THE EASTERN CARIBBEAN SUPREME COURT
IN THE COURT OF APPEAL

SAINT LUCIA

SLUHCMAP2024/0004

BETWEEN:

WEST INDIES PETROLEUM (SAINT LUCIA) LIMITED

Appellant

and

[1] COURTNEY WILKINSON
[2] JOHN LEVY

Respondents

Before:
The Hon. Mde. Esco L. Henry — Justice of Appeal
The Hon. Mr. Gerard St. C. Farara — Justice of Appeal [Ag.]
The Hon. Mde. Georgis Taylor-Alexander — Justice of Appeal [Ag.]

Appearances:
Mrs. Georgia Gibson-Henlin, KC with her Mrs. Diana Thomas-Hunte for the Appellant
Ms. Renee St. Rose, KC with her Ms. Marie-Ange Symmonds for the Respondents

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2025: October 30;
2026: January 30.

Interlocutory Appeal - Contract - Consent Order - Stay of execution - Maintenance of stay of a consent order pending trial of a claim to set it aside for fraud - Principles governing the grant or discharge of a stay - Whether the learned judge erred in law or fact by maintaining the stay against the corporate appellant while discharging it against individual defendants - Settlement of a winding up petition - Nature of a consent order as a contract given the force of a court order - Vitiation of a contract by fraud - Article 925 of the Civil Code of Saint Lucia - Allegations of fraudulent misrepresentation and intentional non-disclosure of material financial information - Whether a consent order can be declared a nullity where induced by fraud - Burden of proof in interlocutory applications - Effect of exhibiting illegible documents to an affidavit - Responsibility of the party to provide clear and probative evidence - Preservation of the status quo - Adequacy of damages - Whether a claim based on the fraudulent undervaluation of shares sounds only in damages - Whether the court should compel the completion of a transaction under a contract whose very validity is challenged as a nullity

The respondents, Courtney Wilkinson and John Levy, were each 20% shareholders and former directors of the appellant, West Indies Petroleum (Saint Lucia) Limited ("WIPLSLU"), an international business company and the holding company of West Indies Petroleum Limited ("WIPLJA"), a Jamaican fuel supply subsidiary. Following their removal from the board in February 2021, the respondents alleged that they were shut out of the company's affairs, denied financials of WIPLSLU and its subsidiaries, and subjected to an unfair share rights issue. In January 2022, they filed a petition to wind up WIPLSLU on just and equitable grounds.

On 8th March 2022, the parties entered into a Consent Order to settle the petition, whereby WIPLSLU and/or individual shareholders agreed to purchase the respondents' shares at a price determined by an independent valuation of WIPLSLU to be carried out by Grant Thornton. The final valuation report, issued in June 2024, identified significant 'Scope Limitations' due to the appellant's failure to provide nine categories of requested information. Notably, the valuer highlighted an undisclosed 'Directors' Loan' of US$21.86 million, and 'Unidentified Deposits' of US$15,168,123.94, and stating that the valuation conclusions might have differed by a 'material amount' had these limitations not been present.

The respondents subsequently filed a claim to set aside the Consent Order as a nullity under Article 925 of the Civil Code of Saint Lucia, alleging that it was induced by fraudulent misrepresentations and the intentional withholding of information regarding a US$21.86 million Directors' Loan used to the individual defendants to purchase an interest in the Limetree Bay Refinery in St. Croix in the United States Virgin Islands in competition with the company. Simultaneously, the respondents applied for and obtained *ex parte* a stay of the Consent Order.

By notice of application filed 11th October 2024 (amended 15th October 2024) the appellant, WIPLSLU, applied, inter alia, to set aside the *ex parte* stay of the Consent Order. The learned judge maintained the stay against the appellant but discharged it against the individual defendants (the 1st to 3rd defendants) on jurisdictional grounds, namely, on the basis that they resided outside the jurisdiction and had not been served. The appellant appealed, arguing that the judge misapplied the 'balance of harm' test; failed to recognise the company was a 'nominal' party; ignored the adequacy of damages; and failed to account for intervening third party rights of a lender, Sygnus Capital, who had allegedly funded the buy-out price assessed in the final report of Grant Thornton.

Held: dismissing the appeal and ordering that the appellant shall pay the respondents' costs to be assessed by a judge of the High Court or Master if not agreed within 21 days of the date of delivery of this judgment, that:

1. A consent order is essentially a contract between parties to litigation which is given the force and enforceability of an order of the court. As such, under Article 925 of the Civil Code of Saint Lucia, such an agreement is a nullity if consent was induced by error, fraud, or violence. In the instant case, the judge was correct to

conclude that there is a ‘good arguable case’ that the Consent Order and settlement of the winding-up petition was procured by the intentional withholding of material financial information by the appellant and the individual defendant/shareholders of the appellant company, in particular, the non-disclosure of a US$21.86 million Directors’ Loan to the said individual shareholders enabling them to purchase an interest in the Refinery. Accordingly, the court retains the jurisdiction to stay its execution pending a trial on the merits of its nullification.

Article 925 of the **Civil Code of Saint Lucia**, Cap 4.01 of the Revised Laws of Saint Lucia applied.

2. The learned judge was correct to maintain the stay against the appellant, notwithstanding the appellant’s assertions regarding an irretrievable breakdown in the relationship between the two sets of individual shareholders, and the appellant’s apparent readiness to complete the share purchase pursuant to the terms of the Consent Order, on the basis that they have, allegedly, secured loan funding of the US$3.2 million purchase price from Sygnus Capital and were ready to wire transfer the said funds to the respondents upon receipt from them of their bank wiring instructions. While these factors relate to the underlying desire for a ‘clean break’, they do not necessarily go to prejudice and the balance of harm when the very status and binding nature of the Consent Order is a live issue in the Claim for determination. The judge was correct to conclude that the respondents, as claimants in the proceedings below, should not be compelled by the lifting of the stay to complete the transaction under the terms of a contract where the respondents have raised arguable grounds on the basis of fraud for seeking revocation of the Consent Order, as the relevant *status quo* to be protected is the situation prevailing prior to the entering into of the Consent Order sought to be impugned in the said proceedings.

C-Mobile Services Limited v Huawei Technologies Co. Limited [BVIHCMAP2014/0017, delivered 2nd October 2014, unreported] followed*;* **Alexandra Vinogradova v Elena Vinogradova and Sergey Vinogradova** [BVIHCMAP2018/052, delivered 30th July 2019, unreported] followed.

3. The appellant failed to satisfy the court with documentary and other evidence regarding alleged intervening third party rights or a loan from Sygnus Capital. There was nothing in the slew of documents exhibited by the defendants which substantiated their claim that a stay would cause irreparable harm to Sygnus Capital, and the judge was correct to so find for the reasons which she gave. The appellant’s failure to exhibit copies of facility letters, loan agreement or security documents meant there was no cogent evidence of a loan or acceleration of debt resulting from the stay. The basic principle in civil litigation is ‘he who asserts must prove’. Pursuant to rule 30.4(3) of the Civil Procedure Rules (Revised Edition) 2023, it is the duty of the party relying on an exhibit to their affidavit evidence to ensure that the copy of the original document is clearly legible for the scrutiny of the Court. The only document provided in relation to transfer of funds, Exhibit

GCC13, is completely illegible, and does not permit the Court to form any conclusion on what that document purports to be or to say.

Rule 30.4(3) of the **Eastern Caribbean Supreme Court Civil Procedure Rules Revised Edition (2023)** applied.

4. The appellant is not a 'nominal' or 'neutral' party to the Claim and/or the Consent Order. First, the appellant is a consenting party to the Consent Order sought to be set aside. Second, and most importantly, by paragraph 1 of the Consent Order, the appellant is one of the consenting parties which it is agreed, by the terms of the Consent Order, is entitled to purchase the respondents' shares in itself. Third, the evidence before the court below, including the instruments of transfer of shares, demonstrates conclusively that it is the appellant which is in fact exercising that right under the Consent Order to purchase the shares of the respondents. These factors all lay hollow the notion that the appellant is a mere 'nominal party' to either the Claim or the Consent Order.

5. A judge ought not to be required at the hearing of a stay application to determine complex issues of fact and law, including allegations of concealment, and it is sufficient that the respondents raised a 'good arguable case' on their pleadings. For a claim of fraudulent misrepresentation to be arguable for the purposes of a stay, there must be a showing that the representations induced the party to enter the contract. While the appellant argued that 'conscious awareness' of the facts at the time of the contract is required, the intentional non-disclosure of the full extent and nature of financial dealings, such as the Directors' Loan used to purchase a competing refinery, can support a claim for fraud. The respondents allege that they were not aware of the fraudulent acts at the time of entering into the Consent Order as these acts were concealed by the defendants through the withholding of financial and other documents to which they were entitled as shareholders, and by the failure to hold general meetings of the said company. The respondents also plead that they entered into the Consent Order on the fundamental assumption or implied representation by the appellant and the individual shareholders of full financial transparency and full compliance with the duty to disclose and to provide to the independent valuer, Grant Thornton, all financial information necessary for them to conduct a proper assessment of the value of the company. However, the 'Scope Limitations' in the final Grant Thornton report later called into serious doubt the conduct of the appellant and the other individual shareholders.

Leeds City Council and others v Barclays Bank plc and anor [2021] QB 1107 distinguished.

6. Delay cannot in and of itself result in a discharge or a stay order or the refusal to stay proceedings. It is but one of several factors to be considered and weighed against the totality of the circumstances. In the circumstances of this matter, delay, if any, was minimal at best. The respondents filed their claim within the 90-day completion window under the Consent Order following the final valuation. Any earlier delay was mitigated by the fact that the valuer was still seeking missing or

undisclosed financial information from the appellant up to and at the time that the final report was issued. The respondents' right to move the court to set aside and, in the interim, to stay the Consent Order was, in the circumstances, not a stale right.

Alfa Telecom Turkey Limited v Teliasonera Finland OYJ [BVIHCVAP2008/012] distinguished.

JUDGMENT

[1] **Farara JA [Ag.]:** This is an appeal by West Indies Petroleum (Saint Lucia) Limited ("the appellant" or "WIPLSLU"), with the leave of the Court granted on 18th February 2025, from that part of paragraph 1 of the order of a learned judge of the High Court of Justice dated 27th November 2024 ("the Order" or "the Decision") by which the judge, in a reasoned decision, maintained in effect in relation to the fourth defendant (the appellant) only the stay by order of 4th October 2024 of a Consent Order dated 8th March 2022 ("the Consent Order"). By paragraph 1 of the Order, the learned judge also discharged the stay of the Consent Order against the first, second and third defendants in the proceedings. The first, second and third defendants are, respectively, Gerald Charles Chambers, Gordon Shirley, and Tarik Felix. They are not parties to this appeal.

Background facts and respondents' pleaded case

[2] The proceedings in the court below (Claim No. SLUHCOM2024/0059) were commenced on 19th September 2024 by the claimants, Courtney Wilkinson and John Levy (the respondents in the appeal) against the defendants, Gerald Charles Chambers, Gordon Shirley, Tarik Felix, and WIPLSLU to set aside the Consent Order made in Claim No. SLUHCM2022/0001; alternatively, damages for breach of contract and fraudulent misrepresentation; interest; and costs.[1] The claimants/ respondents are each 20% shareholders in and were, until their removal on 9th

[1] Statement of Claim, Hearing Bundle Vol.1, p.1427.

