

**THE EASTERN CARIBBEAN SUPREME COURT
ANGUILLA CIRCUIT**

IN THE HIGH COURT OF JUSTICE

CLAIM NO. AXAHCV 2017/0055

BETWEEN:

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:

Mr. William Hare instructed by Alex Richardson & Associates of Counsel for the Applicant

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

2019: May 14, 15;

2020: July 20.

[1] **INNOCENT, J. (Ag.):** The claimant, Barnes Bay Development Limited (in liquidation) ('Barnes Bay'), claims against the defendants, Starwood Capital Group ('Starwood'), SOF-VIII-Hotel II Anguilla Holdings LLC ('SOF'), Mr. Bradford Korzen ('Mr. Korzen'), KOR DUO Investment Partners II LP ('KOR DUO') and KOR DUO II LLC ('KOR DUO II'), referred to herein jointly as the 'Defendants', rescission and or avoidance of the sale of the property known as Four Seasons Resort & Residences Anguilla (the 'Property') previously known as The Viceroy Anguilla Resort & Residences ('Viceroy') by Starwood to SOF; in the alternative, damages or loss of profit; an equitable lien over the Property; interest and costs.

[2] Barnes Bay is a company incorporated in Anguilla and was placed in liquidation by the High Court of Anguilla in 2012. Until on or about 27th July 2011 Barnes Bay was the

proprietor of the Property. Barnes Bay alleges that Starwood is the ultimate parent of SOF. On or about 27th July 2011 the Property was sold to SOF at auction. Mr. Korzen was a director of Barnes Bay. KOR DUO and KOR DUO II, according to Barnes Bay, are companies associated with or controlled by Mr. Korzen.

- [3] By virtue of a loan and security agreement with Citigroup Global Markets Realty Corp. ('Citigroup'), made on or about 13th June 2006 (the 'Original Loan Agreement'), subsequently amended and restated several times, including 30th July 2008 and 17th July 2009, was secured against the Property and other assets belonging to Barnes Bay.
- [4] On or about 13th October 2010 Barnes Bay's outstanding obligation under the Original Loan Agreement, as restated and amended, were acquired by SOF. 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.
- [5] The negotiations respecting the Commitment Agreement, it is alleged, were conducted on behalf of SOF by Starwood and more particularly the Chief Executive Officer ('CEO') of Starwood Barry Sternlieth.
- [6] Barnes Bay alleges that Starwood and SOF, without its knowledge, the same not having been disclosed to it and to which Barnes Bay did not give its consent, entered into an arrangement wherein 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 KOR DUO and KOR DUO II; 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.

- [7] Barnes Bay, in the present claim, alleges that these agreements were entered into by Starwood and/or SOF in order to induce Mr. Korzen and by extension the Board of Barnes Bay, to agree to and enter into the debtor in possession proposal, which proposal would inevitably give substantial control of Barnes Bay's affairs to Starwood and SOF and which was designed to achieve a swift progression to an auction of the Property to SOF and/or to agree to the sale of the Property to SOF.
- [8] Barnes Bay contends that its Board did not cause or encourage Barnes Bay to make any effort to market the Property to any other prospective bidders and failed to take any steps to secure a higher or better offer. The Property was sold at auction on 27th July 2011 to SOF. SOF was the only bidder at the auction.
- [9] On the foregoing premises, Barnes Bay claims that Mr. Korzen's entry into the agreements with Starwood and SOF served as an inducement to procure Mr. Korzen's breach of his fiduciary duty to Barnes Bay, to the extent that he placed himself in a position where his duties to Barnes Bay and his personal interest in the sale of the Property conflicted and/or permitted him to obtain an undisclosed commission.
- [10] In the circumstances, Barnes Bay claims that it is entitled to rescission of the sale of the Property on the grounds that the sale is voidable on account of Mr. Korzen's entry into the agreement with Starwood and SOF placed him in a position where his interest conflicted with that of Barnes Bay, whereby he was in breach of his fiduciary duty to Barnes Bay, a conflict which Starwood and SOF chose to ignore while being cognizant of Mr. Korzen's duties owed to Barnes Bay.
- [11] Therefore, Barnes Bay claims, in addition to rescission of the sale, which it describes as a voidable sale, entitlement to an account of profits made by the defendants and each of them, as a result of Mr. Korzen's breach of his fiduciary duty to Barnes Bay and SOF's acquisition of the Property. In the alternative, Barnes Bay claims damages in the amount of any loss suffered as a result of the sale of the Property to SOF brought about by the inducements contained in the agreement between Mr. Korzen, Starwood and SOF.

- [12] Barnes Bay also claims that money used by Barnes Bay to acquire and develop the Property which amounted to approximately US\$65 million was the proceeds held in trust for investors who had provided returnable deposits on residences to be built on the Property. Therefore, Barnes Bay claims that the investors held an equitable interest in the Property to the tune of their investment and that SOF acquired the Property subject to the investors' equitable interest. Barnes Bay contends that this is the case because SOF stood in a position otherwise than a bona fide purchaser and in light of the inference that SOF had notice of the investors' equitable interest in the Property.
- [13] Therefore, Barnes Bay claims that it stood in the position of trustee for the investors' deposits and is by virtue of this entitled to an equitable lien over the Property.
- [14] Barnes Bay claims interest on all sums that may be found owing to it in its own right or as trustee for the investors at common law or in equity.
- [15] The defendants dispute the court's jurisdiction to entertain the claim pursuant to Rules 7.7, 9.7 and 9.7A of the Eastern Caribbean Supreme Court Civil Procedure Rules (the 'CPR') and the court's inherent jurisdiction to protect its process from abuse.
- [16] By Notice of Application the defendants seek a declaration that the court has no jurisdiction to hear the claim or alternatively: that the court declines to exercise jurisdiction in the matter on the principle of forum non conveniens; that the court set aside service of the claim form and statement of claim on the defendants; ultimately that the claim be struck out as an abuse of process; that Starwood be struck out as a party to the proceedings; and alternatively, that the proceedings be stayed.
- [17] The defendants challenged the court's jurisdiction on the following grounds. Firstly, the defendants contend that the court has no jurisdiction to hear the claim since Barnes Bay had invoked the jurisdiction of the United States Bankruptcy Court for the District of Delaware and participated in Chapter 11 bankruptcy proceedings in that forum.

- [18] Secondly, that even if the domestic court were to find that it had such jurisdiction, it ought to decline to exercise such jurisdiction and defer the matter to the United States Bankruptcy Court.
- [19] Thirdly, the defendants further contend that the assumption of the debtor in possession financing and the sale of Barnes Bay's assets including the Property were made in the course of the bankruptcy proceedings. Therefore, the orders of the United States Bankruptcy Court were final.
- [20] Fourthly, the defendants also mount their challenge to the claim on the basis of what appears to be an abuse of process argument. The defendants contend that the claim is an "impermissible collateral attack" on the final orders of the United States Bankruptcy Court by the very same litigants and is therefore barred by the doctrine of res judicata.
- [21] Finally, the defendants contend that the present claim discloses no reasonable cause of action.

Procedural Matters

- [22] Prior to hearing of the application mentioned above, the court was alerted to a subsequent application filed by the defendants. This was an application by the defendants to strike out certain parts of the first affidavit of Mr. John Greenwood ('Mr. Greenwood') filed on 29th April 2019 ('Greenwood I') in answer to the substantive application, pursuant to CPR 30.1, 30.3 and CPR 26.1.
- [23] The application was premised on the following grounds. Firstly, that Greenwood I, filed in opposition to the defendant's application to strike out the Barnes Bay's statement of claim and disputing the court's jurisdiction to hear the same, is in breach of CPR 30.3 to the extent 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.

- [24] According to the defendants, many of the asserted facts contained in Greenwood I, and central to the issues arising in the claim, and purporting to be based on Mr. Greenwood's own knowledge, are "patently false".
- [25] The defendant's said that this was indeed the case since Mr. Greenwood was appointed liquidator of Barnes Bay in June 2012; therefore, Mr. Greenwood was not involved in the matters alleged against the defendants in the statement of claim or as contained in Greenwood I.
- [26] In addition, the defendants contended that Greenwood I contained no evidence to support any of the factual assertions contained therein and, contained what the Defendants described as "inadmissible and unreliable hearsay evidence".
- [27] On 9th May 2019 Barnes Bay filed an application to amend the name of "Starwood Capital Group" appearing in the claim form and statement of case to "Starwood Group Global L.P." pursuant to CPR 20.1(2), CPR 20.1(3) and CPR 20.2(3) (the 'Amendment Application').
- [28] In support of the Amendment Application, Barnes Bay relied on Greenwood 1 and the third affidavit of Mr. Greenwood ('Greenwood 3'). The Amendment Application contained no grounds for making the same. The Amendment Application was trenchantly opposed by the defendants.
- [29] The court will first deal with the defendant's application to strike out parts of Greenwood 1. Thereafter the court will deal with the substantive striking out application filed by the defendants. It appears that the Amendment Application involves issues that concern the striking out application. At the conclusion of the parties' arguments on the substantive application, the court directed the parties to file written submissions in relation to the Amendment Application which the court ordered would be heard on paper. In the circumstances, the court will deal with the Amendment Application in conjunction with the defendant's strike out application.

- [30] The application to strike out portions of Greenwood 1 is supported by the affidavit of Mr. D. Michael Bourne ('Mr. Bourne'). Specifically, at paragraph 6 of Mr. Bourne's affidavit ('Bourne 1'), reference is made to the matters contained at paragraphs 8 – 9, 25 – 26, 28 – 30, 32, 34 – 35, 37 – 38, 43 (i) (ii) (iii) and 44.
- [31] In addition, at paragraph 7 of Bourne 1, Mr. Bourne stated that the matters contained at paragraphs 10 and 22 of Greenwood 1 are not supported by and evidence. At paragraph 8 of Bourne 1, Mr. Bourne states:
- “Mr. Greenwood's failure to state the source of information which he states as facts in his Affidavit is in breach of the Civil Procedure Rules and renders his evidence inadmissible. The sheer number of instances in which Mr. Greenwood falls foul of the Rules, which he is evidently aware of, based on paragraph 2, makes the breach flagrant and egregious. Further, the aspects of the evidence for which there is no identifiable source all concern the fundamentals of the claim being brought against the Defendants. In circumstances where the Defendants are disputing the court's jurisdiction to try the claim, with the main plank of that dispute being that there is no arguable claim, it behooves the Liquidator to give particular care to substantiating the claim which is being asserted against the defendants, eight years after the sale of the Property under powers of sale exercised by the Second Defendant pursuant to its registered charge.”
- [32] The defendants also contended that, given Mr. Greenwood's intention that the court relies on his affidavit to form a view as to the merits of the claim, it is inconceivable that Mr. Greenwood would rely on hearsay evidence that is wholly unsubstantiated.
- [33] Furthermore, the defendants argued that some of the averments contained in Greenwood 1 amounted to opinion and seek to draw inferences without more and within the context of the court being rendered unable to test and assess the reliability of the facts upon which these opinions are based or from which such inferences can be drawn.
- [34] In addition, the defendants submitted that, many of Mr. Greenwood's averments with respect to facts stated to be within his personal knowledge are contradicted by the documentary evidence contained in the record of the US Bankruptcy proceedings as detailed by Mr. Stuart M. Browne ('Mr. Browne') in his supplemental affidavit in response to Greenwood1.

