Neutral Citation Number: [2023] CA (Bda) 12 Civ

Case No: Civ/2022/37

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE SUPREME COURT OF BERMUDA SITTING IN ITS ORIGINAL CIVIL (COMMERCIAL) JURISDICTION
THE HON. CHIEF JUSTICE
CASE NUMBER 2015: No. 290

Sessions House
Hamilton, Bermuda HM 12

Date: 23/06/2023

Before:

THE PRESIDENT, SIR CHRISTOPHER CLARKE
JUSTICE OF APPEAL SIR ANTHONY SMELLIE, KCMG
JUSTICE OF APPEAL DAME ELIZABETH GLOSTER, DBE

- -

Between:

GLOBAL DISTRESSED ALPHA CAPITAL I LIMITED

Appellant

-and-

(1) CHRISTIAN MICHELSEN HERMAN
(2) WALTON LAW EDDLESTONE

Respondents

Gregory Banner KC and Lilla Zuill of Harney's, for the Appellant
Graham Chapman KC, Katie Tornari of Marshall Diel & Myers Limited and Jai Pachai of Wakefield Quinn Limited for the Respondents
Hearing date(s): 21 March 2023

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APPROVED JUDGMENT

Gloster JA:

Introduction

1. This is an appeal against the order ("the Order") of the Honourable Chief Justice Hargun ("the Chief Justice") made on 13 October 2021 which, pursuant to RSC Ord. 18, r. 19., struck out the Appellant's ("GDACI", "the Company" or "the Appellant") Amended Specially Endorsed Writ of Summons ("the Writ") against the Respondents, Christian Michelson Herman and Walton Law Eddlestone, who are the Third and Fourth Defendants ("the Third and Fourth Defendants" or "the Respondents") to the action and to the appeal. Bell JA granted leave to appeal at the conclusion of a hearing on 14 December 2022

2. In summary the Chief Justice's reasons, as stated in his judgment ("the Judgment"), were that the Third and Fourth Defendants could rely on GDACI's bye-laws to defeat the claim, and that, in any event, no claim was pleaded in the Writ which fell within that part of the bye-laws relied on by GDACI.

3. This appeal raises two points of construction: first of bye-law 42 of the bye-laws; and, second, of the Amended Writ and Statement of Claim. The question for this court is whether the Chief Justice was right in his conclusions.

Procedural history

4. GDACI is a Bermuda exempted company which was incorporated on 6 December 2007. Since 14 April 2014 it has been the General Partner for the Global Distressed Alpha Fund III Limited Partnership – i.e. the Fund - a Bermuda exempted investment fund focusing on the purchase and recovery of privately held distressed sovereign debt from around the world, including Africa, the Middle East and Latin America.

5. The First Defendant, AAAF Management Ltd, was a company registered in Bermuda. However, it appears that the First Defendant was struck off the Register of Companies in Bermuda in August 2016 and therefore it was not served with the notice of these applications.

6. The Second Defendant, Michael John Shone, is an individual who was a former director and shareholder of the Plaintiff. He also funded the Commercial Intelligence Fund Group ("the CI Group"). However, he has absconded and his whereabouts are not known. The Plaintiff has not served him with the Writ of Summons issued in these proceedings.

7. The Third Defendant, Christian Michelson Herman, is an individual who was a director of the Appellant between 28 and November 2007 and 7 October 2013.

8. The Fourth Defendant, Walton Law Eddlestone, is an individual who, it is alleged by the GDACI, was: (i) a *de facto* director of the Plaintiff between 16 October 2011 and 24 December 2012; and (ii) a *de jure* director of the Plaintiff between 24 December 2012 and 7 October 2013. The Fourth Defendant disputes that he was a director at all between 16 October 2011 and 24 December 2012 and contends that he only acted as an alternate director to the Third Defendant (pursuant to the

Plaintiff's bye-laws) between 24 December 2012 and 7 October 2013. However, the present strike out application proceeds on the basis that the Plaintiff's pleaded case is correct and that he was a director in the relevant period.

9. The proceedings started on 10 July 2015. The Writ was amended on 5 January 2016. The Third and Fourth Defendants served their Defences on 21 October 2016, and Replies were served on 6 January 2017. On 17 and 27 February 2017, the Third and Fourth Defendants respectively issued applications under RSC r 18 r 19 to strike out the claim. These were subsequently amended on 21 September 2021.

10. In March 2017, the Fourth Defendant initiated without prejudice negotiations, which included the Third Defendant. According to GDACI, these negotiations did not prove fruitful, and, in August 2020, GDACI reactivated the proceedings, which resulted in a consequent reactivation of the strike out applications.

11. As already stated, on 13 October 2021 the Chief Justice acceded to those applications and subsequently refused leave to appeal.

Summary of GDACI's claim

12. GDACI's current claim is set out in the Amended Statement of Claim, served on the Third and Fourth Defendants on 5 January 2016. In summary, the Plaintiff contends that between 7 December 2010 and 21 February 2014 the Second to Fourth Defendants, acting as directors of the Plaintiff, wrongfully made payments totalling US$23,186,494.09 and SG$1,010,403.64 ("the Payments"). The entities to whom the payments are alleged to have been made (which include the First Defendant) are said by the Plaintiff to be entities in respect of whom the Second to Fourth Defendants were variously directors and/or shareholders and/or owned/controlled.

13. As the Chief Justice pointed out, it is pertinent to note how GDACI's allegations have changed since the service of the original Statement of Claim and the extent to which the allegations of bad faith/dishonesty have been deleted. Thus, in the original Statement of Claim dated 10 July 2015, the Plaintiff's allegations included the following:

    13.1. *"Further or alternatively, the Defendants have been unjustly enriched, directly or indirectly, by the Payments, and the Plaintiff is entitled to restitution accordingly*" (deleted in paragraph 2 of the Amended Statement of Claim);

    13.2. *"A duty to act honestly and in good faith with a view to the best interests of the Plaintiff (including pursuant to section 97(1)(a) of the Companies Act 1981)"* (deleted in paragraph 23.2 of the Amended Statement of Claim);

    13.3. "*A duty to make known to the Plaintiff's auditors details of any benefits or loans received or to be received from the Plaintiff (including pursuant to section 97(4) of the Companies Act 1981)"* (deleted in paragraph 23.5 of the Amended Statement of Claim).

    13.4. Likewise, under particulars of breaches of duty, the Plaintiff originally alleged, *inter alia:*

13.4.1. Some of the Payments were *"unexplained payments to parties (including AAAF Management) … and therefore deemed to be made to the Second to Fourth Defendants"* (deleted in paragraph 114.1 of the Amended Statement of Claim);

13.4.2. the Payments were not made in "*good faith*" (deleted in paragraph 114.2 of the Amended Statement of Claim);

13.4.3. *"The Payments were not fully, fairly, or adequately disclosed by the Second to Fourth Defendants to the Plaintiff's auditors, members, or partners"* (deleted in paragraph 114.5 of the Amended Statement of Claim).

13.5. In relation to loss and damage the Plaintiff claimed, *inter alia: "Further or alternatively, as a result of the matters set out above, the Defendants have been unjustly enriched, directly or indirectly, by the Payments, and are liable to make restitution to the Plaintiff of sums equivalent to the amount of the Payments (in the case of AAAF Management, of sums equivalent to the amount of the Payments made to it or for its benefit)"* (deleted in paragraph 119 of the Amended Statement of Claim).

