

**EASTERN CARIBBEAN SUPREME COURT
SAINT CHRISTOPHER AND NEVIS
(NEVIS CIRCUIT)**

IN THE HIGH COURT OF JUSTICE

CLAIM NO: NEVHCV2019/141

BETWEEN:

- (1) SUNPOWER BUSINESS GROUP PTE LTD
(2) TOURNAN TRADING PTE LTD**

Claimants

- and -

- (1) AMERICA 2030 CAPITAL LIMITED
(2) MARK SIMON BENTLEY (also known as VAL SKLAROV)
(3) WEISER GLOBAL CAPITAL MARKETS LTD (formerly known as WEISER ASSET
MANAGEMENT LTD.)**

Defendants

AND

CLAIM NO: NEVHCV2019/0023

IN THE MATTER OF THE ARBITRATION ACT CAP. 3:01

BETWEEN:

- (1) SUNPOWER BUSINESS GROUP PTE LTD
(2) TOURNAN TRADING PTE LTD
(3) GUO HONG XIN
(4) MA MING**

Claimants

-and-

- (1) AMERICA 2030 CAPITAL LIMITED
(2) KAREN HILL-HECTOR**

1st Defendant

2nd Defendant

Appearances:

Mr. Nicholas Peacock with Ms. Elizabeth Harper of counsel for the claimants

Mrs. Angela Cozier of counsel for the 1st defendant in case NEVHCV2019/0023 and the defendants in case number NEVHCV2019/0141

Mr. Michael Hayton of counsel for the 2nd defendant in case NEVHCV2019/0023

**2020: June 15th
July, 10th**

Reasons for Decision

- [1] **Moise, J.:** On 15th June, 2020, the court dismissed two applications for the strike out of cases NEVHCV2019/0023 and 0141. I undertook to give written reasons for my decision. I do so now. However, before addressing the substance of the applications it is important to highlight a number of facts which are relevant to both cases. I also wish to note that the cases are consolidated solely for the purpose of providing my reasons to the parties as promised on 15th June, 2020.

The Facts

- [2] The 1st and 2nd claimants (hereinafter referred to as SBG and Tournan respectively) are both limited liability companies incorporated in Singapore. In claim NEVHCV2019/0023, the 3rd and 4th claimants are shareholders of SBG and Tournan respectively. The 1st defendant (hereinafter referred to as America 2030(N)) is a company registered in Nevis. The 2nd defendant in claim NEVHCV2019/0141 (hereinafter referred to as Mr. Sklarov) is a citizen of the United States of America of Ukrainian origin and is the principal owner and operator of the America 2030(N). NEVHCV2019/0141 was also brought against Weiser Asset Management Ltd (hereinafter referred to as Weiser) which is a company registered in the Bahamas as a registered broker dealer.
- [3] The claimants assert that in or about May, 2018, they were introduced to Mr. Sklarov and his America 2030 companies, one of which was registered in Hong Kong. SBG and Tournan were in need of finance and Mr. Sklarov presented America 2030 as a specialist in stock loan agreements. Essentially, as I understand it, America 2030 agreed to loan up to an amount of \$25,000,000.00US to SBG and Tournan in return for a deposit of pledged collateral to a depository broker. This agreement was dated 12th June, 2018 and referred to as the “master loan agreement”. The agreement contained the express terms that:
- (a) America 2030 would maintain its full ability to return the pledged collateral upon satisfaction of the borrower’s obligations to repay the loan;

- (b) The pledged collateral would remain with America 2030 until all outstanding loans and interests were repaid, when it would be returned to the borrower; and
 - (c) America 2030 would not sell or trade in the shares for any reason whatsoever unless the borrower was in default or a material event occurred.
- [4] Essentially, the allegation is that the shares deposited with the broker were to be used solely for the purpose of providing collateral for the loans. They were not to be used by America 2030 in anyway, save in the event of a default on the part of the claimants. The agreement also dictated that America 2030 was entitled to trade in a small number of shares for the sole purpose of testing the market price. The claimants however complain, in their statement of claim in case NEVHCV2019/0141, that there were significant disclaimers contained in the master loan agreement. In addition to that, the agreement contained a breakup fee of 5% of the fair market value of the approved loan in the event that the claimants failed to deliver up the pledged collateral.
- [5] The claimants assert that following the execution of the master loan agreement they requested loans of up to \$3,000,000.00US. Mr. Sklarov responded to this by indicating that if there were to be any amount loaned under the agreement, the breakup fee would be calculated on the maximum loan contemplated in the amount of \$25,000,000.00US. He stated further that there had to be novation of the rights and obligations of America 2030 in favour of America 2030(N) and that the governing law had to be changed to Saint Kitts and Nevis law and the arbitration provisions under the original contract were to be amended to provide for arbitration by "The Arbitrator Conflict Resolution Service of Saint Kitts and Nevis." The claimants assert that despite their protestations, they eventually relented and on 3rd September, 2018 the parties entered into a Supplemental Agreement.
- [6] On 19th September, 2018, the claimants, America 2030(N) and Wieser entered into a Power of Attorney and Custodian Management Agreement. This agreement conferred control of an omnibus account into which the claimants each deposited 14,000,000 shares in Sunpower Business Group PTE Ltd. These shares were deposited into the account on 16th and 17th October, 2018. The claimants assert that Mr. Sklarov was aware of this transfer no later than

21st October, 2018. It was also asserted that as at 23rd October, 2018 the value of the shares by far exceeded the amount to be loaned to the claimants. However, between 22nd October and 2nd November, 2018 some 15,290,500 shares were sold leaving a balance of 12,709,500. It is alleged that this high volume of trading led to queries being raised by the Singapore exchange and resulted in a significant reduction in the value of the shares. It is also important to note that, as the claimants assert, at this time no funds had been transferred to them from America 2030(N) in keeping with the loan agreement.

- [7] The claimants also assert that the selloff of the shares took place on Mr. Sklarov's instruction. Despite this, America 2030(N) issued a default and acceleration notice to the claimants. It claimed an entitlement to terminate the agreement and to demand payment of the breakup fee in the sum of \$1,250,000.00US. The claimants refused this request and sought and obtained injunctive relief in the High Court in Singapore in addition to filing a substantive action in that jurisdiction (The Singapore Proceedings). Subsequent to that, America 2030(N) commenced arbitration proceedings in Nevis in which it sought a declaration of its entitlement to forfeit the Sunpower shares. The arbitration proceedings were to be conducted by Ms. Karen Hill-Hector. In addition to that, arbitration proceedings were also commenced against the claimants seeking substantial sums in damages for defamation.

