

**EASTERN CARIBBEAN SUPREME COURT
IN THE HIGH COURT OF JUSTICE
BRITISH VIRGIN ISLANDS
(COMMERCIAL DIVISION)**

CLAIM No: BVIHC (COM) 2019/0141

**IN THE MATTER OF DONDORE INCORPORATED
AND IN THE MATTER OF THE INSOLVENCY ACT 2003**

BETWEEN:

ALBERT COURT (WESTMINSTER) MANAGEMENT COMPANY LTD

Applicant

and

VICTORIA FETAIMIA

Intervenor Applicant/Respondent

DONDORE INCORPORATED (IN LIQUIDATION)

Second Respondent

Appearances:

On 18th November 2019:

Mr. John McCarroll SC and Mr. Stuart Rau of Harneys for Albert Court (Westminster) Management Co Ltd

No appearance by Dondore Inc or anyone else, but Ms. Philippa O'Sullivan of AMS Law submitted the affidavit of the supporting creditor, Mr. Richard Hitt, the sole director and sole shareholder in law of Dondore Inc

On 30th July 2020:

Mr. John Carrington QC of Sabals Law for Mrs. Fetaimia

No appearance by Dondore Inc or anyone else

On 4th April 2022:

Mr. Jonathan Addo and Ms. Jhneil Stewart of Harneys for Albert Court (Westminster) Management Co Ltd

Mr. John Carrington QC of Kendell Law for Mrs. Fetaimia

No appearance by anyone else

On 4th May 2022:

Mr. Stephen Moverley Smith QC, with him Mr. John McCarroll SC and Mr. Jonathan Addo of Harneys for Albert Court (Westminster) Management Co Ltd and Harneys

Mr. John Carrington QC of Kendell Law for Mrs. Fetaimia

Ms. Lisa Walmisley of Bedell Cristin for the liquidators of Dondore Inc
Mr. Stuart Rau in person
Mr. Lewis Hunte QC and Mr. Dan Wise of O'Neal Webster for Mr. Hitt and Ms. O'Sullivan

2019 November 18
(appointment of liquidators)
2020 July 30 (rectification of register)
2022 April 4 (assessment of costs)
2022 May 4
(argument on draft judgment)
2022 May 5 (written judgment)

JUDGMENT

- [1] **JACK, J [Ag]:** This matter first came before me on 18th November 2019, when Albert Court (Management) Co Ltd (“Management”) applied for the appointment of liquidators over Dondore Inc (“Dondore”). Dondore’s only asset is a flat in Albert Court, London, near the Albert Hall. It was at one point worth about £2½ million sterling. Its current value is in dispute. This judgment gives reasons pursuant to rule 21(2) of the **Court of Appeal Rules 1968** for my decision on 18th November 2019. In order to understand what occurred on 18th November 2019 I have set out the procedural history. I also determine an application dated 28th April 2022 made by Management for a seal and gag order in respect of this judgment and other relief. There is also a complaint that the intervenor (“Mrs. Fetaimia”) broke the embargo on an earlier draft of this judgment which I had circulated to the parties and interested persons.

Reasons for making the order of 18th November 2019

- [3] At the hearing on 18th November 2019, Management was represented by Mr. John McCarroll SC. With him was Mr. Stuart Rau, both then of Harneys. (Mr. Rau has since moved firms.) There was one supporting creditor, Mr. Richard Hitt, who did not appear. He claimed to be owed £1,260,130 sterling from Dondore. In his affidavit in support made on 7th November 2019 he said: “I am the sole director and sole shareholder.” He earlier said: “I support the

application.” Mr. Rau swore an affidavit on Dondore’s behalf citing an email from Ms. Phillipa O’Sullivan of AMS Law, Mr. Hitt’s BVI lawyers, which stated that Mr. Hitt was the 100 per cent ultimate beneficial owner of Dondore. Mr. McCarroll SC had filed a skeleton argument. In it (after dealing with various procedural matters) he said:

“11. ...[T]he Company has confirmed that it does not oppose the Application (as set out in the affidavit of Richard Hitt dated 8 November 2019 and its exhibit.

12. As set out in the affidavit of Stuart Rau dated 1 November 2019, the Application was made on the basis of a judgment debt for GBP 11,470.32 dated 31 May 2019 plus interest at 8% per annum.

13. The principal amount of the judgment debt of GBP 11,470.32 was paid by the Company on 18 October 2019.

14. The interest due on the judgment debt (totalling GBP 354.48 as of 30 October 2019) was not paid, and so a small proportion of the debt forming the basis of the Application remains due and owing.

15. Further, additional sums are due and owing from the Company to the Applicant, on the basis of which the Applicant continues to seek the appointment of the Proposed JLs.

16. By a lease dated 19 May 1987 (the Lease), made between Lingo Corporation N.V. (1), Albert Court (Westminster) Management Company Limited (i.e. the Applicant) (2) and Citytowns Ltd (3), the property at 5a Albert Court, Prince Consort Road, London SW7 2BH was let to the Company’s predecessor in title for a term of 125 years from 25 March 1976. The leasehold title is currently vested in the Company. The Applicant is the current management company pursuant to the lease.