13.6. In relation to the relief sought the Plaintiff claimed, inter alia: *"Alternatively restitution for the sum of US$27,901,670.53 and SG$5,221,953.07"* (deleted from the Amended Statement of Claim).

14. As can be seen from its pleaded case, in its original Statement of Claim, GDACI did indeed contend that the Defendants had acted in bad faith and that they had personally benefited from their breaches of duty. GDACI claimed that the Defendants had been unjustly enriched (directly or indirectly) by the Payments and therefore that GDACI was entitled to restitution of those sums.

15. However, all those allegations of bad faith and dishonesty were expressly abandoned by GDACI in its Amended Statement of Claim dated 5 January 2016. Mr. Nicholas Haston, a director of GDACI, explained in paragraph 10 of his Second Affirmation dated 5 January 2016 that the purpose of the amendments to the original Writ and Statement of Claim was to *"reflect the further information and evidence gathered by myself and others who have assisted me*." Mr. Haston explained that the purpose of the amendments was: *"Specifically: (a) to abandon, at least at this juncture and subject to possible reinstatement at a future time, a number of the claims made against the Defendants; and (b) to elaborate on and further particularise the remaining claims against the Defendants"*. After the service of the Amended Writ and Statement of Claim, the pleaded case of the Plaintiff made no allegation against the Third and Fourth Defendants that they, in the execution of their duties as directors, had acted in bad faith or dishonestly. Indeed, as noted above, the allegation of bad faith was expressly abandoned.

16. It was in those circumstances that the Third and Fourth Defendants issued the strike out application contending that they had a complete defence to the claims by way of the indemnity and waiver contained in bye-law 42 (and in particular bye-laws 42.1 and 42.5).

17. At the hearing before the Chief Justice, Mr Gregory Banner KC, leading counsel for GDACI, informed the court that, without prejudice to his submissions:

> *"if the Court considers it is necessary, or it would be prudent for the Plaintiff to clarify its position by an amendment, Mr. Haston, a director of the Plaintiff, has pre-emptively exhibited proposed re-amendments to the Specially Endorsed Writ and the Statement of Claim.";* see paragraph 54 of the Judgment.

18. However, it appears that no actual application to re-amend was made, although Mr Banner did invite the Chief Justice to consider the proposed re-amended pleading *de bene esse,* and, if need be, on an undertaking from his clients to issue an application for leave to amend; see the transcript of the hearing at page 43 lines 15-24. Likewise, before this Court although no application to re-amend was made by Mr Banner on behalf of GDACI, an indication was likewise given that, if necessary, an amendment would be made in the terms of the draft Re-Amended Writ and Statement of Claim. I shall return in due course to analyse the wording of the existing Amended Writ and Statement of Claim and the terms of the proposed re-amendments.

Bye-law 42

19. The critical provision of the bye-laws is bye-law 42. It is in the following terms:

> *"42 Indemnity*
>
> *42.1 Subject to the proviso below, every Indemnified Person shall be indemnified and held harmless out of the assets of the Company against all liabilities, loss, damage or expense (including but not limited to liabilities under contract, tort, and statute or any applicable foreign law or regulation and all reasonable legal and other costs and expenses properly payable) incurred or suffered by him or by reason of any act done, conceived in or omitted in the conduct of the Company's business or in the discharge of his duties and the indemnity contained in this Bye-Law shall extend to any Indemnified Person acting in any office or trust in the reasonable belief that he has been appointed or elected to such office or trust notwithstanding any defect in such appointment or election PROVIDED ALWAYS that the indemnity contained in this Bye-Law shall not extend to any matter which would render it void pursuant to the Companies Act.*
>
> *42.2 No Indemnified Person shall be liable to the Company for the acts, defaults or omissions of any other Indemnified Person.*
>
> *42.3 Every Indemnified Person shall be indemnified out of the assets of the Company against all liabilities incurred by him by or by reason of any act done, conceived in or omitted in the conduct of the Company's business or in the discharge of his duties in defending any proceedings, whether civil or criminal, in which judgment is given in his favour, or in which he is acquitted, or in connection with any application under the Companies Acts in which the relief from liability is granted to him by the court.*

> *42.4 To the extent that any Indemnified Person is entitled to claim an indemnity pursuant to these Bye-Laws in respect of amounts paid or discharged by him, the relevant indemnity shall take effect as an obligation of the Company to reimburse the person making such payment or effecting such discharge.*
>
> *42.5 Each Shareholder and the Company agree to waive any claim or right of action he or it may at any time have, whether individually or by or in the right of the Company, against any Indemnified Person on account of any action taken by such Indemnified Person or the failure of such Indemnified Person to take any action in the performance of his duties with or for the Company PROVIDED HOWEVER that such waiver shall not apply to any claims or rights of action arising out of the fraud of such Indemnified Person or to recover any gain, personal profit or advantage to which such Indemnified Person is not legally entitled.*
>
> *42.6 Expenses incurred in defending any civil or criminal action or proceeding for which indemnification is required pursuant to these Bye-Laws shall be paid by the Company in advance of the final disposition of such action or proceeding upon receipt of an undertaking by or on behalf of the Indemnified Person to repay such amount if any allegation of fraud or dishonesty is proved against the Indemnified Person."*

The Judgment

20. I summarise the Chief Justice's Judgment, so far as is necessary for the purposes of the appeal, as follows:

20.1. The Chief Justice accepted Mr. Banner KC's submission that the Court's discretionary power under Order 18 rule 19 to strike out a pleading was tempered by the requirement that it should only be exercised *"very sparingly",* and *"only in very exceptional circumstances"* (*Lawrence v Lord Norreys* (1890) 15 App Cas 210, 219 per Lord Herschell); in *"plain and obvious cases"* (*Hubbuck & Sons Ltd v Wilkinson, Heywood & Clark Ltd* [1899) 1 QB 86, 91 per Lord Lindley MR) with *"great circumspection and unless it is perfectly clear that the plea cannot succeed"* (see paragraph 18/19/6 at page 348 of vol l of the 1999 Supreme Court Practice). He commented that there was no material difference between the parties in relation to the appropriate approach which this Court should take in relation to an application to strike out a claim. He also referred to the reiteration of those principles in Bermuda, per Hellman J in *Kingate Global Fund Ltd* v *Kingate Management Ltd* [2016) SC Bda 3 Com at [16)-(18]; see paragraphs 16 and 17 of the Judgment.

20.2. He concluded that the Third and Fourth Defendants were clearly ""*Indemnified Persons*", as that term was defined in bye-law 42.1 of the bye-laws, because bye-law 42.1 was drawn in the widest terms possible; and that the claim for damages contained in paragraph 117 of the Amended Statement of Claim was clearly covered by the indemnity provided to the Third and Fourth Defendants under bye-law 42.1: see *ibid* paragraphs 18 – 20.