- [35] In her oral submissions, Mrs. Small-Davis alluded to what she described as the conflict between what is contained at paragraph 8 of Greenwood 1 and paragraph 10 of Mr. Greenwood's second affidavit ('Greenwood 2'). According to Mrs. Small-Davis, Mr. Greenwood appeared to be "backing away" from his original position as it related to the relevance of the US bankruptcy proceedings in the striking out application.
- [36] With respect to paragraph 9 of Greenwood 1, Mrs. Small-Davis submitted that the information contained therein is speculative.
- [37] In relation to paragraph 14 of Greenwood 2, Mrs. Small-Davis pointed out that Mr. Greenwood addresses the question of the Trustee Motion, but, however, fails to state anywhere that the same had been withdrawn.
- [38] Mrs. Small-Davis also submitted that paragraph 21 of Greenwood 1 is premised on two documents that were impugned in other proceedings; and that Mr. Greenwood failed to disclose whether he had confronted the persons associated with these entities referred to by him.¹
- [39] In relation to the paragraphs under the rubric "Inducements" in Greenwood 1, Mrs. Small-Davis submitted that what Mr. Greenwood described as 'inducements' were put forward as part of the proposal for restructuring and were indeed merely proposals which were, in any event, not approved.
- [40] In addition, Mrs. Small-Davis argued that with respect to the 'inducements', Greenwood 1 does not particularise the same by reference to any documentary evidence.
- [41] Mrs. Small-Davis referred the court to paragraph 184 of Greenwood 2, which she agreed showed that the affiant, Mr. Greenwood, by virtue of the matters contained therein, accepted that paragraph 23 of Greenwood 1 breached the CPR. In addition, she argued that Greenwood 1 yet again failed to identify the sources of information

¹ Transcript of Joel Greenbury in 2011

and belief relied on by the affiant, thereby rendering the reliability of the affiant suspect.

[42] Mr. Hare's first line of attack was to seek to impugn Bourne 1 on the basis that Mr. Bourne swore to the affidavit while appearing as counsel in the substantive matter.

[43] Mr. Hare also argued that the application was entirely misconceived as demonstrated by Greenwood 2. According to Mr. Hare, the challenge to Mr. Greenwood's affidavits is not well founded simply because all of the documentary evidence which the Defendants allege was conspicuously absent from Mr. Greenwood's affidavits were contained and referenced in Mr. Browne's affidavits. Mr. Hare referred the court specifically to what is canvassed at paragraphs 7 and 8 of Greenwood 2.

[44] The court has formed the view that neither of Mr. Hare's two contentions on the point can avail Barnes Bay. Firstly, Mr. Bourne cannot properly be said to have appeared as counsel in the matter. Secondly, the court finds Mr. Hare's approach which seems to suggest that Mr. Greenwood's affidavits could have seemingly been bolstered by Mr. Browne's affidavit regardless of the former's blatant noncompliance with the CPR. The court finds this argument wholly inconceivable, for the reasons already advanced, and cannot regard it as curing the procedural defect complained of.

[45] Having heard the arguments advanced by the parties, the court is constrained to find that Mrs. Small-Davis' complaints regarding Mr. Greenwood's affidavits are well founded and properly made out. In the circumstances, those offending portions of Mr. Greenwood's affidavits are struck out.

[46] The striking out of those offensive portions of the Greenwood affidavits will inevitably affect the view which the court takes, not only with respect to the viability of the claim brought by Barnes Bay but also with respect to the court's assessment of the present striking out application. Indeed, as Mrs. Small-Davis has argued throughout the proceedings, it may very well affect the court's view of Mr. Greenwood's credibility and the reasonableness of the grounds for bringing the present claim.

Rescission of Sale

- [47] In her oral submissions on the substantive application, Mrs. Small-Davis argued that the sale which Barnes Bay seeks to have the court rescind was concluded in 2011; and the liquidator was appointed in 2012. Therefore, she argued that the liquidator, Mr. Greenwood, had no involvement in the matter during this intervening period and not until 2018.
- [48] Mrs. Small-Davis argued that the court did not have the power to rescind the sale in light of the provisions of section 75(3) of the Registered Land Act ('RLA'). She said that it is not disputed that Barnes Bay was indebted to SOF and that the Debt was secured against all of Barnes Bay's assets. She said that it was also not in dispute that the charge held by SOF over Barnes Bay's assets was a valid and enforceable charge against the Property in accordance with Anguillian law.
- [49] The defendants argued that the allegation that the Property was sold at an under value is unsustainable. They argued that the sale was conducted in accordance and in full compliance with sections 72 – 75 of the RLA; and the procedure for the sale was approved consistently with the Chapter II proceedings in the United States on 19th May 2011. According to Mrs. Small-Davis, the order for the sale of the Property was made following a motion filed on behalf of the parties and the same was approved by the US Bankruptcy Court.²
- [50] Furthermore, she argued that there was no attempt to stop the sale, and for all intents and purposes, the obligations of SOF as chargee were never breached. Instead, she said SOF had fulfilled all of its obligations under section 75 of the RLA by acting in good faith and rightfully exercising its right as chargee to bid at the auction of the Property. In support of her argument she referred the court to the decisions in **Credit Suisse AG (Cayman Islands Branch) v Anguilla Masonry Products Company**

² Affidavit of Stuart M. Brown – Exhibit SMB1 Tab 5 "Order Approving Procedures for the Auction and Sale of the Debtor's Assets" – United States Bankruptcy Court for the District of Delaware dated 19th May 2011

Limited and others³ and Downsview Nominees Limited and another v First City Corporation Limited and another.⁴

- [51] The pith and substance of the defendants' argument was that, there was no merit in Barnes Bay's allegation that SOF had acted otherwise than in keeping with its rights, duties and obligations as chargee on the sale of the Property. They argued that Barnes Bay had reserved its right to challenge the order but failed to do so. In any event, Mrs. Small-Davis argued that the limitation period for bringing a claim had expired and therefore, Barnes Bay was barred by the doctrine of laches from seeking equitable relief from the court. In support of this argument she relied on the decision in **Delcine Thomas v Victor Wilkins**.⁵
- [52] Mr. Hare argued, that on the contrary, the claim was brought within time. He relied on the decision in **Coburn v Colledge**⁶ for the proposition that time starts running when the cause of action accrues; and that a contingent liability is not sufficient to start time running. Mr. Hare also relied on **Law Society v Sephton & Co (a firm) and others**.⁷ Mr. Hare was vehemently opposed to the defendants' reliance on the 'limitation' ground on the basis that, although it appears in their written submissions it was not canvassed in their notice of application. According to Mr. Hare, they cannot now rely on this ground to mount a challenge to the present claim.
- [53] Mr. Hare argued that the case of **Credit Suisse** relied on by the defendants was distinguishable from the present case. He argued that the sale of the Property involved a credit sale with only one bidder, which raises greater concerns in relation to cases of self-dealing. He cited the case of **Royal Bank of Scotland Plc v Highland Financial Partners LP and others**⁸ in support of the argument that there is a prohibition against self-dealing.

³ [2010] ECSCJ No. 316

⁴ [1993] A.C. 295

⁵ [2009] ECSCJ No. 175

⁶ [1895-99] All ER Rep 539; [1897] 1QB 702

⁷ [2006] 3 All ER 401 at paras. [18], [30], [75], [78]

⁸ [2010] All ER (D) 88

- [54] Mr. Hare criticised the legitimacy of the credit sale on the ground that it was conducted pursuant to a foreign order in proceedings alien to Anguilla, when Barnes Bay was being represented throughout by what he described as a “tainted” and conflicted Board.
- [55] According to Mr. Hare, pursuant to Anguillian law SOF could not have sold the Property to itself in the manner in which it did.
- [56] In the court’s respectful view, the proper starting point is the “Order Approving the Procedures for the Auction and Sale of the Debtor’s Assets” dated 19th May 2011 (the ‘Sale Procedure Order’) made in the United States Bankruptcy Court for the District of Delaware.⁹ The Sale Procedure Order laid out an approved comprehensive scheme approving the procedures in connection with the sale of the Property; scheduling the related auction; and approving the form and manner of notice thereof. The ‘Bid Procedures’ proposed by the Debtors were approved by the Sale Procedure Order.
- [57] Having examined the Sale Procedure Order (‘SPO’) in detail, it appears that Barnes Bay accepted the terms of the SPO and agreed to be bound by the same. The court is fortified in this view by the recitals contained in the SPO. The purport and effect of the SPO is incapable of challenge.
- [58] However, the question that arises is whether there is any merit in Barnes Bay’s complaint that the sale of the Property by auction was conducted improperly or otherwise contrary to law. In the court’s considered view, the real question is whether the sale by auction was conducted in conformity with the SPO as opposed to whether it was conducted in conformity with the laws of Anguilla. It is necessary to raise this point from the outset as it appears that the interpretation of the SPO may very well also impact the view that the court takes in relation to the forum argument advanced by Mrs. Small-Davis. There is a conflict of laws issue arising in relation to this part of

⁹ Tab 5 Exhibit SMB1

the claim which may very well dispose of this part of the claim without significant deliberation regarding the merits of this aspect of the claim.

[59] However, for the sake of completeness, the court will examine the points raised by Mr. Hare in relation to this issue.

[60] Section 72 of the RLA gives a chargee the power of sale.¹⁰ Section 75 of the RLA sets out the power of a chargee to bid on the sale and also sets out his rights, duties and obligations on such a credit sale.¹¹

[61] The court is of the view that SOF had properly exercised its powers of sale, both pursuant to section 75 of the RLA and the SPO. The court is not convinced that SOF had breached any of its obligations neither under section 75 of the RLA nor the SPO. Mr. Hare, in his arguments, seemed to have imposed a more stringent and restrictive set of obligations on SOF in the conduct of the credit bid sale.

[62] In **Credit Suisse**, the claimant sought to exercise its statutory power of sale and sought to have the court sanction the method of sale that it proposed at a public auction. The claimant sought a declaration from the court that the proposed sale satisfied section 75 of the RLA. The court in **Credit Suisse** set out the criteria for sale by a chargee by public auction under section 75 of the RLA.¹²

¹⁰ (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 1 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 3 months of the date of service, with a notice served on him under subsection (1), the chargee may—

(a) appoint a receiver of the income of the charged property; or
(b) sell the charged property;

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

(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.

¹² At paras. 79 – 95

[63] In the present case, Barnes Bay has not pointed to anything specific about the procedure adopted by Starwood in the conduct of the sale by auction that they find reprehensible. Barnes Bay has given no specific indication that the sale by auction was conducted otherwise than in the manner contemplated by either the SPO or section 75 of the RLA. The only discernible complaint is with regards to the Property being sold at undervalue and what it describes as the requirement for greater scrutiny in a 'sale to self'. However, Barnes Bay has not pointed to anything intrinsic in the procedure adopted on the sale that would substantiate the need to review the procedure. Indeed, it appears from a reading of section 75 that Starwood was required to act in good faith and secure the best market value for the Property with the interest of Barnes Bay in mind.