February 2021, directors of WIPLSLU and its subsidiaries. The first, second and third defendants are also each 20% shareholders of WIPLSLU (the 4th defendant).

[3] WIPLSLU is an international business company incorporated under the laws of Saint Lucia. It is a holding company which owns the majority shares in West Indies Petroleum Limited, a company incorporated under the laws of Jamaica ("WIPLJA"). It is common ground in the proceedings that WIPLJA is involved in the business of supplying fuel in Jamaica, the Caribbean region, and internationally to internationally flagged vessels. The first defendant, Gerald Charles Chambers is the chairman of the Board of Directors of the appellant, and the second and third defendants, Gordon Shirley and Tarik Felix, are directors of the appellant.

[4] In the statement of claim filed in the proceedings below, it was contended, *inter alia*, that on 9th February 2021 the respondents were removed from the Board of Directors of the appellant and its subsidiary WIPLJA, and since that date they have been shut out of the affairs of the appellant company and its subsidiaries. It was also pleaded that no annual general meeting of shareholders of the appellant had been held contrary to the byelaws of the said company, and that the respondents had not been provided with copies of the financials of the appellant or its subsidiaries.

[5] It was also alleged in the statement of claim that in December 2021 the directors of the appellant approved a share rights issue of US$20 million. By the terms of the share rights issue, each shareholder was required to "fill" a US$4 million share subscription equity investment. The share rights issue and subscription investment were for the stated purpose of addressing the appellant's debt problem resulting from its US$2.8 million loss as per the 2021 financials of the said company.

[6] On 21st December 2021 an auction was held in the Bankruptcy Court in St. Croix in the U.S. Virgin Islands for the Limetree Bay Refinery on St. Croix. The winning bidders were WIPLJA and Port Hamilton Refinery and Transportation LLP

("PHRT"). The sale of the Refinery closed on 21st January 2022. After completion, WIPLJA held 70% of the shares in PHRT and the remaining 30% were held by David Roberts, CEO of the U.S. Construction/Oil & Gas Company 'Excel'. By the terms of the Asset Purchase Agreement for the Refinery, the debtors' rights and interests in the Refinery were transferred to WIPLJA and PHRT. The deposit of US$5 million for the purchase of the Refinery was paid by WIPLJA.

[7] On 7th January 2022, the claimants/respondents filed an application before the High Court in Saint Lucia for interim orders restraining the defendants from implementing a directors' resolution for a share issue and from requiring the claimants to make a payment of US$4 million or a transfer of title in order to maintain their shares in WIPLSLU. The application was granted *ex parte* on 10th January 2022. The resulting order remained in effect until the hearing on 8th March 2022, which resulted in the Consent Order.

[8] On 17th January 2022, the claimants/respondents filed in the High Court a petition to, among other reliefs, wind up WIPLSLU on the just and equitable ground. In the petition, the claimants/respondents also alleged that the actions of those in control of WIPLSLU and its subsidiaries as alleged were unfairly prejudicial to them and their interests as minority shareholders, which conduct made it just and equitable for WIPLSLU to be wound up.

[9] However, on 8th March 2022, the claimants/respondents entered into the Consent Order with the defendants, including WIPLSLU, with the view to settling the claim. The Consent Order was signed by counsel for both the petitioners and the respondents, including WIPLSLU. Because of its central importance to the discharge proceedings below and to the determination of this appeal, I set out below in full the material terms of the Consent Order:

"**IT IS HEREBY ORDERED BY CONSENT THAT:**

(1) The Company [WIPLSLU] and/or the individual shareholders, jointly and/or severally agree to purchase the shares of John Levy and Courtney Wilkinson.

(2) An independent valuation of the Company shall be carried out by Richard Peterkin of Grant Thornton St. Lucia on the condition that a joint instruction letter be sent to the valuer within twenty-one days of this agreement. In the event that the parties are unable to agree on the joint instruction letter to be sent to the valuer, each party may send their own letter within seven (7) days of their failure to agree.

(3) The valuer is at liberty to undertake additional due diligence on the assets and financials of the Company including its subsidiaries, in undertaking his valuation.

(4) The valuation date shall be as of 08 March 2022.

(5) The parties may put written questions to the valuator regarding the valuation report within ten (10) days of receiving the report for clarification.

(6) On receipt of the valuation report the parties shall complete the transaction within ninety (90) days, subject to any extension to be agreed by the parties and such extension shall not be unreasonably withheld:
    (a) On completion the purchasers shall pay the purchase price calculated by reference to the valuation price in exchange for share transfers and certificates in the following companies:
        i. West Indies Petroleum Limited ("WIPL")
        ii. West Indies Petroleum Limited ("St. Lucia IBC")

(7) The ninety (90) days shall begin to run upon the final clarification being provided by the valuer of the shares in accordance with paragraph 6 above.

(8) The injunction is discharged.

(9) The petition is withdrawn.

(10) The Company shall bear all costs associated with the independent valuation.

(11) Each party shall bear their own costs of these proceedings.

(12) The petitioners will file and serve this order."

[10] An important element of the respondents' case as pleaded are two 'implied representations' which they say induced them to enter into the Consent Order. These implied representations and the inducement are set out at paragraphs 13 and 14 of the statement of claim:

> "13. The Company being unable to address a debt problem without a further equity injection and having failed to hold a single shareholders' meeting or provide financials to the Claimants as shareholders since their expulsion from the Board in February 2021, the Claimants inferred the following representations whether by implication conduct or otherwise:
>
> (a) That there would be no significant or substantial changes in the finances of the Fourth Defendant [WIPLSLU] and its subsidiaries (save and except WIPAJA's acquisition of the Limetree Bay Refinery) between the period which the Claimants were removed as Directors from 9th February 2021 to 8th March 2022 when the Consent Order was entered into.
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> (b) That there would be no directors' loans' given by the Fourth Defendant between the period the Claimants were removed as Directors from 9th February 2021 to 8th March 2022 when the Consent Order was entered into.
>
> (collectively referred to as "the Representations).
>
> 14. Acting on the faith and truth of the Representations and induced thereby, the Claimants entered into the Consent Order, of the following implied terms of the agreement required to give it business efficacy:
>
> (a) That the parties in carrying out its terms would act in good faith;
>
> (b) That the parties in carrying out its terms would act at arm's length; and
>
> (c) That the parties would comply with the disclosure obligations required in order to assist the valuer with information required to obtain fair market value."

[11] Following the parties entering into the Consent Order, on 12th October 2022, Grant Thornton Calgary, through Grant Thornton St. Lucia ("GT" or "the valuer"), was engaged by the appellant to carry out a 'Comprehensive Valuation Report' of WIPLSLU to determine its fair market value. By Appendix C to its engagement letter, GT outlined to WIPLSLU a list of information and documents required in order to be in a position to proceed with the Comprehensive Valuation. A draft valuation report was provided by GT on 31st January 2024. This draft report was

expressly subject to certain 'Scope Limitations' in compiling the valuation report. These limitations relate to certain specified information which was requested by the valuer but remained outstanding or was unavailable.

[12] The final comprehensive valuation report was provided to the parties by GT on 25th June 2024. However, at paragraph 5.04 of the final report the valuer listed under '**Scope Limitations**', 9 items of information requested during the course of their work which either remained outstanding or were not available. Each of these 9 items or documents are clearly of importance to any valuation exercise of a company and its subsidiaries. Of particular importance to this matter and the claim filed by the claimants/respondents to set aside the Consent Order are the information and documents listed at items (m) and (n). Item (m) states: "*With respect to WIPAJA's directors current account of [US]$21.92 million as of February 28, 2022, copy of the loan agreement(s), if any, between WIPJA and the Majority Shareholders, and confirmation whether the loan is secured*." and at (n): "*Details regarding the 'Unidentified Deposits' account 21405000 of [US]$15,168,123.94 recorded in WIPAJA's mapped trial balance for the interim period ended February 28, 2022"*. At paragraph 3.07 of the final valuation report, the valuer expressly stated: "*We note that, had these limitations not been present, our valuation conclusions may have differed, perhaps by a material amount*."

[13] Also of importance to this matter and the claim are the following notes concerning the 'Limetree Bay Refinery':

> Paragraph 5.07: "WIP and PHRT were declared the winning bidder for the Limetree Bay refinery from an auction held in bankruptcy court on December 21, 2021, with the sale closing on January 21, 2022."
> Paragraph 5.08: "Limetree Bay refinery is a petroleum refinery located on the island of St. Croix in the US Virgin Islands (the "Refinery")."
> Paragraph 5.09: "Under the Asset Purchase Agreement ("APA"), the Debtors' rights and interests in the Refinery were transferred to the Purchaser (defined as WIP and PHRT). The deed to the Refinery is held by PHRT."
> Paragraph 5.10: "Per the APA, the purchase price was $62 million. Mr. Chambers, CEO of WIP, testified during the sale hearing on December 21,

2021 that WIP was providing approximately 70% of the purchase price. WIP paid a $3 million deposit during the bid process."
Paragraph 5.11: "WIP's Majority Shareholders (Gordon Shirley, Tarik Felix and Charles Chambers) appear to also own interests in the Refinery through PHRT. The ownership structure of PHRT is set out in the organizational chart on the next page."

[14] After a period when the parties put questions to the valuer, final clarification was provided by GT by letter dated 9th July 2024 and the report was issued as final. This triggered, under the terms of the Consent Order, a 90-day period for the sale and purchase of the respondents' shares in WIPLSLU, which would expire on 7th October 2024. However, at paragraph 19 of the statement of claim, the respondents (as claimants) averred:

> "19. In breach of the implied terms of the Consent Order, the Fourth Defendant and its directors failed to act in good faith, failed to act at arm's length and failed to fully comply with the disclosure obligations by their refusal and/or failure to provide the following documents required by Grant Thornton (collectively "the required information"), namely:
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> (i) Appraisals of equipment owned by WIPLJA.
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> (ii) Copies of budgets. Financial forecasts, or business plans (together "Forecast") for the Companies.
>
> (iii) Copy of the audited financial statements of WIP[SLU] prepared by the external accountant for the year ended December 31, 2022.
>
> (iv) Unaudited statement of profit & loss for WIPSL for the year ended December 31, 2019.
>
> (v) Unaudited financial statements for GILSL for the period ended December 31, 2018, for the years ended December 31, 2019, and 2020, and for the interim period ended February 28, 2022.
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> (vi) Unaudited financial statements for GILJA for the period ended December 31, 2018 and for the years ended December 31, 2019 and 2020.
>
> (vii) Mapped trial balances of WIPJA with account groupings that reconcile to the audited financial statements for the years ended December 31, 2019 and 2021.
>
> (viii) Financial results by business segment for WIPJA for the year ended December 31,2019 and WIPSL for the year ended December 31, 2020.
>
> (ix) A breakdown of director fees by director (name and amount) paid by WIPSL in 2020."