20.3. He held that, given that a company had no cause of action against a director in respect of a

matter against which the Company had agreed to indemnify him, a director was entitled to seek to strike out the claim in these circumstances on the grounds that either the company had no reasonable cause of action against the director, or, alternatively, that the continuation of the proceedings by the company against the director constituted an abuse of process. He stated that it was for those reasons that the courts in Bermuda had struck out proceedings commenced by the liquidators of a company against its former directors for breach of the statutory and/or fiduciary duty of care in circumstances where the conduct of the directors was covered by the scope of the indemnity set out in the company's bye-laws. He referred to what he said remained the leading case in this regard, namely this Court's decision in *Intercontinental Natural Resources Limited (In Liquidation) v The Partners of Conyers, Dill & Pearman and others* [1982] Bda LR 1, where the Court held that if the effect of the bye-law indemnity and/or waiver was to relieve a director from any liability that director was entitled to have the action struck out under order 18 rule 19. He noted that this Court had confirmed this approach in *Focus Insurance Company Limited v Mark Gregory Hardy* (Civil Appeal No. 15 of 1992) and stated that in *Focus* the Court of Appeal had held that, having regard to the terms of the bye-law indemnity in that case, the director could only be held liable if the liquidator, on behalf of the company, was able to show that the conduct of the director amounted to *"wilful negligence, wilful default, fraud and dishonesty"* (the relevant statutory exclusion in the Focus bye-laws). The Chief Justice also referred to the fact that this Court in *Focus* had also confirmed that the provision of an indemnity to the fullest extent allowed by law (other than fraud and dishonesty) was not incompatible with the statutory duty of care set out in section 97 of the Companies Act 1981; see *ibid* paragraphs 21 – 25.

20.4. The Chief Justice rejected the Appellant's submission that bye-law 42.1 only covered claims made by third parties and noted that indemnities in similar terms had been considered in *Intercontinental Natural Resources Limited (In Liquidation) v The Partners of Conyers, Dill & Pearman & Ors* [1982] Bda LR1 and *Viscount of Royal Court of Jersey v Shelton* [1986] 1 WLR 985, where it had been held that directors were entitled to rely upon the bye-law indemnity provision in relation to a claim asserted on behalf of the company itself; see *ibid* paragraph 36.

20.5. He also rejected the Appellant's submission that the meaning of bye-law 42 was not suitable for summary determination because its proper construction required a clear understanding of the factual matrix which was not suited to the strike-out procedure. The Court stated that there was a general prohibition on using extrinsic evidence surrounding the creation of the bye-laws of company when construing the bye-laws; see *ibid* paragraph 27.

20.6. In any event, the Chief Justice (i) was not persuaded that he could look at the terms of the Limited Partnership Agreement or the Private Placement Memorandum as an aid to construction; and (ii) stated there was no inconsistency or discrepancy between those documents and the terms of bye-law 42; see *ibid* paragraph 31.

20.7. He held that it was incumbent on the Appellant to set out the evidence upon which it relied as going to the relevant factual matrix which the Appellant had not done (applying *ICI*

Chemicals & Polymers Ltd v TTE Training Ltd [2007] EWCA Civ 725 and *Wong and Wong v Grand View Private Trust Co Ltd* [2019] Bda LR 41) see *ibid* paragraph 32.

20.8. He held that the Appellant's suggestion that the Court needed extrinsic evidence to construe bye-law 42 was inconsistent with its position in earlier correspondence when refusing to provide further and better particulars of its case; see *ibid* paragraph 33.

20.9. The practice of the Bermuda courts did not support the submission that it was inappropriate for the Court to embark upon the exercise of construing a bye-law in the context of strike out application; see *Intercontinental Natural Resources and Focus Insurance Company Limited v Mark Gregory Hardy supra.*; see *ibid* paragraph 34.

20.10. The Chief Justice rejected the Appellant's submission that bye-law 42.5 provided a self-contained regime for claims by the Appellant against Indemnified Persons and that, accordingly, where a claim came within the terms by law 42.5 (waiver of claims), the indemnity provided in bye-law 42.1 could have no application. He stated that bye-law 42 was cumulative in the sense that each sub-paragraph provided additional protection to the Indemnified Person (i.e. here the Respondents); see *ibid* paragraphs 38 and 44.

20.11. As a result, the Chief Justice held that claims to recover gains, profits or advantage were within the scope of bye-law 42.1; see *ibid* paragraph 45. He went on to hold that the claims pleaded in the Amended Statement of Claim did not come within the proviso in bye-law 42.5; see *ibid* paragraph 46.

20.12. The Chief Justice rejected the Appellant's suggestion that "*if the Court considers it is necessary, or it would be prudent for the Plaintiff to clarify its position by an amendment"* it be permitted to amend its case again in the terms of the draft Re-amended Statement of Claim to plead a claim that fell outwith the scope of bye-law 42.5; see *ibid* paragraphs 54 – 57.

20.13. Accordingly, the Chief Justice held that the indemnity contained in bye-law 42.1 and the waiver contained in bye-law 42.5 had the result that the Appellant had no cause of action against the Third and Fourth Defendant and/or provided the latter with a complete defence to the claim; see *ibid* paragraph 58. As a result, he struck out the Amended Statement of Claim.

GDACI's arguments on the appeal

21. In summary, in its Notice of Appeal and its arguments before us GDACI, by Mr Banner and Ms Lilla Zuill, submitted as follows:

21.1. Within the context of bye-law 42 as a whole, bye-law 42.1 provided a form of wording similar to that considered in *Peiris v Daniels* [2015] Bda LR 16 para 38, and to that considered in *Viscount of Royal Court v Shelton* [1986] 1 WLR 985 (*Peiris* at para 46, 47). It was on its face an indemnity: an obligation on the part of the indemnifier (the company) to hold harmless the indemnified (the officer). Such an indemnity could potentially have

two legal effects: (1) a covenant to reimburse where the claimant making the claim against the officer was a third party and not also the indemnifier; and (2) an exoneration that extinguished the cause of action where the claimant making the claim against the officer was also the indemnifier; see *Shelton*, cited in *Peiris* at para 48).

21.2. But, if bye-law 42.1 bore both meanings here, then it would extinguish all of GDACI's claims that fell within it.

21.3. However, one had to construe the entirety of bye-law 42 as a whole to understand what in fact bye-law 42.1 covered.

21.4. The Chief Justice was wrong to hold in the judgment para 36 (last sentence) that bye-law 42.1 covered claims not only by third parties, but by GDACI as well. If bye-law 42.1 applied to claims by GDACI against its officers, then it extinguished any cause of action which GDACI had against an officer for such a claim. If that were right, then the parts of bye-law 42.5 above which addressed GDACI's position had no effect and were meaningless: there was in effect no claim on the part of the Company that bye-law 42.5 could in reality waive, because the effect of bye-law 42.1 was to extinguish GDACI's claim. The logical conclusion in the face of this inconsistency was that bye-law 42.1 and 42.5 addressed distinct and different situations, and not (as the Chief Justice found) the same situation cumulatively.

21.5. Paragraph 43 of the Judgment contained a similar erroneous conclusion: namely that the waiver in bye-law 42.5 could not be read to cut down the breadth of the indemnity in bye-law 42.1.

21.6. In paragraph 44 of the Judgment the Chief Justice concluded that there needed to be a cumulative structure to bye-law 42 as a whole. He held that the purpose of bye-law 42.5 was to waive shareholders' claims (which would not be extinguished by bye-law 42.1); and that such a waiver provided a benefit to an Indemnified Person where GDACI's covenant to indemnify under bye-law 42.1 had no value because (for example) it was insolvent. That analysis wrongly did not address GDACI's waiver in bye-law 42.5, or what its purpose was if all its claims had already been extinguished under bye-law 42.1. In other words, the fact that the CJ found a meaning in bye-law 42.5 for shareholders' claims did not address, nor reconcile, the inconsistency between bye-laws 42.1 and 42.5 so far as GDACI's claims were concerned.