[64] The court is of the considered view that no specific allegation has been raised by Barnes Bay on its pleadings in relation to the matters contemplated by section 75 of the RLA or the SPO. In fact, the SPO specifically stated that "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".¹³

[65] On the authority of **Downsview Nominees Limited** and **Cuckmere Brick Co. Ltd. v Mutual Finance Ltd.**, the court finds that there was no duty to exercise reasonable care so as not to adversely affect the interest of Barnes Bay imposed on Starwood in the conduct of the sale. The duty of a chargee in possession to the chargor is eloquently set out in these two decisions. In **Downsview Nominees** the court held:

"The general duty of care said to be owed by a mortgagee to subsequent encumbrancers and the mortgagor in negligence is inconsistent with the right of the mortgagee and the duties which the courts applying equitable principles have imposed on the mortgagee. If a mortgagee enters into possession he is liable to account for rent on the basis of willful default; he must keep mortgage premises in repair; he is liable for waste. Those duties were imposed to ensure that a mortgagee is diligent in discharging his mortgage and returning the property to the mortgagor. If a mortgagee exercises his power of sale in good faith for the purpose of protecting his security, he is not liable to the mortgagor even though he might have obtained a higher price and even though the terms might be regarded as

¹³ See: SPO recitals A-D

disadvantageous to the mortgagor. *Cuckmere Brick Co. Ltd. v. Mutual Finance Ltd.* [1971] Ch. 949 is Court of Appeal authority for the proposition that, if the mortgagee decides to sell, he must take reasonable care to obtain a proper price but is no authority for any wider proposition. A receiver exercising his power of sale also owes the same specific duties as the mortgagee. But that apart, the general duty of a receiver and manager appointed by a debenture holder, as defined by Jenkins L.J. in *re B. Johnson & Co. (Builders) Ltd.* [1955] Ch. 634, at 661, leaves no room for the imposition of a general duty to use reasonable care in dealing with the assets of the company. The duties imposed by equity on a mortgagee and on a receiver and manager would be quite unnecessary if there existed a general duty in negligence to take reasonable care in the exercise of powers and to take reasonable care in dealing with the assets of the mortgagor company."

[66] In **RBS v Highland**, upon which Mr. Hare relied on for the proposition that on a credit sale with only one bidder, which was tantamount to a 'sale to self', different considerations applied, it was held that:

"The really significant factors appear to me to be the following:

i) There is no dispute that the mortgagee owes a duty of good faith: see not only *Cuckmere Brick* (above) but also *Downsview Nominees Ltd v First City Corporation Ltd* [1993] AC 295 P.C. at 312F-G per Lord Templeman and *Palk v Mortgage Services Funding Plc* [1993] Ch 330 per Nicholls V-C at 337:

"In the exercise of his rights over his security the mortgagee must act fairly towards the mortgagor. His interest in the property has priority over the interest of the mortgagor, and he is entitled to proceed on that footing. He can protect his own interest, but he is not entitled to conduct himself in a way which unfairly prejudices the mortgagor."

ii) Perhaps the most significant warning light for a mortgagee, albeit one who is entitled, in this case, to sell to itself, is the cautionary account of Jacobs J in *Bangadilly*, a case where the mortgagee sold to an associated company, at 201-2:

"It is true that bona fides in this connexion is not concerned with the motive for exercising power of sale but, once the decision to sell has been made, it is concerned with a genuine primary desire to obtain for the mortgaged property the best price obtainable consistently with the right of a mortgagee to realise his security ... When there is a possible conflict between that desire and a desire that an associate should obtain the best possible bargain, the facts must show that the desire to obtain the best price was given absolute preference over any desire that an associate should obtain a good bargain ... The closer the association,

the greater the conflicts and the greater the possibility of unconscious preference.”¹⁴

[67] Mr. Hare relied on the dicta of Blenman J. in the case of **Credit Suisse** in support of his argument that Anguillian case law, in particular as it relates to the provisions of section 75 of the RLA, was insufficient to form a proper assessment of the conduct of the sale by Starwood, and that the position outlined in the English case law cited by him was more appropriate in scrutinizing the conduct of the sale. In **Credit Suisse at paragraph [80]**, Blenman J said:

“The court is of the view that insofar as there is no statutory or common law guidance in Anguilla as to the nature of a public auction it is left to the court to examine the proposed procedure in order to ascertain whether it is transparent, just, fair and likely to yield the best market price in a manner contemplated stated by section 75 of the Registered Land Act. This would of necessity include getting the best price which should have at its minimum obtaining the fair market price for the Charged Property.”¹⁵

[68] Mr. Hare's reliance on the case of **Aodhcon** does not advance Barnes Bay's case any further. In **Aodhcon** it was held inter alia that, “if a mortgagee decided to sell the mortgaged property he had a duty, in equity, to take reasonable care to sell for the best price reasonably obtainable. How that duty was to be discharged required the mortgagee to make an informed judgment and there were no steps which the mortgagee had to take. It was for the mortgagee to decide on the manner of sale, if appropriate, after having sought expert advice. The property should be advertised sufficiently widely, and fairly and properly exposed to prospective purchasers. The mortgagee was not under a duty to improve the property for sale or remove incumbrances, such as the grant. The fact of repossession could taint the property. The mere fact that a higher price might have been obtained did not inevitably mean that the duty had been breached. The burden of proving a breach of duty rested on the mortgagor and the mortgagee would not have breached his duty unless he was 'plainly on the wrong side of the line'.”¹⁶

¹⁴ At para. 43

¹⁵ At para. 80

¹⁶ At para. [151]

- [69] The court finds absolutely no strength or merit in this argument, particularly in light of the court's observations regarding the several lacunas in the allegations raised by Barnes Bay in its pleaded case. Barnes Bay has not highlighted any particular aspect of the sale that would require the court to examine with an eye of scrutiny the procedure adopted, save and except the very bald assertions that it was a credit bid sale at an undervalue.
- [70] Mr. Hare also relied on the case of **Standard Chartered Bank Ltd v Walker** where it was held that "a receiver realising assets under a debenture owed a duty both to the borrower and to a guarantor of the debt to take reasonable care to obtain the best price that the circumstances permitted, and he also had a duty to exercise reasonable care in choosing the time for the sale; that, despite the receiver being deemed the company's agent, the bank as debenture holder might be attached with responsibility for the receiver's actions if it were shown that it interfered with his conduct of the receivership; and that since there were triable issues whether the bank did so interfere and whether the auction sale was conducted negligently, and as to the liability of the bank ..."
- [71] The court agrees with Mr. Hare's proposition that the conduct of the sale does in fact raise triable issues. However, it is left to be seen whether the Anguillian Courts is the proper forum to try these issues.
- [72] Mrs. Small-Davis quite rightly referred the court to the terms of the SPO which the court had already found had laid out the procedure for conducting the sale, which in large measure was conducted in accordance therewith. In particular, the SPO contained a provision that permitted the Debtor in Possession ('DIP') Lenders to credit bid at the auction. Mrs. Small-Davis cited the case of **Farrar v Farrar's Limited** where three mortgagees in possession, of whom *F.* was one, and acted as their solicitor in the transaction, sold under the powers of sale in their mortgage deed to a company formed for the purpose of purchasing the property. The company was, to some extent, promoted by *F.* who became the solicitor to the company and had a substantial interest as a shareholder. The court held, that the sale could not be set aside on the

simple ground that *F.* was a shareholder in the company, for that a sale by a person to a corporation of which he is a member is not either in form or substance a sale by him to himself along with other people. The court also held, that there was such a conflict of interest and duty in *F.*, of which the company had notice, as to throw upon them the burden of upholding the sale: on the basis that the company had discharged themselves of this burden by showing that *F.* had taken all reasonable pains to secure a purchaser at the best price, and that the price given was not at the time inadequate, though more might have been obtained by postponing the sale.

- [73] In the present case, it appears that Mr. Hare's contention is that there was some improper motive or mala fides on the part of Starwood in the conduct of the sale. This is inextricably bound up with Barnes Bay's allegations with respect to the inducements. According to Mr. Hare, the sale was conducted with the consensus and/or connivance of what he described as a "tainted board". This will require closer examination of the matters raised by Barnes Bay in relation to the alleged breach of fiduciary duty by Mr. Korzen and the alleged inducements.

Breach of Fiduciary Duty

- [74] In her submissions on this point, Mrs. Small-Davis argued that in order for Barnes Bay to succeed on a claim for breach of fiduciary duty and to establish the facts alleged by them, Barnes Bay must show proof of damage.
- [75] The issue that arises is whether the matters pleaded at paragraph 9 of the statement of claim was sufficient to establish a breach of fiduciary duty. Mrs. Small-Davis argued on the authority of **Re Welfab Engineers Ltd.**¹⁷ that the director had been entitled to take the view that if the business was not capable of survival its liquidation was not a task that they were required to undertake and they had been entitled to take the view that the alternatives open to them were a sale which would allow the company to continue, in receivership, or in liquidation. According to Mrs. Small-Davis, the director had not acted in breach of duty by accepting the credit sale bid, and even if he had, it was a case where, it can be said that he acted honestly and reasonably, he ought

¹⁷ [1990] BCLC 833

therefore to be excused under the Companies Act for any alleged breach of fiduciary duty.

[76] In **Re Welfab Engineers Ltd** the company was trading at a loss and it became clear to the directors that the company would have to sell its freehold property, which was its principal asset. There were a number of potential purchasers interested in the property and the directors eventually sold it to a purchaser for £110,000 although there had been a higher offer of £125,000. The purchaser took on the workforce of the company including the directors. Three months later the company went into liquidation and the liquidator brought a misfeasance summons under the Insolvency Act 1986, s 212, alleging that the directors had breached their duty to the company because they had given priority to the preservation of the business and the jobs of the employees including themselves, and that they could have obtained at least £125,000 from another purchaser. The court held, dismissing the summons, that the higher offer for the property had to be discounted to take account of a number of imponderables and when that was done there was not a great deal of difference between the two offers. The directors had been entitled to take the view that if the business was not capable of survival its liquidation was not a task that they were required to undertake and they had been entitled to take the view that the alternatives open to them were a sale which would allow the company to continue, in receivership, or in liquidation. On the facts, the directors had not acted in breach of duty by accepting the offer of £110,000, and even if they had, it was a case where, having acted honestly and reasonably, they ought to be excused under the Companies Act 1985, s 727.

[77] Mr. Hare, in response to the defendants' submissions, submitted that it was not necessary to show damages arising from the inducements. Furthermore, he argued, that in bringing a claim for breach of fiduciary duty, it was not necessary to have a "loss based" claim; and there was no obligation to prove loss or damage. This he said was not an essential ingredient of a claim for breach of fiduciary duty.

[78] Mr. Hare submitted that the directors of Barnes Bay were conflicted by the inducements and the indemnities. According to him, the conflicted board along with

Starwood consented to the restructuring in the United States of an Anguillian company with the subject being an Anguillian property. Within this context Mr. Hare submitted that the Chapter II proceedings sought to transfer the Property debt free on a “credit bid”. In addition, he argued that the auction did not comply with Anguillian law which further compounded the problem.

[79] According to Mr. Hare, the case of **Credit Suisse** did not canvass the high level of caution to be exercised when there is a purchase by a creditor at an auction. Mr. Hare referred the court to the cases of **Alpstream AG and others v PK Airfinance Sarl and another**¹⁸ and **Farrar v Farrars Limited**.¹⁹

[80] Mr. Hare opined that the case of **Credit Suisse** is incompatible with the state of Anguillian law and that the English authorities require and recognize a higher degree of circumspection. He referred the court to what is contained at paragraph [80] of **Credit Suisse**.