[15] It is therefore the respondents' claim in the proceedings that the implied representations were terms of the Consent Order 'in consideration of which [they] entered into the said Order'. However, it is alleged that the representations, which were representations of fact, were made falsely and fraudulently by the defendants (including the appellant, WIPLSLU) and in breach of the terms of the Consent Order. At paragraph 22 of the statement of claim the respondents pleaded certain particulars of fraud at sub-paragraphs (a) to (l). I set out below those (being most) which apply to or concern the 'the Directors' Loan' of US$21.86 million to the first, second and third defendants:

a. "On 28th February 2022, the Fourth Defendant loaned to the First, Second and Third Defendants US$21.86 million dollars, this loan was unsecured, zero interest and had no fixed date of repayment ("the Directors' Loan").
b. [left blank]
c. WIPAJA won the bid to purchase the Refinery, however the US$21.86 million Directors' Loan was used by the First, Second and Third Defendants in their individual capacities to purchase an interest in the Refinery in direct competition with the business of the Fourth Defendant and despite the directors fiduciary duties to act in the best interests of the Company and not to act in self-interest.
d. The giving of a US$21.86 million loan is a substantial change in the finances of the Fourth defendant unknown to the Claimants before entering into the Consent Order and ultimately reducing the value of the Company.
e. The Defendants were aware and the loan was distributed to intentionally significantly devalue the Fourth Defendant and its subsidiaries to the detriment of the Claimants who are required to sell their shareholding in the Company and to the benefit of the First, Second and Third Defendant[s] who are required to purchase the Claimants shares in the Company by virtue of the consent Order.
f. The US$21.86 million Directors' Loan is a significantly large sum of money and extremely high risk being unsecured, zero interest and no fixed date of repayment considering the Company's negative financial position per the 2021 financials and the consequent request for a share rights issue.
g. The US$21.86 million loan was given to intentionally deceive the Claimants of the true value of the Fourth Defendant.
h. The purchase of the interest in the Refinery by the First, Second and Third Defendants individually was done intentionally to divert business opportunities away from the Fourth [Defendant] to intentionally deprive the Claimants of the benefit of the refinery as an asset of the Fourth [Defendant].

i. [left blank]
j. Save for the Fourth Defendant's proposed acquisition of the Refinery, the Claimants were unaware of the above and were only made [aware] when this information was disclosed to Grant Thornton during the valuation process.
k. [left blank]
l. In distributing the Directors' Loan the Defendants acted fraudulently as this information was intentionally withheld and/or hidden from the Claimants as shareholders in order to deceive them of the true value of the Fourth Defendant and its subsidiaries."

[16] At paragraph 25 of the statement of claim, the respondents pleaded certain particulars of loss and damage allegedly suffered by them as a result of the defendants, including WIPLSLU, breaches of the representations which they say were made fraudulently. These are: (a) the actual or true value of WIPLSLU and its subsidiaries when the Limetree Bay Refinery asset is included versus it not being onboarded, it having been sold to the first, second and third defendants; and (b) the difference in value between the Grant Thornton valuation dated 10th June 2024 and the actual value of WIPLSLU when all required information is provided to and taken into account by the valuers.

[17] In the premises, it was the case for the respondents as claimants in the proceedings that the Consent Order is a nullity in accordance with Article 925 of the **Civil Code of Saint Lucia**[2] ("the **Civil Code**") as the defendants (including WIPLSLU) had entered into it knowing of their fraudulent acts, whereas, had the claimants/respondents been made aware of them, they would not have entered into the Consent Order.

Stay application and order

[18] On 19th September 2024, the respondents (as claimants) filed the Claim No. SLUHCM2022/001 ("the Claim") and simultaneously an application to stay the Consent Order pending determination of the Claim which, as we have seen above, sought the revocation of the Consent Order as being null and void. On 4th October

[2] The Civil Code of Saint Lucia, Cap 4.01 of the Revised Laws of Saint Lucia.

2024 the judge, on an urgent basis, dealt with the stay application on paper and made an order staying the Consent Order pending the determination of the Claim and gave directions for the defendants to be served with a copy of the stay application and evidence in support.

Discharge application and Decision

[19] On 15th October 2024, the defendants filed an amended notice of application on several grounds including a jurisdiction challenge, for an order striking out the Claim, for discharge of the stay as wrongly granted, and allegations of material non-disclosure. As is recorded at paragraph 8 of the Order, the learned judge at the request of counsel for the parties, agreed to consider and to rule on the aspects of the application dealing with jurisdiction over the non-resident defendants, jurisdiction to try the claim and discharge of the 4th October 2024 stay order.

[20] The decision of the learned judge is set out in a reasoned order of the court dated 27th November 2024. The reasons given by the learned judge for discharging the Consent Order in relation to the first, second and third defendants are set out at paragraphs 12 and 13 (in material part):

> "12. A court would not be empowered to make an order in relation to a defendant who resides outside the jurisdiction, unless leave has been sought and granted for service out of the jurisdiction. In this case, there was no certificate as required by CPR7.6, and the application for permission to serve the non-resident defendants by a specified method of service was filed only after the application to discharge the order was filed.
>
> 13. The Court is therefore satisfied that the order of 4th October 2024 must be discharged against the non-resident defendants, who have to date, not been served."

[21] For completeness, by the Order, the learned judge also made four additional orders (numbered 2 to 5), none of which are the subject of challenge in the appeal. These are:

> "(2) On this component of the application costs is awarded to the first, second and third defendants in the sum of $3,500.00 to be paid by the claimants; and cost is awarded to the claimants in the sum of $3,500.00 to be paid by the fourth defendant.
>
> (3) The Court has jurisdiction to try the claim and will not decline jurisdiction.
>
> (4) The parties will file written submissions on the application for specified method of service on the non-resident defendants by 12th December 2024.
>
> (5) The matter is adjourned to 18th December 2024."

[22] The judge considered separately whether to discharge the stay of the Consent Order against the fourth defendant (the appellant). In considering this issue the learned judge considered (i) intervening third party rights; (ii) material non-disclosures concluding that there were none; (iii) the balance of harm, concluding that it favours maintaining the stay in relation to the fourth defendant (the appellant), such that the status quo is maintained, until further order of the court; (iv) whether the Claim will be stifled accepting that the issue of whether damages would be an adequate remedy 'is debatable' and that 'the particulars of the claim will have to be examined in this regard, at the appropriate time'; (v) delay accepting that "these matters could have been addressed earlier in the 90-day window, as it would reasonably have been expected that the defendants would be taking steps to complete the transaction within that period", but considered that delay in and of itself is not a determinative factor but simply one of the factors along with others "to be weighed against the totality of the circumstances of the case"; and (vi) the role of the fourth defendant in the claim.

[23] In relation to the sixth issue, the judge disagreed that the fourth defendant (the appellant) is a nominal party and not essential to the Claim and the application for a stay. The judge was of the view that:

> "*… according to clause 1 of the consent order the fourth defendant is equally a part of the order, as are the other defendants*. The shares could have been acquired jointly or severally by any of the defendants. Additionally, the instruments of transfer exhibited by the defendants shows

that it is the **fourth defendant which seeks to purchase the claimants shares**." (Emphasis added)

[24] Having completed her analysis of these factors, the learned judge reached her conclusion at paragraph 48:

> "48. Based on the foregoing the Court is of the considered view that none of the matters advanced by the defendants are sufficient to warrant setting aside the order of 4th October 2024, against the fourth defendant. The balance of harm, and the interests and administration of justice favour maintaining the stay, pending ventilation of the remainder of the application, when further orders may be made in this regard."

The appeal

[25] The appellant relies on the 11 grounds of appeal as set out in its notice of appeal. By these11 grounds, the appellant challenges findings of law and fact made by the learned judge at paragraphs 13, 16 to 19, 22, 24 to 26, 34, 35, 40, 41, 42,44, 45 and 46 of the Decision. The appellant seeks from this Court an order allowing the appeal and discharging that part of paragraph 1 of the Order directing that the stay shall remain in effect against it until further order of the court below. There is a considerable amount of overlap in the 11 grounds of appeal and, accordingly, some grounds may conveniently be dealt with together.

Ground (a): The learned judge erred in law and in fact when she held that the balance of harm favours maintaining the stay against the appellant, such that the status quo is maintained, until further order of the court.[3]

[26] In the notice of appeal, ground (a) is said to be concerned with paragraph 35 of the Decision. However, at paragraph 35, the judge merely encapsulates the submissions of the defendants regarding the balance of harm element of the test for the granting of a stay of proceedings as formulated by this Court in **C-Mobile Services Limited v Huawei Technologies Co. Limited**[4]. She made no findings either of fact or law in that paragraph. Citing paragraph 35 must have been a

[3] Paragraph 35 of the Order.
[4] BVIHCMAP2014/0017 (delivered 2nd October 2014, unreported).

typographical error or misstatement by the drafters of the notice of appeal. In fact, the judge's finding or conclusion with regard to the balance of harm is at paragraph 38 of the Decision. There she concludes "that the balance of harm factor favours maintaining the stay in relation to the fourth defendant, such that the status quo is maintained, until further order of the Court."

[27] The appellant criticises this finding by the learned judge. They do not criticise the correctness of the judge's statement of the principles to be derived from the **C-Mobile** case nor that in considering those five principles the court applies what is, in effect, a balance of harm test in which the likely prejudice to the unsuccessful party must be carefully considered.

[28] The appellant argues, however, that the judge misapplied or misunderstood the balance of harm test in that she conflated that test with maintaining the *status quo*. It is also submitted that, in any event, the *status quo* at the relevant time was that there was an existing contract for the sale of the respondents' shares in WIPLSLU to the said company pursuant to the terms of the Consent Order.

[29] In support of these submissions, the appellant relies on the evidence at paragraphs 5, 10, 13, 18(a) and 18(c) of the affidavit of Gerald Charles Chambers, which facts, argues the appellant, were not challenged or disputed by the respondents and therefore remained uncontroverted. In summary, these paragraphs speak to the defendants having set about to obtain funding for the purchase of the shares; they having obtained a loan to purchase the shares; the amount of US$3.2 million representing the assessed value of both respondents' shares in WIPLSLU having been sent by the lender to the lawyers for the defendants; and the said lawyers having communicated via email with the respondents requesting them to send the bank wiring details for the said amount to be sent to them and for the share transfers to be executed in favour of the appellant in completion of the sale as provided for under the Consent Order. In this respect, the appellant also relies on the email at exhibit "GCC13" to the

affidavit of Gerald Charles Chambers as further proof that the appellant had obtained the loan to fund the purchase price for the shares, had received the sum of US$3.2 million, and had requested wiring details from the respondents. The appellant also relies on the email of 3rd October 2024 from the respondents acknowledging the latter communication from the defendants' lawyers, which acknowledgement, it submits, was significant since it is the very next day, on 4th October 2024 that the respondents obtained, *ex parte*, a stay of the Consent Order.

[30] It is submitted that these undisputed facts demonstrate that the appellant had fully funded the purchase price for the shares and was ready and able to pay over the US$3.2 million and complete the purchase of the respondents' shares pursuant to the terms of the Consent Order. It is the appellant's submission that the learned judge in applying the balance of harm test erred by overlooking the appellant's readiness to pay the purchase price of US$3.2 million and to complete the purchase of the respondents' shares in the appellant.