The Fixed Date Claim

- [8] On 15th February, 2019 the claimants commenced an action in Nevis by way of Fixed Date Claim seeking various orders against the validity of the arbitration proceedings, or in the alternative the removal of Ms. Karen Hill-Hector as the Arbitrator and injunctive relief against the defendants as it relates to proceeding with the arbitration. Together with the Fixed Date Claim, the claimants lodged an application for an interim injunction with a certificate of urgency. They sought from this court an injunction prohibiting the arbitration proceedings from taking place until the final determination of the case. Along with the Claim Form and the Notice of Application, the claimants also filed an affidavit of Guo Hong Xin. Mr. Xin indicated that he made *"this affidavit in support of the Claimant's applications in the claim form and notice of application herein."* On 27th February, 2019, the court ordered a stay of the arbitration proceedings and granted leave to America 2030(N) to file evidence and submissions in

opposition to the application. On 3rd May, 2019 the parties appeared before the court and agreed that the interim injunction granted on 27th February, 2019 would remain in effect with a full hearing of the application to take place on 5th June, 2019. Ms. Hill-Hector indicated that she would play no formal part in the proceedings and undertook to abide by any decision which the court makes in the outcome of this case.

- [9] The Fixed Date Claim came up for hearing on 5th June, 2019 before Justice Raulston Glasgow. At that hearing the parties agreed that the interim injunction would remain in place until the final disposal of the matter. Glasgow J identified 6 issues to be tried and gave further case management directions. The claimants however assert that subsequent to this they became aware that they had fallen victim to a broader fraud scheme perpetuated by Mr. Sklarov. On the basis of information they claim to have received, the claimants lodged a separate claim in this court on 5th December, 2019 in which they sought to rescind the agreement altogether on account of fraud, misrepresentation and breach of contract. They applied for an obtained a worldwide freezing order against America 2030(N), Mr. Sklarov and Weiser.

The Singapore Proceedings

- [10] It is important to outline the facts presented to this court which relate directly to the proceedings in Singapore. The applications to strike out were supported by affidavit evidence sworn to by Mr. Dwight Cozier. Mr. Cozier is an employee with the law firm of Cozier & Associates. He states in his affidavit that he read the chamber file in these matters and concluded that:

“... it is clear from my reading of the Fixed Date Claim Form that the injunctive relief from arbitration is the central issue therein, but I am aware from my reading of the Chamber file that the issue of arbitration in Nevis was already determined by the High Court in Singapore and I am advised by Counsel and do verily believe that this issue is therefore barred from being litigated again here in Nevis.”

[11] Mr. Cozier exhibited an order from the court in Singapore which stated that “*all proceedings in this action brought by the 2nd applicant against the respondent are stayed pursuant to section 6 of the International Arbitration Act*”. That was the full extent of the evidence presented in the application as it relates to the Singapore proceedings. I note that this evidence was presented to support the proposition that the claims should be struck out on the basis of issue estoppel and res judicata. During the course of the hearing I expressed some reservation as to whether this was sufficient evidence on which to base such an assertion. The order contains no reason for the decision of the court apart from its reliance on section 6 of the legislation in force in that jurisdiction. Mr. Cozier’s affidavit relays no information whatsoever concerning these proceedings and the issues which were under consideration in Singapore. He claims to have been able to swear to this affidavit on the basis of instructions from counsel on behalf of the applicants and on the basis of what he had read in the court’s file. I cannot help but to comment that this is entirely deficient information upon which such an application can be based.

[12] However, in response to the application, the claimants relied on affidavit evidence filed by Ms. Michelle Slack which shed some further light on the Singapore proceedings. Ms. Slack informs the court that there were two motions filed with the court in Singapore. These proceedings were commenced by Ma Ming and Tournan against America 2030 and Guo Hong Xin and SBG against America 2030. Neither Mr. Sklarov nor Weiser is a party to those proceedings. The originating summonses in Singapore sought the following declarations:

- (a) That America 2030 is not entitled to a breakup fee under clause 2.4(d) of the agreements between the parties;
- (b) That there has been no event of default under clause 7 of the agreement;
- (c) That Tournan and SGB are entitled to terminate the agreements;
- (d) An injunction restraining America 2030 from selling, forfeiting, transferring or otherwise dealing with the pledged collateral;

(e) An order for the return of the pledged collateral; and

(f) Any other relief which the court deems fit

[13] According to the evidence presented by Ms. Slack, an interim injunction was granted as prayed for by the claimants in the Singapore proceedings. However, on 1st March, 2019, subsequent to the commencement of the Nevis proceedings, America 2030 issued a summons in the High Court in Singapore. The summons sought a discharge of various orders made by the court in Singapore and in the alternative an order for a stay of the proceedings pursuant to section 6 of the Singapore International Arbitration Act. I understand this section to oblige the court in Singapore to grant a stay of proceedings where there is a valid arbitration clause contained in a commercial contract. The affidavit in support of that summons was sworn to by Mr. Sklarov. As Ms. Slack puts it, America 2030 was unable to obtain a stay of the proceedings against Ma Ming and Guo Hong Xin as neither of these claimants was party to the contract.

[14] In submissions filed on behalf of America 2030 in the Singapore proceedings, the court was made aware of the proceedings which were commenced by Fixed Date claim in Nevis. By that time the court in Nevis had in fact granted injunctive relief restraining the arbitration proceedings pending the outcome of the claim. It is also worth noting that in his evidence before the Singapore court, Mr. Sklarov did point out that the proceedings in that jurisdiction did not seek orders rendering the contract null and void. In fact, it appears to be rather clear to me that the issues raised in the Fixed Date Claim, especially as it relates to the impartiality of the arbitrator and the process in general, were not before the court in Singapore. In the end on 26th March, 2019, the court in Singapore granted a stay of the originating motion pursuant to section 6 of the International Arbitration Act of that jurisdiction. The injunctive relief granted in that court nonetheless remained in effect. At that time case NEVHCV2019/0141 had not yet been filed. I turn now to examine the issues relating to that case.

