

**THE EASTERN CARIBBEAN SUPREME COURT
IN THE COURT OF APPEAL**

TERRITORY OF THE VIRGIN ISLANDS

BVIHCMAP2015/0002

BETWEEN:

**[1] LIN CHEE KEEN
[2] STEVEN NG**

Appellants

and

FAM CAPITAL MANAGEMENT LIMITED

Respondent

Before:

The Hon. Dame Janice M. Pereira, DBE
The Hon. Mr. Mario Michel
The Hon. Mr. Paul Webster, QC

Chief Justice
Justice of Appeal
Justice of Appeal [Ag.]

On Written Submissions:

Mr. Jonathan Addo of Harneys for the Appellants
Mr. Andrew Willins of Appleby for the Respondent

2015: December 4.

Interlocutory appeal – Conspiracy – Lawful means conspiracy – Intention to injure – Agency – Liability of director for conspiracy together with company of which he/she is director – Whether learned judge exercised his discretion improperly – Application by respondent to strike out appellants' claim in court below – Application by respondent for summary judgment – Applicable legal tests – Whether BVI is appropriate forum for trial of appellants' conspiracy claim

The appellants, residents of Singapore, entered into a Discretionary Management Agreement with the 2nd defendant in the court below (not a party to this appeal) on or about 28th December 2006. The second defendant is a BVI company. The agreement concerned an investment opportunity in real estate in Singapore, and it gave the 2nd defendant a wide discretion as to how to invest the appellants' funds.

The appellants' funds were invested in the 3rd defendant company, a Mauritian fund ("the Fund"). The Fund, in turn, invested the monies in a real estate development in Singapore through its sub-funds which included the 6th defendant, a BVI company called Floralcape International Limited ("Floralcape"), and a Singaporean company called Premium Land Pte Ltd. ("Premium Land"). Premium Land was not a defendant in the court below. It owned

the real property in Singapore and was carrying out the development of the property by building and selling residential units. The respondent to this appeal (the 4th defendant in the court below) is the manager of the Fund and the 5th defendant is its investment adviser. The 1st defendant ("Mr. Lee"), also not a part to this appeal, is a director of all the corporate defendants.

Under the terms of the Discretionary Management Agreement, the 2nd defendant was entitled to a quarterly management fee of 0.250% of the net asset value of the funds under management and an annual incentive performance fee of 25% of the increase in the net asset value of the managed funds for the preceding year.

Premium Land suffered losses between 2007 and 2011. However, notwithstanding the overall under-performance of the Fund during this period (as evidenced by the losses in Premium Land) it paid a performance incentive fee of SG\$8,041,050.00 to the respondent on 5th May 2008. The fee was paid in the form of the issue of 200,725 shares in the Fund to the respondent. The 2nd defendant did not give notice to the appellants of its intention to pay a performance incentive fee, with supporting statements and documents, as was required by clause 8.2 of the Discretionary Management Agreement. The appellants only became aware of the payment in February 2013. In November 2013 the 2nd defendant offered to redeem a portion of the appellants' investments conditional on the appellants giving certain waivers and indemnities. However, the appellants refused to give the waivers and indemnities and the 2nd defendant did not pay over the sums it had offered to each appellant.

On 18th December 2013, the 2nd defendant purported to terminate the Discretionary Management Agreement and took the position that it was not obliged to pay over the partial redemption proceeds previously promised to the appellants, nor to transfer any shares to the appellants. The appellants commenced legal proceedings in the court below in July 2014, asserting four causes of action against the defendants: (1) breach of contract; (2) breach of fiduciary duty; (3) breach of trust; and (4) conspiracy.

The learned judge dismissed the appellants' ex parte application for permission to serve the foreign defendants outside the jurisdiction, mainly on the grounds that there was no viable claim against any of the defendants other than the 2nd defendant, and that the claims for conspiracy and breaches of duty are firmly based in Singapore and the BVI is not the appropriate forum for the trial of these claims.

