. In this case the allegations concerning dishonest assistance are that
- (a) Starwood, SOF KDIP and Kor Duo II had entered into the inducements with Mr. Korzen and by so doing had induced or knowingly and dishonestly assisted him in his breach of fiduciary duties (**See Statement of Claim paragraph 15**)
 - (b) alternatively, if Starwood was not a party to the inducements it was at least aware of them and had caused or permitted SOF to enter into them. Accordingly, Starwood was liable for the knowing and dishonest assistance of Mr. Korzen in the breach of his fiduciary duties and had conspired to injure Barnes Bay by unlawful means; (**See Statement of Claim paragraph 16**)
113. In so far as Starwood is alleged to have “knowingly and dishonestly assisted” Mr. Korzen by entering into the inducements with him there is no indication in the pleadings as to what actions by Starwood were alleged to have amounted to “entry into the inducements.” I assume the words to mean that Starwood participated in some way in the alleged arrangement to offer secret benefits to Mr. Korzen. There is no indication as to Starwood’s role in that process.
114. The commitment letter and agreement for debtor in possession financing was executed between the Claimant Barnes Bay and SOF. The intended First Defendant Starwood Capital Group Global L.P. here referred to as “Starwood” is not a party to it. It is asserted that the agreement was negotiated by Starwood and its CEO Mr. Sternlicht on behalf of SOF. (**See Statement of Claim paragraph 8**) It is also asserted that the First Defendant Starwood “...orchestrated the U.S. proceedings together with Mr. Korzen” as evidenced by the fact that three and a half months prior to the initial filing of the Chapter 11 proceedings The First Defendant Starwood had written to investors to advise them that “*With our guidance on March 17, 2011 the owner of the Viceroy filed for Chapter 11*”

Bankruptcy to facilitate the sale of the property and to cleanse the asset of liabilities” See (**Statement of Claim paragraph 30**)

115. Neither of these alleged actions point unequivocally to dishonesty on the part of the First Defendant or to the assistance of the third Defendant in the breach of his fiduciary duty. There is nothing intrinsically dishonest in negotiating a loan agreement between an affiliated company and a borrower.
116. As to the “orchestrating” the proceedings in the United States Bankruptcy Court it seems to me that there is nothing inherently wrong for a company experiencing financial difficulties to seek to reorganise itself, even if it does so in a foreign jurisdiction in order to take advantage of a scheme of organisation available in that jurisdiction which might not otherwise be available to the company. In **Re Codere Finance (UK) Limited [2015] EWHC 3778** Mr. Justice Newey observed in relation to a similar situation that-

“In a sense, of course,... what is sought to be achieved in the present case, is forum shopping. Debtors are seeking to give the English court jurisdiction so that they can take advantage of the scheme jurisdiction available here and which is not widely available, if available at all, elsewhere. Plainly forum shopping can be undesirable. That can potentially be so, for example, where a debtor seeks to move his COMI with a view to taking advantage of a more favourable bankruptcy regime and so escaping his debts. In cases such as the present, however, what is being attempted is to achieve a position where resort can be had to the law of a particular jurisdiction, not in order to evade debts but rather with a view to achieving the best possible outcome for creditors. If in those circumstances it is appropriate to speak of forum shopping at all, it must be on the basis that there can sometimes be good forum shopping.”

117. I do not see that a decision to cause a distressed company to seek to reorganise

itself under Chapter 11 of the United States Bankruptcy Code, if it can satisfy relevant jurisdictional requirements, as being by itself a fact that is indicative of any ulterior motive or breach of fiduciary duty on the part of its directors. For Starwood to provide “guidance” to Barnes Bay in that endeavor is not in itself evidence of impropriety or blameworthiness. Further the normal effect of a foreclosure and consequent sale by auction is that the property sold is “cleansed of liabilities”. **Section 75 (4)** of the **Registered Land Act** provides for any property sold at auction in exercise of the chargee’s power of sale to be transferred free of existing liabilities. There was no need to secure Barnes Bay’s engagement in the Chapter 11 process to achieve that result.

118. No other overt act is attributed to the First Defendant. In the Greenwood Affidavit at **paragraph 18** the deponent simply lumps all the companies in the Starwood Capital group as “Starwood” and attributes all actions of group companies and affiliates to “Starwood”. Thus, at **paragraph 24** Mr. Greenwood states that “On March 16, 2011, the eve of Bankruptcy the Debtors entered into a commitment agreement (“the DIP commitment letter”) with Starwood under which Starwood agreed to provide “debtor in possession “financing...” It can be seen that in that and other paragraphs of the First Greenwood Affidavit., SOF the actual party to the commitment agreement is included in the collective term “Starwood.” References to ‘Starwood’ in that affidavit are not necessarily references to the First Defendant. Very little evidence in that affidavit points unequivocally to the First defendant.
119. An alternative pleading, to the effect that if Starwood was not a party to the inducements it was at least aware of them and had caused or permitted SOF to enter them is deficient. There is no indication in the particulars as to what Starwood is alleged to have done to have caused SOF to “enter into the inducements”. Moreover, the assertion that it “permitted” SOF to do so is based on the assumptions (a) that it had a degree of control over SOF which entitled it to grant or refuse permission to SOF, and (b) that it owed a duty to Barnes Bay to refuse such permission. One of the fundamental principles of company law is that a

company is a separate legal entity distinct from the shareholders of the company. There is no general duty on a holding company to prevent its subsidiary or affiliate (a separate person) from causing damage to a third party, see: **Smith v. Littlewoods Ltd [1987] A.C. 241** per Lord Goff of Chieveley at 270 G-H where he observed:

“But it must not be overlooked that a problem arises when the pursuer is seeking to hold the defender responsible for having failed to *prevent* a third party from causing damage to the pursuer or his property by the third party's own deliberate wrongdoing. In such a case, it is not possible to invoke a general duty of care; for it is well recognised that there is no general duty of care to prevent third parties from causing such damage”

120. A company may in certain circumstances come under a duty of care to a third party to do so, see, e.g., **Chandler v Cape [2012] EWCA 525 Okpabi v Royal Dutch Shell plc (Supra)** In **Smith v. Littlewoods Organisation Ltd.[supra]** Lord **Mackay of Clashfern** pointed out at **258F** that the determination of the question whether there was a duty of care to protect against the wrongful acts of third parties was a matter for the judges of fact to determine. Barnes Bay has not asserted or sought to establish that Starwood was under a duty of care to it to prevent SOF from acting as it did.

Unlawful means conspiracy

121. Barnes Bay says that Starwood, SOF KDIP and Kor Duo II had entered into the inducements with Mr. Korzen and by so doing had conspired with Mr. Korzen to injure Barnes Bay by unlawful means; Alternatively, Starwood had conspired to injure Barnes Bay by unlawful means by causing or permitting SOF to enter into the inducements. **(See Statement of Claim paragraph 17)** Again, there is no indication in the pleadings as to what actions by Starwood were alleged to have done to have “entered into the inducements”. I assume it to be an allegation that Starwood participated in some unspecified way in the alleged arrangement to offer

secret benefits to Mr. Korzen.

122. As to the assertion that Starwood had conspired to injure Barnes Bay by causing or permitting SOF to enter into the inducements, there is no indication in the pleadings as to what Starwood is alleged to have done to have caused SOF to do so. Further Barnes Bay has not asserted or sought to establish that Starwood was under a duty of care to it to prevent SOF from acting as it allegedly did so as to incur liability for failing to prevent it from doing so. Moreover, it is difficult to see how a company can be said to have conspired to injure another party by unlawful means merely by not preventing an affiliated company from participating in the alleged conspiracy.

123. With regard to allegations of fraud Neuberger J as he then was observed in the case of **Bradford & Bingley Building Society v. Boyce Evans Shepherd [1998] P.N.L.R. 250** at page 257 that

“Of course, I accept, as was emphasised by Lloyd J. in *National Home Loans Corporation plc v. Thimbleby* (unreported, March 25, 1997) a pleading of fraud cannot be made on what he called a "mere suspicion" that there has been fraud: there has to be "evidence" to support it.”

In my view the same principle obtains where the allegation involves unlawful means conspiracy or dishonest assistance. In **Jarman & Platt Ltd v I Barget Ltd [1977] F.S.R. 260** Megaw L.J. explained at p.267, that “... 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 of fraud, must be clearly pleaded and clearly proved by convincing evidence.”

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

Breach of Fiduciary Duty

125. Barnes Bay says that in agreeing to the arrangements offered to him by Starwood and SOF Mr. Korzen placed himself in a position where his personal interest in receiving the benefits potentially conflicted with his duty to that company to act wholly and disinterestedly in its interest and not, without authorization from the company to put himself in a position in which his personal interest might conflict with his duties to the company. Further they say that by entering into the arrangement he received a secret commission. See: **Paragraph 12 of the Statement of Claim**
126. In **Fiona Trust & Holding Corporation and Others. v. Yuri Privalov and others [2010] EWHC 3199 (Comm)**. Andrew Smith, J. stated at **para. 70** that "..., a bribe is "a commission or other inducement which is given by a third party to an agent as such, and which is secret from his principal": *Anangel Atlas Compania Naviera SA v Ishikawajima-Harima Heavy Industries Company Limited*, [1990] 1 Lloyd's LR 166 at p. 169...
127. He went on to explain at paragraph 72 that-
- "It is not necessary in order to establish a claim for a claimant to show that the bribe was either paid or received dishonestly: where a bribe is paid, it is irrelevant whether either the briber or the agent realised that they were doing wrong. In English law corruption and fraud are presumed, and so a claim can be brought on the basis of the payment of an "innocent" bribe: *Re a debtor*, [1927] 2 Ch 367 at p. 376 per Scrutton LJ. It is also presumed that the person paying a bribe intended that the agent would be influenced by it and that the agent was in fact induced to act in favour of the briber in relation to transactions between the briber and the recipient's principal: *Hovenden & Sons v Millhoff*, (1900) 83 LT 41 ; *Industries & General Mortgage Co Ltd. v Lewis* , (cit sup). If a bribe is paid to an agent, it does not assist the briber or the agent to show that in fact the agent acted in his principal's best interests".