NEVHCV2019/0141 – The Fraud Case

[15] On 5th December, 2019, the claimants filed a separate claim in the High Court in Nevis on the basis of information they state were discovered subsequent to the lodging of the Fixed Date Claim. At paragraphs 5 to 17 of this claim, the claimants provide a summary of what they claim to have discovered were a number of unscrupulous actions on the part of Mr. Sklarov. They claim to have discovered that Mr. Sklarov has a long history of criminal convictions and dishonest business practices. They claim that his most recent activity centered on an elaborate stock loan fraud scheme carried out through a number of companies incorporated in a number of jurisdictions. These companies all contain variations of the names America 2030 or Bentley Rothchild. The claimants assert in their Statement of Claim that the schemes entail Sklarov's representations, through a number of commercial entities under his control, purporting to offer substantial non-recourse loan facilities on attractive terms to shareholders of listed companies, secured against the shares of those companies.

[16] The claimants assert that these shareholders are induced into depositing these shares with a depository broker in advance of disbursement of loan financing by representations and/or warranties that the shares stand as security for repayment of the loans once made and would not be traded save to test the market price or in the event of default of payment. However, the claimants assert, that once the shares are deposited they are heavily traded on Mr. Sklarov's instructions, causing a dramatic drop in share price. At that point Mr. Sklarov seeks to establish inadequacy of the security provided for the loans and an entitlement to both withhold disbursement of the loans and demand payment of a financial penalty or a forfeiture of the shares.

[17] In their Statement of Claim, the claimants assert that the contracts negotiated between the parties are "uncommercial", one sided agreements, which are subsequently amended to incorporate provisions for arbitration in Nevis by "The Arbitrator Conflict Service of Saint Kitts and Nevis." According to the claimant, the Nevis jurisdiction is one which is relatively unknown to the parties. At paragraphs 30 to 45 of the Statement of Claim, the claimants have highlighted what they claim to be a number of examples of Mr. Sklarov's alleged schemes. These include evidence of criminal convictions in the United States and other examples of

fraud. In cases similar to the present, courts in the United States have ordered injunctions against arbitration, notwithstanding the clauses contained in some of these contracts. It is also alleged that Mr. Sklarov adopts significant tactics of intimidation against victims, for example by lodging actions for defamation claiming ruinous sums in damages.

[18] The claimants also plead what they claim to be evidence of Mr. Sklarov's representations in other jurisdiction of his impecuniosity; despite his representations to the parties to his agreements of his ability to provide substantial amounts of money in loans. The claimants go on to plead the particular circumstances of their dealings with Mr. Sklarov and seek remedies such as the rescission of the agreements, a declaration that the agreements are void for uncertainty, a return and account of the shares deposited with Weiser and their traceable proceeds, damages for breach of contract, relief from forfeiture and damages for deceit and fraud. It is of note that the claimants have also pleaded their case on the basis of the court's powers pursuant to section 24(2) and (3) of the UK Arbitration Act of 1950. It is also important to note that neither defendant has filed a defence to this case. In fact, by decision delivered on 7th February, 2020 this court had already ruled that the claimants were entitled to judgment in default against the 1st defendant and 3rd defendants. The settlement of the terms of that judgment was deferred pursuant to the provisions of rule 12.9 and 12.10(4) and (5) of the CPR given that the 2nd defendant had not yet been served with the claim. In addition to this, the court had invited submissions from the parties as to whether case NEVHCV2019/0023 should be stayed in light of the developments in case NEVHCV2019/0141.

[19] In addition to the Claim Form and Statement of Claim, the claimants also filed an application for a worldwide freezing order. This application was supported by an affidavit of Mr. Guo Hong Xin. Mr. Xin indicated that as a result of the events which unfolded, a decision was taken to investigate Mr. Sklarov. In his affidavit he states that following extensive research over several months, a wealth of information and evidence was uncovered. In that very affidavit, Mr. Xin repeats the allegations contained in the statement of claim. He specifically exhibits a number of documents which he claims were discovered in order to substantiate his allegations. It would suffice to say at this stage that the worldwide freezing order was granted and remains in effect to date. The applicants also seek to have this injunction set aside but have however, presented no evidence or submissions as to why the court should exercise this discretion.

The Applications to Strike Out

[20] The application to strike out claim NEVHCV2019/0023 was based on the following:

- (a) The Fixed Date Claim is in breach of rules 8.1(4) and (5) of the CPR2000 as it does not satisfy any of the circumstances for filing such a form;
- (b) This defect in the Fixed Date Claim is incurable as it discloses a blatant disregard for the rules displayed by the respondents in bringing a Fixed Date Claim in the manner it was filed and cannot be set right at this late stage without causing great prejudice to the applicant;
- (c) Any attempt to correct this abuse at this stage in the proceedings would be prejudicial to the applicant's rights to natural justice and contrary to the overriding objective in rule 1.1 of the CPR2000;
- (d) The breach is therefore fatal to the survival of the claim and the damage to the process of the court is irreparable at this stage so that the court has no alternative but to order the Fixed Date Claim be struck out with costs to the applicant on this ground alone;
- (e) The Fixed Date Claim is in contravention of Part 11 of the CPR in that where affidavits are produced significant parts of the affidavits are scandalous and irrelevant, in breach of rule 30.3(3) of the CPR2000;
- (f) Accordingly the Fixed Date claim should be struck out pursuant to rule 26.3(1) (a) of the CPR;
- (g) The claims made in the Fixed Date Claim are clearly unsubstantiated, contrary to rule 8.6 of the CPR and the Fixed Date Claim should be struck out pursuant to rule 26.3(1) (b) of the CPR as it fails to disclose any reasonable ground for bringing the claim at bar;
- (h) The Fixed Date Claim is barred from the proceedings disclosed therein by the principle of res judicata and party estoppel, as the issue of arbitration in Nevis was determined between the same parties by a Singapore High Court of parallel jurisdiction; and

- (i) Accordingly, the Fixed Date Claim is an abuse of process and is likely to obstruct the just disposal of the proceedings, pursuant to rule 26.3(1)(c) of the CPR.