17. Pursuant to the Lease and an oral licence for storage space the following sums are immediately due and payable by the Company (the Additional Debts):

a. Service and Maintenance charges and rent due and payable on demand under clauses 2(1) and 3(D)(ii) amounting to GBP 10,452 and licence fees due and payable amounting to GBP 1,400. Written demands for these sums were sent to the Respondent on 30 October 2019 at the address of the leased property pursuant to clause 9(b) of the lease.

b. Legal fees incurred by the Applicant and due from the Company [under] clause 2(5) of the lease amounting to GBP 21,063.21. These costs have been incurred by the Applicant in the pursuit of proceedings in the UK for Forfeiture of the said lease and a Claim for Possession of the leased premises. A demand for payment of these sums was sent to the registered agent of the Company on 31 October 2019.

18. In total, GBP 33,269.69 remains due and owing. Interest on these sums continues to accrue.”

- [4] The total due at the date of the hearing was a small amount of interest on the judgment debt, the fresh service charges and the legal fees. There appeared to be no dispute about the first two elements (although the interest outstanding was less than the \$2,000 threshold for appointing liquidators). The claim for legal fees was problematic for these reasons.
- [5] I have been since 2004 what is now a judge of the First-tier Tribunal (Property Chamber) (Residential Property), so I am familiar with landlord and tenant disputes of the type between Management and Dondore. I was well aware that there are severe restrictions on forfeiture of leases of residential property. A lease cannot be forfeited for non-payment of rent, service charges or administrative charges unless at least £350 are outstanding or have been outstanding for over three years: **Rights of Re-entry and Forfeiture (Prescribed Sum and Period) (England) Regulations 2004**.¹ This provision is of negligible practical relevance to service charges and administrative charges, because there are separate (and much more onerous) provisions in respect of forfeiture for non-payment of such monies. The £350 limit is only relevant to service charges and administrative charges where they have been established by a judicial decision or agreement at less than the limit, which is rare in practice. The current rent on the flat is £200 per annum payable in two instalments on Lady Day and Michaelmas.
- [6] Forfeiture for breach of a covenant other than non-payment of rent is a two-stage process: **Housing Act 1996**² section 81(1)(a) (for service charges and administrative charges) and **Commonhold and Leasehold Reform Act 2002**³ section 168 (for all other breaches⁴, except non-payment of rent). There are exceptions where the tenant accepts the breach: sections 81(1)(b) and 168(2)(b) respectively. Subject to these exceptions, it is only once a

¹ 2004/3086, made under section 167(1) of the Commonhold and Leasehold Reform Act 2002.

² 1996 c. 52

³ 2002 c. 15.

⁴ This is the effect section 169(8).

breach of covenant is established by (in England) the First-tier Tribunal or a relevant court that a landlord can serve a notice under section 146 of the **Law of Property Act 1925**.⁵

- [7] There was no evidence before me that the proceedings for a money judgment had been for the purpose of later serving a section 146 notice. Generally money judgments are sought so that a debt is paid rather than for other purposes, so there seemed a question as to whether the legal fees were recoverable under clause 2(5): **No 1 West India Quay (Residential) Ltd v East Tower Apartments Ltd**,⁶ distinguishing **Freeholders of 69 Marina, St Leonards-on-Sea v Oram**.⁷
- [8] What I did not realise is that the legal fees (if payable at all) were not payable to Management at all. In this regard para 17.b of Management's skeleton asserts that the legal fees were payable to Management. This part of the skeleton reflects what is said in Mr. Rau's first affidavit.
- [9] The reason Management had no claim to the legal fees is this. The lessor is Albert Court (Freehold) Co Ltd ("Freehold"). By clause 2 the lessee enters covenants jointly with Freehold and Management and severally with each of them. However, this does not mean that Management has a debt claim for monies (such as rent) owed to Freehold or that Freehold has a claim for monies (such as service charges) owed to Management. (Freehold can forfeit for breach of the covenant to pay service charges to Management, but that does not give Freehold itself a freestanding claim in debt to monies owed to Management.) By clause 2(5) the lessee covenants "[t]o pay all costs [etc] incurred by the *Lessor* for the purpose of or incidental to the preparation and service of a notice under Section 146..." (My emphasis.) Thus only the legal fees incurred by Freehold are recoverable in debt. Management has no claim in debt for those fees, nor any claim for substantial damages for breach of the payment obligation under clause 2(5). Only Freehold has the claim. Management can make claims under the service charge provisions in respect of the legal fees incurred by both Management and Freehold: see Schedule 5 para (14). Management can then claim those legal fees back

⁵ 15 & 16 Geo V c 20.

⁶ [2021] EWCA Civ 1119, [2022] L&TR 10 at [57].

⁷ [2011] EWCA Civ 1258, [2012] L&TR 4.

from lessees through the service charge. (This is subject to section 20C of the **Landlord and Tenant Act 1985**,⁸ which gives a power to limit the recoverability of legal costs through the service charge account.) However, this does not give Management any direct claim against a lessee under clause 2(5).