[81] In response to paragraph 45 at p. 12 of the defendants' submissions, Mr. Hare referred the court to the decision in the case of **Downsview Nominees Ltd and another v First City Corporation Ltd. and another**.²⁰ Mr. Hare also relied on the decision in **Cukmere Brick Co. Ltd. and another v Mutual Finance Ltd**.²¹

[82] In **Downsview Nominees** the mortgagor company issued a debenture to a bank to secure a loan of \$NZ230,000 in 1975 and in 1986 issued a second debenture to the first plaintiff for monies lent and owing. Each debenture entitled the debenture holder to appoint a receiver and manager. The company traded at a loss and on 10th March 1987, when the monies secured by the second debenture became due and payable, the first plaintiff appointed receivers of the company who formed the provisional view that a sale of assets would be necessary. However, on 23rd March the first debenture was assigned to the first defendant, a company controlled by the second defendant

¹⁸ [2013] EWHC 2370 (Comm)

¹⁹ (1888) 40 Ch. D. 395

²⁰ [1993] A.C. 295

²¹ [1971] Ch. 949 at pp. 966 C – D; 968 H; 972 F – H; 978 A – B

who was appointed receiver and manager under that debenture. The first plaintiff's receivers withdrew and the first plaintiff wrote to the first defendant offering to purchase the first defendant's debenture for the amount then owing or to sell its own debenture to the first defendant for the amount then owing, which was the \$721,621. Both offers were rejected and instead the company issued a third debenture in favour of the first defendant to secure a loan of \$100,000 which was said to be 'receiver's borrowings' having preference to all other claims in the receivership, including the claims of the first plaintiff. On 13th August the first plaintiff called on the first defendant to assign the first debenture to the first plaintiff as a subsequent charge holder but the defendants refused. Instead, the defendants arranged for company assets to be sold and the proceeds to be received by a subsidiary incorporated by the second defendant, stripped out the value of the first debenture by means of an inter-company loan when ordered by the court to assign the first debenture to the first plaintiff, and then assigned it on payment of \$130,000 by the first plaintiff as ordered by the court but refused to relinquish control of the company unless the first plaintiff paid a further \$329,000 cash. And when ordered by the court to cease acting as receiver and to transfer the company's assets to the first plaintiff's receivers, among other things, he paid to his company \$224,000 by way of reduction of his receiver's borrowings and removed over \$300,000 worth of the company's assets and gave notice that the second defendant had ceased to act as receiver. The first plaintiff and the second plaintiff, to whom the first plaintiff had assigned its rights under the second debenture, brought an action against the defendants for damages alleging that the defendants as the prior debenture holder and the receiver were under a duty to exercise their powers for proper purposes, honestly and in good faith and to exercise reasonable care, skill and diligence and instead had acted, or omitted to act, fraudulently, recklessly or negligently in breach of those duties. The judge found that the second defendant had acted as receiver and manager, not for the purpose of enforcing the security under the first debenture but for the purpose of preventing the enforcement by the plaintiffs of the second debenture, and that the first defendant had acted in bad faith and not as a prudent debenture holder would act. The judge awarded the plaintiffs damages of \$554,566 being the difference between the loss that would have been incurred had

the first receivership been allowed to proceed unimpeded and the loss actually incurred following the second receivership. The defendants appealed to the New Zealand Court of Appeal which dismissed the second defendant's appeal on the ground that he acted in breach of the duty of care which a receiver and manager who elected to carry on the business of the company and to trade it out of receivership owed to subsequent debenture holders to take reasonable care in dealing with the assets of the company. However, the court held that the first defendant was not in breach of that duty and allowed its appeal. The defendants appealed against the dismissal of the second defendant's appeal and the plaintiffs cross-appealed. The Court of Appeal held, dismissing the defendant's appeal and allowing the plaintiff's cross-appeal, that a mortgagee, whether under a legal or equitable mortgage created by a charge on property or under a debenture issued by a company for its debts, owed a duty to the mortgagor and to all subsequent incumbrancers of the mortgaged property to act in good faith for the special purpose of enabling the assets comprised in the security for the debt to be preserved and realised for the purpose of obtaining repayment of the debt. That duty was owed both to the mortgagor and to any subsequent incumbrancers because if a mortgagee committed a breach of his duties to the mortgagor, the damage inflicted by that breach of duty would be suffered by any subsequent incumbrancers and the mortgagor, depending on the extent of the damage and the amount of each security. However, provided a receiver and manager appointed under a debenture acted in good faith for the purpose of enabling the assets comprised in the debenture holder's security to be preserved and realised for the benefit of the debenture holder, his decisions could not be impeached even if they were disadvantageous to the company or other incumbrancers, and he was subject to no further or greater liability: in particular, he owed no general duty of care in negligence since if such a duty were to be imposed that would be inconsistent with the specific duties which the courts, applying equitable principles, had imposed on a mortgagee and which permitted him to manage the company without risk of suit instead of merely selling the assets as quickly as possible to repay the mortgage debt. However, in exercising a power of sale, the receiver must take reasonable care to obtain a proper price. On the facts, both defendants had acted in breach of the duty of

good faith, the second defendant in carrying out his receivership for improper purposes and in bad faith ultimately verging on fraud and the first defendant in failing to transfer the first debenture to the first plaintiff at the end of March 1987 when the first plaintiff offered to purchase it.

- [83] Mr. Hare also relied on the decision in **Aodhcon LLP v Bridgeco Limited**.²² According to Mr. Hare, the thrust of the English case law highlights the approach that the courts take when scrutinizing creditor sales bids or sales by creditors/mortgagees. He said that it was arguably the case that the sale can be impugned. In support of this argument he cited the cases of **Standard Chartered Bank Ltd. v Walker and another**²³ and **Palk and another v Mortgage Services Funding PLC**.²⁴
- [84] In **Aodhcon** it was held, following **Cuckmere Brick Co. Ltd. v Mutual Finance Ltd.** that: (1) If a mortgagee decided to sell the mortgaged property he had a duty, in equity, to take reasonable care to sell for the best price reasonably obtainable. How that duty was to be discharged required the mortgagee to make an informed judgment and there were no steps which the mortgagee had to take. It was for the mortgagee to decide on the manner of sale, if appropriate after having sought expert advice. The property should be advertised sufficiently widely and fairly, and properly exposed to prospective purchasers. The mortgagee was not under a duty to improve the property for sale or remove incumbrances, such as the grant. The fact of repossession could taint the property. The mere fact that a higher price might have been obtained did not inevitably mean that the duty had been breached. The burden of proving a breach of duty rested on the mortgagor, and the mortgagee would not have breached his duty unless he was 'plainly on the wrong side of the line'.
- (2) A bracket approach was conventionally adopted in valuers' professional negligence claims, but that approach was not mandatory in this case and might be too inflexible. Where the property had been exposed to the market and a number of genuine offers had been received, the more logical approach was to start by

²² [2014] 2 All ER (Comm) 928

²³ [1982] 1 WLR 1410 at p. 1417 – 1418 H – C; 1419 E

²⁴ [1993] 2 WLR 415

considering the steps that the mortgagee took to sell the property and then to consider whether, in all the circumstances, the mortgagee acted reasonably in accepting the purchaser's offer and contracting to sell the property at that price. The Red Book market value was one factor in the overall consideration of the more general question whether Bridgeco took reasonable care to sell for the best price reasonably obtainable. Red Book market value was based on a number of assumptions which did not apply in the case of a sale of the property by Bridgeco, as mortgagee in possession, in the state it was actually in. Where, as in this case, sales activity took place before a property was repossessed, a decision which had regard to actuality was likely to be more accurate than one which required the court to do the best it could to apply an appropriate discount for the Red Book market value assumptions which did not or did not wholly apply.

(3) The property was properly marketed for sale on Aodhcon's behalf prior to its repossession and in the circumstances Bridgeco was entitled to rely on that earlier marketing. The property suffered some taint when an offer was accepted and then rejected, and when multiple draft sale contracts were issued and then withdrawn. Bridgeco obtained marketing appraisals from two agents. It did not obtain Red Book valuations but it was not an absolute requirement that it should do so. The property would have been unlikely to have sold at auction on the proposed terms and would thereby have been tainted further. Bridgeco could not be criticised for not having auctioned the property at all. The pool of prospective purchasers was likely to have been equally well alerted to the property by the marketing activities which were in fact carried out. By its conduct Bridgeco was not in breach of duty.

(4) Ignoring the repossession of the property and its consequences, the best price reasonably obtainable for the property in March 2011 was an amount less than £970,000, taking into account the position in respect of the grant and the cost of completing the development. That figure and the Red Book market value did not take into account the taint which the property suffered by being repossessed and offered for sale by a mortgagee in possession or a sale within 90 days, which Bridgeco was entitled to pursue. Both of those factors would significantly depress the price. In the circumstances, Bridgeco could not properly be criticised for not having rejected the

£852,000 offer in the expectation of a later higher offer and for not holding out for a longer period for a higher offer. It did not breach its duty to take reasonable care to sell the property for the best price reasonably obtainable. It did not plainly fall on the wrong side of the line or, to put it another way, Bridgeco's selling decisions were within an acceptable margin of error. The claim failed and the counterclaim succeeded.

- [85] In **Standard Chartered Bank** a bank appointed a receiver of the property of a company indebted to it. At the bank's insistence, he very quickly sold the company's assets, highly specialised machinery; the sale was poorly attended, and proceeds were too low to pay the bank after payment of the preferential creditors. The bank thereupon sued guarantors of the company's debt to it on their guarantee and obtained summary judgment against them. The guarantors appealed, seeking leave to defend, on the basis that the bank had been negligent in pressing for a hasty sale when a later, better-prepared sale would have realised higher proceeds. The court held that a receiver owed a duty to a guarantor to get the best possible price because of the guarantor's interest that the debts should be paid out of the proceeds of the sale. A debenture holder who interfered with a receiver's acts, owed a like duty to the guarantor. In the circumstances, there were triable issues relating to negligence by the bank and the receiver in the holding of the sale, and the leave sought by the guarantors would be granted.
- [86] Mr. Hare directed the court's attention to the duty of care a mortgagee or a chargee ought to exercise when exercising a power of sale and that ultimately that duty is to be fair to the borrower.
- [87] Mr. Hare insisted that a secured creditor cannot sell to himself without an order from the court; otherwise the sale would be void. He said that the court must be satisfied that the sale is fair; even if the lender is the only party interested in the property being sold.

- [88] In addition, Mr. Hare argued that the power to credit bid is not recognised by section 75 (1) of the RLA or Anguillian law; and furthermore, there was no contractual right to credit bid.
- [89] In response, Mrs. Small-Davis discussed the case of **Credit Suisse** and its applicability to Anguilla; and distinguished the case of **Royal Bank of Scotland** which she said pertained to loans as opposed to receiverships. She also relied on the decision in **Standard Chartered Bank Ltd.** for the proposition that a receiver has entirely different duties from a chargee or mortgagee.
- [90] Mrs. Small-Davis cited the decision in **Aodhcon**²⁵ and argued that the court must examine each case on its own merits; and sought to distinguish **Aodhcon**²⁶ from the present case.²⁷ Mrs. Small-Davis made specific reference to the Order authorizing sale process and bid procedure ('SPO'); the fact that the US Court had expert evidence and that the reserve price was not based on the most recent appraisal. More importantly, she argued that the sale was conducted by an independent auctioneer. Mrs. Small-Davis relied on the decision in **Bridgeco** to support the argument that the sale price was the price reasonably obtainable at the time, and that it was of no moment that the sale did not achieve market price. Mrs. Small-Davis referred the court to the decision in **Regal (Hastings) Ltd v Gulliver and others**²⁸ to support the argument that Mr. Korzen possessed no mala fides, did not act in bad faith and did not act in breach of his fiduciary duty to Barnes Bay from which he derived any profit. In short, Mrs. Small-Davis' argument was that in the absence of the aforesaid elements, no substantive claim could be brought against Mr. Korzen. The court finds favour with this submission.
- [91] In **Regal (Hastings)** the appellants, Regal (Hastings) Ltd. ("Regal"), were plaintiffs in the action and the respondents Charles Gulliver, Arthur Frank Bibby, David Edward Griffiths, Henry Charles Bassett, Harry Bentley and Peter Garton were the

²⁵ At p. 26 para. 131

²⁶ At p. 28

²⁷ s. 72 RLA – remedies available to charges; Tab 10 1st Bundle line 7 et seq.