Whether the proffered benefits constituted a 'secret commission'

128. The Statement of Claim alleges that the complained of inducements were offered to the Third Defendant Mr. Korzen and were not disclosed by him to the claimant company (**Paragraph 9 of the Statement of Claim**) In **paragraph 28 of his first Affidavit** Mr. Greenwood states that "...My review of the books and records of BarnesBay does not demonstrate that Mr. Korzen disclosed his conflict of interests or abstained from influencing these decisions."
129. Where misfeasance such as breach of fiduciary duty by failure to disclose a benefit, is alleged it is for the Claimant to prove the negative proposition that there has been no disclosure: **Cavendish Bentinck v Fenn (1887) 12 App. Cas. 652** per Lord Herschell **at 661** where he observed -
- "There is no misfeasance in a person who has an interest in the property, by being a shareholder in the company, which is selling it, nevertheless acting as a director in the purchase of that property for another company. 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."
130. The Defendants/Applicants say that the Board and Barnes Bay itself were aware of the Pre-Petition Agreements. Defendants/Applicants point out that Barnes Bay is 99.5% owned by the fourth and fifth Defendants KDIP and Kor Duo II and that Mr. Korzen was the managing member of Kor Duo II (the General partner of KDIP which held 99.5% of the shares in Barnes Bay). Their knowledge was the knowledge of 99.5% of the shareholders. Thus, the details of the alleged 'secret commission' were known to the entire board, 99.5% of the shareholders and the secured creditors holding a first legal charge over the Property. They further say that the Pre-Petition Agreements now complained of by Barnes Bay as constituting inducements formed part of a proposal for reorganisation of the Claimant which was intended to be carried out under Chapter 11 of the United

States Bankruptcy Code. As such they could be put into effect only after approval of the United States Bankruptcy Court for the District of Delaware. They were disclosed by the Claimant company to that Court as part of the proposed Plan of Reorganisation submitted for approval and were exhibited to the Disclosure Statement in Support of the Second Amended Joint Chapter 11 Plan of Liquidation dated 28 June 2011. The Claimant's response, at paragraph 25 of the Greenwood Affidavit is that Debtor in Possession Commitment letter was disclosed to the United States Bankruptcy Court but that other relevant documents such as the Indemnity Agreement, the Deposit Guarantees and other instruments by means of which the which proffered benefits were documented were not so disclosed.

131. From the foregoing it is clear that a triable issue arises between the parties as to whether the benefits allegedly conferred on the 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.

The Chapter 11 process

132. Barnes Bay says that "debtor in possession" insolvency is an alien concept under Anguillian law and refers to circumstances in which the directors of the insolvent entity remain in office (and in control of the subject entity) during the procedure and there is no independent liquidator appointed, provisionally or otherwise to act in the interest of the creditors as a whole. Extensive written and oral submissions were made by Mr. Hare in which he contended that a liquidation process in Anguilla would have been preferable to United States based bankruptcy proceedings. This was, however, a decision taken by the Claimant company. As I see it, the Second Defendant SOF 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.

Submissions on the merits of the case

133. The Defendants/Applicants made extensive submissions, some of which I have set

out, as to the facts, circumstances by which they sought to show the inherent improbability of the allegations made by the Claimant in this case.

134. The Claimant's case involves the concept of a conspiracy between the financiers, directors and shareholders of a financially distressed company to injure it by causing it to enter into an agreement to receive loan monies which were needed to fund its continued operations and which, by all accounts it had been unable to obtain from any other source. It is postulated that the object of the conspiracy and of the overt acts done pursuant to it was to give the lender control over the affairs of the company. The reason why the 'debtor in possession' financing agreement would have given the lender such control is not spelt out in the pleadings nor addressed in the submissions made on behalf of the Claimant/Respondent. There is also no explanation as to why the advancement of (eventually) some additional \$12 million in debtor in possession financing to Barnes Bay by SOF could have given SOF any leverage or control over Barnes Bay's affairs that SOF would not otherwise have had by reason of its previous charge, bearing in mind that Barnes Bay was already indebted to SOF in a sum in excess of \$370 million. 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 SOF 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 SOF's hidden objective was to achieve a swift sale of the Property to SOF on terms advantageous to it, would SOF 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.

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 Claimants case as pleaded may require some amendment and/or further particularisation. Notwithstanding these difficulties, I cannot conclude on the basis of the evidence before me that the Claimants chances of success on those claims are fanciful or that those claims are entirely without substance. Clearly there are serious issues to be tried between the parties on the merit of these claims.
137. There are, however, a number of claims in the case, which I find to be unsustainable and ought not to be permitted to go to trial.

Claim against the fourth and Fifth Defendants

138. The case against the Fourth Defendant KDIP and the Fifth Defendant Kor Duo II is that they conspired with the first Defendant Starwood, the second Defendant SOF and the Third Defendant Mr. Korzen to injure Barnes Bay by unlawful means and that they knowingly and dishonestly assisted and induced a breach of Mr. Korzen's fiduciary duties. An 'unlawful means conspiracy' is one in which the participants combine together to perform acts which are themselves unlawful. This involves two elements. Firstly, it must be shown that the acts involved are "unlawful". Secondly, it must be shown that the unlawful acts were the means of inflicting harm on the claimant: **Customs and Excise Commissioners v Total Network SL [2008] UKHL 19; [2008] 1 A.C. 1174 at [96], [119]**.
139. Here the conspiracy alleged is that Starwood and SOF offered a number of lucrative benefits to Mr. Korzen to induce him to cause Barnes Bay to enter into a commitment agreement with SOF under which SOF "...agreed to provide 'debtor in

possession' financing for the purpose of an anticipated Chapter 11 process to be entered into by the Claimant under the United States bankruptcy Code..." see: **paragraph 7 of the Statement of Claim**. It is alleged that Mr. Korzen's interest in receiving the benefits conflicted with the interest of Barnes Bay and that Starwood and SOF acted as they did knowing that his entry into the arrangements whereby he would receive such benefits would put him in breach of his duty to that company. The inducements allegedly offered to Mr. Korzen included an indemnity to himself, KDIP and Kor Duo II against "...a broad set of claims and causes of action" see **paragraph 9 of the Statement of Claim**.