[10] It follows that there was no ground for winding up Dondore on the application of Management for non-payment of the legal fees. (There were two other arguable points. First, once Management obtained a money judgment for £11,470.32 in unpaid service charges, the obligation to pay that sum under the lease was converted into a judgment debt under the doctrine of *transit in rem judicatam*, so there was no continuing breach of covenant which could found the service of a section 146 notice. Second the right to forfeit for breach of the covenant to pay those service charges to Management was lost by affirmation of the lease.⁹ If these arguments are right, the legal fees from the date of the money judgment could not refer to the potential service of a section 146 notice. However, this would not prevent a claim — at least in principle, if they were incurred in contemplation of service of a section 146 notice — for the legal costs incurred prior to the entry of judgment against Dondore.)

[11] I was aware of some of the issues about the legal costs associated with the forfeiture action (although I had not spotted that Management had no claim). However, it was clear that Mr. Hitt was accepting that Dondore should be liquidated and indeed supported Management's application to appoint liquidators. He said that he was the sole director and sole shareholder. In these circumstances, even if there were issues about the legal fees, the service charges nonetheless seemed to be due, so there was jurisdiction to appoint liquidators. Mr. Hitt was not concerned about the exceptionally short service of the fresh demands for service charge. I considered that I could appoint liquidators solely on the basis of the freshly claimed service charges, without hearing argument about the legal fees.

⁸ 1985 c. 17.

⁹ See *Dendy v Nicholl* (1858) 4 CB (NS) 376 at p 386 ("Here, there has been not merely a demand of the rent, but an action brought to enforce it. That seems to me to be an unqualified and conclusive act on the part of the landlord, shewing a determination on his part to treat the lessee as still continuing his tenant."), but cf *Golding v Martin*, where the significance of obtaining a money judgment before seeking forfeiture was not argued: [2019] EWCA Civ 446, [2019] Ch 489 at [5].

[12] So far as he claimed to be a supporting creditor, the debts claimed by Mr. Hitt were on their face unusual and aroused suspicion. Most of the items were said to be due from 2009, so questions of limitation would arise. The biggest items were his director's fees at £5,000 per month, said to total £590,000, and legal fees owed to Joelson Law of £524,630. (It was unexplained that this referred to the litigation to which I shall come and of which I was unaware on 18th November 2019.) These, however, were in my judgment matters for the liquidators to determine. They gave rise to no reason in my judgment to refuse Management's application. I did not pick up on the fact, briefly referred to in Ms. Bolt's affidavit in support of the application, that Mrs. Fetaimia was the beneficial owner of Dondore. Since I overlooked this fact, I did not consider whether suspicions about Mr. Hitt's behaviour were relevant to the propriety of his consenting to the appointment of liquidators. Mr. Rau's affidavit of 1st November 2019 recited what Ms. Philippa O'Sullivan of AMS Law said in her email of 6th October 2019 to Harneys, namely that Mr. Hitt was the "100% UBO" of Dondore. This I did notice.

[13] I considered that it was appropriate to waive any requirement to make a formal amendment to the application or readvertisement. I laid great weight on the fact that the only person able to represent the company, Mr. Hitt, who I understood (due to my overlooking the evidence of Ms. Bolt on the involvement of Mrs. Fetaimia) was the sole beneficial owner, the sole shareholder and the sole director of Dondore, wanted the company to be placed into compulsory liquidation.

[14] Taking the existence of the service charge debt and Mr. Hitt's active support of the liquidation into account, in the exercise of my discretion I made the order for the appointment of liquidators.

This Court learns of the English litigation

[15] Subsequently on 30th July 2020, Mrs. Fetaimia applied to be recognized as the shareholder of Dondore. This was the first time I learnt that there had been litigation in England involving Mrs. Fetaimia. It is possible (I have not been able to trace emails that long ago) that in July 2018 I read a summary on Lawtel of the judgment delivered 18th July 2018 by Ms. Amanda Tipples QC (as she then was) sitting as a deputy High Court judge in England. However, by

November 2019 I would have completely forgotten it. For practical purposes, July 2020 was the first I knew of the judgment in connection with the proceedings in this jurisdiction. The judgment concerned an action between Dondore and Mr. Hitt, as claimants, and Mrs. Fetaimia and her husband, as defendants.¹⁰ The judgment speaks for itself. The English Court clearly had jurisdiction to determine the matter because all the parties voluntarily participated in the litigation. Ms. Tipples determined that Mrs. Fetaimia was the beneficial owner of the shares in Dondore and made a declaration to that effect. She dismissed Dondore's claim for possession of the flat. She also made very damaging findings about Mr. Hitt's honesty. An application for permission to appeal was refused by Patten LJ shortly afterwards on 17th August 2018. Ms. Tipples' judgment was final and unappealable.