²⁸ [1942] 1 All ER 378

defendants. The action was brought by Regal against the first five respondents who were former directors of Regal, to recover from them sums of money amounting to £7,018 8s. 4d., being profits made by them upon the acquisition and sale by them of shares in a subsidiary company formed by Regal and known as Hastings Amalgamated Cinemas Ltd. The action was brought against the respondent Garton, who was Regal's former solicitor, to recover a sum of £1,402 1s. 8d. and also a sum of £233 15s. in respect of a solicitor's bill of costs, the former sum being profit made by him in a similar dealing in the said shares and the latter sum being a sum paid to him by Regal in respect of work purported to have been done on their behalf. There were alternative claims for damages and misfeasance and for negligence. The action was based upon the allegation that the directors and the solicitor had used their position as such to acquire the shares in Amalgamated for themselves with a view to enabling them at once to sell them at a very substantial profit, that they had obtained that profit by using their offices as directors and solicitor and were therefore accountable for it to Regal; and also that in so acting they had placed themselves in a position in which their private interests were likely to be in conflict with their duty to Regal. The action came for trial before Wrottesley J., who found for the respondents. That decision was upheld, on appeal, by the Court of Appeal. Lord MacMillan delivering the decision of the court said:

"My Lords, the real question for decision in this appeal seems unfortunately to have been somewhat obscured by the course of the arguments before the trial judge and to some extent also in the Court of Appeal. The issue, as it was formulated before your Lordships, was not whether the directors of Regal (Hastings), Ltd., had acted in bad faith. Their bona fides was not questioned. Nor was it whether they had acted in breach of their duty. They were not said to have done anything wrong. The sole ground on which it was sought to render them accountable was that, being directors of the plaintiff company and therefore in a fiduciary relation to it, they entered in the course of their management into a transaction in which they utilised the position and knowledge possessed by them in virtue of their office as directors, and that the transaction resulted in a profit to themselves. The point was not whether the directors had a duty to acquire the shares in question for the company and failed in that duty. They had no such duty. We must take it that they entered into the transaction lawfully, in good faith and indeed avowedly in the interests of the company. However, that does not absolve them from accountability for any profit which they made, if it was by reason and in virtue of their fiduciary office as directors that they entered into the transaction.

The issue thus becomes one of fact. The plaintiff company has to establish two things: (i) that what the directors did was so related to the affairs of the company that it can properly be said to have been done in the course of their management and in utilisation of their opportunities and special knowledge as directors; and (ii) that what they did resulted in a profit to themselves. The first of these propositions is clearly established by the analysis of the whole complicated circumstances for which the House is indebted to my noble and learned friend who has preceded me. The second proposition is admitted, except in the case of Gulliver, in whose case I agree that, on the evidence, he is not proved to have made any profit personally. The conditions are, therefore, in my opinion, present which preclude the four directors who made a personal profit by the transaction from retaining such profit."

[92] Relying on the decision in **re Etic Limited**,²⁹ Mrs. Small-Davis argued that no action could lie against Mr. Korzen unless he, as an officer of Barnes Bay, had caused material loss to the company. She argued that quite apart from not causing any loss to Barnes Bay, Mr. Korzen having adopted the position, that he ought to be applauded for his efforts. According to Mrs. Small-Davis, Barnes Bay was deeply indebted and there was no alternative means of curing its perennial state of insolvency. Therefore, she argued, there exist no evidence of loss sustained by Barnes Bay arising out of the restructuring arrangement.

[93] In **re Etic Limited**, the liquidators of the company issued a summons under section 215 of the Companies (Consolidation) Act, 1908, against the secretary of the company asking for a declaration that he was indebted to the company for the expenses of a visit by him to America and for sums overdrawn on account of his salary. The respondent alleged that he had a right of set-off against the sums overdrawn. On the evidence his Lordship found that the claim for expenses was not made out, and on the question whether section 215 was intended to apply to a claim for sums overdrawn by a secretary with the consent of the managing director. Section 215 of the Companies Act, 1908 provided that: "Where in the course of winding up a company it appears that any person who has taken part in the formation or promotion of the company, or any past or present director, manager or liquidator, or any officer of the company, has misapplied or retained or become liable or accountable for any money or property of the company, or been guilty of any misfeasance or breach of

²⁹ [1928] Ch. 861

trust in relation to the company, the Court may, on the application of the official receiver, or of the liquidator, or of any creditor or contributory, examine into the conduct of the promoter, director, manager, liquidator, or officer, and compel him to repay or restore the money or property or any part thereof respectively with interest at such rate as the Court thinks just, or to contribute such sum to the assets of the company by way of compensation in respect of the misapplication, retainer, misfeasance, or breach of trust, as the Court thinks just."

- [94] The court in **Re Etic Limited** held, that the operation of section 215 was not applicable to all cases in which a company had a right of action against an officer of the company, but was limited to cases where there had been something in the nature of a breach of duty by an officer of the company as such which had caused pecuniary loss to the company; no order would therefore be made on the summons under the summary jurisdiction under section 215.
- [95] Mrs. Small-Davis argued that the conclusion of the Credit Committee was the arrangement put in place and was the plan that was in the best interest of the creditors; otherwise they would have received nothing.
- [96] Ultimately, Mrs. Small-Davis submitted that the claim is hopeless because the so-called 'inducements' relied on to ground the claim are not premised on any mala fides on Mr. Korzen's part, as the procedure adopted was transparent and consented to by the necessary parties. Furthermore, she argued, the matters relied on as inducements were matters of which the US Bankruptcy Court was fully aware.³⁰
- [97] On the issue of whether the Chapter 11 proceedings were initiated by Starwood for a collateral purpose in an effort to obtain an unfair advantage, Mrs. Small-Davis opined that the defendants came together to save the business and to ensure a smooth transition to new ownership and to keep the value of the Property.³¹ She also alluded

³⁰ Final Recommendation at Tab 10

³¹ Transcript p. 40 line 7

to this being the purpose and intent of the restructuring and the reasons why the bankruptcy proceedings were not required to effect execution.³²

[98] All this, argued Mrs. Small-Davis, runs contrary to Barnes Bay's assertion in relation to the manner in which the sale was conducted.

[99] The court is of the view that the claim itself is deficient, to the extent that it fails to substantiate the allegation of any wrongdoing by Mr. Korzen in light of what had been canvassed in the US Bankruptcy proceedings. The court agrees with Mrs. Small-Davis that it can be discerned from the evidence before the court that, if nothing else, Mr. Korzen was acting in the best interest of the parties and not contrary to what had already been conceded and agreed to in the US Bankruptcy proceedings. Therefore, it cannot be said, in the circumstances, that Mr. Korzen's breached his fiduciary obligation to Barnes Bay. It appears that the parties had formulated a resolution plan to deal with the indebtedness of Barnes Bay in the US Bankruptcy proceedings. This fact is self-evident and there appears nothing to lead one to a contrary view.

[100] The court having adopted the posture that it has, concludes that it would be inconceivable to challenge the sale at auction on the basis advanced by Barnes Bay.

Purchase Sales Agreements ('PSA')

[101] It appears from Mrs. Small-Davis' submissions that seventeen claims were brought by the PSA creditors and were all defended by Barnes Bay on the basis that the monies paid were not refundable as the deposits paid under the PSA were utilized in the construction of the Property.

[102] The issue that arises is whether Barnes Bay is entitled to claim recovery of any sums on the basis of any equitable lien arising from the Trustee Agreement.

³² Order dated 26th November 2018

- [103] Having carefully considered the arguments of the parties and the case law provided, the court is of the view that Barnes Bay has not put forward any sustainable basis for claiming to be a trustee in respect of what has been described as the equitable interest of PSA purchasers. The sustainability of this claim is significantly challenged by the evidence before the court. The fact that Barnes Bay had adopted the position that the money paid by the PSA creditors was not refundable supports the contention that they cannot now attempt to bring a claim to recover those sums on behalf of the PSA creditors on an equitable basis.
- [104] The court was referred to the final order dated 14th June 2011 in the contested proceedings. It appears that there was no challenge to the secured claims.³³ This, Mrs. Small-Davis argued, was binding on the liquidator as successor to Barnes Bay.³⁴ According to Mrs. Small-Davis, paragraphs 13(a) and 13(b), of the final order are of binding effect³⁵, wherein one finds that the Committee of Creditors had withdrawn the claim and supported the restructuring plan.
- [105] It appears that Mrs. Small-Davis' argument is that Barnes Bay is estopped by the principle of res judicata from claiming an equitable lien in respect of the PSA creditors. In any event, according to her, the PSA creditors' right to bring claims was preserved.³⁶ In fact, she says, claims were brought by the PSA creditors, a fact which had already been disclosed.³⁷ None of the PSA creditors went beyond filing for declarations that the monies paid by them under the PSA stood as an equitable lien. Hence, according to Mrs. Small-Davis, the present claim by Barnes Bay that they are entitled to an equitable lien amounts to an abuse of the court's process.
- [106] She argued further that, it can be inferred as an automatic stay of the Anguillian proceedings; and that the PSA creditors were satisfied with the arrangements under

³³ Tab 6 at para. 4 et seq.

³⁴ para. 13 Tab 6

³⁵ Disclosure Statement at p. 2

³⁶ pp. 8 and 11 Tab 6

³⁷ Disclosure Statement at p. 16

the Chapter II proceedings. In fact, according to Mrs. Small-Davis, eleven cases were stayed.³⁸

[107] It is the defendants' submission that some of the very same issues now raised in the present claim were already raised before the US Bankruptcy Court.³⁹ This clearly shows that Mr. Greenberg voted in favour of the plan and also stood to benefit if the plan proceeded, by virtue of which he was guaranteed to benefit from the return of his deposit.⁴⁰

[108] Relying on the principles set out in the cases of **Henderson v Henderson**⁴¹ and **Endell Thomas v The Attorney General of Trinidad and Tobago(No 2)**,⁴² Mrs. Small-Davis submitted that there was an overriding public policy that there must be an end to litigation. Consequently, she argued, the defendants are entitled to enjoy the finality of the decision of the US Bankruptcy Court.

[109] In **Thomas v The Attorney General**, Sharma JA explained the principles of res judicata, he said:

"Res judicata, whether cause of action estoppel or issue estoppel is based on the fundamental principle that it is unjust for a man to be vexed twice with litigation on the same matter, coupled with the public interest in seeing an end and finality to litigation.