140. 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.

141. In my view, Barnes Bay's case against KDIP 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.

Asserted equitable lien

142. Barnes Bay says in the alternative that of the money that it used to acquire and

develop the property approximately US \$65 million represented money that it held on trust for investors who had provided returnable deposits on residences to be built on the property. It argues that SOF took the Property subject to an equitable interest that those investors held in the property in the amount of their investment because it was not a bona fide purchaser given the matters complained of, and because "...it is to be inferred that it had notice of the investor's equitable interests" It claims to be entitled as trustee for those investors, to an equitable lien over the property in the amount of US \$65 million, or such sum as is held to represent the value of the investors equitable interest in the Property.

143. In my view, this argument is misconceived, and the claim is bound to fail.
144. 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 vendor's 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 [2002] QB 902 per Laddie J at paragraphs 31-32.**
145. In its written submissions Barnes Bay argues that "...[A]n escrow agency had been established for the investors and that such an arrangement was wholly inconsistent with any notion that the deposits were non-refundable. Under Anguilla law it was and is the case (or at least arguably so that the deposits were refundable and therefore trust property." I observe that-

- (a) This assertion contradicts the statement in the Statement of Claim that the deposit was held by Barnes Bay on trust for the investors.

- (b) This assertion is wrong in law. Where deposit monies are held by a stakeholder that stakeholder holds the monies under a tripartite contract or quasi-contract between himself, the vendor or purchaser on terms that he is to keep it until one or other two possible alternative future events (i.e., the failure of the contracts by the repudiatory breach of one party or the other) happens and then pay it to one or other of the parties accordingly. A stakeholder who holds the deposit in escrow is not an agent for either party. He does not hold the money on trust. See: **Gribbon v Lutton and another [2002] QB 902** where **Laddie J** at **page 909 Paragraph 13** referred to the judgment of Millett, LJ in *Manzanilla Ltd v Corton Property and Investments Ltd* (unreported) 13 November 1996; Court of Appeal (Civil Division) Transcript No 1477 of 1996 on this point. See also **Potters (A Firm) v. Loppert (1973) 1 Ch. 399**.

- (c) If the purchaser has paid the deposit to a stakeholder or escrow agent rather than directly to the vendor or the vendor's agent a purchaser's lien cannot come into existence. In those circumstances it is to the stakeholder rather than the vendor to whom the purchaser must look for repayment. The purchaser has no claim against the vendor for the return of the deposit and accordingly there will be no indebtedness between vendor and purchaser and thus no lien to secure any such indebtedness, see **Combe v. Lord Swaythling [1947] Ch. 625**

- (d) Even if the monies had been held by an escrow agent on express trust for the investors pending finalisation of a sale and purchase transaction it is that escrow agent and not the vendor Barnes Bay who would be constituted the trustee of the funds for those investors. Barnes Bay has shown no circumstance in which it would be able to enforce such a trust or to assert a

claim on behalf of the investors as their trustee.

146. In the premises Barnes Bay

- (a) has furnished no evidence that the investors and itself had arrived at any express or implicit agreement with regard to the payment of the deposits that could constitute some special arrangement creating a trust; and
- (b) has given no other reason why it should be inferred that the deposit monies were to be held on trust
- (c) has shown no circumstance in which it would have the standing to enforce a trust of funds held by a third party in favour of the investors if such a trust existed.

147. At common law a purchaser who has not received title is entitled to an equitable lien in the property for so much of the purchase price as has been paid to the vendor. Assuming that the deposit was paid to the vendor or to a third party as agent for the vendor, so that a purchaser's lien could come into existence such a lien could not possibly impact the interest of the holder of a legal charge on the property. A Torrens system of land registration such as is in operation in Anguilla confers upon a registered proprietor a title to the interest in respect of which he is registered "...free from all other interests and claims whatsoever, but subject to the leases, charges and other incumbrances and to the conditions and restrictions, if any, *shown in the register*." (**Section 23 of the Registered Land Act**) The only unregistered interests to which such land is subject are "...such liabilities, rights and interests as affect the same and are declared by section 28 not to require noting on the register", that is to say, the liabilities, rights and interests listed as overriding interests in **Section 28** of the **Act**. A purchaser's lien is not a legal interest shown in the land register nor is it one of the interests listed as overriding interests in **Section 28**. It is not the type of interest which could affect an entitlement or priority interest secured by a registered legal charge on the property.