Events in England

[16] Shortly after the Tipples judgment, Treon Law, Mrs. Fetaimia's English solicitors, had been put in in contact with AMS Trustee Ltd ("AMS Trustee"), Dondore's registered agents. On 28th August 2018, Joelson, Mr. Hitt's solicitors in the English proceedings, said that AMS Trustee wanted Mrs. Fetaimia's contact details so they could do background (presumably "know your client") checks on her. There was then a sea-change. On 5th September 2018 AMS Trustee said that they "don't believe the UK court has jurisdiction in the BVI over this matter and we have sought advice that has said a BVI Court order should be obtained." The first part of this statement is incorrect. The UK court (i.e. the English High Court) did have jurisdiction which would be recognized in the BVI over the matter. All the parties, Dondore, Mr. Hitt and the Fetaimias had submitted to the jurisdiction of the English court and fought the merits over five days. The declaration as to the beneficial ownership of the shares in Dondore bound the parties, in this Territory just as much as in England. The contrary is in my judgment unarguable and no competent BVI Legal Practitioner would have advised that the English High Court had in the events which had happened no jurisdiction to determine the beneficial ownership of the shares.

[17] However, the advice that Mrs. Fetaimia should obtain an order from this Court was sensible. It gave her a BVI document confirming her beneficial ownership and, once she was

¹⁰ [2018] EWHC 1832 (Ch).

registered, her legal title. If the registered agents were unwilling to rectify the register of shareholders she could obtain an order from this Court effecting the rectification: **Wanda Fong Jerri v Meridian International Holdings Ltd.**¹¹

[18] Mr. Hitt refused to execute a share transfer, so Zacaroli J sitting in the English High Court on 10th April 2019 ordered pursuant to section 39 of the **Senior Courts Act 1981**¹² that a share transfer of the shares in Dondore be executed by a Chancery Master. Master Teverson executed the share transfer on 30th April 2019. Now it is arguable that this Court would consider that, by submitted to the jurisdiction of English courts, Mr. Hitt was permitting the English court to order that the share transfer might be executed by a Chancery Master in the manner in which it was. If that is right, the order of Zacaroli J did not offend the prohibition on this Court recognising steps taken by a foreign court to enforce a judgment by way of execution in this jurisdiction: see **Re Lenux Group Ltd; JSC Mezhdunarodniy Promyshlenniy Bank v Lenux Group Ltd.**¹³ The position as to the validity in this jurisdiction of the Teverson transfer is, however, unclear and AMS cannot be blamed for wanting the security of an order of this Court.

[19] On 5th November 2018 Treon Law informed Management of the Tipples judgment. Management and Freehold have been advised throughout by the well-known firm of English solicitors, Russell-Cooke LLP (“Russell-Cooke”). The judgment of Ms. Tipples QC was readily available on BAILII. Mr. Rubie, the chairman and a director of both Management and Freehold, accepts at paras 48 and 49 of his affidavit that they all knew the full facts before the hearing on 18th November 2019. (Indeed, they informed Harneys of the position: see Ms. Bolt’s affidavit of 30th September 2019 para 8.) On 25th January 2019, Russell-Cooke acknowledged to Treon Law that Mrs. Fetaimia was the *de facto* owner of Dondore.

[20] On 14th May 2019 Treon Law told Russell-Cooke that they were no longer instructed on Mrs. Fetaimia’s behalf, but they seem to have been reinstructed subsequently.

¹¹ [2019] ECSCJ No 399.

¹² 1981 c. 54, formerly the Supreme Court Act 1981.

¹³ [2021] ECSCJ No 445 at [15].

- [21] On 31st May 2019 the County Court Money Centre entered judgment against Dondore in favour of Management for £11,470.32, comprising £10,802.11 in respect of service charges with interest to the date of judgment and costs in addition. So far as appears from the papers (the claim form is missing), there was no claim for rent, which would in any event have been due to Freehold, not Management.
- [22] On 11th July 2019, Russell-Cooke on behalf of Freehold served a notice under section 146 of the **Law of Property Act 1925** which stated that Dondore had not paid £10,802 owing to Management under clauses 3(D)(i) and 3(D)(ii) of the lease. (As I have noted above, there is an issue as to whether there was any ongoing breach of covenant given the conversion of the service charge debt under the lease into a judgment debt. Reliance on the money judgment as a determination of a breach involves reading section 81(1)(a) of the **Housing Act 1996** and section 168(2)(c) of the **Commonhold and Leasehold Reform Act 2002** as referring not just to declarations by a Court of a breach of covenant, but as including money judgments.)
- [23] On 21st October 2019, possession proceedings brought by Freehold against Dondore to effect forfeiture of the lease were listed for hearing in the County Court sitting at Wandsworth. Mrs. Fetaimia appeared by counsel. The proceedings were dismissed with no order for costs. There is a dispute as to precisely what was said by counsel for Freehold on that day. However, it seems that Mrs. Fetaimia understood (whether rightly or wrongly is unclear on the evidence) that no application before this Court to appoint liquidators was proceeding.

Events in this Territory

- [24] On 7th November 2019, Ms. Philippa O'Sullivan of AMS Law, AMS Trustee's sister law firm, filed Mr. Hitt's affidavit in the current proceedings and paid the \$548.40 filing fee. She had the previous day emailed Mr. Rau at Harneys to give notice of Mr. Hitt's intention to appear as a supporting creditor on the part of Mr. Hitt and his claim to be owed £1,260,130 sterling.
- [25] On 30th July 2020 I ordered that the register of shareholders of Dondore be rectified to show Mrs. Fetaimia as the only shareholder. Although I see that the order I made referred to the Teverson transfer, in fact this was unnecessary to the decision to order rectification. The

declaration of Ms. Tibbles QC sufficed: see **Wanda Fong Jerrit v Meridian International Holdings Ltd** supra.