21.7. As submitted in paragraph 3(1)(c) of GDACI's Notice of Appeal, a claim for disgorgement fell outside bye-law 42.1. The Chief Justice wrongly rejected this argument at paragraph 45 of the Judgment. An officer who committed an actionable wrong which caused a loss was *prima facie* liable to compensate the injured party. That is a compensation claim from the officer's resources, and represented to him or her a liability, or a loss, or damage or expense. But, on the other hand, an officer who wrongly benefited from a breach of duty did not suffer a loss in that sense if ordered to disgorge the benefit.

21.8. The Chief Justice wrongly dismissed reliance upon the documentary factual matrix to

construe the bye-laws. In paragraph 31 of the Judgment, he wrongly held that there was no inconsistency or discrepancy between bye-law 42 and the Limited Partnership Agreement ("LPA") or the Placement Memorandum ("PM").

21.9. The Chief Justice wrongly construed GDACI's pleading by reference to deleted wording in the Amended Writ and Statement of Claim; see the Judgment at paragraphs 10-12 and paragraphs 46-50. On proper analysis the contents of that pleading set out sufficient primary facts which, if proved, would entitle GDACI to elect between its alternative forms of pleaded relief. The pleading as it stood alleged that in breach of fiduciary duty the Third and Fourth Defendants had caused or permitted payments to be made to entities in which they had an ownership interest or control. There were only two possible inferences – which were not matters of primary fact – either the recipients needed these funds, which absent their receipt the recipients' shareholders would have had to contribute; or the recipients did not need these funds, and they were disbursed by the recipients including to those who controlled the recipients.

21.10. Accordingly, the appeal should be allowed.

The Third and Fourth Defendants' argument on the appeal

22. In summary, in their arguments in their written skeleton argument and orally before us, Mr Graham Chapman KC, Mr Thomas Ogden, Ms Katie Tornari and Mr Jai Pachai on behalf of the Third and Fourth Defendants (with the oral argument before this Court being presented by Mr Chapman), submitted as follows:

22.1. This Court should dismiss the Appellant's appeal and uphold the decision of the Chief Justice for the reasons which he gave.

22.2. The Appellant's arguments in relation to the construction of bye-laws 42.1 and 42.5 was wrong. The authorities (i.e. *Peiris* and *Shelton*) relied on by the Appellant not only established the proposition that the effect of an indemnity such as that contained in bye-law 42.1 was that the indemnifier (i.e. company) had no cause of action against the indemnified (the director) but also that a director might rely on such an indemnity in relation to a claim brought <u>on behalf of the company</u> (i.e. not just against claims brought by third parties). This was stated in terms by the Chief Justice in the Judgment at paragraph 36, which also referred to the decision in *Intercontinental Natural Resources* - a decision not referred to by the Appellant's skeleton argument.

22.3. If an indemnity such as that contained in bye-law 42.1, which was drafted in the widest possible terms, had an established meaning which entitled a director to rely on it as against his company, then it was plain that such meaning could not be circumscribed so that the indemnity only applied to claims brought by third parties by a separate bye-law (bye-Law 42.5) which (i) concerned a legally separate concept (a waiver); and (ii) did not purport to alter the meaning or effect of bye-law 42.1; bye-law 42.5 did not in terms seek to limit the scope of bye-law 42.1 and nor was bye-law 42.1 expressed to be subject to bye-law 42.5 .

22.4. Moreover, there was no reason in principle why the existence of a provision providing for partial waiver of claims on the part of the Appellant and its shareholders, such as that contained in bye-law 42.5, should lead to the entire elimination of the indemnity set out in bye-law 42.1.

22.5. If the bye-laws were to have the effect contended for by the Appellant then clear words limiting the scope of bye-law 42.1 to third party claims or, at the very least, making it subject to bye-law 42.5 would have been used. Their absence was fatal to the Appellant's argument. It was clear that the bye-laws were drafted in the widest possible terms in order to provide the maximum possible protection.

22.6. The Chief Justice was therefore plainly correct to hold that the protections afforded by all the bye-laws were cumulative in nature. There was no inconsistency here as the Appellant sought to contend; rather the two bye-laws operated as part of a scheme of bye-laws contained in bye-law 42 which, through cumulative provisions, provided the widest possible protection.

22.7. The Appellant was wrong to contend that the Chief Justice "failed to construe Bye-Law 42.1 correctly in any event in failing to conclude that a disgorgement remedy falls outside the scope of Bye- Law 42.1". The correct construction of bye-law 42.1 did not exclude a liability to disgorge and did not in any event assist the Appellant because the Amended Statement of Claim did not contain a claim for disgorgement.

22.8. First, bye-law 42.1 was extremely widely drafted and was only circumscribed by the proviso that it should not extend to claims of fraud or dishonesty against the Indemnified Person. That proviso did not exclude "relief against a disgorgement claim" save where a disgorgement claim arose out of the fraud or dishonesty of a director (which was not alleged by the Appellant).

22.9. The only limit on the scope of the indemnity contained in bye-law 42.1 was contained in the proviso at the end of the bye-law. Section 98 of the Companies Act only precluded an indemnity in relation to any fraud or dishonesty.

22.10. The case of *Mackie v BCB Trust Co Ltd* [2006] WTLR 1253 did not support the construction proposed by the Appellant. The release in that trust deed was in different terms from the bye-laws here and was found, on the facts, not to cover the trustee's own actions in removing funds from the trust. In short, that case provided no assistance as to whether or not the bye-laws here applied to a "disgorgement claim". On the (very) wide wording of the bye-laws, they plainly did.

22.11. Secondly, even if the Appellant's proposed construction of "liability" were correct it would not assist the Appellant because the Appellant's Amended Statement of Claim did not contain a claim for disgorgement. The Amended Statement of Claim contained no pleaded case that the Third or Fourth Defendants had made any personal gain, profit or advantage to which they were not legally entitled. Indeed, by its 2016 Amendments the Appellant had expressly abandoned its claims that (i) the Third and Fourth Defendants had been unjustly

enriched and for the restitution of that enrichment; and (ii) that the Third and Fourth Defendants should be deemed to have benefited from payments made to parties related to them.

22.12. The fact that the Amended Statement of Claim contained a bald assertion that the Appellant reserved its right to seek an account of profits did not transform a claim for compensation into a claim for disgorgement. Absent any allegation that the Third or Fourth Defendants had personally profited or benefited as a result of a breach of any fiduciary obligation owed by them to the Appellant (which allegations the Appellant had abandoned), or other wrongdoing (which the Appellant did not allege), there was no basis upon which the Appellant was entitled to the remedy of disgorgement. It was not sufficient for the Appellant to contend that personal benefit could be inferred from the pleading. Any such allegation had to be pleaded in terms; all the more so where it was this relied upon as the basis for engaging the proviso to the bye-law or to otherwise escape its effect.