[31] The appellant also submits that the learned judge overlooked or did not properly consider or take into account these significant and undisputed factual matters in the affidavit of Gerald Charles Chambers when assessing the balance of harm test and where the greater prejudice lies and, in this respect, the learned judge came to an incorrect conclusion on this issue and wrongly exercised her discretion by maintaining the stay against the appellant, which company was in any event a 'nominal' party to the winding up proceedings, the settlement of which was the main or sole objective of the Consent Order.

[32] The appellant submits that in applying the balance of harm test the greater prejudice clearly lies with them and not with the respondents, as the learned judge found. They submit that the only prejudice which has been identified by the respondents in the affidavit of John Levy,[5] was that they would be forced to sell

[5] Hearing Bundle Vol.1 p.130-132 at paras. 34,35,37,38 & 39.

their shares in WIPLSLU at an undervalue, which alleged 'prejudice' sounds only in damages, and damages would be an adequate remedy in all the circumstances.

[33] The appellant argued that in the context of a winding up petition which the parties had agreed and contracted to settle on certain terms, including the withdrawal of the petition itself,[6] damages would clearly be the only, but also, an adequate remedy were the respondents to be shown to be correct that the assessed valuation and resulting share price for their shares in WIPLSLU was significantly less than the actual value for the reasons or on the bases set out in their statement of claim. The appellant argues that the learned judge erred when she did not consider that damages would be an adequate remedy for the respondents, rather than maintaining the stay of the Consent Order against the appellant company. The appellant submits that the substance of the respondents' claim is that their shares are valued more, and any claim founded on an alleged undervalue intrinsically raises an issue of damages, and not one of the transfer of the shares themselves.

[34] Additionally, the appellant submits that it would suffer the following prejudice:

> "(a) The closing date for the sale and purchase of the respondents' shares in WIPLSLU was 8th October 2024, and 5 days before that date, on 3rd October 2024, the respondents' legal practitioners were sent letters attaching the draft share certificates and a request for their wiring details so that payment could be effected for the shares in accordance with the Consent Order.
> (b) Once the valuation had become final, they (the appellant) had set about securing the financing on a commercial basis for the purchase of the shares of the respondents. However, it is the appellant's submission, the learned judge failed to appreciate that funding US$3.2 million could not be possibly arranged between the date of service of the application on the appellant and the making of the order on 4th October 2024. They stress the point that prior to 7th October 2024 they had in fact secured from Sygnus Capital the loan funding necessary to purchase the respondents' shares in WIPLSLU and that third party rights in those funds

[6] See para. 9 of the Consent Order.

and over the shares had now arisen or intervened since the funding had been negotiated from 9th July 2024."[7]

(c) The appellant had paid for the valuation and participated in the valuation exercise "by facilitating the providing of the documents as required."

(d) As a result of the loan process, intervening third party rights had been acquired over the shares of the first, second and third defendants in the appellant and, looking at this matter in a commercial context, you simply could not reverse the loan to purchase the shares.

(e) The stay will and has kept the respondents as shareholders in the appellant company and its subsidiaries, enabling them to continue to "blithe" the expansion of the appellant and it subsidiaries. Furthermore, the respondents have tried to "steal and/or misappropriate the corporate assets of the appellant and its subsidiaries by forming competing companies." In this vein, the appellant also refers to proceedings before the Halfway Tree Criminal Court in Jamaica concerning the respondents' conduct "including accessing without authorization and using of the appellant's subsidiary's confidential information to establish competing business."

(f) In any event, the respondents were guilty of delay in commencing the Claim and in applying to stay the consent Order, since they were well aware at least by the time of the draft valuation report sent by GT on 20th January 2024 of the very information and documentation requested by the valuer having not been supplied."

[35] The appellant submits that it is in its interest to get on with its business free from the disputes with the respondents as shareholders 'where it is common ground that they do not get along or trust each other'. It is therefore the appellant's argument that due to the conduct of the respondents, the business of the appellant and its subsidiaries is being severely hampered. Moreover, had the court below discharged the stay of the Consent Order against the appellant also, the respondents' Claim would not be rendered 'nugatory' for the reason that were they to be successful, they would be entitled to and would receive an award of damages representing the difference between the assessed share value of the court appointed valuer of US$1,600,000 per respondent, and the resulting higher assessed value based on the respondents' case.

[7] See para. 12(b) of the appellant's skeleton submissions.

[36] The appellant also argues that, in considering the balance of harm test, a court can also consider the status quo, or what is or was then the status quo, to be protected in the interest of justice between the parties. In support of this submission, the appellant relies on the dicta at paragraph 49 of the judgment of this Court in **Alexandra Vinogradova v Elena Vinogradova and Sergey Vinogradova**[8] where it is stated that the status quo is '*not the situation that is created as a result of the ex parte appointment of a receive*r', but the situation which prevailed prior.

[37] Accordingly, it is submitted, that the status quo which existed prior to the grant of a stay of the Consent Order, was that the Consent Order was in place and the appellant had taken and was 'taking the necessary steps to give effect to the Consent Order'.[9] These steps included paying Grant Thornton for the valuation report, providing in excess of 130 documents to facilitate the valuation and report, securing financing through a loan from Sygnus Capital to fund the purchase of the respondents' shares in WIPLSLU, the funds loaned being transferred to the appellant's lawyers to complete the purchase, and the respondents being requested in writing to provide their wiring details for the transfer and payment of the purchase price for the said shares in exchange for executed share transfers.

[38] It is also submitted that on these facts the learned judge ought not to have considered that the 'status quo' was not to maintain the stay of the Consent order as against the appellant, but to ensure that the share purchase transaction under the Consent Order, upon which the appellant has already part performed its obligations and which was virtually completed save for the wiring of the funds to the respondents and the appellant receiving their executed share transfers, could be fully completed.

[39] The appellant also contends that the respondents have not pleaded an arguable or actionable case of fraudulent misrepresentation in their statement of claim,

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[8] BVIHCMAP2018/052 (delivered 30th July 2019, unreported).
[9] See para. 15 of the Consent Order.

which claim is bound to fail. This issue, which the appellant submits is a question of law, is the focus of grounds (h), (i) and (j) of the appeal and will be dealt with more substantially when considering each of these grounds together. However, suffice it to be said at this juncture that the appellant contends that the respondents' pleaded case is not one of misrepresentation, but of non-disclosure of documents and information which they say were important to an assessment by the valuer of the true market value of WIPLSLU as at the date specified in the Consent Order.

[40] More fundamentally, they submit that there is no pleading in the statement of claim that the so-called misrepresentations were in their minds or known to them when entering into the contract, that is, the Consent Order. They submit that this is fatal to any claim based on alleged misrepresentation. Moreover, as a matter of law for there to be actionable misrepresentation there must be a 'conscious awareness' of facts giving rise to the particular transaction or inducing that party to enter into the particular transaction or contract. Where a party was unaware of certain facts when entering into the contract, they cannot say that they were induced to enter into the contract on the basis of matters of which they were unaware. In support of this submission, the appellant relies on the dicta of Cockerill J in **Leeds City Council and others v Barclays Bank plc and anor**.[10] In this respect, it is also contended that the learned judge erred in a material way and the order maintaining the stay as against the appellant ought to be set aside.

[41] In support of the submission that the Claim is bound to fail, the appellant pointed out that the defendants' notice of application included also an application that the Claim be struck out against the defendants, including the appellant. However, when the notice of application came on before the judge on 5th November 2024 the jurisdictional issues took centre stage. This statement is not entirely accurate. At paragraph 8 of the Decision, the learned judge stated:

[10] [2021] QB 1027 at paras. 144 to 162.

> "At the request of Counsel for the defendants the Court agreed to deliberate and rule on the aspects of the application pertaining to jurisdiction over the non-resident defendants, jurisdiction to try the claim, and discharge of the order of 4th October 2024. Submissions on striking out the claim was deferred."

[42] In response to these points, the respondents submit that the main issue for this Court to determine is whether the judge in exercise of her discretion was plainly wrong to maintain the stay against the appellant. It is submitted that the judge in preserving the subject matter of the claim pending trial was not plainly wrong and there is no basis upon which this Court ought to set aside the order being appealed. It is also argued that the Decision of the judge showed that she had a proper appreciation of the relevant facts and of the applicable law. She went through every aspect of the test as encapsulated in the **C-Mobile** case and gave proper consideration to every issue and every point of importance in reaching her decision to maintain the stay against the appellant.

[43] As to the balance of harm test, the respondents dispute as incorrect the appellant's contention that the sole prejudice identified by them in the affidavit of John Levy was that they would be forced to sell their shares in WIPLSLU at an undervalue. Instead, they submit that the judge found that the real prejudice to the respondents would be to have to sell their shares in WIPLSLU to the appellant and lose their right to have the Consent Order set aside thereby losing their rights and entitlements as shareholders of the said company. In this vein, the respondents refer to paragraph 39 of the Decision. The respondents also rely on paragraph 40 where the learned judge accepted that if a stay of the Consent Order is not maintained against the appellant "the Claimants claim for breach of contract and fraudulent misrepresentation (leading to its setting aside) would be stifled and rendered nugatory and they will be required to execute the very contract which they are attempting to challenge, before the Court can make a determination on the merits of their claim."

[44] The respondents also submitted that the prejudice to them should the stay order not be maintained includes the following:

> "(i) being compelled to sell their shares before the Claim can be adjudicated, and at an undervalued price "based on the defendants' deliberate actions of withholding and/or refusing to disclose pertinent information to the valuer;
> (ii) losing the opportunity by way of the Claim to have the Consent Order set aside on the ground of fraud;
> (iii) being unjustly compelled to relinquish their proprietary rights in the share and at an undervalue; and
> (iv) the loss of corporate and business opportunities in WIPLSLU if they were to succeed in having the Consent order set aside."

[45] The respondents submit in response to this ground of appeal that the appellant has in their submissions sought to mischaracterise the claim in SLUHCOM2024/0059. They contend that the essence of their claim is not a claim in damages. Instead, they seek the revocation of the Consent Order, and the stay granted was necessary to protect their interests until determination of the Claim by the High Court. Accordingly, argue the respondents, damages would not be an adequate remedy, instead of maintaining the stay against the appellant. It is the very Consent Order, the agreement, which the respondents seek an order setting it aside on the basis that it is a nullity as a result of the fraudulent concealment of material facts by the defendants, including the appellant. By this submission, I understand the respondents to be arguing that the Claim seeks revocation of the Consent Order and not the implementation of its terms of sale by the court compelling the reassessment of the value of WIPLSLU taking into account the documents or information which the appellant has withheld or failed to supply or to make available to the court appointed valuer to enable them to conduct a full and proper assessment of the market value of the shares in WIPLSLU.

[46] On the question of what the applicable status quo is, the respondents submit that it is the state of affairs which existed immediately prior to them filing the Claim. They contend that the **Vinogradova** case relied on by the appellant, can and ought to be distinguished from the instant matter. They argue that the learning

from the said case is primarily concerned with the threshold test for the appointment of receivers and the general principles for receivership. Accordingly, it is being misapplied by the appellant in relation to an understanding of the meaning of the expression ‘status quo’. Instead, the principle to be extracted from that case is that the courts will adopt a cautious approach to altering the status quo.