[26] On 9th September 2020 Mrs. Fetaimia applied to our Court of Appeal for an extension of time within which to appeal against my order of 18th November 2019. On 23rd November 2020 the Court of Appeal granted the application but ordered that Management's "costs of the application for an extension of time to appeal shall be borne by [Mrs. Fetaimia] in accordance with CPR 65.11(3)(b), such costs to be assessed if not agreed within 21 days of the date of this order." The assessment subsequently came before me on 4th April 2022. Although Pereira CJ delivered an oral judgment at the hearing in the Court of Appeal, no one had obtained a transcript of it. It was unclear whether the costs of the "extension of time" were intended to include the (very much more substantial) costs incurred by Management in considering the substantive merits of Mrs. Fetaimia's appeal, or solely the costs of the extension itself. The judgment of the learned Chief Justice would have assisted on this. In the event, the parties agreed the costs at \$75,000 plus \$10,000 for the costs of the costs assessment rather than have an adjournment to obtain the transcript.

[27] The Court of Appeal ordered an expedited hearing of the appeal. However, the listing of the matter has been stymied by the unavailability of a transcript of the hearing before me on 18th November 2019. (I have asked the Court Reporters to make a further search for the recording of the proceedings that day, but without success.) On 10th February 2021 Mr. Carrington QC, who then as now acts for Mrs. Fetaimia, asked for any notes which I had of that hearing. Unfortunately, he did not explain the precise need for these. If he had, then pursuant to rule 21(2) of the **Court of Appeal Rules 1968**, I would have endeavoured to produce a judgment like the present after looking at the hearing bundle for that hearing. Instead, in order to answer his request, on 11th February 2021 I had the following email sent to the parties by my assistant:

"I have referred Mr. Carrington QC's letter of 10th February 2021 to Justice Jack.

Justice Jack says that he does have some limited recollection of the case, because he had a colleague at the bar, now a circuit judge, who owned a flat nearby, so he knows the area around the Albert Hall. It is also rare for a supporting creditor to appear and Mr. Hitt's position was unusual.

There was, however, nothing to tip him off that the application to appoint liquidators was part of a scheme illegitimately to obtain monies from Mr. and Mrs. Fetaimia (if such it was). Indeed their names do not appear in the affidavits sworn in support of the application to appoint liquidators.¹⁴

In those circumstances, the judge says that before the hearing he would have checked that the necessary procedural steps had been taken. In view of the undisputed debt owed to the applicant management company, he granted the order. He would have had no reason to examine the validity of Mr. Hitt's claims, for that would be a matter for the liquidators. The length of the hearing would have been very short. Only the applicant seems to have appeared. The judge would have taken no note, because there were no issues with the application. The arguments were set out in Mr. McCarroll SC's skeleton."

If I had known the true facts on 18th November 2019

[28] If on 18th November 2019, I had been made aware of the Tipples judgment, then I would have adjourned the application for the appointment of liquidators in order that Mrs. Fetaimia might be served with the proceedings pursuant to rule 17(1)(b) of the **Insolvency Rules 2005**.¹⁵ Mr. Hitt denies that by consenting to and in supporting the appointment of liquidators he was acting in breach of his fiduciary duties to Dondore as a director. He says that Dondore owed monies, not just to Management and himself, but also to HM Revenue and Customs. He denied seeking to harm the interests of Mrs. Fetaimia. Mr. Hitt's position as now advanced by him was not known to me on 18th November 2018. There would still have been a concern as to whether his consent to the appointment of liquidators was given in breach of his fiduciary duties to Dondore.

[29] As a separate reason for adjourning, if I had been aware of the hearing of the possession action on 18th October 2019, I would have wished to have more information as to what precisely occurred there. Harneys say that on 1st November 2019 they recommended to Dondore and Russell-Cooke that Mr. Rau's affidavit be sent to Mr. Hitt and Mrs. Fetaimia. It is not entirely clear whether that occurred, but it is striking that Mrs. Fetaimia appeared by

¹⁴ As noted above, this was an error: Mrs. Fetaimia was mentioned in Ms. Bolt's affidavit.

¹⁵ Statutory Instrument No 45 of 2005, Laws of the Virgin Islands.

counsel at the hearing on 18th October, but did not appear before me on 18th November 2019. At the very least there seems to have been some misunderstanding.