It is thought that this expression was first coined by Diplock LJ in *Thoday v Thoday* [1964] 1 All ER 341. It is the simplest estoppel, *per rem judicatam*; *res judicata* in its most essential form. Diplock LJ said (at page 352):

'The first species, which I will call "cause of action estoppel", is that which prevents a party to an action from asserting or denying, as against the other party, the existence of a particular cause of action, tion, the non-existence or existence of which has been determined by a court of competent jurisdiction in previous litigation between the same parties. If the cause of action was determined to exist, i.e. judgment was given on it, it is said to be merged in the judgment, or, for those who prefer Latin, "*transit in rem judicatam*". If it was determined

³⁸ p. 30 – 32; p. 44 para. (g)

³⁹ Tab 10 pp. 9 - 40 et seq.; pp. 88 – 143; p. 37

⁴⁰ pp. 38 – p. 24 Transcript at line 4; pp. 27 – 28, p. 31

⁴¹ (1843) 3 Hare 100

⁴² (1988) 39 WIR 372

not to exist, the unsuccessful plaintiff can no longer assert that it does; he is estopped *per rem judicatam*. This is simply an application of the rule of public policy expressed in the Latin maxim, "*nemo debet bis vexari pro una et eadem causa*".'

So far as cause of action estoppel is concerned the rule is absolute. One cannot sue twice for the same relief based on the same cause of action even if new facts or law had come to light. This is quite unlike issue estoppel, in which (in exceptional circumstances) one is permitted to re-litigate an issue raised in previous proceedings. In my judgment, this is a clear case of cause of action estoppel. All the relevant allegations of facts made in High Court action 5067 of 1981 were made in High Court action 2227 of 1972.

As I sought to show, the Privy Council considered the matters which the appellant complained of in High Court action 5067 of 1981, and having done so together with the other issues raised held that the appellant was lawfully dismissed from his position.

In any event it seems immaterial whether or not the Privy Council was confined to the three preliminary points. Its decision that the appellant's claim was not maintainable in view of sections 99 and 102 of the former Constitution was a decision on a question of law which was binding on every other court, and was a final determination of the parties' rights. In effect, it stated that the appellant had no right or cause of action.

However, even if the cause of action estoppel does not arise, I am still of the view that the appellant must fail because of his infringement of the rule of *res judicata* in its wider sense. The decision generally cited as the leading authority on this principle is that of Sir James Wigram V-C in *Henderson v Henderson* (1843) 3 Hare 100 at pages 114, 115, where he said:

'In trying this question I believe I state the rule of court correctly when I say that, where a given matter becomes the subject of litigation in, and of adjudication by a court of competent jurisdiction, the court requires the parties to that litigation to bring forward their whole case, and will not (except under special circumstances) permit the same parties to open the same subject of litigation in respect of matter which might have been brought forward as part of the subject in contest, but which was not brought forward, only because they have from negligence, inadvertence or even accident, omitted part of their case. The plea of *res judicata* applies, except in special cases, not only to points upon which the court was actually required by the parties to form an opinion and pronounce a judgment, but to every point which properly belonged to the subject of litigation, and which the parties, exercising reasonable diligence, might have brought forward at the time.'

This statement has been repeatedly cited and followed over and over again in many subsequent decisions of the highest authority.

Sir James Wigram V-C's phrase 'every point which properly belonged to the subject of litigation' was expanded in *Greenhalgh v Mallard* [1947] 2 All ER 255 at page 257 by Somervell LJ. He said:

'... *res judicata* for this purpose is not confined to the issues which the court is actually asked to decide, but ... it covers issues or facts which are so clearly part of the subject matter of the litigation and so clearly could have been raised that would be an abuse of the process of the court to allow a new proceeding to be started in respect of them.'

[110] At the heart of the defendants' argument on the abuse of process point, is that the present claim may properly be regarded as a resurrection of the claims already canvassed and determined in the US bankruptcy proceedings, which said claims had already been denied. In addition, Mrs. Small-Davis argued that Barnes Bay is seeking to rely on evidence in a motion that was withdrawn.⁴³ Moreso, Mrs. Small-Davis argued that it appears from paragraph 30 of the said order that the order is binding on the liquidator.⁴⁴ In addition, she submitted that Barnes Bay not having objected or appealed reinforces this point.

[111] Mr. Hare's contention was that the causes of action pursued in the present claim were never raised and determined in the US bankruptcy proceedings. He argued that the Trustee Motion was withdrawn in light of a new and revised plan; and that no claim had been brought by Barnes Bay in the US proceedings or elsewhere.

[112] In addition, Mr. Hare argued that Barnes Bay is not prevented from bringing the present claims because the question of issue estoppel does not arise at all; and, even if the court was to find in favour of the defendants on the issue estoppel argument, this would be wrong where the issue of fraud is alleged. However, the court rejects this argument on the basis that nowhere in its pleadings does Barnes Bay specifically allege fraud or give particulars thereof.

⁴³ Tab 15 – Order 29th March 2019 at paras. 8, 11, 14 – 15, 18, 21 and 24

⁴⁴ At para. 31 *infra*

[113] Mr. Hare contended that, in any event, the US proceedings were alien to Anguilla. To support this argument he relied on the decision in **Arnold and others v National Westminster Bank PLC**⁴⁵ where it was held on appeal, that although issue estoppel constituted a complete bar to relitigation between the same parties of a decided point, its operation could be prevented in special circumstances; that where further material relevant to the correct determination of a point involved in earlier proceedings which could not, by reasonable diligence, be brought forward in those proceedings became available, it gave rise to an exception to issue estoppel, whether or not that point had been specifically raised and decided; that such further material was not confined to matters of fact; but that where a judge made a mistake and a higher court overruled him in a subsequent case, justice required that the party who suffered from the mistake should not be prevented from reopening that issue when it arose in later proceedings; and that, accordingly, the plaintiffs ought to be permitted to reopen the question of construction decided against them by Walton J.⁴⁶

The court is of the view that the decision in **Arnold v National Westminster Bank** cannot avail Barnes Bay in the present circumstances of the instant case. This is so because the result of the US Bankruptcy proceedings was intended to bring an end to the matters in dispute between the parties and Barnes Bay in large measure conceded. The liquidator in this instance is thereby bound by the decision emanating from the US Bankruptcy Court.

[114] According to Mr. Hare, the claim does not involve the reopening of the US bankruptcy case since there were no adversarial issues drawn between the parties in the former proceedings. He said that none of the present defendants were named as parties to the US proceedings; and accordingly, the question of issue estoppel and res judicata clearly cannot arise in the present proceedings. Mr. Hare's position was that the present claim was never litigated in the US bankruptcy proceedings and were not sought to be determined in these proceedings.

⁴⁵ [1991] 2 WLR 1177; [1991] AC 93

⁴⁶ pp. 1185G–H, 1187E–F, 1188A–B, 1189B–E, F–H, 1191A, G)

[115] Mr. Hare referred to Tab 12 of the Defendants' Supplemental Affidavit at paragraph 2 to support the proposition that there was no deliberation or adjudication on the merits. Mr. Hare conceded that, in any event, the Trustee Motion was settled and withdrawn; and no claim was made by Barnes Bay. Accordingly, no issue estoppel arises. He relied on the decision in **Carl-Zeiss Stiftung v Rayner and Keeler Ltd and others (No 2)**⁴⁷ He also referred to the decision in **Arnold v Westminster Bank PLC**⁴⁸ in support of this argument.

Forum Non Conveniens

[116] Mrs. Small-Davis argued that the burden rests on Barnes Bay to establish that Anguilla is clearly and distinctly the most appropriate forum for bringing the present claim. In determining the appropriate forum, the court is required to carry out and apply a three-pronged test which is: Firstly, whether Anguilla is clearly and distinctly the appropriate forum; second;y, whether there is another forum that is more appropriate for the trial; and thirdly, if so, whether there exist the risk of injustice if the claim were to be prosecuted in that forum.

[117] In addition, Mrs. Small-Davis argued, quite rightly, that should Barnes Bay fail to succeed on the forum argument to the extent that they have failed to satisfy the court that Anguilla is the appropriate forum for the trial of the dispute, then service of the claim should be set aside and the proceedings stayed.⁴⁹ In support of this argument she cited the decision in **VTB Capital Plc v Nutritek International Corporation and others**⁵⁰ where VTB, a bank incorporated and regulated in England which was a subsidiary of a Russian bank, lent some \$US225m to a Russian company, RAP, to finance the purchase of six dairy companies and three associated companies in Russia from N, a British Virgin Islands company owned by two Russian companies and managed in Russia. The terms of the loan were set out in a facility agreement, an interest rate swap agreement and various other agreements, all of which were

⁴⁷ [1966] 2 All ER 536

⁴⁸ at p. 106 G – A, p. 107 C; p. 109 A – E; p. 110 G

⁴⁹ para 30, 32 Supplemental Submissions – Ref. Tab 23

⁵⁰[2013] 1 All ER 1296

expressed to be subject to English law. RAP made three interest payments on the loan and then defaulted leaving VTB with security worth no more than \$US40m. VTB brought proceedings in England seeking damages for deceit and/or conspiracy against N and three other defendants, MC (a British Virgin Islands company), MC Moscow (a Russian subsidiary of MC), and M, a Russian citizen. VTB claimed that the dairy companies had been grossly overvalued on the basis of information provided by N's management, that VTB had been induced to enter into the loan by fraudulent misrepresentations made by N as to the value of the dairy companies and that the sale was at arm's length when in fact RAP and N were indirectly controlled by M through MC Moscow and MC, and that the respondents were jointly and severally liable for the misrepresentations. VTB was granted permission by the chief master to serve the proceedings out of the jurisdiction and was also granted a worldwide freezing order (the WFO) against M freezing his assets up to \$US200m. N, MC and M applied to set aside the service out of the jurisdiction. VTB applied for permission to amend its particulars of claim to add a claim in contract against the defendants, contending that they were liable for breach of the facility and interest rate swap agreements, that those agreements ought to be enforced against them even though they were not parties to the agreements, and for that purpose the court ought to 'pierce the corporate veil' of RAP. The judge set aside the order granting VTB permission to serve the proceedings out of the jurisdiction, on the grounds that the applicable law for the claim in tort was Russian law, and he refused to allow VTB to amend its particulars of claim to plead the contract claim, on the grounds that the corporate veil of a company could not be pierced in support of a claim for damages for breach of contract. The judge continued the WFO to allow VTB to apply to the Court of Appeal for permission to appeal, which was granted. On appeal, the Court of Appeal upheld the judge's decision not to pierce the corporate veil so as to permit the claim in contract to proceed and his refusal to permit service of the proceedings out of the jurisdiction, on the grounds that the governing law of the alleged torts was Russian law and VTB had failed to establish that England was clearly or distinctly the appropriate forum. VTB appealed to the Supreme Court. The WFO was continued pending the hearing of the appeal.