22.13. The Appellant's argument that the Chief Justice was wrong to conclude that the Court could not properly look at the terms of two contemporaneous documents (the Limited Partnership Agreement ("LPA") and the Private Placement Memorandum ("PM")) as an aid to the construction of bye-law 42 was raised by the Appellant in the context of its submission that the determination of whether bye-law 42 provided the Third and Fourth Defendants with a complete defence was not suitable for an application pursuant to Ord 18, r.19. The Appellant's position was that construction of the bye-law could only be carried out "*in light of the factual matrix".* The Chief Justice correctly identified that there was a general prohibition on using extrinsic evidence when construing bye-laws; see paragraph 27 of the Judgment. Moreover the Chief Justice also correctly identified at paragraphs 28 and 29: that (i) In *In the Matter of Coroin Limited* [2011] EWHC 3466 (Ch) Richards J did not reach a final conclusion as to whether a shareholders' agreement was permissible as an aid to construction of the bye-laws; and (ii) the use of a partnership agreement and placement memorandum as an aid to the construction of bye-laws was considered in *Capital Partners Securities Co Ltd v Sturgeon Central Asia Balanced Fund Ltd* [2017] Bda LR 78.The Court was therefore correct to find that *"In the circumstances"* (i.e. of this case) it was *"not persuaded"* that it could look at the terms of the LPA or PM as an aid to construction. The Chief Justice did not say that the Court could never look at such documents; see paragraph 31 of the Judgment.

22.14. In any event the Chief Justice did look at the LPA and PM and concluded (rightly) that they were not inconsistent with the terms of bye-law 42; see paragraph 31 of the Judgment. It was well established that the Bermuda courts could strike out a claim brought by a company against a director, where that company was obliged to indemnify the director: see *Intercontinental Natural Resources* and *Focus Insurance.*). So the entire premise of the Appellant's submission in this respect was misplaced.

22.15. The Chief Justice did not make an error of approach in his construction and consideration of the Amended Writ and Statement of Claim. He expressly considered both what was contained in the original and what was contained in the Amended Statement of Claim; see paragraphs 10-12, 49 and 50 of the Judgment. What the Amended Statement of Claim no

longer said was highly pertinent to what the Appellant's pleaded case was, because the Appellant had explained by way of an affirmation that it had deliberately abandoned the allegations that the Third and Fourth Defendants had personally benefitted from the alleged wrongful payments in January 2016 *"to reflect the further information and evidence"* after further investigations had been carried out following preparation of the original pleading.

22.16. The Appellant's argument that the Chief Justice *"failed to conclude, as he should have done, that the Amended Writ and Statement of Claim pleaded and sought a disgorgement remedy (an account of profits) in respect of the breaches of fiduciary duty alleged against the Third and Fourth Defendants"* had no merit. The Appellant's argument was that, notwithstanding that the Appellant had disavowed its allegation that the Third and Fourth Defendants had personally benefited from the alleged wrongful payments, the Court ought nonetheless to have inferred that they had in fact personally benefited, and therefore that the Amended Statement of Claim contained a claim for the remedy of disgorgement which fell within the proviso contained in bye-law 42.5. That was wrong.

22.17. Whilst it was correct that a remedy available for breach of fiduciary duty was an account of profits where, for example, it was alleged that the fiduciary had acted in breach of his fiduciary duty not to gain a benefit for himself, such a claim had to be predicated on an allegation that the fiduciary had in fact made a profit or gain. The Amended Statement of Claim contained no *positive* plea that the Third and Fourth Defendants had personally profited or benefited as a result of the breach of any fiduciary obligation owed by them to the Appellant. On a proper reading of the Amended Statement of Claim, one could not discern any allegation that there was any gain for the Third and Fourth Defendants to disgorge (whether as a result of fraud or dishonesty or otherwise).

22.18. The Appellant in fact knew that the Amended Statement of Claim did not entitle it to the remedy of disgorgement because the Appellant suggested at the strike-out hearing that it be permitted to make yet further amendments to its Statement of Claim following the hearing. The proposed amendments (for which permission was not sought or granted) sought to (re)introduce, among other things, a plea that each payment to an entity in which a Respondent held an ownership interest was a gain, personal profit or advantage of that Respondent (paras. 114.2 and 121). Absent those amendments the Appellant's pleaded case could not give rise to the remedy of disgorgement. It was absurd for the Appellants to seek to argue that the Court could infer that the Third and Fourth Defendants had in fact personally benefitted from the alleged wrongful payments when that argument was not pleaded and was directly contrary to the Appellant's positive decision to abandon the allegations that the Third and Fourth Defendants had personally benefited from the alleged wrongful payments.

22.19. The Chief Justice was therefore right to conclude as he did that:

> *"absent any allegation that the Third and Fourth Defendants had personally profited or benefited as a result of a breach of any fiduciary obligation owed by them to the Plaintiffs (which allegations the Plaintiff has abandoned) or other wrongdoing (which is not pleaded) there is no apparent basis upon which the*

> *Plaintiff is entitled to the remedy of an account of profits (see Attorney General v Blake [2001] 1 AC 268 at 280 G-H). In this regard, it is to be noted that allegations of bad faith (paragraph 114.2); of unexplained payments deemed to be made to the Third and Fourth Defendants (paragraph 114.1); of Payments being not fully, fairly or adequately disclosed by the Third and Fourth Defendants to the Plaintiff's auditors, members or partners (paragraph 114.5); of the Third and Fourth Defendants having unjustly enriched themselves, directly or indirectly, by the Payments; and of liability on the part of the Third and Fourth Defendants to make restitution, were expressly abandoned by the Plaintiff in the Amended Statement of Claim in 2016."*

22.20. Accordingly, the Court of Appeal should dismiss the Appellant's appeal with costs.

Analysis and determination

23. In the light of the Judgment and the respective arguments of the parties, the principal issues which arise for this Court's determination are the following:

(1) the intended scope of bye-laws 42.1 and 42.5 on their correct construction;

(2) whether the Chief Justice was correct to exclude the terms of the Limited Partnership Agreement or the Private Placement Memorandum as aids to the construction of bye law 42;

(3) whether the Chief Justice was correct to decide that, even if, contrary to his conclusion, bye-law 42.5 did not provide an indemnity or an exoneration in respect of claims "*to recover any gain personal profit or advantage to which such Indemnified Person is not legally entitled*", the pleaded claims in the Amended Statement of Claim did not fall within such description and therefore the waiver applied.

Issue (1) - the correct construction of bye-law 42

24. The first issue which arises is the construction of bye-laws 42.1 and 42.5 in the context of the bye-laws as a whole – and, in particular, what is the intended scope of the two bye-laws.

25. Before starting my analysis I should say that I was not persuaded by Mr Banner's linguistic point in support of GDACI's construction of bye-law 42 that "liabilities" in bye-law 42.1 could not, purely as a matter of language, be construed as applying to a disgorgement, or an account of profits, claim against a director on the basis that a "liability to hand back that which was never yours in the first place" was not strictly a "liability" within the meaning of bye-law 42.1. An obligation to account for profits which a director has made in breach of fiduciary duty is normally referred to as a liability as Mr Banner fairly accepted in oral argument. However, such a linguistic argument is only the start of the iterative process of construction. What is critical is a construction of the relevant wording in context.

26. My conclusion is that bye-law 42.1 is to be construed as *only* providing an indemnity to a director

(or other Indemnified Person[1]) in respect of external liabilities, that is to say liabilities incurred by him *to 3rd parties* arising out of his conduct of the Company's business or in the discharge of his duties as a director (subject to the fraud and dishonesty exception provided for in section 98 of the Companies Act 1981). In other words, I would not construe bye-law 42.1 as providing an indemnity to a director in respect of claims which the Company itself might have against him. Likewise, I would construe bye-law 42.5 as *only* applying to claims which the Company/GDACI itself, or a shareholder, has against the director. Accordingly, in this respect I accept the submissions of Mr Banner on behalf of GDACI.