- [30] I would also not have waived the procedural requirements for reamendment etc. It was only because of Mr. Hitt's consent that I did so, but his consent was potentially tainted by his improper motive. That potential motive was unknown to me,

After circulating the draft judgment

- [31] After the hearing on 4th April 2022, I prepared a draft judgment, which I distributed to the parties and to Ms. O'Sullivan with an invitation that I would list the matter for a hearing, if any party so desired. Management did. It issued an application dated 28th April 2022 seeking to have the hearing held *in camera* with a confidentiality club for information. This was largely because of comments I made about some of the lawyers. In the event, I have had affidavits from Ms. O'Sullivan, Mr. Rau and Mr. McCarroll SC, which I summarise below. In the light of these, it seems to me that any issues as to the behaviour of any lawyers should be a matter for the Court of Appeal on an application by Mrs. Fetaimia.
- [32] Ms O'Sullivan says that in August 2018 Mr. Hitt visited this Territory and she arranged for him to be advised by Mr. Lewis Hunte QC. She says:

"5. ...Mr. Lewis Hunte QC advised that in order to give effect to the English Judgment an action would have to be commenced in the British Virgin Islands in order to obtain an order the Dondore's register of members be updated.

...

12. ...[T]he English judgment [was given] both to the surprise of Mr. Hitt, and it would seem to Mr. Hitt's English legal team. Mr. Hitt had sought advice from Lewis Hunte QC in 2018 on the English judgment. Mr. Lewis Hunte QC advised that it was a non-monetary Judgment and not enforceable without action. Mr. Lewis Hunte QC concluded that as no enforcement action was taken in the BVI, Mr. Hitt remained the Ultimate Beneficial Owner."

Ms. O'Sullivan did not produce a copy of the instructions to Mr. Hunte QC or a note of the consultation with him. It can be seen that the last sentence of para 12 goes further than what she says in para 5.

[33] Mr. Rau was the recipient of Ms. O'Sullivan's email of 4th October 2019 which said that she had "been trying to contact Richard Hitt 100%UBO/shareholder/Director of Dondore Inc but we are not having any luck". He reproduced this passage in his first affidavit, but says in his third affidavit: "I had no intention, and never had any intention, of giving the Court the impression that Mr. Hitt was the beneficial owner of the Company. I do not believe it ever occurred to me that my affidavit, or anything else in Albert Court's case, might give that impression." He accepts that he knew of the Tipples judgment throughout his involvement in the matter. As to the issue as to whether the legal fees claimed by Management were owed to Management or to Freehold, he said he relied on the advice of Russell-Cooke, who, he thought, may in fact have drafted that part of his first affidavit.

[34] Mr. McCarroll SC said that he came into the case at a late stage, just before the hearing for the appointment of liquidators, and had prepared for the case over the weekend. He (like me) had not noticed the discrepancy between Ms. Bolt's statement that Mrs. Fetaimia was the beneficial owner and Ms. O'Sullivan's assertion that Mr. Hitt was the 100 per cent ultimate beneficial owner of Dondore. He does not think he was aware of the Tipples judgment.

Rule 21(2) of the Court of Appeal Rules 1968

[35] Mr. Moverley Smith QC raises an issue as to the true construction of rule 21(2) of the **Court of Appeal Rules 1968**. This provides:

"If no written decision is given by the Judge at the time of giving judgment such Judge shall communicate his reasons for the judgment in writing to the Registrar of the court below and such reasons shall be included in the record."

[36] He says:

"31. It is respectfully submitted that the requirement imposed by rule 21(2) is for the Judge to supply written reasons for the decision 'given by the Judge at the time of giving judgment'. Those reasons are accordingly necessarily limited to those which explain the Winding Up Order. Equally necessarily, the evidence that the Court refers to in giving those reasons is limited to the evidence that was before it at the time the Winding Up Order was made.

32. It is respectfully submitted that, given that the Court at first instance became *functus officio* once the Winding Up Order was made, a consideration of whether the Winding Up Order ought to have been made is properly the province of the Court of Appeal, which will in due course, on the hearing of the appeal, review the Order and the reasons for it.

- [37] Both he and Mr. Rau, in the latter's separate submissions, argue that the first mention of "judgment" in rule 21(2) refers to the judge's reasoning. However, it is common for a final order to be referred to as a "judgment": see **Jowitt's Dictionary of English Law**.¹⁶ Rule 21(2) is not in my view restricted to a judge having to recall what he or she said when making the order against which an appeal is brought and writing those words down. Indeed, the usual case in which rule 21(2) will be called in aid of an appeal is where the judge has given no reasons or only vestigial reasons for his or her decision. Were the rule to be confined (as is submitted) to the words uttered at the hearing where the order under appeal was made, then a cast-iron ground of appeal would be the absence of reasons: **English v Emery Reimbold & Strick Ltd**¹⁷ and most recently **Re B (A Child) (Adequacy of Reasons)**.¹⁸
- [38] Instead what rule 21(2) invokes is the common situation where a judge announces his or her order but says that written reasons will be given later. Mr. Rau submits that a judge, having made an order becomes *functus officio*. This is correct in part. Once a judge has made an order and that order has been sealed, the judge has no general power to vary or discharge the order. (The CPR make exceptions to this general rule, but none are relevant in the current case.) However, the judge remains seized of the case in order to provide a rule 21(2) compliant judgment. He is therefore not *functus*.
- [39] It follows that a judge giving written reasons later for an order which he has already made (whether pursuant to an indication given to that effect on the making of the order or pursuant to rule 21(2)) is not confined in the way Mr. Moverley Smith QC submits. For example, if a judgment of a superior court is handed down between the making of the order and the handing down of the written reasons, it can hardly be objectionable for the judge to indicate

¹⁶ 5th Ed (2019), article "Judgment".