[21] The application to strike out claim NEVHCV2019/0141 was based on the following:

- (a) The Claim Form and Statement of Claim filed by the respondents on the 5th December 2019 are in breach of Rules 26. 3 (a), (b), (c) and (d) of the CPR 2000 as the claim seeks to relitigate an issue, (namely the jurisdiction for determination of breach of contract) that has been ordered stayed by the Singapore High Court, a court of parallel jurisdiction to this Honourable court, pursuant to section 6 of the International Arbitration Act Cap. 143A, and which is to be determined by arbitration proceedings;
- (b) This defect in the Statement of Claim is incurable as it discloses no other cause for bringing or defending the claim filed on the 5th December 2019 and cannot be set right unless the entire claim is re-written which is not permitted by the rules of court;
- (c) Any attempt to amend the breach would amount to a new claim being brought which would be prejudicial to the applicants' rights to natural justice and contrary to the overriding objective in Rule 1.1 (1) of the CPR 2000;
- (d) The breach is therefore fatal to the survival of the claim and the damage to the process of the court is irreparable at this stage so that the court has no alternative but to order the Statement of Claim to be struck out with costs to the applicants on this ground alone;
- (e) Additionally, the Statement of Claim is in contravention of Rule 30.3 (3) of the CPR 2000 in that it is prolix and parts of it are scandalous and irrelevant and accordingly, the Statement of Claim should be struck out pursuant to 26.3 (1) (c) and (d) of the CPR 2000 on these grounds;
- (f) The allegations made in the Statement of Claim are clearly unsubstantiated, contrary to Rule 8. 6 of the CPR 2000, and the Statement of Claim should be struck out pursuant to Rule 26.3(1) (b) of the CPR 2000, as the Statement of Claim fails to disclose any reasonable ground for bringing the claim at bar;

(g) The Statement of Claim is barred from raising the issue of the determination of contractual breach in the proceedings disclosed therein, by the principle of res judicata, both issue and party estoppel, as the issue of arbitration of a contractual dispute was determined by a Singapore High Court of parallel jurisdiction to be an issue to be determined by arbitration pursuant to the International Arbitration Act Cap 143A;

(h) Accordingly, the Statement of Claim is an abuse of the process of the court, and is likely to obstruct the just disposal of the proceedings, pursuant to Rule 26.3 (1) (c) of the CPR 2000 and should be struck out on this ground also

[22] In addition to the issues raised above, the applicant has identified what was described as 24 grounds on which the application was based. In my view however, many of these appear to be legal submissions rather than outright grounds for the application per se and will not be repeated here in their entirety.

[23] To my mind, the issues raised in the application in both cases can be summarized into two broad headings. The first is the issue of res judicata and whether the claimants are entitled to raise the issues in the Fixed Date and Fraud claims on the basis of issue estoppel. The defendants also raise the issue of whether the claims amount to an abuse of the court's process, given the stay of the proceedings in the Singapore Court. The grounds for these submissions are largely the same as in res judicata and I propose to deal with them as one issue. Finally, the court must consider the question of whether there are procedural defects in the claims which warrant the nuclear option of striking out the claims. It must be observed that these are not applications to stay the proceedings pending arbitration, but rather to strike them out altogether.

Res Judicata/Issue Estoppel

The Defendant's submissions

[24] In written submissions filed on 10th June, 2020 counsel for the defendants argues that the claims claim contravenes of rule 26.3 (a), (b), (c) and (d) of the CPR2000. which grants the court powers to strike out a statement of case if:

- (a) *there has been a failure to comply with a rule, practice direction, order or direction given by the court in the proceedings;*
- (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; or*
- (d) *the statement of case or the part to be struck out is prolix or does not comply with the requirements of Part 8 or 10.*

[25] Counsel goes on to submit that the claimants are seeking to relitigate an issue which has been ordered stayed by the High Court in Singapore. That issue, according to counsel, is that of breach of contract. Counsel argues that the court in Singapore determined that there was no jurisdiction to litigate that issue in light of the arbitration agreement in force between the parties. Accordingly, it is argued that the claimant is barred from raising this issue as the need for arbitration of the contractual dispute was determined by the court in Singapore. In addition to that, it is argued that claim NEVHCV2019/0141 seeks to relitigate issues in claim NEVHCV2019/0023 in this very jurisdiction. These defects, according to counsel, are fatal to the claim and cannot now be cured. Counsel goes on to argue that *“all the paragraphs and sub-paragraphs of the claim form and statement of claim are res judicata and an abusive collateral attack on the decision of the Singapore High Court, which the claimants are barred by law from doing.”* For these same reasons it is argued that the claim is an abuse of the court’s process.

[26] Counsel for the defendants refers the court to the UK Arbitration Act of 1950 and, quite rightfully, pointed out that this act is the applicable legislation in force in Nevis. Counsel goes

on to state that on the basis of that legislation the court has no jurisdiction over the arbitration proceedings until a decision is made by the arbitrator. Despite this very forceful submission, counsel does not point the court to any section in the Act which substantiates this assertion. In fact, for reasons which I will explain later on, counsel seemed to have completely ignored certain express powers granted to the court under the Act.

[27] Counsel goes on to refer the court to the case of ***Premium Nafta Products Limited et al (Respondents) v. Fili Shipping Company Limited et al (Appellants)***¹. In that case, the UK House of Lords came to consider the question of whether the court should entertain a claim notwithstanding the fact that the parties had entered into an arbitration agreement. Of particular significance was the question of whether the court should determine the matter on the basis of an allegation that one party had induced the other into the agreement on account of bribery. The court noted the following a paragraphs 9 and 10 of that judgment:

9. There was for some time a view that arbitrators could never have jurisdiction to decide whether a contract was valid. If the contract was invalid, so was the arbitration clause. In Overseas Union Insurance Ltd v AA Mutual International Insurance Co Ltd [1988] 2 Lloyd's Rep 63, 66 Evans J said that this rule "owes as much to logic as it does to authority". But the logic of the proposition was denied by the Court of Appeal in Harbour Assurance Co (UK) Ltd v Kansa General International Insurance Co Ltd [1993] QB 701 and the question was put beyond doubt by section 7 of the Arbitration Act 1996:

"Unless otherwise agreed by the parties, an arbitration agreement which forms or was intended to form part of another agreement (whether or not in writing) shall not be regarded as invalid, non-existent or ineffective because that other agreement is invalid, or did not come into existence or has become ineffective, and it shall for that purpose be treated as a distinct agreement."