27. I summarise the reasons for my conclusions as follows.

28. The first point to note – and this is in contra-distinction to many of the cases to which we were referred - is that structurally bye-law 42 contains two strands: the first is the indemnity and hold harmless clause contained in bye-law 42.1 which at first sight appears to relate to "*all liabilities*…." to which the relevant director (or more strictly *'an Indemnified Person*") is subject; the second strand is the waiver in bye-law 42.5 which is exclusively given by shareholders and the Company in respect of claims which they or it have against the relevant director. The waiver is subject to different constraints, as the proviso to bye-law 42.5 makes clear, from those applicable to the indemnity contained in bye-law 42.1

29. In accordance with normal canons of construction, one has to construe the entirety of bye-law 42 as a whole to understand what in fact bye-law 42.1 and bye-law 42.5 respectively cover. A proper construction ought to produce the result that each bye-law has a separate function – otherwise one or other bye-law is surplusage or otiose. The natural reading of the different protection afforded to a director under each bye-law, and a consideration of the respective limitations or constraints on such protection, in my judgment leads to the conclusion that, contrary to the Chief Justice's view, the function of each of the two bye-laws is different. The first – bye-law 42.1 – is to provide an indemnity to the director:

> *"against all liabilities, loss, damage or expense …… incurred or suffered by him by or by reason of any act done, conceived in or omitted in the conduct of the Company's business or in the discharge of his duties…."*

As Mr Banner pointed out, such an indemnity could potentially have two legal effects: (1) simply a covenant by the Company/ GDACI to reimburse where the claimant making the claim against the officer was a third party and *not* also the Company/indemnifier; and (2) additionally, an exoneration which extinguished the cause of action where the claimant making the claim against the officer was also the Company/indemnifer.

30. It is clear from the decision of the Privy Council in *Viscount of Royal Court v Shelton* [1986] 1 WLR 985, per Lord Brightman at 991 D – G, that a company has no cause of action against a director in respect of a matter against which the company has agreed to indemnify him; see also *Peiris v Daniels* [2015] Bda LR 16 at [38]. It follows that, if the Respondents were indeed correct in their wide construction of bye-law 42.1, so that it indeed provided an indemnity in respect of all

[1] I do not need separately to address the other categories of "Indemnified Persons" as defined in bye-law 1. My comments apply equally to them.

claims by the Company/ GDACI itself against the officer, there would then be no claims (other than fraud claims) in relation to which bye-law 42.5 could apply; that would be because, since they had all been indemnified under bye-law 42.1, they would *ex hypothesi* have been extinguished and the Company/ GDACI would have no cause of action in respect of such matter, with the result there was nothing upon which bye-law 42.5 could bite.

31. With respect to the Chief Justice, I was not persuaded by his conclusion, as set out in paragraph 44 of the Judgment, that one could effectively construe the structure of bye-law 42 cumulatively so as to identify a function or purpose for bye-law 42.5. His view was that the function or purpose of bye-law 42.5 was to waive shareholders' claims (which would not have been extinguished by bye-law 42.1); and that such a waiver additionally provided a benefit to an Indemnified Person where GDACI's covenant to indemnify under bye-law 42.1 had no value because (for example) it was insolvent. Whilst I accept that an additional protection is afforded to a director as a result of the waiver given in respect of *shareholder* claims in bye-law 42.5, bye-law 42.5 provides nothing additional (whether in insolvency or otherwise) so far as claims by the Company/GDACI itself against the director are concerned, on the hypothesis of the Respondents' construction that all the Company/GDACI's claims against the director are already indemnified under bye-law 42.1. On the basis, as set out in *Viscount of Royal Court v Shelton supra,* that the mere giving of an indemnity by a company in respect of claims against the director (irrespective of actual payment under such indemnity) extinguishes such a claim, no additional benefit is derived from the waiver of such claims by the company. In other words, the fact that the Chief Justice found a meaning in bye-law 42.5 for shareholders' claims did not address, or reconcile, the inconsistency between bye-laws 42.1 and 42.5 so far as GDACI's claims were concerned, if the Respondents' construction were the correct one.

32. Nor does the Chief Justice's analysis explain the reason for the difference in the scope of the respective provisos to bye-law 42.1 and bye-law 42.5. On the Respondents' construction (where effectively all claims by the Company against the director are extinguished by reason of the indemnity under bye-law 42.1), there is a tension between what is carved out under bye-law 42.1 – exclusively claims in respect of any fraud or dishonesty[2] - and what is carved out under bye-law 42.5 – namely, in addition to fraud claims, *"claims or rights of action… to recover any gain, personal profit or advantage to which such Indemnified Person is not legally entitled."* If the Respondents' construction were right, and claims by the Company/GDACI against a director were within the scope of bye-law 42.1, as well as within bye-law 42.5, it is wholly unclear (subject to a further argument of the Appellant, with which I deal below) whether a director would be liable to face a claim by the Company *"to recover any gain, personal profit or advantage to which such Indemnified Person is not legally entitled*", since an indemnity in respect of such a claim would *not* prima facie have been excluded by the wide wording of the indemnity in bye-law 42.1 and the relatively narrow scope of the proviso therein, limited as it was to fraud and dishonesty.

33. For similar reasons, I cannot agree with the Chief Justice's conclusion in paragraph 43 of the Judgment, namely that there was no reason in principle why the existence of a partial waiver in bye-law 42.5 "*should lead to the entire elimination of the comprehensive indemnity set out in bye-law 42.1*". As Mr Banner submitted, that conclusion ignored: (a) the inconsistency between the two provisions which I have referred to above; and (b) took as its starting point a settled, or

[2] See section 98 (2) of the Companies Act 1981.

conclusory, view of what bye-law 42.1 must mean, without construing the bye-law as a whole.

34. On the other hand, none of these tensions arise if one concludes that the scheme of the indemnity provisions is that each of bye-law 42.1 and bye-law 42.5 are providing an indemnity, or waiver, in relation to a different type of claim.

35. Nor do I agree with the approach of the Chief Justice in paragraph 36 of the Judgment where he relied on what he said were *"bye-law indemnities in similar terms*" having been considered by the Court of Appeal in Bermuda and by the Privy Council, namely *Intercontinental Natural Resources Limited (In Liquidation) v The Partners of Conyers, Dill & Pearman & Ors* supra and *Viscount of Royal Court of Jersey v Shelton* supra, where it had been held that directors were entitled to rely upon the bye-law indemnity provision in relation to claims asserted on behalf of the company itself.

36. In *Intercontinental Natural Resources,* the relevant bye-law was not divided into two parts as in the present case, it was in materially different terms[3] from the wording in the present case and clearly on its wording covered claims by the company itself. It did not – like in the present case – contain separate and different provisions dealing on the one hand with potentially all liabilities and, on the other, specifically with claims by the company and shareholders. The issue in contention in *Intercontinenta*l related to whether the claimant company had adequately pleaded matters supporting an allegation of "*wilful neglect or default*" on the part of the relevant directors and upon whom the burden of proof lay to establish that allegation. In circumstances where wilful neglect or default was established, the directors were not entitled to the benefit of the indemnity. The Bermuda Court of Appeal held that no sufficient allegation of wilful neglect or default had been pleaded and that the onus lay on the claimant not on the defendants to establish the conditions dis-entitling the directors to rely on the indemnity. It was not a claim for breach of duty arising out of the wrongful application of corporate funds for the benefit of directors or their associates personally. To use Mr Banner's terminology, it was not a disgorgement claim. It was a claim against directors, who were either Bermudan law firms or partners or managers in such firm, for allegedly failing to monitor highly speculative overseas oil trading of the company. I find it of no assistance to the construction of the bye-law wording in the present case.