The respondent had also applied to strike out the claim against all the defendants except the 2nd defendant or, alternatively, for summary judgment. On the day before the hearing of this matter, the appellants filed an amended statement of claim. At the hearing, counsel for the appellant indicated that only the claims for conspiracy to injure and unjust enrichment were being pursued against the respondent. The amended statement of claim alleged that the defendant companies were the agents of Mr. Lee and that the companies had combined together with Mr. Lee in a conspiracy. The learned judge found that no such question of conspiracy could arise because the companies were acting on behalf of a single person and there could not be a combination – it would take at least two persons, acting individually and not in an agency relationship to conspire to injure. Accordingly, the

learned judge concluded that 'no claim of conspiracy to injure [had] a slightest chance of succeeding at trial' and struck out the appellants' conspiracy claim against the respondent, as well as the unjust enrichment claim. The appellants appealed against the striking out of the conspiracy claim. The appeal is against the respondent/4th defendant only.

Held: dismissing the appeal, and ordering that the respondent be awarded two-thirds of their costs of the appeal to be assessed if not agreed within 21 days of the date of this order, that:

1. Notwithstanding that the learned judge erred in finding that: (i) the appellants did not plead in their amended statement of claim that the defendants in the court below had an intention to conspire to injure them (the appellants); and (ii) the relationship of principal and agent between Mr. Lee and the respondent company defeated the allegation of conspiracy; he rightly found that the claim in conspiracy does not have a reasonable chance of succeeding at trial. The scheme, taken at its highest level, was nothing more than a failed investment in an illiquid real estate development where those in charge of investing the funds took a performance fee, did not audit the accounts of one of the subsidiaries (Floralcape), and provided limited information to the appellants. It does not have the trappings of an agreement to deprive the appellants of their investment deliberately.
2. The learned judge rightly found that the BVI was not the appropriate forum for the trial of the conspiracy claim, notwithstanding that some of the alleged conspirators (the 2nd, 4th and 6th defendants in the court below) are BVI companies. The appellants and the main parties to the alleged conspiracy are not resident in the BVI and the events underlying the claims for breach of trust and conspiracy all occurred in Singapore.

Nilon Limited and Another v Royal Westminster Investments SA and Others
[2015] UKPC 2 applied.

3. A company is a separate and distinct legal entity from its members and directors. It acts through its directors and other agents. As a general rule, the knowledge of the directors acting within the scope of their duties is imputed to the company. Thus, where the directors conspire to injure a third party, the directors' knowledge of the conspiracy is imputed to the company which then becomes a party to the conspiracy. Accordingly, a director, even if he/she is the controlling mind of a company, can combine with that company to injure a third party in circumstances where the company is not the victim, but the beneficiary of the conspiracy. In the present case, regardless of whether Mr. Lee was the controlling mind of the respondent company, it was possible for him to enter into a combination with that company as well as the other defendant companies for the purpose of injuring the appellants, in circumstances where the respondent company was not the victim of the conspiracy, but the beneficiary.

Belmont Finance Corporation Ltd. v Williams Furniture Ltd. and Others [1979] Ch 250 applied; **Lim Leong Huat v Chip Hup Hup Kee Construction Pte Ltd** [2009] 2 SLR 318 applied.

JUDGMENT

- [1] **WEBSTER, JA [AG]:** This is an interlocutory appeal against the order made by Bannister J on 20th January 2015, striking out the claim against the respondent, who was the 4th defendant in the court below, and ordering that the 6th defendant (who is not a party to this appeal) shall cease to be a party to the action. The learned judge also ordered the claimants/appellants to pay the costs of the 4th and 6th defendants.

Background and parties

- [2] The appellants reside in Singapore. On or about 28th December 2006 they entered into a Discretionary Management Agreement with the 2nd defendant, Ferrell Asset Management Limited, a British Virgin Islands company. The agreement was preceded by discussions between the appellants' representative, Mr. William Ng, and the 1st defendant, Mr. David Lee Kuo Chuen ("Mr. Lee"), regarding an investment opportunity in real estate in Singapore. The agreement gave the 2nd defendant a wide discretion as to how to invest the appellants' funds.
- [3] The 2nd defendant invested the appellants' funds in the 3rd defendant, Ferrell Premier Funds Limited, PCC, a Mauritian fund ("the Fund"). The Fund, in turn, invested the monies in a real estate development in Singapore through its sub-funds, including the 6th defendant, Florcalpe International Limited, a BVI company ("Florcalpe"), and Premium Land Pte Ltd, a Singaporean company ("Premium Land"). Premium Land is not a defendant in the court below. It owned the real property in Singapore and was carrying out the development of the property by building and selling residential units. The 4th defendant is the manager of the Fund and the 5th defendant is its investment adviser.