¹ [2007] UKHL 40

10. This section shows a recognition by Parliament that, for the reasons I have given in discussing the approach to construction, businessmen frequently do want the question of whether their contract was valid, or came into existence, or has become ineffective, submitted to arbitration and that the law should not place conceptual obstacles in their way.

[28] Counsel's argument is simply that the parties had agreed that any dispute between them would be settled by arbitration in Saint Kitts and Nevis. As a result of that, there is no basis for a claim against the defendants. Counsel also states that in accordance with section 6 of the legislation in Singapore, such proceedings were stayed. The particular section states as follows:

"... where any party to an arbitration agreement to which this Act applies institutes any proceedings in any court against any other party to the agreement in respect of any matter which is the subject of the agreement, any party to the agreement may, at any time after appearance and before delivering any pleading or taking any other step in the proceedings, apply to that court to stay the proceedings so far as the proceedings relate to that matter."

[29] I take counsel's argument to suggest, that given the order of the Singapore court, the claimants are not entitled to seek the relief which they seek in Nevis. The argument is that the High Court of Singapore is a court of concurrent jurisdiction and has already decided that the matter should be subject to arbitration.

The claimants' submissions

[30] The respondents make 3 broad submissions in response to the Applications. Firstly, it is argued that the issue of res judicata and issue estoppel cannot arise as there was no final order on the merits of the case in Singapore. Secondly, it is argued that, in any event, the issues raised by the claims in Nevis are entirely different from what was before the court in Singapore.

[31] Counsel refers the court to the case of **Desert Sun Loan Corp v Hill**² where the following was stated:

There is no reason in principle why such an issue should not be decided in a decision on a procedural matter as opposed to the final determination of the cause of action or proceedings. But the decision must be final and conclusive and not provisional or subject to revision. The expression 'interlocutory' is used in two distinct senses in English law, which can give rise to confusion unless the distinction is borne in mind. Some decisions or orders are interlocutory in the sense that they are made pending final determination of the case. The obvious example of this is an interlocutory injunction pending trial. Such a decision cannot give rise to an issue estoppel because it is not final. The other use is to distinguish between those decisions where leave to appeal to the Court of Appeal is required and those where it is not. Some of the former decisions can determine finally the issue which is raised. I prefer therefore to use the expression procedural in the sense that I have defined, rather than interlocutory.

[32] Counsel also referred the court to the case of **The Sennar (No 2)**³ where it was decided that in order to give rise to issue estoppel the decision must be ***“one that cannot be varied, reopened or set aside by the court that delivered it or any other court of co-ordinate jurisdiction although it may be subject to appeal to a court of higher jurisdiction”***. The argument put forward is that all the Singapore court did was to stay the proceedings on account of the arbitration exercise in Nevis. This was not a final order on the merits of the case in any way and therefore cannot give rise to issue estoppel.

[33] Counsel for the claimants also go on to argue that, in any event, the court must proceed with caution on such an application to strike out and give due regard to three issues which were cited by Lord Reid in the case of **Carl-Zeiss**⁴ and cited with approval in **Desert Sun Loan v. Hill**⁵ these are:

² [1996] 2 All ER 847

³ [1985] 1 WLR 490

⁴ [1967] 1 AC 853

⁵ [1996] All ER 847

- (1) the differences in modes of procedure between this Court and those in foreign countries;
- (2) the practical difficulties encountered by a defendant who might not have been required to put forward his full case before the foreign court; and
- (3) whether the issue was finally disposed of, so that the matter cannot be raised again in the foreign court, which is a question of foreign law

[34] It is argued further, that even if the order in Singapore was final, the defendants would have to show that the specific fact in issue in these proceedings were raised before, and decided by, the Singapore court. It is therefore submitted that the court in Singapore was simply not considering the same issues which were brought before this court and that the parties to these proceedings are, to some extent, different. As such there could therefore be no issue estoppel which arises.

[35] Counsel for the claimants argue that the proceedings in Singapore sought declarations as to the contractual effect, or lack thereof, of the Master Loan Agreements and Supplemental Agreements made between SBG, Tournan and America 2030, an injunction restraining America 2030 from dealing with the pledged collateral and an order for the return of the shares. On the other hand, the Fixed Date Claim in this jurisdiction seeks declarations with respect to the arbitration and the removal of Ms. Hill-Hector as the Arbitrator. The claim also seeks an injunction restraining the future conduct of the arbitration. The fraud claim seeks to invoke the court's jurisdiction by virtue of section 24(2) and (3) of the Arbitration Act in a claim for fraud, fraudulent misrepresentation, deceit and breach of contract. These it is argued are different proceedings, not adjudicated on by the court in Singapore.

[36] The claimants also argue that the jurisdiction being exercised by the Singapore Court was fundamentally different from those in Nevis. By virtue of the very agreement between the parties, Nevis is in fact the seat of the arbitration and seized with supervisory jurisdiction over the conduct of the arbitration. The court is also being asked to exercise a power which is specific to this jurisdiction as contained in section 24(2) and (3) of the Act. In fact the issues

raised in the fraud claim are all issues discovered subsequent to the Singapore proceedings and not raised in that jurisdiction.

The Court's Conclusions

[37] I generally agree with the submissions put forward by counsel for the claimants, although in my view some issues must be placed into context. I take the arguments of counsel for the defendants to be that the question of whether the parties should be subject to arbitration has already been decided by the court in Singapore. The issue raised may very well not be whether the claims are substantively the same, but whether the question of the parties being subject to the arbitration proceedings have already been decided to the extent that they should no longer be litigated here in Nevis. Despite this distinction, I am of the view that the distinguishing elements of the various cases are important in the general discussion on whether an issue estoppel arises. There is also an argument being made here that claim NEVHCV2019/0141 re-litigates issues contained in claim NEVHCV2019/0023 right here in Nevis.