37. Similarly, *Viscount of Royal Court of Jersey v Shelton* was not a disgorgement case. It was a case where the directors of the company were sued in respect of losses arising from the alleged ultra vires purchase of the property and the alleged ultra vires trading outside Channel Islands. (There was also a fraudulent trading case but this was not subject to the decision and was dealt with separately.) The indemnity clause (which appears at page 988 of the judgment) covered liabilities incurred by a director "*in the conduct of the company's business, or… in the discharge of his duties*." The specific liabilities covered in the relevant article of association probably did not include the wrongful application of corporate funds for the benefit of directors or their associates personally - although the exoneration clause was very wide terms, and included the provision:

> *"(2) no director or officer of the company shall be liable for……or (g) for any loss, damage, or misfortune whatever which will happen in the execution of the duties of his office or in relation thereto, unless the same shall happen through his own dishonesty."*

[3] See paragraph 51 of the judgment in that case for the terms of the relevant bye-law.

The Privy Council held that even if the transactions were ultra vires, the liability was incurred "in the conduct of the company's business" and that accordingly the directors were entitled to be indemnified against such liability in respect of which the company had no cause of action, since it had agreed to indemnify him; see page 991 F. There was no allegation of dishonesty or improper applications of corporate funds for the director's benefit. There was no separate clause dealing specifically with claims by the company or by shareholders as in the present case. The issue of a disgorgement claim simply did not arise. Given the very different wording, and the very different circumstances, in the *Shelton* case, I find it provides no assistance to the construction of the bye-law wording in the present case in relation to a disgorgement claim.

38. Mr Chapman on behalf of the Respondents also referred to *Peiris v Daniels supra* as another example of wide wording which enabled a director to rely on an indemnity clause. But again, apart from the fact that the wording of the relevant indemnity did not contain the two very different limbs which are present in the wording in the present case, the relevant misfeasance claim brought by the judgment creditor was based on the directors' breaches of their duty to perform their duties as directors with reasonable care and skill - they failed to maintain continuity of workers' insurance cover when they were under a statutory duty to do so, as a result of which the company had to pay out in respect of a substantial claim by an employee. So there was no question in that case as to whether the indemnity applied to a claim in respect of misapplication of corporate funds for the directors' own benefit. Accordingly, I derive no assistance from *Peiris v Daniels* in relation to the construction of the relevant bye-law in the present case.

39. Mr Banner had a further argument in support of his argument that bye-law 42.1 did not apply in the present circumstances, even on the assumption that he was wrong in his submission that bye-law 4 did not apply *at all* to claims by the Company against the director. This argument was that the scope of the indemnity under bye-law 42.1 was limited to acts "*done, conceived in or omitted in the conduct of the Company's business or in the discharge of his duties*"; and that a profit acquired by reason of a breach of duty was not something done in the conduct of a company's business or in discharge of an officer's duty. He submitted that support for this construction of bye-law 42.1 was to be found in *Mackie v BCB Trust Co Ltd* [2006] WTLR 1253 (Bermuda SC). Thus, even if bye-law 42.1 could be relied upon, it was not apt to provide relief against a disgorgement claim. Rather the focus should be on bye-law 42.5 as the applicable provision for such claims.

40. In *Mackie v BCB Trust Co Ltd* the current trustees of a trust claimed *inter alia* from one of the defendants, a bank trustee company which had been the former trustee of the trust, the return of $196,483 which the claimants alleged (and the court found) had been wrongly debited to the trust's bank account in respect of fees which the former trustee alleged were due, but in fact were unjustified and were found to have been claimed in breach of trust. The former trustee pleaded that it was released and/or exonerated from any liability by the relevant indemnity provision of the trust deed. The specific exoneration provision in that case provided that:

> *"No Trustee shall be liable… for any other loss of any description whatsoever… unless such loss is attributable to such Trustee's own dishonesty or to any wilful act or omission on his part which was known to him to be a breach of trust which*

> *could have been known if he would not have had acted [sic] with gross negligence…".*

The judge, Chief Justice Ground, accepted the submissions of Mr Hargun (as he then was) that the indemnity was not apt to cover a trustee's own actions in removing funds from the trust. However, in the present context the decision is of limited assistance in answering the question as to whether bye-law 42.1 should be construed as not applying to disgorgement claims. That is because: (a) Chief Justice Ground went on to say that in any event he had no doubt that the former trustee acted dishonestly (in which case clearly the indemnity did not bite); and (b) there was an express provision in the indemnity that it did not apply if the loss was known to the former trustee to have been a breach of trust. In the present case, however, there is no express wording in bye-law 42.1 excluding an indemnity in circumstances where there has been

> *"… any wilful act or omission on his part which was known to him to be a breach of trust which could have been known if he would not have had acted [sic] with gross negligence".*

And of course, in the present case there is no allegation of dishonesty.

Having said that, I agree with Mr Banner that the approach in *Mackie v BCB Trust Co Ltd* does support the propositions:

(1) that it would be surprising if a widely drafted indemnity, such as that is appears in bye-law 42.1 in the present case, would allow an indemnity in respect of breach of trust by a trustee in making payments for his own benefit, which was inconsistent with the constraints on the waiver set out in the proviso to bye-law 42.5; and

(2) that, given the structure of bye-laws 42.1 and 42.5, the focus should be on bye-law 42.5 as to whether it excludes an indemnity and waiver for such claims.

41. Accordingly, I conclude that whether a director or "*Indemnified Person*" has a waiver in respect of claims by the Company/ GDACI in the present case depends on whether the claims against him can be characterised as: *"any claims or rights of action … to recover any gain, personal profit or advantage to which such Indemnified Person is not legally entitled*." In the event that they can be so characterised, then the waiver given to the director under bye-law 42.5 will not apply. In addition, I consider that it would be open to the Company/ GDACI in the present case to demonstrate that the relevant action taken by the directors, or the failure to take any relevant action, was not an act or omission taken by such director "*in the performance of his duties with or for the Company*" with the consequence that the waiver would not be applicable in any event.

Issue (2): Whether the Chief Justice was correct to exclude the terms of the Limited Partnership Agreement or the Private Placement Memorandum as aids to the construction of bye-law 42?

42. In the light of my decision as to the construction of bye-law 42, there is no need to address this issue. That is because I have decided that GDACI is correct in its submission that the Respondents

do not have the benefit of the carte blanche indemnity provided in bye-law 42.1, but only the more limited waiver contained in bye-law 42.5.

43. However, as Mr Chapman pointed out in his submissions, the Chief Justice did *not* decide that the Court could never look at documents such as the Limited Partnership Agreement or the Private Placement Memorandum as aids to the construction of a bye-law. He simply held that, in the circumstances of the present case, it was not appropriate for him to do so; see paragraph 31 of the Judgment. He correctly pointed out at paragraphs 28 and 29: that (i) in *In the Matter of Coroin Limited* [2011] EWHC 3466 (Ch) Richards J did not reach a final conclusion as to whether a shareholders' agreement was permissible as an aid to construction of the bye-laws; and (ii) the use of a partnership agreement and placement memorandum as an aid to the construction of bye-laws was considered in *Capital Partners Securities Co Ltd v Sturgeon Central Asia Balanced Fund Ltd* [2017] Bda LR 78. Accordingly, I express no opinion as to the circumstances (if any) in which it would be appropriate to consider such documents as an aid to construction of bye-laws.