- [4] Mr. Lee is a director of all the corporate defendants and the appellants' case is that he had management control of the other defendants. This is admitted by the 2nd defendant in its defence. The 2nd, 4th and 6th defendants are BVI companies.
- [5] Under the terms of the Discretionary Management Agreement, the 2nd defendant was entitled to a quarterly management fee of 0.250% of the net asset value of the funds under management and an annual performance incentive fee of 25% of the increase in the net asset value of the managed funds for the preceding year.
- [6] It is not disputed that from 2007 to 2011 Premium Land suffered losses, although the amount of the losses is disputed. Notwithstanding the overall under-performance of the Fund during this period, as evidenced by the losses in Premium Land, the Fund paid a performance incentive fee of SG\$8,041,050.00 to the 4th defendant on 5th May 2008. The fee was paid in the form of 200,725 shares in the Fund issued to the 4th defendant. The 2nd defendant did not give notice to the appellants of its intention to pay a performance incentive fee, with supporting statements and documents, as required by clause 8.2 of the Discretionary Management Agreement. The appellants became aware of the payment in February 2013.
- [7] In November 2013 the 2nd defendant offered to redeem a portion of the appellants' investments by a payment of SG\$163,093.34 to each appellant. The payment was conditional on the appellants giving certain waivers and indemnities. The appellants refused to give the waivers and indemnities and the 2nd defendant did not pay over the SG\$163,093.34 to each appellant.
- [8] On 18th December 2013 the 2nd defendant purported to terminate the Discretionary Management Agreement and took the position that it was not obliged to pay over the partial redemption proceeds previously promised to the appellants, nor to transfer any shares to the appellants.

Proceedings in the court below

- [9] The appellants commenced the proceedings in the court below on 4th July 2014 asserting four causes of action against the defendants, namely: (a) breach of contract, (b) breach of fiduciary duty, (c) breach of trust, and (d) conspiracy.
- [10] On 16th September 2014, the judge dismissed the appellants' ex parte application for permission to serve the foreign defendants outside the jurisdiction mainly on the grounds that there was no viable claim against any of the defendants, other than the 2nd defendant, and that the claims for conspiracy and breaches of duty are firmly based in Singapore and the BVI is not the appropriate forum for the trial of these claims. There is no appeal from this decision and the claim is proceeding against the BVI defendants only (2nd, 4th and 6th defendants).
- [11] On 9th September 2014, the 4th defendant applied to strike out the claim against all the defendants except the 2nd defendant or, alternatively, for summary judgment. On 19th January 2015, the day before the hearing of the 4th defendant's application, the appellants filed an amended statement of claim. Mr. Jonathan Addo, who appeared for the appellants at the hearing, agreed that the claims for breach of contract and the fiduciary claims against the 4th defendant were not being pursued in the amended statement of claim, and that the remaining claims against the 4th defendant are for conspiracy to injure and unjust enrichment.
- [12] At the commencement of the hearing Mr. Jonathan Ward, who appeared for the 2nd and 4th defendants, pointed out that the appellants needed permission to file the amended statement of claim because it alleges a new cause of action (unjust enrichment) which is outside the limitation period. However, Mr. Ward was happy to proceed with his clients' strike out and summary judgment application because even with the amendments, the statement of claim did not disclose a viable cause of action against his clients. The judge proceeded on the basis of the amended statement of claim but stated that the claimants needed to make a formal application to amend.

The judge's findings

- [13] At the conclusion of the hearing the learned judge delivered an oral judgment. He found that 'as a matter of pleading, as a matter of law, and as a matter of ordinary common sense, given the structure which have briefly described, no claim of conspiracy to injure has a slightest chance of succeeding at trial'¹ and struck out the conspiracy claim against the 4th defendant, as well as the claim for unjust enrichment. The claimants appealed against the striking out of the conspiracy claim. The appeal is proceeding against the respondent/4th defendant only.
- [14] The judge's conclusion that the conspiracy claim did not have the slightest chance of succeeding at trial is supported by the following findings:²
- (a) There is no pleading that the defendants conspired together with the dominant intention of injuring the appellants.
 - (b) The relationship of principal and agent between Mr. Lee, as the controlling director of the corporate defendants, and those defendants, precludes the possibility of a combination or conspiracy to injure the appellants.
 - (c) The BVI is not the appropriate jurisdiction for trying the conspiracy claims.
 - (d) The facts do not support the appellants' case that the 4th defendant conspired with the other defendants to injure the appellants.