[47] In the instant matter, submit the respondents, the status quo to be maintained in the interest of justice is exactly what the learned judge did in the instant matter at paragraph 40. In this respect, the judge adopted a cautious approach in referencing at paragraph 50 the next step being to fully ventilate the application to strike out the Claim. The respondents argue that, in this context, maintaining the status quo ‘means not prejudicing the respondents’ claim to challenge the validity of the Consent Order’ by allowing the respondents’ Claim to be determined on its merits, ‘without any change in the legal rights to the shares in the appellant until final determination of the claim’. Looked at in this way, it is the respondents’ principal submission, that the learned judge properly exercised her discretion by finding that the balance of harm favours maintaining the stay against the appellant. The status quo is not, as the appellant has contended, permitting or facilitating the steps necessary to give full effect to the terms of the Consent Order, “but rather the circumstances which existed prior to the entering into [the] Consent Order, as it is the very Consent Order which has been stayed and which is the subject of the Claim”.

[48] Furthermore, argue the respondents, maintaining in place the stay of the Consent Order against the appellant does not serve to frustrate the appellant or its rights, but is necessary to ensure fairness between the parties in the determination of the Claim to set aside the Consent Order. This point, says the respondents, was echoed by the learned judge at paragraph 46 of the judgment when she stated, ‘*the consent order is for the benefit of both sides*’. In adopting this approach, the learned judge correctly exercised her discretion to maintain the stay of the Consent Order against the appellant, the very entity which was a party to the

terms of the Consent Order for the orderly sale and purchase of the respondents' shares in the said company, and which company is the intended purchaser of the said shares. Accordingly, the risk of prejudice is greater for the respondents. It was, therefore, in the interest of justice to maintain the status quo whereby the respondents continued to retain their shares and interest in WIPLSLU pending the determination of their Claim by which they seek an order that the Consent Order itself be declared null and void because of the fraud of the defendants, including the appellant. It is also the respondents' submission that the appellant will not be prejudiced by awaiting the outcome of the Claim on its merits.

[49] On the issue of intervening third party rights, the respondents submit that no evidence of any existing third party rights have been produced by the appellant and the judge was correct to so conclude. Moreover, even if such rights had been created over the shares of the first, second and third defendants this would not be sufficient to supersede the rights and claims of the respondents to have the Consent Order set aside on the ground of fraud. This represents a challenge on material grounds which came to light only during the valuation process.

[50] On the issue of whether the respondents have pleaded an arguable case of fraudulent misrepresentation, the respondents refer to paragraphs 39 to 41 of the decision where the learned judge dealt with the 'Prospects of Success' and with article 925 of the **Civil Code** which identifies fraud as a cause for nullifying a contract. The respondents also refer to paragraphs 13 and 14 of the statement of claim where they have pleaded implied representations and that the respondents were induced to enter into the Consent Order on the basis of those implied representations. They also refer to the particulars of fraud pleaded at paragraph 22 (a) and (c) to (i). The respondents also stressed that before the learned judge the appellant did not raise the issue of 'conscious awareness'.

[51] In relation to the **Leeds City Council** decision, the respondents submit that this case can be distinguished from the instant matter which is based on concealment

of the fraud. In the instant matter the respondents were not aware of the fraudulent acts at the time of entering into the Consent Order as these acts were concealed by the defendants (including the appellant) from them by the withholding of financial and other documents to which they were entitled to as shareholders, and by the failure by those controlling the appellant to hold general meetings of the said company, all matters upon which they relied in bringing the winding up petition on just and equitable ground. Moreover, it is submitted that the judge ought not to be required at the hearing of the stay application to determine complex issues of fact and law, including allegations of concealment, and it is for these very reasons that the hearing of the strike out application was deferred by the judge with the agreement of the parties.

[52] In response to the 'clean break' point relied on by the appellant in its submissions, the respondents submit that the Consent Order was a compromise of the winding up petition and not the parties seeking a clean break, although the ultimate effect if properly implemented, would have resulted in a clean break between the respondents and those in control of the appellant and its subsidiaries.

[53] Finally on the issue of delay in bringing the Claim and stay application, the respondents submit that any delay or prejudice (which is not admitted) could only be assessed from the date of the final valuation and not from the draft valuation, especially since by the draft valuation the valuer were still seeking to obtain further information and documents from the defendants, including the appellant, in order to conduct a proper and full assessment of the value of WIPLSLU and its subsidiaries. The final valuation having been issued in July 2024, the 90-day period for completion would begin to run from then, and the Claim and stay application was filed well within that period.

Analysis and Conclusion – Ground (a)

[54] In my judgment, there is considerable merit in the respondents' submissions and argument in response to this ground of appeal and the appellant's submissions

thereon. This is particularly the case with regard to the reasoning and finding of the judge that the balance of harm favours maintaining the stay of the Consent Order against the appellant in order to preserve the status quo while the Claim, by which the respondents seek an order setting aside the Consent Order on the ground of fraud or fraudulent misrepresentation as particularised in the statement of claim, is tried and determined.

[55] The learned judge considered the 'balance of harm' test at paragraphs 35 to 38 of her Decision and Order. At paragraph 35, she properly summarised the appellant's arguments against maintaining the Consent Order in place against it. Much of what the appellant has relied on before this Court in support of this ground of appeal has been accurately captured and summarised by the judge at paragraph 35. This includes the argument that the essence of the respondents' claim is an undervalue of the shares in WIPLSLU by the valuer, that this intrinsically leads to a claim in damages and not the continuation of the stay against WIPLSLU but its removal, leading to the terms of the Consent Order being fully implemented and the sale of shares completed so as to achieve a 'clean break', which on the evidence is favoured by both sides.

[56] At paragraphs 36 and 37 of the Decision, the learned judge also summarised and considered the various points of argument made by the respondents supportive of maintaining the stay of the Consent Order against the appellant. This includes the argument that there is no harm or prejudice to the appellant by continuing the stay until determination of the Claim; that there is no prejudice to the appellant's lender or to any third party 'as there is no evidence of any agreement having been executed between the defendants and the third party', and even if that were so, it is settled law that third party rights cannot supersede the claimants' rights and, further, obligations to a third party cannot be used to obstruct justice when fraud is in issue. The judge summarised the respondents' point that the appellant and its subsidiaries 'can continue to [be] run as usual whether the shareholdings change or not'.

[57] It is to be stated that I am not convinced by the argument relied on by the appellant as to what is the actual *status quo* which ought to be maintained at this stage of the proceedings. The Claim seeks an order setting aside the Consent Order, which is essentially and as a matter of established principles, a contract or agreement between the parties to litigation given the force and enforceability of an order of the court. As such, under Article 925 of the **Civil Code**, such an agreement is a nullity if consent was induced by error, fraud, or violence. In the instant matter, the respondents, as claimants, have relied on fraud in seeking to have the Consent Order set aside, particulars of which are set out in the statement of claim. Accordingly, this issue is joined as between the respondents and the appellant and, subject to the issue of service and jurisdiction over them being addressed, the other three defendants.

[58] However, the appellant also moved the court below to strike out the Claim as being frivolous and vexatious and disclosing no reasonable cause of action. The existence of this application was clearly considered by the learned judge and, as noted at paragraph 8 of the Decision, the parties agreed to have this issue fully argued at a later date as the next step in the proceedings.[11]

[59] Accordingly, as matters stood on 27th November 2024 when the learned judge made the Order maintaining the stay of the Consent Order against the appellant, the defendants were facing a claim brought by the respondents by which they are seeking not to have a reassessment of the value of WIPLSLU or to enforce the terms of the Consent Order by having the outstanding requested information and documents provided to the valuer by the appellant nor a reassessment of the value of the appellant and its subsidiaries carried out and the sales of the shares completed on that basis. Instead, the Claim seeks to have that very Consent Order set aside on the basis that the implied representations were made falsely and

[11] See para. 50 of the Decision.

fraudulently by the defendants, including the appellant, which representations had induced or led the respondents to enter into the Consent Order.

[60] One of the main (if not the main) allegations of fraud as particularised at paragraph 22 of the statement of claim, is in relation to an unsecured interest free loan of US$21.86 million made to the first, second and third defendants with no repayment date (the Directors' Loan); and how that money was used by those defendants to purchase a proprietary interest or stake in the Limetree Bay Refinery on St. Croix, and which Directors' Loan was not disclosed by the appellant and the first, second and third defendants when entering into the Consent Order a mere 8 days later on 8th March 2022. Further, on the basis of the pleading, an important issue for determination at trial is whether that Directors' Loan was given by the appellant to intentionally deceive the respondents as to the true value of WIPLSLU and its subsidiaries, and whether the acquisition by the first, second and third defendants of a stake in the Refinery was done by them and the appellant to intentionally divert away from the appellant a significant asset and business opportunities.

[61] The appellant argues that the Claim is hopeless and discloses no arguable cause of action for fraudulent misrepresentation. In doing so, they referred to paragraph 13 of the statement of claim by which the respondents pleaded certain 'inferred' representations 'whether by implication, conduct or otherwise'; and to paragraph 14 by which they plead that 'acting on the faith and truth of the Representations and induced thereby' they entered into the Consent Order. Relying on the judgment of Cockerill J in **Leeds City Council**, the appellant submits that in order for the respondents to succeed on the Claim they must plead a conscious awareness of the alleged acts or factors of misrepresentation. Having not done so the Claim is doomed to fail. The respondents counter that while they were not aware of the fraudulent acts when entering into the Consent Order, their claim is based on concealment of the fraud by the defendants, those in control of WIPLSLU and its subsidiaries.

[62] In my considered view, all these points and counterpoints are at least arguable. However, it is in my judgment that this is an issue to be fully ventilated at the hearing of the strike out application. For these reasons I will not say much more about it, except that in my judgment that is not a basis for the judge to have discharged the stay against the appellant at that stage of the proceedings. Obviously, were the strike out application to succeed, there would be no basis upon which the stay could be allowed to continue and it must be discharged against the appellant, unless that decision itself is stayed pending any appeal therefrom.

[63] On the question of delay, in my view while it can be said that the respondents were made aware by the draft report issued on 31st January 2024 of certain information and documents which were requested by the valuer but remained outstanding, the valuation exercise had not been finalised and the expectation would have been that the defendants would have provided the undisclosed documents to the valuer in order for them to complete the exercise and finalise the valuation. Viewed in this way, any question of delay ought, in my opinion, to be judged from the date of the final valuation report in July 2024 and not from 31st January 2024. In these circumstances, the Claim and stay applications were filed within the 90-day completion period under the Consent Order, and any delay was marginal and certainly not inordinate such that the right of the respondents to move the court to set aside the Consent Order on the basis of fraud would be 'stale'.