[118] On appeal to the Supreme Court, it was held, (Lord Clarke and Lord Reed dissenting in part) that the appeal would be dismissed for the following reasons: (1) VTB could only be granted permission to serve the proceedings out of the jurisdiction on the respondents if it satisfied the court, for the purposes of CPR 6.37(3), that England was the proper place in which to bring the claim because it was clearly the appropriate forum for the trial of the action. However (Lord Clarke and Lord Reed dissenting), even though both torts of deceit and conspiracy were governed by English law by virtue of being committed in England, which was therefore the place where the events constituting the tort occurred, the natural and appropriate forum was Russia, because the fundamental matters in dispute and the common design on which VTB's tortious claims depended was thoroughly Russian, the alleged representations emanated from Russia, the key issues were factual rather than legal and the factual focus was Russia, the witnesses and documentary evidence were likely to be overwhelmingly Russian, and there was no evidence that Russian law and Russian courts would not impose tortious liability for deceit and conspiracy and no suggestion that there would not be a fair and proper trial in Moscow. Although the judge and the Court of Appeal had erred in holding that the torts were governed by Russian law that did not vitiate his decision and there was no basis for interfering with the exercise of his discretion to set aside the permission to serve the proceedings out of the jurisdiction.⁵¹

[119] In delivering the judgment of the court, Lord Mance held, applying the decision in **Spiliada Maritime Corp v Cansulex Ltd. The Spiliada**⁵² said:

“...that the ultimate over-arching principle to determine the appropriate forum where permission is required to serve proceedings out of the jurisdiction is that permission to serve out will be refused or set aside if the court is not satisfied that England is clearly the appropriate forum, and the presumption that the appropriate forum is the place where the tort arose or was committed is subsidiary to that general principle. The preferable analysis is that, viewed by itself and in isolation, the place of commission is a relevant starting point when considering the appropriate forum for a tort claim as it will normally establish a prima facie basis for treating that place as the appropriate jurisdiction, but in the context of an international transaction it is likely to be

⁵¹See at paras. [7], [9]–[10], [47]–[49], [52], [58], [62], [66]–[71], [74], [98]–[101], [113], [153]–[154], [156], [190]

⁵²[1986] 3 All ER 843 at 858–859

over-simplistic to view the place of commission in isolation or by itself, as it may be dwarfed by other countervailing factors.”⁵³

- [120] Mr. Hare in reply contended that, US Bankruptcy law is not an analog of Anguillian bankruptcy law. According to Mr. Hare there was no adversarial litigation in the United States courts capable of raising the question of issue estoppel.
- [121] In a nutshell, Mr. Hare contended that the claim presently before the court pertains to issues concerning an Anguillian company and touching and concerning the subject matter of the litigation that is located in Anguilla. However, in keeping with the principles set out in **VTB v Nutritek** and **Re Spiliada**, the court is of the view that these are not by themselves altogether decisive of the issue of the appropriate forum.
- [122] He argued that the case of **Credit Suisse** was distinguishable from the present case. Therefore, he argued, that the US Bankruptcy Court could not say whether the sale was conducted properly; it was for an Anguillian Court to say so.
- [123] With respect to the defendants' submissions in relation to the operation of section 75 of the RLA and the contention that the chargee had acted in good faith, Mr. Hare argued that Barnes Bay was entitled to seek the Anguillian court's determination of this issue.
- [124] It appears that the centripetal force that drives the present claim brought by Barnes Bay radiates along the fulcrum of the US Bankruptcy proceedings. In the court's view, that being the case, an examination of whether the sale was conducted in a manner consistent with the SPO is one best left for the consideration of the US Bankruptcy Court. It appears that to hold otherwise would be ascribing onto the Anguillian Court the power to determine issues that had already been agreed to by the relevant parties in proceedings that were alien to Anguilla. Indeed, the SPO provided that the sale would be undertaken pursuant to Anguillian law. To the court this makes good sense. However, the issues arising on the present claim, including some of which the court finds had already been canvassed in the US proceedings, makes Anguilla an

⁵³ At paras. [18], [51]

inappropriate forum to ventilate the issues currently raised in the present claim. Indeed, the issues arising on the present claim are inextricably bound up with the US Bankruptcy proceedings.

[125] The crux of the matters raised by the present claim arises clearly and distinctly from the US Bankruptcy proceedings. This is particularly so in the case not only of the SPO, but also in respect of the allegations regarding Mr. Korzen's role in the restructuring plan, the allegation of misfeasance or wrongdoing and breach of fiduciary duty on the part of Mr. Korzen, which Barnes Bay alleges induced them into entering into the DIP agreement and the SPO; and as well the issue regarding the PSA creditors, to say the least.

[126] In any event, the court is also mindful of the fact that the sale on auction was indeed carried out within this jurisdiction and pursuant to the RLA. Therefore, it would be improper to suppose that the US Court would be well placed to examine and determine the allegations made by Barnes Bay with respect to the conduct of the sale in Anguilla. However, the court is also mindful of the fact that the US Bankruptcy Court had the benefit of expert evidence when making the SPO. Therefore, it cannot be said that the US Bankruptcy Court would not benefit from such expert evidence in the event that the conduct of the sale at auction pursuant to the SPO was revisited and reviewed by the US Bankruptcy Court. In the circumstances, the court is minded to adopt the approach set out in **VTB v Nutritek** and **Re Spiliada** and holds that the United States is the more appropriate forum.

No Reasonable Grounds for Bringing the Claim

[127] In addition, Mrs. Small-Davis challenged not only the reliability of Mr. Greenwood's affidavits, but also his credibility, on the basis that the contents of the affidavits are based almost entirely on a document extracted from the US Bankruptcy Motion which was withdrawn.⁵⁴ She argued that it could be inferred from Mr. Greenberg's withdrawal of the Bankruptcy Motion that Mr. Greenberg may have obtained satisfaction otherwise. Mrs. Small-Davis concluded that Mr. Greenwood's affidavits do

⁵⁴ Ref. testimony of Mr. Greenberg

not present an accurate view of the facts but merely recite what someone else had said previously.⁵⁵

- [128] In the circumstances, Mrs. Small-Davis argued, that on the basis of the defendants' submissions in relation to the conduct of the sale, the issue of breach of fiduciary duty, and the claim for equitable lien, there clearly are no reasonable grounds for bringing the present claim; which for all intents and purposes amounts to an abuse of the court's process and ought to be struck out.
- [129] Mr. Hare, on the contrary, submitted that the court's power to strike out a claim arises only in clear and obvious cases. Furthermore, he contended that the court should assess the claim on the basis that the facts contained therein are true.
- [130] It appears that the abuse of process complained of in the present case does not necessarily arise within the context of issue estoppel but rather within the ambit of the general public policy that there must be an end to litigation and that a party ought not to be vexed twice in defending proceedings where another party had failed to bring forward its entire claim at the first instance.
- [131] The court understands this to be one limb of Mrs. Small-Davis' submission. According to Mrs. Small-Davis, Barnes Bay had agreed to the restructuring plan and did not challenge the proceedings in the US Bankruptcy Court. In addition, she said that the liquidator, as the successor in title to Barnes Bay, had sat on any rights that he may allegedly have had and has only pursued the present claim to set aside the sale after a period of over seven years. Hence she relied on the doctrine of laches.
- [132] The court takes the point that to litigate the present issues at this stage may very well amount to an abuse of process. Separate and apart from the issue concerning the sale by auction, the other issues canvassed by the present claim are best left to be resolved in the US proceedings. This creates a difficulty, to the extent that having adopted such a course there exist a likelihood of satellite litigation which may very

⁵⁵ Ref. Tab 12 – Notice of Withdrawal.

well obstruct the just disposal of the proceedings related to the sale by auction if the court were to accept that it had jurisdiction to entertain the same.

- [133] The court's power to strike out a claim is premised on the provisions of CPR 26.3; and in respect of the present application before the court, specifically CPR 26.3(1) (b) and (c) which provides:

"In addition to any other power under these Rules, the court may strike out a statement of case or part of a statement of case if it appears to the court that –

(b) the statement of case or the part to be struck out does not disclose any reasonable ground for bringing or defending a claim;

(c) the statement of case or the part to be struck out is an abuse of the process of the court or is likely to obstruct the just disposal of the proceedings."

- [134] The defendant's application arises both within the context of the res judicata point and the abuse of process point. The court agrees with Mr. Hare's submission that the issue regarding the propriety of the sale by auction has not been discretely and distinctly determined by any court. The court finds therefore, that the question of issue estoppel does not arise within that aspect of the claim. It will be recalled that the SPO stated specifically that the sale was to be conducted in accordance with Anguillian law.

- [135] However, the question that arises for the court's determination on the present strike out application is whether Barnes Bay is competent to bring the claim at this present time, and if so, whether it is barred by the principles of res judicata or abuse of process from doing so.

- [136] The court retains the power to prevent the use of proceedings which are likely to constitute an abuse of the court's process.⁵⁶ The abuse of process of which the defendants complain arises in two respects. Firstly, on the basis of an attempt by Barnes Bay at re-litigation where the defendants claim that the issues that Barnes Bay now wished to litigate in a second set of proceedings which had already been determined in the US Court. However, with respect to issues related to the sale by

⁵⁶ See: *Ebert v Birch* [2000] Ch. 484; [1999] 3 WLR 670 and CPR 26.3 (1) (c)

auction, it cannot be said that this is a case where Barnes Bay is seeking to raise issues which should have been raised in the US Bankruptcy proceedings and were not pursued by Barnes Bay in these proceedings.

[137] The court understands the principle in **Henderson v Henderson** to be that, a litigant should bring his whole case against all possible parties in 'one go', however, that does not mean that re-litigation is barred, but that it may be a demonstrable abuse of process.

[138] The court understands Mr. Hare's contention to be that, the present claim cannot be taken to amount to an abuse of process because the possibility of litigating these issues were not available in view of the fact that they did not fall within the scope of the US Bankruptcy proceedings.

[139] However, the difficulty arises within the argument advanced by the defendants; that is, that the present litigation involves the same subject matter as in the US Bankruptcy proceedings. According to their Lordships in **Johnson v Gore Wood**:

"Thus the abuse question need not involve the reopening of a matter already decided in proceedings between the parties, as where a party is estopped in law from relitigating a cause of action or an issue already decided in earlier proceedings, but as Somervell LJ said in *Greenlough v Mullard* [1947] 2 All ER at 257 may cover

"issues or facts which are so clearly part of the subject matter of the litigation and so clearly could have been raised that it would be an abuse of process of the court to allow a new proceeding to be started in respect of them."

[140] Their Lordships held, at paragraph 19 of the judgment in **Johnson v Gore Wood**:

"But *Henderson v Henderson* abuse of process, as now understood, although separate and distinct from cause of action estoppel and issue estoppel, has much in common with them. The underlying public interest is the same: that there should be finality in litigation and that a party should not be twice vexed in the same matter. This public interest is reinforced by the current emphasis of efficiency and economy in the conduct of litigation, in the interest of the parties and the public as a whole. The bringing of a claim or the raising of a defence in later proceedings may, without more, amount to abuse if the court is satisfied (the onus being on the party alleging the abuse) that the claim or defence should have been raised in the earlier proceedings if it was to be raised at all. I would not accept that it is necessary, before abuse can be

found, to identify any additional element such as collateral attack on a previous decision or some dishonesty, but where those elements are present the later proceedings will be much more obviously abusive, and there will rarely be a finding of abuse unless the later proceedings involves what the court regards as unjust harassment of a party. It is, however, wrong to hold that because a matter could have been raised in earlier proceedings it should have been, so as to render the raising of it in later proceedings necessarily abusive."

[141] It is on this basis that the court finds that Barnes Bay is competent to bring the present claim. Applying the decision in **Morgan Crucible Co. Plc v Hill Samuel & Co. Ltd.**⁵⁷ and **Swain v Hillman and another**,⁵⁸ that the application to strike out was obviously an application under CPR 26.3(1) (b) and the court would be obliged to assume that the facts alleged in the statement of claim were true and that it is not entitled to make use of the powers contained in CPR 15.2 in the absence of an application for summary judgment. The summary judgment test – whether the claimants had any real prospect of succeeding on the claim - was not an option in considering the respondent's application to strike out the claim.