I will now examine the judge's findings with reference to the grounds of appeal.

No pleading of intention to injure – Ground 3.2 (c)

- [15] In the civil law there are two types of conspiracy, namely: (1) conspiracy to use unlawful means to injure; and (2) conspiracy to use lawful means with the

¹ p. 68 of Transcript of Chambers Proceedings dated 20th January 2015.

² pp. 116-177 of Transcript of Chambers Proceedings dated 20th January 2015.

predominant intention of injuring the person who is the object of the conspiracy. In the former case of an unlawful conspiracy the tort is constituted by the conspirators combining to use unlawful means to injure the claimant. In this situation the intention to harm the claimant is not essential – the tort is constituted once the wrongdoers agree to use unlawful means and the person who is the object of the conspiracy suffers loss.

[16] The other type of conspiracy is a lawful means conspiracy which involves persons combining to use lawful means with the predominant intention of injuring the claimant. In this type of conspiracy the claimant must allege and prove that the conspirators' predominant intention is to injure the claimant. If the conspirators have more than one intention and the predominant intention is to further their own business interests, it does not matter that their secondary intention is to injure the claimant. The claim in the amended statement of claim is a lawful means conspiracy and the appellants were required to plead a clear case that the conspirators' predominant intention was to injure them.

[17] In giving his decision on 16th September 2014 refusing the appellants' application for leave to serve the foreign defendants outside the jurisdiction, the judge noted that:

"Singularly absent from the pleading is any allegation that there was an intention, which I accept doesn't have to be the predominant intention but at any rate an intention to cause damage to the claimants, and it seems to me that presently, although of course, amendments may be made later, the claiming [sic] conspiracy that [sic] does not get off the ground."³

The appellants' claim is based on a conspiracy to injure, as opposed to an unlawful means conspiracy, and the statement of claim as filed did not contain a sufficient allegation that the defendants combined with the intention of injuring the appellants. The only allegation is in the former paragraph 16 of the un-amended statement of claim where it is pleaded that Mr. Lee and the other defendants 'combined and conspired with one another to injure the commercial interests of

³ See pp. 24-25 of Transcript of Chamber Proceedings dated 16th September 2014.

Ms. Lin and Mr. Ng'. This was not followed by particulars of the alleged conspiracy, and, by itself falls far short of alerting the defendants to the elements of the conspiracy that was being alleged against them.

[18] The claimants filed the amended statement of claim on 19th January 2015 with a revised and more detailed conspiracy claim at paragraphs 27 to 29. The new paragraph 27 reads:

“At some point prior to 28 December 2006, on a date or dates known to the First to the Fifth Defendants, Mr. Lee and each of the other Ferrell Entities, or Mr. Lee and any one or more of the other Ferrell Entities, combined to invest, use or place the Claimant's Funds in a scheme that was designed to harm the Claimants and their interests and did harm them rather than protect or enhance their interests.”

Paragraph 28 states that Mr. Lee's knowledge (of the conspiracy) should be attributed to the other defendants, and paragraph 29 lists the particulars of conspiracy as:

- (i) Failing to audit the accounts of Floralcape for the years ending 31st December 2011 and 2013.
- (ii) Failing to provide the Claimants with any financial information on Floralcape's financial statements for the years 2006 to 2012.
- (iii) As agents of Mr. Lee, the Ferrell Entities individually and collectively failed to disclose to the claimants that they had agreed amongst themselves to invest the funds in an underperforming and illiquid asset wherein it was highly probable that the Claimants would be unable to redeem the funds nor recover income, capital gains, dividends or the original principal invested.
- (iv) Failing to act upon the consistent losses of Premier Land.
- (v) Paying themselves a performance incentive fee of SG\$8,041,050.00 when Premier Land was showing consistent losses.