¹⁷ [2002] EWCA Civ 605, [2002] 1 WLR 2409.

¹⁸ [2022] EWCA Civ 407, [2022] 4 WLR 4.

whether that new precedent would or would not have affected the order made. Equally, if a judge whilst writing the reasons has second thoughts, it is not objectionable for the judge to share his doubts, even though these cannot affect the order already made. Indeed, arguably it would be improper for the judge not to state his revised view.

[40] Adopting Mr. Moverley Smith QC's approach would also produce strange results. Take the current case. I would be obliged to confine my rule 21(2) judgment to saying: "I had read the papers. There were issues about the legal fees, which reached the **Sparkasse Bregenz** threshold,¹⁹ but the new service charges were undoubtedly due. Mr. Hitt, the only director and shareholder, made some rather odd claims as a supporting creditor, but that is a matter for the liquidators. He supported the appointment of liquidators, so I waived the procedural requirements to amend the application. For these reasons I appointed liquidators."

[41] With all due respect to Mr. Moverley Smith QC, that would not be a useful judgment for the Court of Appeal. Mr. Carrington QC would submit that I had clearly overlooked the status of Mrs. Fetaimia as the beneficial owner. The Court of Appeal would, on the Moverley Smith assumption, be entitled to say: "Ah, but the judge says that he had read the papers. He must therefore have been aware that Mrs. Fetaimia was the beneficial owner, or at least that there was a question about Mr. Hitt's status. How can we infer that he overlooked that point? Moreover, even if he had overlooked the point, how can we infer that he would have done something different, like adjourn the case for Mrs. Fetaimia to be added as a party and insist on the amendments being made to the application? He would have been entitled to take the view that Dondore had not paid the most recent service charges, which is sufficient evidence of insolvency and exercise his discretion in favour of appointing liquidators." Surrealism is not part of Eastern Caribbean civil procedure.

[42] Further, there is this rather paradoxical point. In order to explain my views on rule 21(2), I have set out the matters of which Mr. Moverley Smith QC and Mr. Rau say I should not have included as part of my rule 21(2) judgment. I have to give reasons for my decision on the

¹⁹ Sparkasse Bregenz Bank AG v In the Matter of Associated Capital Corp [2003] ECSCJ No 47.

true construction of rule 21(2) and that includes explaining the matters of which they complain. There would be no reason to delete those matters from this judgment.

- [43] As it is, the judgment is intended to assist the Court of Appeal. Mr. Moverley Smith QC submits that I should not state what I would have done if I had known the full facts. I do not agree. There is no reason artificially to leave the Court of Appeal to speculate on what I would have done, when I am able to tell them that. The situation is little different to the common occurrence that the judge dismisses a claim for damages, but says that, if he or she were wrong in dismissing the claim, the damages would be such-and-such amount. If the Court of Appeal determine that any discretion is to be exercised by them, then they can easily ignore what I say.

Mr. Pryor's opinion

- [44] In support of its position that I reached the right result on 18th November 2018, Management obtained the opinion dated 26th April 2022 of English counsel, Mr. Michael Pryor. His view is that I erred in my conclusion as to the recoverability (or rather irrecoverability) of the legal fees by Management against Dondore. Without disrespect, I shall not lengthen this judgment by considering his arguments *seriatim*. Firstly, they are not relevant. The new (and undisputed) service charge demands were sufficient to give the Court jurisdiction to appoint liquidators. Secondly, Mr. Pryor's opinion needed to overcome the **Sparkasse Bregenz** threshold. He at no point says that the views which I express above (which he had seen in draft) are not reasonably arguable. In my judgment, they are reasonably arguable and would (if the claim for the legal fees had stood alone) have afforded a defence to the application to appoint liquidators.

The application for a seal and gag order

- [45] Management's application for a seal and gag order was not the subject of submissions in Mr. Moverley Smith QC's skeleton. This instead focussed on the need for an oral hearing. When I had my draft judgment distributed to the parties on 11th April 2022, I directed that the rubric on the draft be in these terms:

“This draft judgment is sent in confidence. The legal practitioners to whom it is sent may share the draft (and, for the avoidance, not just the gist) with their clients, provided it is made clear to the clients that the draft judgment is confidential and neither it nor the gist of it may be shared with any other person. Any typographical or other errors should be submitted by noon on 28th April 2022. If any party or any of the legal practitioners wish to make representations as to the substance of the judgment, they should formulate those representations into writing and submit them by noon on 28th April 2022. The judge will then consider whether to list the matter for a hearing.”

[46] Pursuant to that invitation, Ms. O’Sullivan, Mr. Rau and Mr. McCarroll SC made affidavits, extracts of which I set out above. I also heard from Mr. Moverley Smith QC on 4th May 2022. The draft judgment was also distributed to Mr. Dan Wise of O’Neal Webster. Mr. Hitt submitted a short unsworn affidavit in which he said monies were also owed to HM Revenue and Customs by Dondore.