[142] Mr. Hare referred the court to the decision in **Williams and Humbert Ltd. v W. & H. Trademarks (Jersey) Ltd.**⁵⁹ where it was held that where an application to strike out a pleading under R.S.C., Ord. 18, r. 19 involved prolonged and serious argument the court should generally decline to proceed with the argument unless it was satisfied that striking out would obviate the necessity for a trial or substantially reduce the burden of preparing for a trial; that, although the issues raised would more appropriately have been the subjects of applications under Ord. 33, r. 3 for determination of the questions raised before trial of the action, in the circumstances the course of the investigation by the judge and the time involved in the application under Ord. 18, r. 19 had been the same as if the applications had been made under Ord. 33, r. 3; and that, accordingly, the decision to strike out the defence in the first action and to refuse leave to amend in the second action had been rightly made

⁵⁷ [1991] Ch 295

⁵⁸ [2001] 1 All ER 91

⁵⁹ [1986] A.C. 368; at pp. 435 A; 436 F – G; 441 D

[143] In support of his argument Mr. Hare also relied on the decision in **Three Rivers District Council and others v Bank of England (No. 3)**⁶⁰ where it was held that When determining whether a claim should be struck out, a court was not entitled to treat a report of the findings of a non-statutory private inquiry as conclusive on the questions a judge had to answer in the litigation or to conclude that all the available material evidence on those questions had been gathered in. Neither the report nor any of its findings or conclusions would be admissible at any trial. Accordingly, in the instant case the judge and the majority of the Court of Appeal had been wrong to rely on the findings and the conclusions of the Bingham report when determining whether the claim should be struck out. The depositors had not been represented before the inquiry, the case against the Bank had not been put by counsel and the investigation had been carried out behind closed doors. It followed that it was open to their Lordships to take a fresh look at the issue of strike-out, and to reconsider the depositors' draft new particulars. When examining those particulars, it was necessary to consider some of the essential elements of the tort of misfeasance in public office. First, there had to be an unlawful act or omission done or made in the exercise of power by the public officer. Secondly, as the essence of the tort was an abuse of power, the act or omission had to have been done or made with the required mental element. Thirdly, the act or omission had to have been done or made in bad faith. Where the allegation was one of untargeted malice, the required mental element was satisfied if the act or omission was done or made intentionally by the public officer in the knowledge that it was beyond his powers and that it would probably cause the claimant to suffer injury, or recklessly because, although he was aware that there was a serious risk that the claimant would suffer loss due to an act or omission which he knew to be unlawful, he wilfully chose to disregard that risk. As regards that form of the tort, the fact that the act or omission was done or made without an honest belief that it was lawful was sufficient to satisfy the requirement of bad faith. Bad faith would be demonstrated by knowledge of probable loss on the part of the public officer or by recklessness on his part in disregarding the risk. The facts pleaded by the depositors in their fresh pleadings were capable of meeting the requirements of the tort. There

⁶⁰ [2001] 2 All ER 513

was an unequivocal plea that the Bank was acting throughout in bad faith and any question as to whether the evidence pointed to negligence rather than to misfeasance in public office was a matter which had to be judged not on the pleading, but on the evidence, which was a matter for decision by the trial judge. The question whether the Bank knew that loss to the depositors was probable or was reckless in the relevant sense could not be answered satisfactorily without hearing oral evidence. It could not be said, therefore, that the claim had no real prospect of success, and justice required that the depositors be given an opportunity to present their case at trial so that its merits might be assessed in the light of the evidence. Accordingly, the Bank's application for summary judgment would be rejected and the depositors' appeal would be allowed.⁶¹

[144] Mr. Hare relied also on the decision in **Morgan Crucible v Hill Samuel** where the plaintiffs, a public limited company which had taken over a company, brought an action against the defendants, the advisers, accountants and directors of that company, and served a statement of claim alleging breach of a duty of care by negligent misrepresentations in audited financial statements, in an unaudited interim statement published prior to the bid, and in a series of representations contained in defence documents issued to shareholders and served on the plaintiffs' advisers after the bid on which the plaintiffs had foreseeably relied in making and increasing their offer and whereby they had suffered loss. The plaintiffs later sought to amend their pleadings by restricting their claim to representations made in the course of the bid, when their relationship as identified bidders was alleged to be sufficiently proximate to create a duty of care owed to them by the defendants, but including the previously issued financial statements on the grounds, inter alia, that they were "continuing representations" never withdrawn or qualified. The plaintiffs further alleged that a particular purpose of the representations was to persuade them to offer the best terms which the directors could expect to recommend shareholders to accept. On the plaintiffs' summons for leave to amend their pleadings, the judge refused leave, holding that, despite the proposed amendments to the pleadings, the case was bound

⁶¹ *Infra* at [1], [5], [6], [8], [42]–[46], [56], [77]–[86], [95], [106]–[111], [125]–[129], [132], [133], [137]–[139] and [144]–[152],

to fail because of the absence of a duty of care owed by the defendants to the plaintiffs. On appeal by the plaintiff, the court held, allowing the appeal, that, on the facts pleaded in the statement of claim, each of the defendants intended when making the representations that the plaintiffs would rely on them in deciding whether or not to make an increased bid; that the plaintiffs did rely on them for that purpose; that, therefore, it was plainly arguable that there was a relationship of proximity between the plaintiffs and the defendants sufficient to give rise to a duty of care; and that, accordingly, the draft amended pleading disclosed a reasonable cause of action which should be allowed to go to trial.⁶²

[145] Relying on the decision in **Aodchan LLP v Bridgeco**, Mr. Hare suggested that this too raised triable issues that could only be determined upon the court hearing the evidence. Therefore, according to Mr. Hare, the present case was not fit to be struck out on the basis of disclosing no reasonable cause of action.

[146] However, inasmuch as this may hold true in respect of the claim concerning the sale by auction, the part of the claim brought in relation to breach of fiduciary duty and an equitable lien in respect of the PSA creditors clearly disclose no reasonable grounds for bringing the present suit based on the court's previous findings in this judgment. As it stands, if the claim against Mr. Korzen is struck out on the basis of there being no reasonable grounds for bringing the claim, then obviously there exist no basis for pursuing the claim in respect of the sale by auction, since Mr. Korzens' conduct appears to be the underpinning basis of that claim.

The Amendment Application

[147] Barnes Bay filed an application to amend its statement of case to substitute the name of the first-named defendant, "Starwood Capital Group" with the name "Starwood Capital Group Global LP". The amendment application was supported by the third affidavit of Mr. Greenwood ('Greenwood 3') filed 9th May 2019. The grounds for the amendment application put forward by Barnes Bay was that the name "Starwood

⁶² *Infra* at pp. 319H-320B, 321H, 322G, 323D, 324E-G, 325C-E).

Capital Group” was a misnomer. According to Barnes Bay’s argument, the statement of claim inadvertently named the first defendant as “Starwood Capital Group”, whereas the main intention was to name the parent company of SOF, which Barnes Bay alleged is the ‘ultimate parent’ of SOF.⁶³

[148] According to Greenwood 3, the source of the error arose from the nomenclature used in the US proceedings, where “Starwood Capital Group” was used to describe the company of which SOF was an affiliate.⁶⁴

[149] Mr. Hare argued that no issue was taken with the nomenclature in the US proceedings and that there was no confusion by any of the parties or any misapprehension of who the party named actually was.

[150] According to Mr. Hare, a review of the records available publicly showed that the parent company frequently referred to in court documents as “Starwood Capital Group” is in fact “Starwood Capital Group Global LP”.⁶⁵

[151] Mr. Hare alluded to the provisions of CPR 20.1(3), which he argued contained the relevant factors to which the court must pay regard in considering the application to amend.

[152] Mr. Hare further argued that Barnes Bay had made the application to amend at the first available opportunity, that is, on 14th May 2019. Mr. Hare also argued that Barnes Bay would be severely prejudiced if the application was not granted. The fulcrum of Mr. Hare’s argument on this point was that, in the event that the error in the nomenclature ascribed to the first-named defendant was not rectified, Barnes Bay would be unable to obtain relief in circumstances where the true identity of the intended defendant was plain and well known.

⁶³ Ref: foot note para. 5 Greenwood 3

⁶⁴ Ref: foot note 2 Trustee Motion at Tab 12 Exhibit SB1 foot note 2 para. 6

⁶⁵ Ref: Tab 3 Exhibit JG1; p. 18 Tab 4 Exhibit JG1.

- [153] Mr. Hare also argued that there was no likelihood of prejudice to the first-named defendant or any of the other defendants for that matter.
- [154] The court was directed by Mr. Hare to the provisions of CPR 20.2(3) which deals with changes to statement of case after the relevant limitation period.
- [155] It was argued on behalf of the defendants that the rule which the court ought to apply in the circumstances was CPR 19.4. The defendants contended that CPR 20.1(4) gives preeminence to CPR 19.4 and 20.2. According to the defendants, both of these rules are of particular importance in the context of the claimant's application. The court agrees with this submission.
- [156] The court has formed the view, based on the evidence before it and the submissions of the parties, that it is incapable of discerning the true identity of the corporate entity that Barnes Bay wished to substitute for "Starwood Capital Group". There is nothing presented to the court to suggest that "Starwood Capital Group" and "Starwood Capital Group Global LP" are one and the same entity or that the misnomer occurred as a result of an error in nomenclature. Furthermore, no evidence has been presented which satisfies the court that "Starwood Capital Group Global LP" is the parent of "Starwood Capital Group".
- [157] CPR 19.4 provides:
- "(1) This rule applies to a change of parties after the end of a relevant limitation period.
 - (2) The court may add or substitute a party only if the –
 - (a) addition or substitution is necessary; and
 - (b) relevant limitation period was current when the proceedings were started.
 - (3) The addition or substitution of a party is necessary only if the court is satisfied that the –
 - (a) claim cannot properly be carried on by or against an existing party unless the new party is added or substituted as claimant or defendant;
 - (b) interest or liability of the former party has passed to the new party; or
 - (c) new party is to be substituted for a party who was named in the claim form in mistake for the new party."

The court is of the view that Barnes Bay has failed to satisfy the dictates of CPR 19.4. In particular, the court finds that Barnes Bay has failed to satisfy CPR 19.4(3)(b) to the extent that the court is not satisfied that the substitution of the party is necessary on the basis that the interest or liability of the former party has passed to the new party. Also, Barnes Bay has not satisfied the provisions of CPR 19.4(3)(c). No evidence of the corporate structure of either of the two entities have been presented to the court. What has been presented has a tendency to lead to mere speculation, an exercise which the court cannot engage in. The court must be satisfied with respect to the requirements of the relevant rule.

[158] In line with Mrs. Small-Davis' argument, the court has also examined the provisions of CPR 20.2(3) which provides:

"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."

The court is of the considered view that the danger anticipated by CPR 20.2(3)(b) cannot be alleviated. The arguments advanced by Barnes Bay has casts reasonable doubt as to the identity of the two corporate entities.

[159] In the circumstances, the court declines to grant Barnes Bay's application to amend the statement of case. It is also on this basis that the strike out application succeeds. Therefore, the court will set aside service of the claim form on the defendant "Starwood Capital Group".

Order

[160] In the circumstances, and for the reasons already stated by the court the claimant's statement of claim is struck out in its entirety. The court is of the view that the present claim is an abuse of the court's process and discloses no reasonable cause of action.

[161] In the event, if the court is wrong in exercising its discretion pursuant to CPR 26.3(1) (a) and (c), the court has already decided that Anguilla is not the appropriate forum to

bring the present proceedings. Therefore, on that basis, the present claim is stayed and service of the claim form is set aside.

- [162] Costs to the applicants to be assessed in accordance with CPR 65.11 if not agreed within 21 days.

Shawn Innocent
High Court Judge

By the Court


Registrar