[19] The judge considered the amended statement of claim and found, as he did at the ex parte application for leave to serve the foreign defendants outside the jurisdiction, that there was no pleading of a predominant intention to injure the claimants. Remarkably, there was no specific challenge to this finding by the appellants. However, ground of appeal 3.2(d) is in the following terms:

“In allowing the claim of conspiracy against the Respondent to be struck out, the judge exercised his discretion in a draconian manner such that correctly pleaded claims with reasonable prospects of success were not allowed to be ventilated at trial and in circumstances where defects (if any) could be addressed by an order to re-amend the Statement of Claim.”

This ground expresses in an unnecessarily convoluted way the appellants' dissatisfaction with the judge's decision to strike out the conspiracy claim because of a bad pleading. Therefore, I do not accept Mr. Ward's submission that the notice of appeal does not attack the judge's finding that the statement of claim does not plead an intention to injure the claimants.

[20] Returning to the pleading itself, I am satisfied that it discloses that prior to 28th December 2006 the defendants agreed amongst themselves to invest the claimants' monies in an illiquid asset and an underperforming fund which was designed to enrich the defendants generally and Mr. Lee in particular, and to injure the claimants by the loss of the funds that they had invested under the Discretionary Management Agreement. This is an adequate pleading for a conspiracy claim. Whether it discloses a reasonable ground for bringing the claim or has reasonable prospects of succeeding at the trial, are separate issues that I will deal with below.

[21] The judge had the amended statement of claim before him and obviously considered it in giving his decision. He erred in finding that it did not plead an intention to injure the claimants.

Agency – grounds 3.2 (a) and (b)

- [22] The amended statement of claim alleges that the defendant companies were the agents of Mr. Lee and the judge found that as such no question of conspiracy could arise because the companies were acting on behalf of a single person and there could not be a combination. In effect, that it takes at least two persons, acting individually and not in an agency relationship, to conspire to injure. Grounds 3.2(a) and (b) challenge this finding by the judge.
- [23] I do not accept that the law of conspiracy is restricted in this way. A company is a separate and distinct legal entity from its members and directors. It acts through its directors and other agents. As a general rule, the knowledge of the directors acting within the scope of their duties is imputed to the company. Thus, where the directors conspire to injure a third party, the directors' knowledge of the conspiracy is imputed to the company which then becomes a party to the conspiracy combining together with the directors to injure the third party. This court has not been directed to a local or English case that deals directly with the issue whether a company and its agents can combine together in a conspiracy. However, the principle seems to be the underlying basis of the decision of the English Court of Appeal in **Belmont Finance Corporation Ltd. v Williams Furniture Ltd. and Others**⁴. The case concerns a conspiracy by the directors of a company ("company A") to sell their shares in company A to another company ("company B"), and then to purchase the shares of company B in circumstances that breached section 54 of the Companies Act 1948⁵. The Court of Appeal decided that since company A was the victim of the conspiracy the knowledge of the directors would not be imputed to the company to make it a co-conspirator. Buckley LJ summed up the company's position on this point at page 262 as follows:

⁴ [1979] Ch 250.

⁵ Section 54(1) of the Companies Act makes it unlawful for a company to provide financial assistance to another person for the purpose of acquiring shares in the company.

“So in my opinion the plaintiff company should not be regarded as a party to the conspiracy, on the ground of [its] lack of the necessary guilty knowledge.”

Implicit in this statement and the judgment as a whole is that if the evidence had shown that the company was not the victim of the conspiracy the general rule would apply and the directors’ knowledge would be imputed to the company making it a party to the conspiracy.

- [24] The High Court of Singapore dealt with the issue directly and had no difficulty deciding that the sole director and controlling mind of a company can conspire with the company to injure a third party. In the case **Lim Leong Huat v Chip Hup Hup Kee Construction Pte Ltd**,⁶ a Mr. Neo was one of two directors of the defendant company and the beneficial owner of the company’s shares. The company owed monies to the plaintiff and the case against Mr. Neo was that he acted unlawfully and in bad faith by inducing the company not to pay the monies due to the plaintiff. The plaintiff applied to join Mr. Neo as a second defendant. The application was opposed on the ground that there was no cause of action against Mr. Neo for conspiracy or inducing the company not to pay the monies to the plaintiff. The application was allowed. In delivering the judgment of the High Court, Ang J made important findings regarding the legal issue of a director being liable for conspiracy with a company for which he is a director and also its moving spirit and controlling mind. After referring to the rule that the conspirators’ knowledge should not be imputed to the company where the company is the victim of the conspiracy he continued at paragraph 24:

“However, the position is different where the company and its directors are in an established arrangement which benefits the company, to the detriment of third parties. In this case, the company is no longer a victim of an alleged conspiracy of its directors. Instead, the third party is the victim of the alleged conspiracy between the company and its directors. Taking a leaf from the reasoning of McCarthy J in *Taylor* ([18] *supra*), I can see no reason why the assets of a limited company and/or that of its errant director, even where such a director is the controlling mind of the company, should not be liable to answer for conspiracy where either or

⁶ [2009] 2 SLR 318.

both of their assets have been augmented as a result of the action alleged to constitute the conspiracy.”

And further at paragraph 30:

“Because a person and the company are, in law, separate legal entities, there is no barrier, in law, precluding a combination between the director and the company, *even where* that director is the controlling mind of the company.”

- [25] Ang J also referred to and relied on the **Belmont Finance** case⁷ to support his finding that a director, even if he is the controlling mind of the company, can combine with the company to injure a third party where the company is not the victim but the beneficiary of the conspiracy.
- [26] Bannister, J’s finding that an agency relationship between Mr. Lee and the defendants precluded the finding of a conspiracy could be understood if this was a case of wrongdoing by Mr. Lee which caused damage to the respondent and the respondent was suing to recover the losses that it had suffered as a result of a conspiracy of which it was aware. However, as Mr. Addo rightly highlighted in his submissions, this case involves an allegation that the wrongdoing of the defendants caused damage to the claimants, and that Mr. Lee and the respondent actually benefitted from the alleged wrongdoing by being paid an extravagant performance incentive fee and they did not have to pay returns to the appellants nor return any part of the monies that they had invested under the Discretionary Management Agreement. He submitted that in this situation the directors’ knowledge of the wrongdoing should be imputed to the respondent and therefore it would have the requisite knowledge to combine with the other defendants in the conspiratorial scheme. He relied on the cases of **Lin Leang Huat v Chip Hup Kee Construction Ltd** and **Belmont Finance Corporation Ltd. v Williams Furniture Ltd. and Others** referred to above.

⁷ See para. 22 above.

[27] Following the very helpful guidance of Ang J in **Lin Leang Huat** and the decision of the Court of Appeal in **Belmont Finance**, this Court finds that Mr. Lee, whether or not he was the controlling mind of the respondent, could enter into a combination with the respondent and other defendants for the purpose of injuring the appellants in circumstances where the respondent is not the victim of the conspiracy, but the beneficiary. Accordingly, we hold that the judge erred in finding that the relationship of principal and agent between Mr. Lee and the respondent 'defeats the allegation of any conspiracy, because it's actually an act which can be attributed to a single person' ⁸

Appropriate Forum – ground 3.2(c)

[28] In giving his decision refusing leave to serve the foreign defendants outside the jurisdiction, the judge found that the events underlying the claims for breaches of trust and conspiracy occurred in Singapore and notwithstanding that some of the alleged conspirators are BVI companies (defendants 2, 4 and 6), the BVI was not the appropriate forum for the trial of these claims. He repeated this finding in the 20th January 2015 decision on the strike out and summary judgment application.

[29] I agree with the judge's conclusion on this issue. The reality is that the only link that the conspiracy claim has with the BVI is that the two remaining corporate defendants (the 2nd and 4th defendants) alleged to be a part of the conspiracy are incorporated in the BVI and that the 4th defendant is also a regulated entity under the BVI Securities and Investment Business Act and holds a mutual funds licence. The main parties to the alleged conspiracy are not resident in the BVI and the acts underlying the alleged conspiracy took place in Singapore.

[20] The issue of the BVI being the appropriate forum based on incorporation of the defendant in the jurisdiction has come up before the courts on previous occasions and the latest pronouncement on the issue is in the advice of the Privy Council delivered on 21st January 2015 in **Nilon Limited and Another v Royal**

⁸ See p. 17 of Transcript of Chambers Proceedings dated 20th January 2015.