148. Regarding interests not shown on the Land Register or falling within the category of an overriding interest the Privy Council in **Creque v. Penn [2007] UKPC 44** at **paragraph 16** confirmed that registration confers upon a registered proprietor a title to the interest in respect of which he is registered which is immune from adverse claims, other than those specifically excepted. However, “.... the Land Registration Act was not intended to exclude the possibility of a personal remedy which has no effect on the principle of indefeasibility of title.” Thus, a party to a transaction may as against another party to that transaction assert a personal claim or enforce a personal obligation arising between them. The Board in coming to this conclusion noted at **Paragraph 10** that “...the position as against a third party (such as a mortgagee or a later purchaser deriving title from the original purchaser) would be quite different, because then it would be a matter of title, not personal obligation.”. Such a party may not assert a proprietary claim such as the existence of an equitable lien against a third party such as a mortgagee because that would amount to an attempt to undermine the indefeasibility of that third party's title. Put another way even if the investors were entitled to assert a purchaser's lien against Barnes Bay for their deposits, they could assert no such right against the chargee SOF and Barnes Bay could not assert such a lien against the Property on their behalf.
149. It is simply untenable for Barnes Bay to argue, as it does that the Purchaser SOF took the Property subject to an equitable interest that those investors held because it was not a bona fide purchaser. The sale of the Property by auction was not a wrong done to the company: it was done in the exercise of a statutory right that the Chargee SOF undoubtedly had to sell the same, given that Barnes Bay had defaulted on its obligations under the charge and had been given due notice required by **Section 72 of the Registered Land Act**. SOF was permitted by statute to bid at the sale See: **Section 75 (4) of the Registered Land Act**. As I see it at best Barnes Bay could challenge the fairness of the process by which the sale was conducted (other than the sales procedures specifically sanctioned by the

United States Bankruptcy Court).

150. Moreover, Barnes Bay's contention that SOF took the Property subject to an equitable interest vested in the investors because "...it is to be inferred that it had notice of the investor's equitable interests" is unarguable. An essential characteristic of the Torrens system of land registration is the 'curtain' principle i.e., that a transferee of an interest in registered land, upon registration is not to be affected by actual or constructive notice of any pre-existing trusts or interests not appearing in the Land Register and is not required to inquire into the circumstances of the registration of any previous proprietor. Thus, in **Creque v. Penn [2007] UKPC 44 Lord Walker of Gestingthorpe** giving the judgment of the Privy Council stated at **paragraph 15** that "[T]here are some rules of equity (notably the general rule as to the effect of actual notice) which plainly are inconsistent with section 23 of the Land Registration Act (effect of registration with absolute title) and do not apply to registered land..."
151. For the foregoing reasons I would strike out the claim for an equitable lien over the Property.

Claim for rescission, or alternatively avoidance of the sale

152. The Claimant claims that the alleged wrongful acts of the Defendants rendered the arrangements for sale of the Property to be voidable. It claims to be entitled to rescind or alternatively to avoid the sale by auction of the property some 6 years after the sale was completed, having (i) known of the proposed arrangements for SOF to extend debtor in possession financing to the Claimant company in the context of the Chapter 11 reorganization process then being pursued; (b) having known at the time of the proceedings and subsequent auction sale of the Property of the alleged "inducements" offered to the third Defendant and the sales procedures approved by the United States Bankruptcy Court; and (c) having taken no interim step to challenge the validity of such sale or the adequacy of the sale procedures. In the first place the Claimant was not a party to the agreement for

sale resulting from the auction of the Property so that there is no agreement for sale for the Claimant to rescind. 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.

Credit bidding

153. I observe in relation to credit bidding that at common law a mortgagee exercising his power of sale or an agent acting for him could not purchase the charged property from himself: this was seen as an irreconcilable conflict of interest. For this reason, the concept of credit bidding in connection with the exercise of a mortgagee's power of sale was untenable. There was no such objection in principle where the auction was conducted not by the mortgagee but by the Court or by an independent auctioneer, see: **Tse Kwong Lam v Wong Chit Sen, [1983] 1 W.L.R. 1349**. I note however that in contrast to the position at common law **Section 75. (1) of the Registered Land Act** authorizes a chargee exercising his power of sale to "sell or concur with any person in selling the charged land... by public auction ..., subject to such reserve price and conditions of sale as the chargee thinks fit, with power to buy in at the auction..." Thus, in Anguilla a mortgagee exercising his power of sale is permitted to, in effect purchase property at a public auction conducted by himself. I have not been able to uncover any instance in which a chargee who was permitted to bid at an auction for the sale of charged property and who was entitled to set the conditions of sale was precluded from including a right to credit bid part or all the amount of the secured debt as part of the conditions of the sale and I see no reason in principle why a chargee should be so precluded. In deciding whether reasonable steps have been taken by a mortgagee to obtain the best price, the steps taken by the mortgagee and those acting with it must be

looked at in the round. The issue is commercial one, to be viewed in practical commercial terms, see: **Newport Farm Ltd & Ors v. Damesh Holdings Ltd & Ors (New Zealand) [2003] UKPC 54 at paragraph 24**

154. In the sale under review however, the Claimant Barnes Bay by its own motion sought and obtained the sanction of the United States Bankruptcy Court for the proposed sale procedures including the approval of the Court for the chargee SOF to credit bid at the sale. That order was made on the basis that the procedures so approved were compliant with Anguilla law. I have already indicated my view that it would be an abuse of process for Barnes Bay to contest the correctness or validity of procedures specifically approved of by the United States Bankruptcy Court such as the right of SOF to credit bid at the auction.