[38] If I may firstly address the issue of the Fixed Date Claim. I am in agreement with the submission of counsel for the claimants that no issue estoppel arises. I am of that view for a number of reasons. Firstly, it appears from the facts presented that the court in Singapore was fully aware that the claimants had in fact commenced proceedings in Nevis when it came to consider the application for a stay in that jurisdiction. That court was also made aware of the interim injunctions granted in the case in Nevis. The order of that court however, did not seek in any way to trouble the process in Nevis; and I rather doubt that it had the jurisdiction to do so. All that was done was to stay the Singapore proceedings pending the outcome of the arbitration in Nevis.

[39] One possible outcome was that of a potential success on the claimants' part in seeking to put an end to these arbitration proceedings altogether or to have the arbitrator replaced. This is perhaps one of the reasons why courts are encouraged to stay proceedings pending arbitration, rather than striking out the proceedings altogether. The court's desire to honour arbitration agreements are not designed to oust its jurisdiction over disputes, but rather to

seek an alternative form of resolution and to honour contractual arrangements entered into freely by the parties. By staying the proceedings it is possible for the litigation to be recommenced. Arbitration clauses are not designed to deny access to justice in a broad sense.

[40] Further, I agree with the submissions of the claimants where it is argued that it is this court which is seized with supervisory jurisdiction over the arbitration proceedings in Nevis. Although courts are encouraged into a position of non-interference in the arbitration of disputes, that principle does not detract from the court's power, either under the Supreme Court Act or its inherent jurisdiction, to grant injunctions restraining arbitration proceedings if it is just and convenient to do so. As Chief Justice Pereira has noted ***"it would be astonishing to say the least, if the statement to the effect that the Act is founded on the principle that 'the court shall not interfere in the arbitration of a dispute' is to be construed as having thereby, without any specifically expressed and clear language, swept away the court's jurisdiction to grant injunctive relief where warranted."***⁶ This inherent jurisdiction to grant injunctive relief, as the claimants seek in the Fixed Date Claim, is an important part of the court's jurisdiction to relieve a litigant against ***"unconscionable conduct, or conduct the aim of which is to undermine the court's lawful process."***⁷

[41] Though the courts are cautious in ensuring, and perhaps demanding, that parties honour their agreements to arbitrate their disputes, what it never does is to abandon its equitable jurisdiction to grant injunctions against arbitration if to do so would meet the ends of justice. When one examines the allegations made in the Fixed Date Claim and the parties to that claim, it is clear that the claim seeks injunctive relief and the court would therefore not be minded to strike it out altogether at this stage in the proceedings. In addition to that I am not of the view that this is an issue which was considered by the court in Singapore sufficient to find that the claimants are prohibited from raising these issues on the basis of issue estoppel or res judicata in this court.

⁶ BVIHCMAP2015/0005

⁷ Ibid

[42] Further, to my mind, the issues raised here are similar to those raised in relation to ‘anti-suit injunction’ orders. As Lord Hobhouse noted in the case of *Turner v. Grovit and Others*⁸ **“when an English Court ... makes a restraining order, it is making an order which is addressed only to a party which is before it. The order is not directed against a foreign court.”** An order of this nature cannot demand that a **“foreign court desist from exercising the jurisdiction given to it by its own domestic law.”** In my view therefore, when the court in Singapore ordered a stay of its own proceedings, it did so on the basis of its own domestic law. That in no way takes away from the jurisdiction of this court to consider the claimants’ claim as outlined in the Fixed Date Claim; especially as this is the seat of the arbitration and that the proceedings in Nevis were well underway when the Court in Singapore granted a stay of its own proceedings. I doubt very much that the court in Singapore could have decided to bring an end to proceedings in Nevis while presiding over its own exclusive jurisdiction.

[43] In any event, when a court stays proceedings pending arbitration, it does so on the assumption that the arbitration would be fair and observe the rules of natural justice. As Anderson JCCJ noted in the case of *Belize Natural Energy Ltd. v. Maranco Ltd*⁹ **“the courts do retain residual responsibility for guaranteeing the integrity of the arbitral process in ensuring, for example, the application of the principles of natural justice...”** A party is therefore entitled to seek relief from the court if it is of the view that the process would undermine these principles. Given the court’s supervisory role as the seat of this arbitration I am not of the view that the order in the Singapore court ousts the jurisdiction in Nevis to consider the issues raised in the Fixed Date Claim. This is not subject to an estoppel in any way. In light of that I refer to Mustill and Boyd in their publication *Commercial Arbitration*¹⁰ where they state:

“with the exercise of common sense a situation should never arise in which the arbitrator’s personal impartiality is put in question. A person who is approached to act and knows that he has some kind of relationship with one of the parties should remember that there is no keener sense of injustice that is felt by someone who has doubts about whether the arbitrator is doing his

⁸ [2002] 1 WLR 107

⁹ CCJ Appeal BZCV2014/004

¹⁰ Lexis Nexis Butterworths

honest best. He should also bear in mind that the question is not just whether he really is impartial but whether a reasonable outsider might take this view.”

[44] This passage was cited with approval in the case of ***Eckhart v. the Attorney General***¹¹ in which the court came to consider an application for the removal of an arbitrator on account of bias. In the present case apart from the injunctive relief being sought in the Fixed the Claim, the claimants also seek the removal of the arbitrator. This court is seized with the power to do so and the order in the court in Singapore does not take away the right of the claimants to seek this specific relief. No issue estoppel can therefore arise in the present circumstances.

[45] As it relates to the fraud case, I am also not of the view that the case should be struck out on the basis of res judicata or issue estoppel. Although the claim does repeat in some way the issues of breach of contract, these are, to a great extent, predicated on difference issues. The claimants claim to have discovered a significant history of fraud on the part of Mr. Sklarov, who by the way was not a party to the Singapore proceedings. The fraud case, unlike the case in Singapore, seeks to rescind the agreement altogether, rather than enforce it. What the claimants seek to do in this jurisdiction is to invoke the powers of this court pursuant to section 24(2) and (3) of the 1950 UK Arbitration Act to determine this dispute despite the arbitration clause in the agreement on the basis of fraud. It is noteworthy that the very contracts established Saint Kitts and Nevis law as what is applicable to its interpretation.