Issue (3): whether the claims as currently pleaded in the Amended Statement of Claim fall within the description of claims "*to recover any gain personal profit or advantage to which such Indemnified Person is not legally entitled*", and therefore the waiver/exoneration contained in bye-law 42.5 does not apply?

44. The Chief Justice concluded as follows in relation to the pleading in the Amended Statement of Claim:

> *"absent any allegation that the Third and Fourth Defendants had personally profited or benefited as a result of a breach of any fiduciary obligation owed by them to the Plaintiffs (which allegations the Plaintiff has abandoned) or other wrongdoing (which is not pleaded) there is no apparent basis upon which the Plaintiff is entitled to the remedy of an account of profits (see Attorney General v Blake [2001] 1 AC 268 at 280 G-H). In this regard, it is to be noted that allegations of bad faith (paragraph 114.2); of unexplained payments deemed to be made to the Third and Fourth Defendants (paragraph 114.1); of Payments being not fully, fairly or adequately disclosed by the Third and Fourth Defendants to the Plaintiff's auditors, members or partners (paragraph 114.5); of the Third and Fourth Defendants having unjustly enriched themselves, directly or indirectly, by the Payments; and of liability on the part of the Third and Fourth Defendants to make restitution, were expressly abandoned by the Plaintiff in the Amended Statement of Claim in 2016."*

45. Mr Banner, on behalf of GDACI, argued that the existing Amended Statement of Claim contained a claim for "*equitable compensation, by the 2nd to 4th defendants, in such sum as the Court may assess"*; and also a claim for an account "*of such profits made by the Defendant, or deemed to be made by the Defendants, as the court may assess*." He submitted that these and other provisions of the Amended Statement of Claim were sufficient to enable this Court to infer that there was indeed a claim made to the effect that the Respondents had benefited personally and were not legally entitled to retain such sums. In particular, he relied upon paragraphs 120 and 121 of the operative part of the Amended Statement of Claim and paragraphs (3) and (4) of the prayer for relief

46. Mr Chapman, on behalf of the Respondents, argued that, even if the Appellant's proposed construction of bye-law 42 were correct, it would not assist the Appellant because the Appellant's Amended Statement of Claim did not contain a claim for disgorgement. In other words the Amended Statement of Claim contained no pleaded case that the Third or Fourth Defendants had made any personal gain, profit or advantage to which they were not legally entitled. Indeed, by its 2016 Amendments the Appellant had expressly abandoned its claims that (i) the Third and Fourth Defendants had been unjustly enriched and for the restitution of that enrichment; and (ii) that the Third and Fourth Defendants should be deemed to have benefited from payments made to parties related to them. He also argued that the fact that the Amended Statement of Claim contained a bald assertion that the Appellant reserved its right to seek an account of profits did not transform a claim for compensation into a claim for disgorgement.

47. I agree with the Chief Justice, and with the submissions of the Respondents, that the Amended Statement of Claim does not contain any adequate allegation, or positive plea, that the Third and Fourth Defendants had personally profited, or benefited, as a result of the breach of any fiduciary obligation owed by them to the Appellant.

48. The Third and Fourth Defendants The claim, in its amended form, contains *inter alia* the following allegations (which, for the sake of brevity, I have summarised):

    48.1.1. that the imputed payments/loans which had been made to various third parties were wrongfully made and authorised by the Third and Fourth Defendants;
    48.1.2. that certain of the third party recipients of the loans/payments had the Third and Fourth Defendants as directors or direct or indirect owners;
    48.1.3. that the making of the loans/payments did not fall within proper purposes of the Fund;
    48.1.4. that the Third and Fourth Defendants breached their obligation to consult in relation to the loans/payments with the Advisory Committee prior to entering into the transactions;
    48.1.5. that the loans/payments provided no benefit to GDACI and indeed caused it detriment;
    48.1.6. that the loans/payments were contrary to the purpose and intent of the Fund;
    48.1.7. that the loans/payments were not within the scope of the objects, duties and powers of GDACI;
    48.1.8. that the loans/payments constituted a breach of the fiduciary duties owed by the Third and Fourth Defendants;
    48.1.9. that certain of the loans/payments were made for the benefit of clients of another group of investors managed by inter alia the Third and Fourth Defendants;
    48.1.10. that certain of the loans "were not made in good faith in the best interests of GDACI".

49. But nowhere in the lengthy Amended Statement of Claim can one find a clear allegation in relation the numerous allegedly improper loans or payments that the Respondents are said to have authorised, that they (i.e. the Third or Fourth Defendants) have personally profited or benefited as a result of a breach of any fiduciary obligation owed by them to the Appellant; nor is there any allegation that the Respondents have made "*any gain, personal profit or advantage to which such ……(p)erson is not legally entitled*." In a pleading of a breach of fiduciary duty in this sort, together with an allegation of consequent personal benefit, there is a duty on the pleader to make the allegations clearly and directly. It is wholly inappropriate to contend that such consequences can be inferred from the unparticularised allegations of breach of fiduciary duty or from the claim for

relief in paragraph (4) of the prayer for "*an account of profits*" where there is no pleaded basis in the body of the Amended Statement of Claim to support such relief. As Mr Chapman submitted, any such allegation had to be pleaded in terms; in particular in circumstances where, as here, the allegations are required to engage the proviso to bye-law 42.5 in order to have a non-demonstrable claim.

50. Accordingly, I agree with the Chief Justice that the Amended Statement of Claim is demurrable in its present form. However, unlike him, I would propose to give GDACI an opportunity to make an application to re-amend the Amended Statement of Claim. The reason why I think it is appropriate for this Court to provide an opportunity to GDACI to do so, is because of the different view which I take from the Chief Justice as to the construction of bye-law 42. On the basis of the Chief Justice's construction, GDACI would have no claim in the absence of allegations of fraud being made against the Respondents, which clearly were not going to be made. In my judgment, that is not a correct analysis since a director may be in breach of fiduciary duty and personally in receipt of payments benefits to which he is not legally entitled, even in the absence of dishonesty.

51. I would propose that the Appellant be given 21 days from the date of this order to provide (if it chooses to do so) a draft Re-Amended Statement of Claim to the Respondents for their agreement, or otherwise, as to whether the re-amendment may be made. In the absence of the Respondents' agreement to the proposed re-amendment, a formal application for leave to re-amend will need to be made to this Court which will consider whether or not it contains the necessary averments to bring the claim within the proviso to bye-law 42.5. I should say that I do not regard the existing draft Re-Amended Statement of Claim as sufficiently meeting the justified criticisms of the Amended Statement of Claim to which I have referred to above.

Disposition

52. Accordingly, I would allow this appeal to the extent stated above. What order we should make in relation to the action is likely to depend on the form of the proposed Re-Amendment, if the Appellant chooses to serve a draft Re-Amended Statement of Claim.

SMELLIE JA:

53. I agree.

CLARKE P:

54. I, also, agree. The appeal is therefore allowed.