Jurisdictional gateways

155. The Defendants/Applicants do not dispute the fact that the claims fall within one or more of the gateways specified in **paragraph 7.3** of the **CPR**. **CPR 7.3 (5)** provides with respect to claims in tort that a claim form may be served out of the jurisdiction if a claim in tort is made and the act causing the damage was committed within the jurisdiction or the damage was sustained within the jurisdiction. Barnes Bay says that the damage sustained by it as a result of the alleged fiduciary breach and/or alleged dishonest assistance and/or conspiracy to injure was the conveyance of the property out of its proprietorship by means of an auction sale which was carried out in Anguilla by procedures which were inadequate and on terms which did not comply with applicable laws. **CPR 7.3 (6)** provides with respect to claims involving property that a claim form may be served out of the jurisdiction if the whole subject matter of the claim relates to property within the jurisdiction. As to claims made for restitution **CPR 7.3 (9)** provides that a claim is made for restitution where the defendant's alleged ability arises out of acts which, wherever committed, were to the detriment of a person domiciled within the jurisdiction.

156. Accordingly, I find that the claimant has established that the case falls within one of the gateways specified in **paragraph 7.3 of the CPR**.

Service out of the jurisdiction/Forum conveniens

157. In **Spiliada Maritime Corpn v Cansulex Ltd (The Spiliada) [1987] AC 460**, Lord Goff of Chieveley identified as the underlying aim in all cases of disputed forum, "to identify the forum in which the case can be suitably tried for the interests of all the parties and for the ends of justice": **p 480G**.
158. In this case the burden rests on Barnes Bay to establish that Anguilla is clearly and distinctly the most appropriate forum for the trial of the dispute, and that in all the circumstances the court ought to exercise its discretion to permit service of the proceedings out of the jurisdiction. see: **Nilon Limited v Royal Westminster Investments S.A. [2015] UKPC 2** at [13].
159. Barnes Bay seeks relief against the First Defendant Starwood, the Second Defendant SOF the fourth Defendant KDIP and the Fifth Defendant Kor Duo II on the basis that they were parties to a conspiracy to injure it by unlawful means. The conspiracy alleged is that Starwood and SOF offered an array of significant benefits to the Third Defendant Mr. Korzen to induce him to cause Barnes Bay to agree to a debtor in possession financing proposal "...which proposal was to give substantial control of the Claimant's affairs to [Starwood and/or SOF] and which proposal was designed to achieve a swift progression to an auction and sale of the property to [SOF] and /or to agree to the sale of the property to [SOF]." The unlawful means identified is Mr. Korzen's breach of his fiduciary duty to the company in that, by entering into arrangements with Starwood and SOF to receive the stated benefits, allegedly without disclosing the same to Barnes Bay he placed himself in a position in which his duty to Barnes Bay and his personal interest were in conflict. Barnes Bay asserts that Starwood and SOF by in effect bribing Mr. Korzen to use his position as director and his influence on the other members of the Board to bring about the

impugned transaction conspired to injure it by unlawful means, namely Mr. Korzen's alleged breach of duty. It says that the benefits conferred upon Mr. Korzen included an indemnity to himself, KDIP and Kor Duo II against "...a broad set of claims and causes of action". Hence BarnesBay claims that KDIP and Kor Duo II "...by entering into the inducements" took part in the conspiracy. Further it is claimed that "...by entering into the inducements" Starwood, SOF, KDIP and Kor Duo II dishonestly assisted Mr. Korzen in his alleged breach of fiduciary duty.

160. The case is largely concerned with alleged torts of unlawful means conspiracy (the unlawful means being an alleged breach of fiduciary duty by a director) dishonest assistance. Where it is alleged that a tort had been committed within a particular jurisdiction prima facie starting point is that the court having jurisdiction on that basis would be the most appropriate forum, see **The Albaforth [1984] 2 Lloyd's Rep 91, 96** Robert Goff LJ where he posited that

"...If the substance of an alleged tort is committed within a certain jurisdiction, it is not easy to imagine what other facts could displace the conclusion that the courts of that jurisdiction are the natural forum."

161. In **VTB Capital plc v Nutritek International Corpn (SC(E)) [2013] 2 AC 337** Lord Mance JSC noted at **paragraph [18]** that ultimate over-arching principle is that stated in **The Spiliada**, and, if a court is not satisfied at the end of the day that England is clearly the appropriate forum, then permission to serve out must be refused or set aside. In that case it was held that the place of commission of the torts was a relevant starting point, rather than a presumption, in determining the appropriate forum for a tort claim and would, viewed in isolation, normally establish a prima facie basis for being treated as the appropriate jurisdiction. In the context of an international transaction, however, its significance might be overshadowed by countervailing factors.

162. Likewise, although the fact that the governing law of the alleged torts was

English law was in general a positive factor in favour of trial in England, that factor had less force where the issues were factual rather than legal.

163. The Claimants argue that Anguilla is clearly the appropriate forum for the trial of the action because-

- (a) the Claimant company is being liquidated in Anguilla, and that the liquidation is subject to the laws of Anguilla and is being conducted under the supervision of the Anguilla Courts.
- (b) since the Claimant company had been incorporated in Anguilla, the fiduciary duties owed by the directors to the company existed under the laws of Anguilla and were to be measured by reference to those laws.
- (c) The Property is situated in Anguilla
- (d) The claims are subject to the laws of Anguilla and will most efficiently be determined both from a cost and from an accuracy perspective by Anguillan judges and on the basis of legal submissions by Anguillian lawyers. The governing law is always a critical if not the most important factor in assessing the most appropriate forum.
- (e) The impact of the case will be greatest in Anguilla, the hotel being the largest hotel in Anguilla.