[46] The defendant's reliance on the case of ***Premium Nafta Products Limited et al (Respondents) v. Fili Shipping Company Limited et al (Appellants)***¹² is not of much assistance to this court as it does not consider the issue of the peculiar powers conferred on this court by section 24(2) and (3) of the 1950 Arbitration Act. As the claimants have rightly pointed out, the case of ***Cunningham-Reid et al v. Buchanan-Jardine***¹³ is authority for the proposition that this is a discretion which the court has and should consider carefully. However, the decision of the Court of Appeal in that case is also worth some analysis.

¹¹ DOMHCV1992/0570

¹² [2007] UKHL 40

¹³ [1981] 1 WLR 678

[47] In **Cunningham-Reid et al v. Buchanan-Jardine**, the English Court of Appeal came to consider an appeal against an order denying a stay of the proceedings in provisions similar to those currently in force in Nevis. The judge at first instance allowed an appeal against the decision of a master who had himself granted a stay of the proceedings notwithstanding the fact that the claimant had pleaded fraud. The judge took the view that the plaintiffs had made an allegation of fraud and that there was strong and convincing evidence which led him to the conclusion that it was not appropriate that there should be an arbitration. The court of appeal overturned that decision and determined that in a case where a party to a contract which incorporates an arbitration clause has commenced an action on the contract alleging fraud, the court would, on an application brought by the party against whom fraud has been alleged, normally exercise its discretion under sections 4 and 24(3) of the Act of 1950 by granting a stay of the proceedings pending arbitration. This would be the normal course to follow, unless a good reason against arbitration existed. The court also found that even strong prima facie evidence of fraud would not on its own be a sufficient reason for refusing a stay.

[48] In that case extensive arguments were led on a particular statement of Lord Wilberforce in the case of **Camilla Cotton Oil Co. v. Granadex S.A**¹⁴ where he said that ***“the fraud relied on must be fraud by the party opposing the stay: see Russell v. Russell, 14 Ch.D. 471, so that any alleged fraud by the appellants is irrelevant.”*** The difficulty with this statement by Lord Wilberforce is that he relied on the case of **Russell v. Russell** as precedent for that proposition. A close reading of the case of **Russell v. Russell** clearly shows that Lord Wilberforce’s statement was not compatible with what was decided in that case. In **Russell v. Russell** what was stated was as follows:

“Where the party charged with the fraud desires it, I can perfectly understand the court saying, ‘I will not refer your character against your will to a private arbitrator.’ It seems to me in that case it is almost a matter of course to refuse the reference, but I by no means think the same consideration follows when the publicity is desired by the person charging the fraud. His character is not at stake, and the other side may say, ‘The very object that I have in desiring the arbitration is that

¹⁴ [1976] 2 Lloyd's Rep. 10

the matter shall not become public. It p is very easy for you to trump up a charge of fraud against me, and damage my character, by an investigation in public."

[49] The judge in ***Russell v. Russell*** also went on to state the following:

"The next question I have to consider is, what foundation there is for the charges, because, if the mere making of a charge of fraud would entitle the person making it to call upon the court, in the exercise of its discretion, to refuse to refer to arbitration, there would be a very easy way of getting rid of all these clauses of arbitration. I am satisfied that the mere making of a charge will not do that, even in a case where the court ought to exercise its discretion by refusing to refer the case to arbitration. There must be sufficient prima facie evidence of fraud, not conclusive or final evidence, because it is not the trial of the action, but sufficient C prima facie evidence."

[50] In light of these it is difficult to conclude that Lord Wilberforce was correct when he stated that ***Russell v. Russell*** was authority for the proposition that ***"the fraud relied on must be fraud by the party opposing the stay... so that any alleged fraud by the appellants is irrelevant."*** It seems to me that the legislation does not limit the court's discretion to deny a stay of the proceedings on account of a pleading of fraud by either party. Wolf LJ was somewhat critical of Lord Wilberforce's statement but felt bound by it, although it was argued that it may have been said obiter as it was found in that case that there was no basis for an allegation of fraud. Wolf LJ nonetheless concluded that in relying on ***Russell v. Russell*** there was nothing in Lord Wilberforce's statement which sought to indicate that he was dissenting or differing from the views expressed therein. He concluded that:

I do not believe Lord Wilberforce was suggesting that in no circumstances could a charge of fraud be of any relevance where the fraud was being Q relied on by the party making the allegation of fraud, rather than the person charged with fraud, in support of a contention that an action should not be stayed. The passage does, however, give some support for the view that, in circumstances where the party charging fraud is seeking to oppose a stay, the court's normal

approach will not be to accede to arguments advanced on his behalf against a stay when the sole matter relied on is the charge of fraud.

[51] The proper approach therefore is that where a party seeks to stay the proceedings on account of an arbitration clause, the court would normally accede to that request if it is made by the party against whom fraud has been alleged. This retains the court's discretion to try the case notwithstanding the arbitration clause, but there must be good reason, other than a mere allegation of fraud for doing so¹⁵ if the party opposing the stay is the one who has made the allegation of fraud.

[52] I thought it important to place the case of ***Cunningham-Reid*** into context, given the claimants' reliance on it in opposition to the application to strike out. What is important to note is that rather than seeking a stay of the proceedings, the defendants seek to strike the claim out altogether. These calls for different considerations. As I have stated earlier, the legislation regarding arbitration encourages the court to stay proceedings pending arbitration, rather than striking them out. This is because the court retains general supervision over the arbitration process within its jurisdiction. An arbitration clause is therefore not a basis upon which a claim is to be struck out but rather stayed pending arbitration. The legislation does not deny either party the right to bring an action in court, but rather grants powers to the court to stay the proceedings if one or all of the parties wish to invoke the arbitration clause. Commencing an action in these circumstances does not amount to an abuse of process.