[64] At paragraph 38 of the Decision, the learned judge gave this impeccable summary of the correct approach to be adopted by a judge when considering whether to grant or to maintain a stay. She opined: "whereas a stay is the exception rather than the rule, the Court may exercise the discretion to grant a stay, upon assessing the relevant factors and conducting the requisite balancing exercise. It is well established that no one factor is decisive, and the degree of importance attached to each will vary according to the facts of each case. Additionally, the

court must give due regard to all the circumstances of the case". The judge stated categorically that she "accepts the claimants' submissions [on the balance of harm and prejudice] and concludes that the balance of harm favours maintaining the stay in relation to the fourth defendant, such that the status quo is maintained, until further order of the Court."

[65] In the instant case, the judge was correct to conclude that there is a 'good arguable case' that the Consent Order and settlement of the winding-up petition was procured by the intentional withholding of material financial information by the appellant and the individual defendants/shareholders of the appellant company, in particular, the non-disclosure of a US$21.86 million Directors' Loan to the said individual shareholders enabling them to purchase an interest in the Refinery. Accordingly, the court retains the jurisdiction to stay its execution pending a trial on the merits of its nullification. In my judgment, and for the reasons stated above, the learned judge's conclusion and finding on the balance of harm test is sound and unimpeachable, and she was correct in not accepting the various points of challenge to it by the appellant. The judge considered and applied the correct principles, and her consideration and analysis of the points and counterpoints cannot be faulted. She did not omit from her consideration any important or relevant factor that could have tipped the scale towards the appellant suffering greater harm or prejudice if the stay of the Consent Order is maintained. Accordingly, I am not persuaded that on this count there is any sound basis for setting aside the judge's finding and order, and this ground of appeal fails.

Ground (b): The learned judge erred in law and in fact when she failed to consider that the appellant is a nominal party in a shareholder dispute and that by maintaining the stay against it, then court side wind granted a stay to the respondents against the real parties in the dispute, being the shareholder defendants, in circumstances where the learned judge ruled that the court had no jurisdiction over them.[12]

[12] Paragraphs 13, and 16-19 of the Order.

[66] The main thrust of the appellant's argument on this ground of appeal is that the dispute giving rise to the petition to wind up the appellant on the just and equitable ground, is a dispute between shareholders of the appellant, and no allegations were made in the petition against the appellant itself. The winding up petition was brought by shareholders and allegations therein are made against other shareholders for effectively shutting them out of the affairs of the company and steps taken in withholding documents and financials against their interest as minority shareholders of WIPLSLU. Accordingly, the real disputants, argue the appellant, are these shareholders and not the company itself. The company, WIPLSLU, was "only made a party to the winding up and similar proceedings so that it may be bound by any order that the court makes in relation to the real parties in dispute."[13] In relation to the Consent Order, the appellant submits that it is the result of a settlement of the winding up petition 'brought by the respondents [as] shareholders against the other shareholders of the appellant.'

[67] It is submitted that the appellant is merely a 'nominal' party to the winding up petition proceedings. Yet the learned judge having discharged the stay of the Consent Order against the first, second and third defendants, maintained it against the appellant company 'in favour of the shareholder claimants'. It is submitted that in a winding up petition the real parties to the dispute are the shareholders or those in control of the company.[14] In the instant matter, the stay ought to have fallen away against the appellant also, once it was discharged "as between the hostile or disputing parties especially in these circumstances where it was discharged on the basis that the learned judge had no jurisdiction to grant it against the shareholder Defendants." To maintain it against the appellant is to effectively grant a stay in favour of the respondents even though the court below accepted that it had no jurisdiction to grant the stay in relation to the shareholder parties.[15]

[13] See paras. 16 and 17 of the appellant's skeleton submissions.
[14] See para. 19 of the appellant's skeleton submissions.
[15] See para. 18 of the appellant's skeleton submissions.

[68] In response to ground (b), the respondents submit that the learned judge fully considered the role of the appellant company in the winding up proceedings and explicitly disagreed with the defendants' submissions before her that the appellant was a 'nominal party' and not essential to the Claim and the application for a stay.

Analysis and Conclusion – Ground (b)

[69] At paragraph 45 of the Decision, the learned judge dealt with these submissions on behalf of the appellant head on and disagreed with them. In doing so, she expressed the view that:

> "… according to clause 1 of the consent order the fourth defendant is equally a part of the order, as are the other defendants. The shares could have been acquired jointly or severally by any of the defendants. Additionally, the instruments of transfer exhibited by the defendants shows that it is the fourth defendant which seeks to purchase the claimants' shares."

[70] I agree with and adopt the learned judge's reasoning at paragraph 45 of the Decision. In addition, it is patently clear that the Claim in which the respondents and the appellant are engaged as, respectively, claimants and one of four defendants, is concerned not with the winding up petition (which seems to have been the focus of the appellant's arguments on this ground), but with the Consent Order and its validity in the face of allegations (and they are mere allegations at this stage) of fraud, such as could vitiate the Consent Order and agreement reached by all 6 parties in purported settlement of the winding up petition. Further, the reliefs sought and the pleading and particulars of fraud in the statement of claim are made against all four defendants, including the appellant. This much is pellucid.

[71] Viewed in this way, the appellant is not, in essence, a 'nominal' party or 'neutral' party to the Claim and/or the Consent Order sought thereby to be set aside. This position is easily reached for a number of reasons. First, the appellant is a consenting party to the Consent Order sought to be set aside. Second, and most

importantly, by paragraph 1 of the Consent Order, the appellant (WIPLSLU) is one of the consenting parties which it is agreed, by the terms of the Consent Order is entitled to purchase the respondents' shares in itself. Third, the evidence before the court below, including the instruments of transfer of shares, demonstrates conclusively that it is the appellant which is in fact exercising that right under the Consent Order to purchase the shares of the respondents. These factors all lay hollow the notion that the appellant is a mere 'nominal party' to either the Claim or the Consent Order.

[72] For completeness, the appellant, in crafting ground (b), references paragraphs 13 and 16 to 19 of the Order of the court below. Paragraph 13 contains the judge's decision to discharge the stay against the first, second and third defendants. These parties are referred to as the 'non-resident' defendants. However, importantly the judge's reason for discharging the stay of the Consent Order against these non-resident defendants, is because they had not, up to that point in the proceedings, been 'served' with the originating documents and, as a consequence, the court could not exercise jurisdiction over any of them. It is not, as the appellant seems to insinuate, because the court has not or could not have any jurisdiction over these defendants in relation to the Claim. Indeed, at paragraph 13 of the Decision, the learned judge states:

> "However, the Court is mindful that service of process on these defendants is still a live issue, as the claimants have filed an application for a specified method of service, to which the defendants have filed a notice of opposition. If necessary, that application will be ventilated, at the appropriate time".

[73] At paragraphs 16 to 19 of the Decision (cited by the appellant), the learned judge treats with the issue of whether the court ought to decline jurisdiction to try the Claim, having found at paragraph 15 that 'this Court is properly clothed with the jurisdiction to [try the Claim].' Thus, the real issue under consideration at paragraphs 16 to 19 is not whether the court has jurisdiction to try the Claim but, having jurisdiction to do so whether, in the particular circumstances of this case, it

ought to decline the jurisdiction which it undoubtedly has. In any event, at paragraph 19 the judge found conclusively that there is no basis for declining jurisdiction. Finally, I note that there has been no appeal either from the decision that the court has jurisdiction to try the Claim or the decision not to decline such jurisdiction.

[74] The determinations and findings above lead inextricably to the conclusion that there is no merit in ground(b) of the appeal which, accordingly, fails.

Grounds (c) and (d):

(c) The learned judge misdirected herself in relation to the fact that by the time that the matter came before the court on all occasions the agreement was partially performed by the appellant and the other parties including in relation to the matters referenced by paragraphs 24 -26 of the Order.
(d) The learned judge erred as a matter of fact and/or law in relation to the question of delay and detriment insofar as the application was made not only after part performance but also after the Appellant and the other parties had taken steps to complete the contract.[16]

[75] Both of these grounds of appeal can conveniently be dealt with together. This was the approach adopted by the appellant and the respondents in their respective written submissions. The common thread between these two grounds is the reliance on what is termed as part performance of the contract enshrined by the Consent Order, leading to issues of delay and detriment and the invoking of equitable principles.

[76] The appellant relies on the well-known maxim 'delay defeats equity'. In this instance, delay in seeking interim relief, including the grant of a stay, which they argue is critical in determining whether the court ought to grant, refuse or set aside the stay application. In this vein, the appellants cite the dictum at paragraph 41 of the decision of this Court in **Alfa Telecom Turkey Limited v Teliasonera Finland OYJ**[17] where George-Creque JA (as she then was) citing Snell's Equity 21st Edition, noted:

[16] Paragraphs 44 and 45 of the Order.
[17] BVIHCVAP2008/012 (delivered 28th September 2009, unreported).

> "…a lesser degree of acquiescence or laches suffices to debar a Claimant from interlocutory relief than from obtaining a perpetual injunction, the refusal of an interlocutory injunction is only a temporary rebuff, whereas the refusal of a perpetual injunction … 'amounts to a decision that a right which has once existed is absolutely and forever lost'. Moreover, interim relief is granted only in matters of urgency, so that a Claimant who delays thereby demonstrates the absence of any urgency requiring prompt relief. Even a month's delay between the assertion of a right and the commencement of proceedings may debar the Claimant if in the meantime the Defendant has contracted to let the subject property matter to third parties."[18]

[77] The gravamen of the appellant's submission is that he who sleeps on his rights loses them, and courts do not come to the aid of stale demands.[19] At paragraph 22 of the appellant's skeleton argument, it recounts the timeline from the first draft of the valuation report being sent by Grant Thornton on 30th January 2024 to their final report on 9th July 2024. It is the appellant's argument that the respondents would have been made aware, from as early as 30th January 2024, that some of the information and documents requested by the valuer were outstanding or not provided. This, it says, was more than 6 months before the first draft of the report was prepared.[20] However, the respondents' disclosure application was not filed until 19th March 2024. Accordingly, the respondents failed to act on their perceived rights, there was in the interim part performance on the part of both sets of parties.

[78] In response, the respondents say that the learned judge properly dealt with 'delay' at paragraphs 43 and 44 of the Decision. While at paragraph 44 she was of the view that the respondents could have completed their assessment of the final valuation report much sooner to enable them to commence the Claim and to file the stay application sooner, the fact is that these proceedings were commenced within the 90-day period stipulated in the Consent Order for completion of the sale of the shares to the appellant. This latter fact was weighed by the learned judge in exercising her discretion and not to discharge the Consent Order against the

[18] Ibid, at para. 41.
[19] Smith v Clay [1767] 3 Bro. CC 639.
[20] See para. 23 of the appellant's skeleton submissions.

appellant purely on the basis of any perceived lack of promptitude, as she was entitled to do, delay not being of itself a determinative factor. The respondents also submit that the question of delay must be judged from when the respondents would have been aware of certain facts, and when looked at in that way, any delay did not amount to undue delay to the prejudice of the appellant.