Westminster Investments SA and Others.⁹ The claim was for rectification of a share register based on a factual dispute occurring entirely outside the BVI. The Privy Council found that the BVI was not the appropriate forum and at paragraph 66 Lord Collins stated:

“The reality of the matter is that, apart from the fact that the claim is that Mr. Varma made a promise to allot shares in a BVI company, and that if they are successful the Mahtani parties may obtain an order that Mr. Varma procure the allotment or transfer to them of shares in Nilon, the issues have nothing to do with the BVI at all. The alleged contract was made in England, the company was to be managed from Jersey, the underlying business was concerned with Nigeria and India, the operating companies would be in Nigeria, the witnesses (including Mr. Mata and Mr. Surana [sic], the managing director and secretary of Nilon, and who were said to be involved in the formation and performance of the Joint Venture Agreement) would be mainly in England. The documents are in England or Jersey. There is no suggestion that there are any witnesses or documents in the BVI, or that there is any connection with the BVI other than as the place of Nilon’s incorporation.”

The appellants’ conspiracy claim falls squarely within the principle outlined by Lord Collins and the judge was correct to find that the BVI is not the appropriate forum for the trial of the claim.

Finding of no conspiracy – ground 3.2

[31] Finally, the judge found that the conspiracy claim had no reasonable prospect of success (see paragraph 13 above). The notice of appeal raises this finding as the sole ground of appeal supported by the four issues and findings that are dealt with above (grounds 3.2 (a) to (d)). I will deal with it as a separate ground of appeal with reference to the allegations in the pleadings and then analyse my conclusion against the findings on the four proven issues.

[32] The factual background to the allegation of conspiracy is set out in paragraphs 2-8 above. The essence of the alleged conspiracy is that prior to December 2006 the defendants agreed among themselves to take the appellants’ monies and invest it

⁹ [2015] UKPC 2.

in a scheme that was designed to harm the appellants and benefit the defendants. The judge found that this was not a scheme that was designed to deprive the appellants of their money, but an investment in an illiquid asset which turned out to be a failure. That seems to be a perfectly reasonable interpretation of the facts. In the world of business some investments fail and there is a heavy evidential burden on the investor to prove that the investment company was out to harm him by scheming to invest his monies in an investment that was bound to fail and yet produce benefits for the investment company, as is alleged in this case.

[33] I mention in passing that it is not clear on the pleadings that the investment in real estate in Singapore was a failure. However, this Court is assessing the matter, as we are required to do by the authorities, on the assumption that all the allegations in the amended statement of claim can be made good by disclosure, witness statements and oral evidence.

[34] Rule 26.3 of the **Civil Procedure Rules 2000** deals with strike out applications and the applicable test is whether the amended statement of claim discloses a reasonable ground for bringing the conspiracy claim. Mr. Addo goes further by referring to the case of **Wenlock v Moloney and Others**¹⁰ and submitted that the test on a strike out application is that the pleading should not be struck out as long as it discloses some cause of action or question to be tried, even if it is weak or may not likely succeed at trial. This is a stringent requirement, but one that is consistent with the draconian step of striking out a pleading with the usual consequence that the litigant is denied a trial either of the issue that is struck out, or the entire case.

[35] The test for summary judgment on a defendant's application is set out in CPR 15.2(a) and it is that the defendant must show that the 'claimant has no real prospect of succeeding on the claim or the issue'. The difference in wording between the two tests and the fact that on a summary judgment application the

¹⁰ [1965] 1 WLR 1238.

court is not restricted to the pleadings and can look at the evidence in support of the application, give the court a wider scope on a summary judgment application in deciding whether to strike out the action or the issue. In **Three Rivers District Council and Others v Bank of England (No 3)**¹¹ Lord Hope of Craighead dealt with the differences between the two tests under the parallel provisions of the Civil Procedure Rules in England and observed at paragraph 91 of his judgment that:

“The difference between a test which asks the question ‘is the claim bound to fail?’ and one which asks ‘does the claim have a real prospect of success?’ is not easy to determine. In *Swain’s* case Lord Woolf MR (at 92) explained that the reason for the contrast in language between r 3.4 [which deals with strike out applications] and r 24.2 [which deals with summary judgment applications] is that under r 3.4, unlike r 24.2, the court generally is only concerned with the statement of case which it is alleged discloses no reasonable grounds for bringing or defending the claim. In *Monsanto plc v Tilly* (1999) Times, 30 November, Stuart Smith LJ said that r 24.2 gives somewhat wider scope for dismissing an action or defence. In *Taylor’s* case he said that, particularly in the light of the CPR, the court should look to see what will happen at the trial and that, if the case is so weak that it had no reasonable prospect of success, it should be stopped before great expense is incurred.”