[53] This court is not of the view that the issues raised in this fraud claim are similar to those raised in Singapore, save and except the issues of breach of contract, which, as I indicated, was based on a different premise. Even then, these issues have not been fully litigated given the fact that the proceedings in that jurisdiction are stayed. Here Mr. Sklarov is a party to the proceedings in Nevis, unlike the claim in Singapore. Significant allegations of fraud are made against him directly. Weiser is also not a party to the proceedings in Singapore. This defendant has not even so much as filed an acknowledgement of service in this claim. If the court were to have considered a stay in accordance with the decision in ***Cunningham-Reid***

¹⁵ See also the judgment of Belle J in ***Baron Gabriel van der Elst v LPA International Inc.*** SLUHCV2008/0158

then a proper application of that nature had to have been brought with evidence upon which the court could have exercised its discretion pursuant to sections 4 and 24(2) and (3) of the 1950 Arbitration Act. This was not pursued and the court is not minded to strike out the claims brought by the claimants as it is not of the view that the issues contained therein have been decided by the court in Singapore, neither has that court's order prohibited the claimants from bringing such an action in Nevis. For these same reasons I am also not of the view that there has been an abuse of the court's process in any way.

The Procedural Issues

[54] During the course of the oral hearing, the court made it clear that it was not minded to elevate form over substance in the manner which was pursued by counsel for the defendants. It is important however, to elaborate on the court's reasons to deny the strike out applications on the procedural defects complained of by the defendants.

[55] Firstly, it is alleged that the Fixed Date Claim process ought not to have been used to commence claim NEVHCV2019/0023. I understand that this was an issue raised before Justice Glasgow during case management. He nonetheless proceeded to manage this case pursuant to the CPR. In any event, I would certainly not be minded to strike out a case on this basis. As counsel for the claimants have rightly pointed out, it is not unusual for cases of this nature to be commenced by way of Fixed Date Claim in the jurisdictions of the Eastern Caribbean Supreme Court. Further, the court would have been empowered to put matters right pursuant to rule 26.3 of the CPR. It would certainly be an unjust exercise of its powers for the court to strike out the claim on that basis.

[56] It was also argued by the defendants that the Fixed Date Claim was not supported by an affidavit as required by rule 8 of the CPR. This is factually inaccurate. As I indicated earlier, on the very day of the filing of the Fixed Date Claim, the claimants also filed an application for an injunction. An affidavit was also filed by Guo Hong Xin which clearly indicated that the claimants were also relying on that affidavit in support of the Fixed Date Claim. On that premise the matter had gone through its case management stages to the extent that the 1st defendant had in fact filed affidavit evidence in response. Justice Glasgow had given clear

case management directions identifying 6 issues to be tried. Yet the 1st defendant comes at this stage to say that there is no affidavit evidence in support of the claim. I do not accept that this is the case and would certainly not be minded to strike out the case on that basis as the parties are well aware of the pleadings on which the claimants rely.

[57] As it relates to claim NEVHCV2019/0141, it is alleged that the claimants have failed to attach the documents on which they rely in their Statement of Claim. I note that in addition to the fraud claim an application had also been made for an interim worldwide freezing order. That application was supported by an affidavit which, to a great extent, duplicates much of the information contained in the Statement of Claim. The claimants attached the documentation on which they relied to that affidavit. Insofar as that is the case it would seem that any breach of the rules was limited to the claimants simply not duplicating the exhibition of the documents in the Statement of Claim. That can hardly be a reason on which to base an application to strike out the claim. The documents are clearly exhibited in the claim in general and served on the defendants. In any event, as I pointed out to counsel, if the defendants were concerned with the lack of documentation then a request for information could have certainly been made. This is not a basis on which the claim should be struck out.

[58] Lastly, and perhaps somewhat substantively, the defendants assert that the claims should be struck out for breach of rule 8.6 of the CPR in that the entirety of claim NEVHCV2019/0141 raises no reasonable basis for bringing the claim and that claim number 23 does not raise any issue against the 1st defendant. In addition it is argued that both claims are a prolix and raise a number of scandalous and irrelevant issues against the defendants in breach of rule 30.3 of the CPR. I do not agree with these submissions.

[59] Firstly, it seems very clear to me that claim NEVHCV2019/0023 raises issues such as the validity of the arbitration proceedings commenced by America 2030(N) and whether these proceedings should be brought to an end by the court. The claimants also seek orders relating to the impartiality of the arbitrator and an order revoking her authority. If America 2030(N) wished to play no part in these proceedings then it was free to do so but the case was substantive enough to have gone through the entire case management process. I do not propose to discuss the substance of the case in its entirety but it would suffice to say that I am

of the view that the 6 issues identified by Justice Glasgow are substantive and valid issues which would not warrant the nuclear option of being struck out at this stage on the basis put forward by counsel for the defendants.

[60] Secondly, as it relates to case NEVHCV2019/0141 I am of the view that there are substantive allegations of fraud, misrepresentation and breach of contract raised in this case. Insofar as it relates to counsel's arguments that the substance of the case is a prolix and unnecessarily scandalous I do not agree with them. To my mind, the Statement of Claim goes into some detail of facts which the claimants claim to have discovered even subsequent to the lodging of the Fixed Date Claim and the proceedings in Nevis. The claim seems to center on the fact that Mr. Sklarov has represented himself as a reputable businessman with the capability of providing loans to the claimants. The facts which they claim to have discovered are alleged to have undermined this view of Mr. Sklarov. Insofar as there may have been damaging information I am not of the view that this amounts to a prolix given the peculiar circumstances of this case. In any event, as I pointed out to counsel during the oral hearing of this matter, even if the court were to exclude all of the evidence which the defendants find offensive, there would still remain a substantive claim against the defendants. The court is not minded to strike out this claim.

Conclusions

[61] In the circumstances, this court does not find that the issues raised in either case are barred by the doctrine of res judicata, neither are the matters an abuse of the process of the court. Further, the procedural issues raised by the defendants are not bases upon which the court would be minded to exercise the nuclear option of striking out these claims.

[62] In the circumstances I make the following orders:

- (a) The application to strike out case number NEVHCV2019/0023 is dismissed;
- (b) The application to strike out case number NEVHCV2019/0141 is dismissed;
- (c) Insofar as the applications have requested an order setting aside the injunctive relief granted in both claims, these are also dismissed;

- (d) Given the nature of the applications and the manner in which they were litigated I make a consolidated order for costs against the applicants on these applications;
- (e) If the parties are unable to agree on reasonable costs within 21 days from the date of delivery of this judgment, the claimants are entitled to bring an application for the assessment of those costs within the provisions of the CPR.

Ermin Moise
High Court Judge

By the Court

Registrar