Analysis and Conclusion – Grounds (c) and (d)

[79] At paragraphs 43 and 44 of the Decision, the learned judge noted that the valuation report was considered final on 9th July 2024 which, pursuant to paragraph 6 of the Consent Order, meant that the 90-day period to complete the buy out of the respondents' shares in WIPLSLU commenced from that date and would have ended on 8th October 2024. However, the claim for a stay of the Consent Order was filed on 19th September 2024, 'a mere 20 days before the expiration date for completion of the sale.'[21] The judge accepted that any assessment by the respondents of the final valuation could have been addressed and concluded earlier in the 90 day completion period stipulated by the Consent Order 'as it would reasonable (sic) have been expected that the defendants would be taking steps to complete the transaction within that period.' However, the learned judge considered that delay in and of itself is not a determinative factor, but one of several factors to be considered and weighed in the circumstances of a case.

[80] At paragraphs 43 and 44 of the Decision, the learned judge seems to have accepted that while the Claim and application for a stay of the Consent order had been filed by the respondents within the 90 day window for completion of the sale and purchase of the respondents' shares in WIPLSLU (20 days before its expiration on 8th October 2024), the respondents' assessment of the final report could have been addressed earlier in the 90 day transaction completion window. This statement by the judge while imputing some lack of promptitude by the

[21] See para. 44.

respondents in bringing their claim for setting aside the Consent Order, is not a definitive finding of delay by the learned judge, much less a finding of inordinate or undue delay.

[81] The appellant has not directly criticised as an error of fact or law the judge's reasoning and assessment of this issue at paragraphs 43 and 44. The thrust of their submissions is to the effect that the period to be looked at in assessing whether the respondents have been guilty of delay or laches in bringing their Claim and the stay application on 19th September 2024, is not from when the final valuation report was issued on 9th July 2024 to when the 90 day period for completion of the sale would expire on 8th October 2024 as posited by the judge, but from when the draft valuation report was sent to the parties by Grant Thornton of 30th January 2024, as the draft report clearly showed and made the respondents aware that certain documents and information requested had not been provided.

[82] In my judgment, while there is some merit to that submission by the appellant, any delay in bringing the Claim and stay application must be put in its proper context. The starting point here is that some of the timelines in the Consent Order for doing certain things by the parties to it were not adhered to or realised. Most importantly, paragraph 2 whereby the independent valuer was to have received a joint instruction letter from the parties within 21 days of the Consent Order, that is 21 days from 8th March 2022 or by 29th March 2022. This was certainly not complied with, and any fault must be visited on both sets of parties. Second, the engagement of the valuer and the valuer doing their work such that a draft report could be produced was clearly delayed for a considerable period. Indeed, the draft report was sent to the parties by Grant Thornton on 30th January 2024, some 22 months after the Consent Order had been entered into.

[83] Third, while it is correct to say that when the draft valuation report was sent to the parties on 30th January 2024, it made the respondents aware that certain information and documents requested by the valuer had not been provided to

them by the appellant, the clear objective of pointing this out was not only to qualify the results of the valuation then in the process of being undertaken by the valuer, but equally, in my considered view, to prompt the appellant into complying with their request and to provide the absent information and documents which, on any reasonable view, were important to the valuation exercise itself being undertaken by Grant Thornton pursuant to the terms of the Consent Order. However, as the documentary evidence discloses this has resulted in only some, but not all, of the documents and information requested being provided.

[84] This fact is pellucid since paragraph 3.06 of the final valuation report listing some 9 items of information requested but which remained outstanding, prompting the valuer at paragraph 3.07 to include this telling qualification: "We note that, had these limitations not been present, our valuation conclusions may have differed, perhaps by a material amount." This statement calls into question the accuracy or correctness of the final valuation amount. It also calls into question the appellant's failure to supply the missing items of information which the valuer considered to be of some importance to the correctness of their valuation and the discharge by them of their implied duty to conduct and to present in the form of a report a fair and reasonable valuation of the market value of WIPLSLU as of the date specified at paragraph 4 of the Consent Order. Finally, it is evidence which the respondents seek to use as supportive of their case for the implied representations and ultimately of the particulars of fraud which they have pleaded in the statement of claim.

[85] I have therefore reached the conclusion on grounds (c) and (d) that while the learned judge considered that the respondents could or even ought to have filed their claim and the stay application more promptly or somewhat earlier, they nevertheless did so within the 90-day transaction completion period specified in the Consent Order, and were not guilty of undue or inordinate delay in taking those steps to dispute the Consent Order itself on the grounds of fraud. Moreover, any 'delay' must be viewed in its proper context as disclosed by the sequential or

chronological facts in the instant matter. Further, the learned judge was correct as a matter of principle in holding that delay cannot in and of itself result in a discharge or a stay order or the refusal to stay proceedings. It is but one of several factors to be considered and weighed up by a judge when coming to such decisions. In the circumstances of this matter, delay, if any, was minimal at best. The respondents' right to move the court to set aside and, in the interim, to stay the Consent Order was not a stale right such that in equity a court ought to refuse in these circumstances to maintain the stay of the Consent Order against the appellant. Accordingly, grounds (c) and (d) also fail.

Ground (e): The learned judge erred as a matter of fact and/or law when she found that no evidence was provided to substantiate the matters relating to loans and third-party intervening rights.[22]

[86] This is a relatively short point. The appellant submits that contrary to the judge's finding of lack of evidence evincing the loans and third party rights, there was before her ample evidence to substantiate these matters. The appellant refers to the affidavit evidence of Gerald Charles Chambers filed in support of the application to set aside or not maintain the stay of the Consent Order. In particular, the appellant stresses Mr. Chambers' averments that he had participated in meetings with various lenders and examined confidential security documents on the basis of which funding to pay the respondents for their shares in WIPLSLU was provided and notification sent to the respondents' lawyers to make payment to them. Moreover, a copy of the payment confirmation from Sygnus Capital was exhibited to Mr. Chambers' said affidavit as "GCC13".

[87] The appellant also argues that it is not enough for the learned judge to say at paragraph 24 of the Decision that the document exhibited as "GCC13" was not clear, since a clearer copy could have been asked for, presumably by the learned judge. In any event, it is said that the entire document was unclear, but only the "image of the transfer that was included in the email dated the 3rd day of October

[22] Paragraph 22 of the Order.

2024 that was unclear." This notwithstanding, the appellant argues, based on the said email it was clearly stated that the funds received was US$3.2 million, which sum is consistent with the price for the respondents' shares as valued in the final valuation report. Accordingly, the appellant submits that this was more than prima facie evidence that the defendant shareholders had sought funding, were put in funds to make payment of the price for the respondents' shares, and it is on this basis that they were saying that there is intervening third party rights and prejudice. These third party rights were said to be the acquisition by the lender of an equitable interest over the first, second and third defendants' respective shares in WIPLSLU. They also claim that around 3rd October 2023, Sygnus Capital had wired the purchase price of US$1.6 million for each of the respondents to the lawyers for the appellant and they had written to the respondents requesting wire transfer details to send payment for their respective shares.

[88] The respondents in reply emphasise and rely on the judge's findings at paragraph 24 of the Decision that there was nothing in the documents provided in evidence by the defendants (including the appellant) "which substantiates a lending from Sygnus Capital, or an assignment of the shares of the 1st, 2nd or 3rd Defendants or even the shares of the 4th defendant to this entity". They underscore, in particular, the judge's finding that 'there is no facility letter, loan agreement exhibited, or a deed of assignment exhibited'. The respondents also refer to the judge's comment that exhibit GCC13 "is completely illegible and does not permit the court to form any conclusion on what this document purports to be. The third-party rights which are said to have arisen or intervened have not been substantiated in any satisfactory manner, to enable the Court to test the veracity of these matters, to arrive at a position regarding prejudice to intervening third party rights."

[89] The respondents also submit that it is not the responsibility of the court to decipher illegible documents, but of the party and their counsel in exhibiting them to an affidavit to ensure that the quality of documents placed before the court in support of a submission is legible and capable of being examined and read by the judge.

In support of this argument, the respondents pray in aid the provisions of rule 30.4(3) of the **Civil Procedure Rules, 2023** ("**CPR**") which states:

> "Clearly legible photocopies of originals may be exhibited, provided that the originals are made available for inspection by the other parties before the hearing and by the Court at the hearing."

[90] The respondents also submit that even if the judge were to be provided with a clearer copy of exhibit GCC13, there would still be before her "insufficient evidence to allow the Court to arrive at a different decision regarding the alleged intervening third party rights". Moreover, even a finding of third party rights, cannot supersede the respondents' proprietary rights in the shares and cannot be used to obstruct the court's equitable powers to prevent an injustice when fraud is in issue.

Analysis and Conclusion – Ground (e)

[91] The learned judge dealt with the issue of intervening third party rights or interests at paragraphs 21 to 24 of the Decision. She summarised the main points of submission of the defendants at paragraph 21, including that they had pursued obtaining loan to finance the purchase of the respondents' shares, which loan was granted in the sum of US$1.6 million by Sygnus Capital , and that the defendants will be severely prejudiced if the stay of the Consent Order is maintained as Sygnus Capital had obtained an equitable interest as lender over the shares of each of the first three defendants in WIPLSLU; and that the funds had been wired to lawyers for the appellant, who had written by email to the respondents (or their lawyers) requesting account wiring details for the transfer of the said sum of money to complete the purchase of the shares in the amount or value assessed by the valuer in their report. The judge likewise summarised and addressed the main counter-points of the respondents at paragraph 22, including their submission that no evidence had been produced by the defendants to substantiate the matters or claims relating to the alleged loan from Sygnus Capital and any intervening third party rights obtained by that entity in or over the shares of each of the first, second and third defendants in WIPLSLU.

[92] Importantly, the learned judge referenced the email exchanges between the defendants and the registered agent for the appellant dated 2nd October 2024 (exhibit "GCC22"), and an email of 3rd October 2024 to the respondents informing them that funds had been disbursed and requesting from them their wire transfer details so that the funds (the assessed amount of US$1.6 million) can be sent and paid in exchange for execution of the share transfer of the shares of each of the two claimants/respondents in WIPLSLU.

[93] The appellant failed to satisfy the court with documentary and other evidence regarding alleged intervening third party rights or a loan from Sygnus Capital. There was nothing in the slew of documents exhibited by the defendants which substantiated their claim that a stay would cause irreparable harm to Sygnus Capital, and the judge was correct to so find for the reasons which she gave. I set out below, paragraph 24 of the Decision in full:

> "24. The Court noted that there is nothing in the slew of documents exhibited by the defendants which substantiates a lending from Sygnus Capita, or an assignment of the shares of the first, second and third defendants, or even shares of the fourth defendant to this entity. There is no facility letter, loan agreement exhibited, or deed of assignment exhibited. The only document provided in relation to transfer of funds for payment to the claimants is Exhibit GCC13 which is completely illegible, and does not permit the Court to form any conclusion on that this document purports to be. The third party rights which are said to have arisen or intervened have not been substantiated in any satisfactory manner, to enable the Court to test the veracity of these matters, to arrive at a position regarding prejudice to intervening third party rights."