164. I place little importance on factor (a) above mentioned: the place of liquidation of a company provides little assistance in determining where a dispute concerning the company in liquidation can be suitably tried for the interests of all the parties and for the ends of justice.

165. A more significant consideration is that an allegation of breach of fiduciary duty on the part of the Third Defendant, Mr. Korzen is of pivotal importance to the Claimant's case. The law of the place of incorporation applies to the duties

inherent in the office of director and it is irrelevant that the alleged breach of duty was committed, or the loss incurred, in some other jurisdiction, see: **Base Metal Trading Ltd v Shamurin [2004] 2 CLC 916 per Arden, LJ at [69]**. Thus, the fiduciary duties owed by Mr. Korzen to Barnes Bay is a matter of Anguilla law.

166. A further consideration is that the property is situate in Anguilla. One of the remedies sought by the Claimant is avoidance of the sale. A foreign court could make only orders in personam with regard to the re transfer of the property, (assuming that SOF was still the registered proprietor)
167. Although this is a factor in favor of Anguilla as the appropriate forum it is not a particularly important factor in this case. Here the sale of the property was the realization of a chargee's security to a person authorized by the Registered land Act to bid at the sale: the chargee SOF. The mere fact that the sale took place did not render it unlawful or subject to avoidance or invalidation. Where it is contended that a chargor or any other person has suffered damage by reason of an irregular exercise of the chargee's power of sale **Section 75 (3) of the Registered Land Act** provides that such a person "...shall have his remedy in damages only against the person exercising the power." The claim for avoidance of the sale has been struck out. Nonetheless I appreciate that the assessment of damages, should the Claimant have suffered any by reason of an irregular exercise of the chargee's power of sale may be more efficiently carried out in Anguilla.
168. For similar reasons I disregard the Claimant's assertion that impact of the case will be greatest in Anguilla. If and to the extent that that factor is relevant, I observe that Barnes Bay is in liquidation. The Property has already been transferred to new owners/operators and there is no prospect that the ownership of that property will be affected by the litigation.

169. An important question is where the substance of the alleged torts committed? There is no indication in the pleadings as to where it is alleged that the common design to induce Mr. Korzen to bring about the impugned arrangement between Barnes Bay and SOF was formed. However, the persons allegedly party to the scheme Starwood and SOF are United States entities; the commitment agreement under and by virtue of which the alleged objective of the conspiracy was supposedly accomplished and the procurement of which was the purpose for which inducements had been offered to Mr. Korzen was made in the United States. Moreover, it was made in the context of contemplated proceedings under Chapter 11 of the United States Bankruptcy Code, and expressly provided that it was to be governed and construed in accordance with the laws of the state of New York. In other words, the aim of the alleged conspiracy was to induce a director of the Claimant company to breach his fiduciary duty to that company by causing that company to enter into a contract with the Second Defendant SOF, which contract was to be governed by New York law and provided for exclusive jurisdiction for the courts of New York. This was allegedly done with a view to giving control of the Claimant company's affairs to SOF thereby enabling SOF to achieve "... a swift progression to the auction and sale of the Property to [itself]," that is to say, to facilitate SOF's obtaining proprietorship of the Property (which was located in Anguilla) unfairly and illegitimately.
170. In **Metall und Rohstoff A.G. v. Donaldson Lufkin & Jenrette Inc. and Another [1990] 1 Q.B. 391** the **Court of Appeal for England and Wales** considered circumstances in which it was alleged that persons in the United States acted in concert to induce a breach of contract in consequence of which a party in London sustained damage There **Slade LJ a pages 449 Paras. A to D** observed

"The damage which M. & R. suffered as a result of the trading contract breaches was, in our view, suffered in London: M. & R. did not receive

the ledger credit payment which should have been made in London, did not receive the warrants which should have been delivered in London and suffered the detrimental closing out of their accounts in London. Similarly, it appears to us that the damage caused to M. & R. by the compromise agreement breach was suffered in London since security which should have been available to M. & R. in London was (it is said) wrongly charged in London and paid out of London.

If the acts of inducement alleged are viewed in isolation, the torts alleged here in our judgment, would, be properly regarded as, in substance, torts committed in New York. But if, as we have concluded, the question is where as a matter of substance the torts were committed, the matter must be looked at more broadly, taking account of the breaches (particularly the effective breaches) induced and the resulting damage. On this approach we conclude that as a matter of substance the torts were committed in London. This is the view which the judge took, and we agree with him."

171. If, as contended by the Claimants the conspiracy was directed at procuring the transfer of Barnes Bay's property in Anguilla to SOF by unfair and/or illegitimate means, the transfer of the property and any loss or damage resulting would have occurred in Anguilla notwithstanding that the alleged common design took place in the United States between United States individuals and entities. Accordingly, I hold that as a matter of substance the tort of unlawful means conspiracy, if it was committed at all was committed in Anguilla.
172. Mr. Korzen is alleged to have breached his fiduciary duty to Barnes Bay by accepting undisclosed benefits in exchange for causing that company to enter into the impugned arrangements with SOF. As previously explained the fiduciary duties owed by Mr. Korzen to Barnes Bay is a matter of Anguilla law.

The issue of dishonest assistance in relation to the alleged breach of that duty must necessarily be determined in the same proceedings.