[36] The application that was before Bannister J was to strike out the statement of claim against the 4th defendant because it does not disclose a reasonable cause of action in conspiracy or unjust enrichment, or grant summary judgment on the ground that the said claims do not have a real prospect of succeeding at trial. The judge found that the conspiracy claim did not have the ‘slightest chance of succeeding at trial. In any event, no cause of action is disclosed’. The judge seemed to be deciding the matter on both grounds of the application. He struck out the claim because no cause of action was disclosed on the pleading and granted summary judgment because the claim did not have the ‘slightest chance of succeeding’.

[37] There was material before the judge on which he could have come to the conclusions that he did and it only remains to be seen if there is any reason why this Court should interfere with the exercise of his discretion in striking out the

¹¹ [2001] 2 All ER 513.

conspiracy claim, either because it failed to disclose a reasonable ground for bringing the claim or because it had no real prospect of succeeding.

The judge's discretion

- [38] The test for assessing the exercise of a judge's discretion is well known and has been repeated in numerous decisions of this Court. The most often quoted version of the test is that of former Chief Justice Sir Vincent Floissac in **Dufour and Others v Helenair Corporation Ltd and Others**.¹² The learned Chief Justice expressed the view that the appellate court will only upset the exercise of a judge's discretion if it is satisfied:

“(1) that in exercising his or her judicial discretion, the judge erred in principle either by failing to take into account or giving too little or too much weight to relevant factors and considerations, or by taking into account or being influenced by irrelevant factors and considerations; and (2) that, as a result of the error or the degree of the error, in principle the trial judge's decision exceeded the generous ambit within which reasonable disagreement is possible and may therefore be said to be clearly or blatantly wrong.”

If this Court is satisfied that the judge exercised his discretion improperly it can exercise its own discretion afresh.

- [39] Based on the findings above that the judge erred in his conclusions that Mr. Lee could not conspire with the other defendants to injure the appellants, and that the amended statement of claim did not plead an intention to harm the appellant, it is apparent that the judge took into consideration matters that he should not have and this Court is entitled to set aside his decision and, if appropriate, exercise its own discretion. However, this Court will not set aside the judge's decision for the following reasons:

- (i) The finding by the judge that the claim in conspiracy does not have a reasonable chance of succeeding at the trial is correct on the facts of the case even when the finding is considered in the

¹² (1996) 52 WIR 188 at 190-191.

context of the judge's misdirections. It is clear that he would have come to the same conclusion even if he had directed himself correctly. This finding was open to the judge on the facts without reference to the agency and pleading points. The scheme, taken at its highest level, was nothing more than a failed investment in an illiquid real estate development where those in charge of investing the funds took a performance fee, did not audit the accounts of one of the subsidiaries (Floralcape), and provided limited information to the appellants. It does not have the trappings of an agreement to deprive the appellants of their investment deliberately.

- (ii) The finding that the BVI is not the appropriate forum for the trial of the conspiracy claim is obviously right, and for this reason only the pursuit of the claim in this jurisdiction should be stayed.

[40] Alternatively, if the exercise of the judge's discretion were to be set aside on account of the misdirections, this Court would exercise its own discretion and for all of the reasons set out above find that the conspiracy claim does not have a reasonable chance of succeeding at the trial, and in any case the BVI is not the appropriate forum for the trial of the claim.

[41] The respondent has had overall success on the appeal but the appellants were successful on two important issues. This is reflected in the costs order below.

Order

[42] It is hereby declared and ordered as follows:

- (i) The appeal is dismissed.

- (ii) The respondent will have two-thirds (2/3) of its costs of the appeal to be assessed if not agreed within 21 days of the date of this order.

Paul Webster, QC
Justice of Appeal

I concur.

Dame Janice M. Pereira, DBE
Chief Justice

I concur.

Mario Michel
Justice of Appeal