[47] In my judgment there is no basis for sealing this order. I have made no findings against any of the lawyers involved in this case. Even if I had, that would not have afforded a reason to seal the judgment or the Court file. In **Multibank FX International Corp v Von der Heydt Invest SA and others**,²⁰ the appellant sought:

“an order that the publication of the judgment delivered by Jack J [Ag.] on 4th October 2021 (corrected on 19th October 2021) in suit no BVIHCom 73 of 2021 and suit no BVIHCom 215 of 2020 (the ‘Judgment’) from which an appeal has been made in these proceedings, be stayed or alternatively only be published on the basis that it is anonymised with the names of the parties and any individuals or entities mentioned in the Judgment replaced by randomly chosen letters, and shall not be published by any person otherwise than in anonymised form.”

[48] The application was based on what were said to be damaging findings made by me in the judgment which would destroy the appellant’s business.²¹ The Court refused the application “being mindful of the principles concerning seal and gag orders as formulated by Lord Woolf MR in **R v Legal Aid Board, ex parte Kaim Todner**,²² and by Lord Reed in **A v British**

²⁰ BVIHCVAP2021/0009 (unreported, determined 11th November 2021) (Blenman, Michel and Thom JJA).

²¹ [2021] ECSCJ No. 751, sub. nom. Von der Heydt Invest SA v Mex Clearing Ltd.

²² [1999] QB 966.

Broadcasting Corp.²³ In my judgment, the same applies here. There are no grounds for sealing the judgment.

Breach of the embargo

[49] On 13th April 2022 Harneys wrote to the Court as follows:

“Since receiving the embargoed draft, it has been brought to our attention by our client, that Ms. Fetaimia namely Mr. Carrington’s client, has not observed the terms of the embargo.

Given the urgency, I enclose in the body of this email (for now) the email thread that was sent to Harneys. Given the terms of the embargo and the most recent case law emanating from England,²⁴ Harneys are under a professional duty to immediately raise this breach with the judge so he can assess the breach for himself.

For context, this was an email sent by Mrs. Fetaimia to the First-tier Tribunal (Property Chamber) in London after the embargoed draft was sent to counsel.

The allegations raised by her are, we submit, a direct result of the content of the draft judgment in particular her raising for the first time an alleged conflict of interest between Russell Cooke and our client and a threat of a report to the SRA and the FIA.

The latter in particular indicates a direct correlation to the content of the draft judgment. We invite the Court to take the relevant steps to strictly enforce the embargo particularly given the very serious allegations made against the legal practitioners in the matter.

[50] Mrs. Fetaimia’s communication of 12th April 2022 to the Property Chamber said:

“Thank you for your letter of 8th of April 2022.

My legal adviser is on Easter break holiday until next week. I will write to you substantially with the relevant documentation upon his return and in any event before the 29 April 2022.

²³ [2014] UKSC 25, [2015] AC 588.

²⁴ Presumably a reference to Attorney-General v Crosland [2021] UKSC 15, [2021] 4 WLR 103, appeal dismissed [2021] UKSC 58, [2022] 1 WLR 367; R (Counsel General for Wales) v Secretary of State for Business, Energy and Industrial Strategy [2022] EWCA Civ 181, [2022] 1 WLR 1915 and The Public Institution for Social Security v Banque Pictet & Cie SA [2022] EWCA Civ 368.

I believe Russell Cooke and Mr. Jason Hunter in particular are conflicted acting on behalf of Albert Court (Westminster) Freehold management. They have materially and deliberately misled a high court Judge Justice Adrian Jack to defraud me of my family home where I reside since 2005 which is worth £2½ million pounds.

The international fraud perpetrated against me by the building management two main directors Mr. Graeme Aarons and Mr. Rubie Kerrie with help from Russell Cooke was under the veil of a fictional debt allegedly for the advanced payment for the service charge and for the major works contribution and the basement vault storage.

I have been advised by my legal team to immediately report Mr. Jason Hunter and Russell Cooke to the Financial Investigative Agency in the BVI and also to the SRA.

Thank you for your letter and for your time.”

- [51] In my judgment, this letter does not reproduce anything from the draft judgment circulated to the parties. I made no finding of fraud in that draft. It is Mrs. Fetaimia’s case that she has been the victim of a fraud, but I have never had occasion to adjudicate on it. As to whether I have been misled that is a matter which has been investigated with the affidavits submitted as set out above. In her communication of 12th April, Mrs. Fetraimia is, in my judgment, merely setting out her own view of her opponents’ behaviour.

Conclusion

- [52] Accordingly,
- (a) I deliver this judgment giving my reasons for the order made on 18th November 2019;
 - (b) I make no order on the application of 28th April 2022, save that this judgment shall be embargoed until 4pm on Thursday 5th May 2022;
 - (c) I acquit Mrs. Fetaimia of breaching the embargo on the draft judgment;

(d) I order that the costs of Management and Dondore's liquidators be costs in the liquidation but otherwise make no order for costs.

Adrian Jack

Commercial Court Judge [Ag.]

By the Court

Registrar