173. I conclude that in relation to the alleged torts of unlawful means conspiracy and dishonest assistance and the alleged breach of fiduciary duty the governing law is the law of Anguilla.
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 members of its board; whether in acting to secure debtor in possession financing in the circumstances of the financial difficulties facing Barnes Bay at the time Mr. Korzen acted in the best interest of the company 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; whether the other defendants combined to in effect suborn Mr. Korzen to cause Barnes Bay to agree to the impugned debtor in possession proposal; whether the actions of the Defendants amounted to giving assistance to Mr. Korzen in the alleged breach of fiduciary duties and if so whether such acts were in fact 'dishonest'; whether the company suffered any loss and damage as a result of Mr. Korzen's alleged breach of fiduciary duty and if so, what loss - 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.
175. I bear in mind that the courts in the various jurisdictions in the United States recognize and impose tortious liability for unlawful means conspiracy and for dishonest assistance in breaches of fiduciary or other duties. I also bear in mind that courts adjudicating upon the issues in this case in a United States jurisdiction can, where necessary, receive expert evidence as to Anguilla law. The United States Bankruptcy Court received evidence as in relation to a

chargee's power of sale under the laws of Anguilla and as to the legal requirements for the conduct of an auction sale in exercise of that power.

176. Notwithstanding the foregoing, looking at the matter in the round I conclude that Anguilla is the appropriate forum for trial of the case. I have already indicated my view that the governing law will be the law of Anguilla law, both in relation to the alleged torts of unlawful means conspiracy and dishonest assistance and in relation to the allegation of breach of fiduciary duty by a director of a local company. I have heard no submissions as to the potential witnesses and where they are likely to reside or as to where the documentary evidence is likely to be found. In **VTB Capital plc v Nutritek International Corpn, (supra)** Lord Mance JSC observed at **paragraph [62]** that this was a factor at the core of the question of appropriate forum. I conclude that there are no sufficient countervailing factors to displace the prima facie starting point that the court having jurisdiction on the basis of the locus delicti would be the most appropriate forum.
177. I also note in passing that the claim would probably be time barred in any jurisdiction within the United States where the above action may otherwise have been brought. In **Spiliada Maritime Corpn v Cansulex Ltd (The Spiliada) (supra)** Goff of Chieveley discussed such a possibility at **p.483 C to 484 B -**

“Let me consider how the principle of forum non conveniens should be applied in a case in which the plaintiff has started proceedings in England where his claim was not time barred, but there is some other jurisdiction which, in the opinion of the court, is clearly more appropriate for the trial of the action, but where the plaintiff has not commenced proceedings and where his claim is now time barred....But, in my opinion, this is a case where practical justice should be done. and practical justice demands that, if the court considers that the plaintiff acted reasonably in commencing proceedings in this country, and that, although it appears

that (putting on one side the time bar point) the appropriate forum for the trial of the action is elsewhere than England, the plaintiff did not act unreasonably in failing to commence proceedings (for example, by issuing a protective writ) in that jurisdiction within the limitation period applicable there, it would not, I think, be just to deprive the plaintiff of the benefit of having started proceedings within the limitation period applicable in this country. This approach is consistent with that of Sheen J. in *The Blue Wave* [1982] 1 Lloyd's Rep. 151. It is not to be forgotten that, by making its jurisdiction available to the plaintiff - even the discretionary jurisdiction under R.S.C., Ord. 11 - the courts of this country have provided the plaintiff with an opportunity to start proceedings here; accordingly, if justice demands, the court should not deprive the plaintiff of the benefit of having complied with the time bar in this country."

178. Even if I had concluded that a United States jurisdiction was clearly the appropriate forum this consideration may have rendered a trial in Anguilla necessary for the purpose of doing substantial justice between the parties.

Disposition

179. I make the following orders-
1. The application to strike out parts of the first affidavit of Mr. John Greenwood is refused.
 2. The application to amend the claim form and statement of case to change the name of the first Defendant appearing in the claim form and statement of case from "Starwood Capital Group" to "Starwood Group Global LP." is granted.
 3. The application 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 is denied.

4. Notwithstanding the preceding order, this Court declares that it would be an abuse of the process of the court for the Claimant 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 Claimant to now pursue a claim against any of the Defendants for breach of a duty to take reasonable steps to obtain a proper price for the Property.
5. The application for an Order setting aside service of the Claim Form, Statement of Claim and ancillary documents on the Defendants for material non-disclosure is refused.
6. The application to aside service of the Claim Form, Statement of Claim and ancillary documents on the Defendants is refused in relation to the First, Second and Third Defendants.
7. An Order is hereby made striking out the case against the Fourth and Fifth Defendants and setting aside service of the Claim Form, Statement of Claim and ancillary documents upon those Defendants.
8. Paragraph 19 of the Statement of Claim by which the Claimant claims an equitable lien over the Property in the amount of US\$ 65 million is struck out, Paragraph 3 of the listed claims for relief in which such an equitable lien is claimed is also struck out.
9. Paragraph 14 of the Statement of Claim by which the Claimant claims rescission, or alternatively avoidance of the sale is struck out, Paragraph 1 of the listed claims for relief in which such rescission, or alternatively avoidance of the sale is claimed is also struck out.

10. The Court holds that Anguilla is clearly the appropriate forum for trial of the case.

11. I will hear the parties on the question of costs on a date to be set by the Registrar after consultation with the parties.

Sydney A. Bennett QC

High Court Judge (Ag.)

BY THE COURT

REGISTRAR