[94] In my view, the general or basic principle in civil litigation regarding the burden of proof applies here: 'he who asserts must prove'. This principle applies with equal validity to a party to interlocutory proceedings. In the instant matter, it was the defendants (including the appellant) who were asserting in seeking to have the stay discharged, that they as borrowers and the interests of third parties acquired over the shares of the first, second and third defendants in the appellant would be severely prejudiced by the continued maintenance of the stay of the Consent

Order. Accordingly, it fell to them as the parties asserting or relying on the existence of a loan of US$1.6 million from Sygnus Capital and the creation of rights in equity over the shares of the first, second and third defendants in WIPLSLU in favour of the said entity, to produce before the judge ample and cogent proof of these matters, and hence of the prejudice which they were asserting. This the learned judge found they had failed to do or to do in a satisfactory manner.

[95] As to the loan from Sygnus Capital, none of the usual documentation evincing the existence of a loan was found to have been provided to the court in the proceedings below. It is not disputed by the appellant in its submissions that no facility letter or loan agreement was provided or adduced in evidence whether as exhibits to the affidavit of Gerald Charles Chambers or otherwise. In short, the mere or bare assertion of a loan or the existence of a loan was insufficient or unsatisfactory proof of it. As to the alleged resulting security interest over the shares of the first, second and third defendants in favour of Sygnus Capital, the learned judge also noted that no deed of assignment or other documents evidencing the creation of such an equitable interest had been adduced. The appellant's failure to exhibit copies of facility letters, loan agreement or security documents meant there was no cogent evidence of a loan or acceleration of debt resulting from the stay.

[96] As to proof of the transfer of funds to the defendants' lawyers for onward transfer to the respondents in purchase of their shares in WIPLSLU, there is not much dispute that the document exhibit GCC13 is indeed illegible. Pursuant to CPR rule 30.4(3), it is the duty of the party relying on an exhibit to their affidavit evidence to ensure that the copy of the original document is clearly legible for the scrutiny of the court. The only document provided in relation to transfer of funds, Exhibit GCC13, is completely illegible, and does not permit the Court to form any conclusion on what that document purports to be or to say. The only argument relied on by the appellant to counter this position is that the judge herself could

have requested a legible or clearer copy and it would have been provided. However, as the respondents argue, it is not the duty of the judge to request a party to produce a legible copy of a document attached to an affidavit. That duty lies squarely with the party seeking to rely on that document, to ensure that it is legible and if not to produce a legible copy for the scrutiny of the court. Indeed, up to the hearing of this appeal the appellant has not produced or sought the leave of this Court to adduce a legible or clearer copy of the said document.

[97] Finally, on this issue, there is not much to be made of the appellant's submission that the statements in the affidavit of Mr. Chambers that he had participated in meetings with various lenders, examined confidential security documents on the basis of which funding to pay for the respondents shares was provided and sent to the lawyers for the respondents, was sufficient evidence for these purposes in proof of the defendants' assertion of the existence of the Sygnus Capital loan and intervening third party rights. These are bald statements lacking in documentary proof, particularly in relation to matters where one would expect to see exhibited certain types of loan and security documents. Again, none of these types of documents were produced by the defendants to the court below and, absent these documents or a probative portion of them, it was not for the learned judge to speculate on a matter of such significance. Accordingly, the learned judge was correct to conclude that the defendants had not substantiated in any satisfactory manner the loan or the existence of any intervening third party rights, and ground (d) also fails.

Grounds (f) and (g):

(f) The learned judge erred in law and in fact when she failed to consider the fact that there existed facts and matters before the Supreme Court of Jamaica and the Halfway Tree Criminal Court, as well as the High Court of Saint Lucia concerning the respondents' conduct including allegations of breach of confidentiality, misuse of confidential information in that the respondents were alleged to have accessed confidential information of the appellant's subsidiaries in Jamaica to set up competing businesses such that trust and confidence had broken down between the parties and that also

influences the amount of confidential information regarding [the] appellant, its subsidiaries and the other parties that was shares with the respondents.[23]

(g) The learned judge failed altogether to consider that the remedy sought by the respondents in Claim No. SLUHCN2022/00001 was winding up of the appellant, and that the Stay Order forced the appellant and the other parties to remain in the commercial relationship with the respondents, notwithstanding that the Stay Order was that they were dissatisfied with the sale value expressed by the valuation experts.[24]

[98] Short shrift can be paid of these two grounds, neither of which has merit. The matter of other proceedings before the courts in Jamaica and the defendants' submission on it was addressed by the learned judge at paragraph 39 of the Decision. This included their submission that the allegations of misrepresentation and/or of fraud in the statement of claim were frivolous, vexatious or otherwise false, and represented an attempt by the respondents to 'come within the principles for setting aside consent orders.'

[99] The judge also recorded at paragraph 40, the respondents' submissions about this issue and their reliance on Article 925 of the **Civil Code** to assert that the Consent Order was a nullity. These were all matters considered by the judge when dealing with the prospect of success of the respondents' claim. At paragraph 41, the learned judge correctly noted that for present purposes the standard of proof required of the respondents as claimants is a good arguable case on their pleadings, and the court is not required to conduct a mini trial to attempt to resolve conflicting arguments relating to allegations, but need only be concerned that the claimants/respondents have raised 'arguable grounds for seeking revocation of the consent order'. Accordingly, the judge took the position that these were matters to be more fully ventilated and examined when considering the application to strike out the claim.

[100] Ground (f) concerns the issue of material non-disclosure which was not pursued before this Court on the hearing of the appeal. It is also concerned with allegations

[23] Paragraph 34 of the Order.
[24] Paragraph 42 of the Order.

of misuse by the respondents of so-called 'confidential information' of the appellant and its subsidiaries. Without pronouncing on the merits of any such allegations, I would merely state that the respondents are and remain shareholders of the appellant and by extension its subsidiaries, entitled under the relevant company law statutory provisions to access to or to being provided with certain information in their capacity as shareholders. The question of whether a shareholder misuses such information to damage the business or other interests of the company is another question which may be of some relevance. However, I fail to see any cogent bases upon which it can be asserted that the learned judge erred in law and/or in fact in not considering the 'allegations' of breaches of confidentiality said to be asserted in proceedings in Jamaica and in Saint Lucia. Those are matters for consideration by each of these courts and do not lend any credence to the assertion that the judge erred leading to the setting aside of her Decision and Order as against the appellant.

[101] Ground (g) is in my view a non-point. The simple fact is that unless and until the respondents are no longer shareholders of the appellant, they and the other shareholders retain their rights and interests *qua* shareholders. While the intent of the parties when entering into the Consent Order was clearly to buy out the shares of the respondents in WIPLSLU and to thereby achieve a 'clean break' and to permit the said company to emerge from the spectre of compulsory liquidation proceedings and to enable it to continue, without the presence of the respondents as shareholders, with its business as a holding company of certain subsidiaries, this does not lead to the conclusion that the court below should in the face of the Claim that the Consent Order is a nullity on grounds of misrepresentation and fraud for an order revoking it, to lift the stay against the appellant to enable it to complete the purchase of the respondents' shares under the terms of the very Consent Order said to be a nullity pursuant to Article 925 of the **Civil Code**.

Grounds (h), (j) and (k):

(h) The learned judge erred in law and in fact in holding that the respondents have a good arguable case since they did not state when or where the

representations on which they relied to ground the Claim were made since the Respondents have been out of operations of the appellant and its subsidiaries since in or about February of 2021 and they have not communicated with each other.[25]
(j) The learned judge erred in law and in fact when she failed to consider the relationship between the respondents in this Court and the defendants in the court below has broken down irretrievably and that but for the valuation exercise, they had all but moved on.[26]
(k) The learned judge erred in law and in fact when she failed to consider that the relationship between the respondents in this Court and the defendants in the court below had broken down irretrievably.[27]

[102] I have earlier in this judgment when dealing with ground (a), briefly expressed my opinion on the issue of good arguable case which lies at the cornerstone of these three grounds of appeal and which, conveniently, have been dealt with together by the parties in their respective written submissions. Accordingly, and for these reasons I do not intend to set out and to consider in depth the competing submissions of the parties in relation to these three grounds of appeal.

[103] In my view, the issue of whether the respondents' claim raises an arguable issue of fraudulent misrepresentation or is doomed to fail while properly a factor for consideration in examining the prospects of success, is not properly a matter for the conduct of a mini trial. It is not an issue which ought not to have led the learned judge to discharge the stay against the appellant at this stage of the proceedings. This issue raises issues of law and fact more properly and fully to be ventilated at the hearing of the strike out application. While to a large extent the point raised by the appellant in argument is a matter of law, the respondents have countered that they rely on concealment, which raises issues of fact not suitable to be resolved on a stay application. In my opinion, the learned judge was correct in her approach when at paragraph 41 she stated: 'These matters will be more fully examined when the parties ventilate the application for striking out the claim.' This disposes of ground (h).

[25] Paragraphs 40 and 41 of the Order.
[26] Paragraph 46 of the Order.
[27] Paragraph 44 of the Order.

[104] Grounds (j) and (k) deal with the issues of 'clean break', the relationship between the parties in relation to the management of the appellant and its subsidiaries and businesses having said to have broken down irretrievably. They also concern the argument that the appellant's point that the judge had failed to consider or to properly consider that the valuation exercise had moved on to the point where the appellant had obtained funding of the assessed purchase price of US$3.2 million for the respondents' shares and had requested from the respondents their wire transfer details to wire the funds to them and receive from them executed share transfers.

[105] In my judgment, while it may be clear that the relationship between the parties had broken down and perhaps irretrievably so, this issue goes more to substantiating the bases for winding up the appellant on the just and equitable ground. It is a factor which does not necessarily go to prejudice and the balance of harm when the very status and binding nature of the Consent order is live issue in the Claim for determination. Likewise, the fact that the appellant has taken steps towards implementing the terms of the Consent Order and completing the purchase of the respondents' shares in WIPLSLU, while a matter to be weighed in the exercise of the court's discretion whether to maintain the stay against the appellant, these steps must be viewed in the context of a challenge to that very consent order as a nullity on the basis of fraud.

[106] For these reasons these three grounds of appeal also fail.

Ground (i): The learned judge erred in law and in fact when she failed to make an assessment regarding the balance of convenience in general and more so about whether damages was an adequate remedy, in that the respondents' stated reason for seeking the Stay Order was not to remain as shareholders of the appellant but to obtain a higher price for their shares.[28]

[28] Paragraph 42 of the Order.

[107] This issue has, to a large extent, been dealt with above under ground (a). In my view, the learned judge was correct to conclude that the respondents, as claimants in the proceedings below, should not be compelled by the lifting of the stay to complete the transaction under the terms of a contract where the respondents have raised arguable grounds on the basis of fraud for seeking revocation of the consent order, as the relevant *status quo* to be protected is the situation prevailing prior to the entering into of the Consent Order sought to be impugned, rather than the state of the affairs created by the disputed order itself.

Disposition

[108] The appellant has failed on all grounds. Accordingly, I would dismiss the appeal and order the appellant to pay the respondents' costs of the appeal. The orders of the Court are as follows:

(1) The appeal is dismissed.

(2) The appellant shall pay the respondents' costs to be assessed by a judge of the High Court or Master if not agreed within 21 days of the date of delivery of this judgment.

I concur.

Esco L. Henry
Justice of Appeal

I concur.
Georgis Taylor-Alexander
Justice of Appeal [Ag.]

By The Court

Chief Registrar