[2021] SC (Bda) 83 Civ (13 October 2021)

IN THE SUPREME COURT OF BERMUDA

CIVIL JURISDICTION COMMERCIAL COURT

2015: No 290

BETWEEN

GLOBAL DISTRESSED ALPHA CAPITAL I LIMITED

Plaintiff

-and-

(1) AAAF MANAGEMENT LIMITED

(2) MICHAEL JOHN SHONE

(3) CHRISTIAN MICHELSEN HERMAN

(4) WALTON LAW EDDLESTONE

Defendants

Before: **Hon. Chief Justice Hargun**

Representation: **Mr. Gregory Banner QC and Ms. Lilla Zuill of Zuill & Co for the Plaintiff**

Mr. Graham Chapman QC, Ms. Katie Tornari of Marshall Diel & Myers Limited and Mr. Jai Pachai of Wakefield Quin Limited for the Third and Fourth Defendants

Date of Hearing: 22 September 2021

Date of Judgment: 13 October 2021

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JUDGMENT

Application to set aside the Plaintiff's claim pursuant to RSC Order 18. r 19(1); principles of construction to be applied in construing bye-law indemnity in favour of directors; whether the court is entitled to take into account the factual matrix in construing bye-law indemnity; whether bye-law indemnity only applied in relation to third party claims; whether appropriate to rely upon bye-law indemnity in aid of a strike out application

HARGUN CJ

Introduction

1. By materially identical Amended Summonses, Christian Michelsen Herman, the Third Defendant, and Walton Law Eddlestone, the Fourth Defendant, apply to strike out the Amended Specially Endorsed Writ of Summons on the ground that it discloses no reasonable cause of action against the Third and Fourth Defendants, namely that it does not plead any matters that are outside of the scope of the indemnities that Global Distressed Alpha Capital I Limited ("**the Plaintiff**" or "**the Company**") accepts apply to the Third and Fourth Defendants. Further or alternatively, that the claim be struck out on the grounds that it is vexatious and/or an abuse of process.

2. The Third and Fourth Defendants also seek an order that their costs and expenses of and occasioned by these proceedings shall be paid by the Plaintiff on an indemnity basis in accordance with the indemnity provision in Bye-Law 42.6 of the Plaintiff's Bye-Laws dated 8 September 2010.

3. The issue for the Court, as correctly submitted by Mr. Chapman QC, is whether the Plaintiff's claim falls within the scope of the Bye-Laws 42.1 and/or 42.5 of the Plaintiff's Bye-Laws such that the Third and Fourth Defendants are entitled to the benefit of an

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indemnity and/or waiver and therefore the Plaintiff does not have a cause of action against the Third and Fourth Defendants and/or they have a complete defence to the Plaintiff's claim.

Background

4. The Plaintiff is a Bermuda exempted company which was incorporated on 6 December 2007. Since 14 April 2010, the Plaintiff has been the General Partner for the Global Distressed Alpha Fund III Limited Partnership ("**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 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 it has therefore not been possible to serve it with the notice of these applications.

6. The Second Defendant 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 is an individual who was a director of the Plaintiff between 28 and November 2007 and 7 October 2013.

8. The Fourth Defendant is an individual who, it is alleged by the Plaintiff, 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. It is disputed by the Fourth Defendant that he was a director at all between 16 October 2011 and 24 December 2012 and only acted as an alternate director of the Third Defendant (pursuant to the Plaintiff's Bye-Laws) between 24 December 2012 and 7 October 2013. However, the

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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 Plaintiff's 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.

10. In the original Statement of Claim dated 10 July 2015 the Plaintiff's assertions included the following:

    (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).

    (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).

    (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)(a) of the Companies Act 1981)"* (deleted in paragraph 23.5 of the Amended Statement of Claim).

    (4) Under particulars of breaches of duty the Plaintiff asserted, *inter alia*:

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(a) 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).

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

(c) "*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).

(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).

(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).

11. As can be seen from the pleaded case, as set out in paragraph 10 above, in its original Statement of Claim the Plaintiff did indeed contend that the Defendants had acted in bad faith and that they had personally benefited from their beaches of duty. The Plaintiff claimed that the Defendants have been unjustly enriched (directly or indirectly) by the Payments and therefore that the Plaintiff was entitled to restitution of those sums.

12. However, all the averments and claims set out in paragraph 10 above were expressly abandoned by the Plaintiff in the Amended Statement of Claim dated 5 January 2016. Mr. Nicholas Haston, a director of the Plaintiff, explains 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 explains that the purpose of the amendments was to abandon a number of claims made against the Defendants and 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, acted in bad faith or dishonestly. Indeed, as noted above, the allegation of bad faith was expressly abandoned.

13. It is in these circumstances that the Third and Fourth Defendants have issued the present application contending that they have 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).

14. Bye-Law 42 provides as follows:

> *"**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 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 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 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 agreed 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.*

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"*Indemnified Person*" is defined in Bye-Law 1 as "*any Director, Officer, Resident Representative, member of a committee duly constituted under these Bye-Laws and any liquidator, manager or trustee for the time being acting in relation to the affairs of the Company, and his heirs, executors and administrators*."

15. Bye-Law 42.1 provides that the indemnity contained in this Bye-Law "*shall not extend to any matter which would render it void pursuant to the Companies Acts*." In this connection it is to be noted that pursuant to sections 98(1) and (2) of the Companies Act 1981, a company may indemnify any officer in respect of any loss arising or liability attaching to him by virtue of any rule of law of which the officer of person may be guilty in relation to the Company or any subsidiary thereof, "*save for fraud or dishonesty*." It follows therefore that as long as the conduct of a director complained of does not rise to the level of "*fraud or dishonesty*" Bye-Law 42.1 obliges the Plaintiff to indemnify a director in respect of that conduct.

The strike out application

16. There is 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. The Court accepts Mr. Banner QC's submission that the Court's discretionary power under Order 18 rule 19 to strike out a pleading is 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 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 1 of the 1999 Supreme Court Practice).

17. As Mr. Banner QC rightly submits these principles were reiterated recently in Bermuda by Hellman J in *Kingate Global Fund Ltd v Kingate Management Ltd* [2016] SC Bda 3 Com at [16]-[18]:

"16. When deciding whether a strike out application pursuant to Order 18, rule 9 is likely to succeed it will be helpful to have in mind the principles governing such an application. They were summarised by the Court of Appeal in Broadsino Finance Co Ltd v Brilliance China Automotive Holdings Ltd [2005] Bda LR 12. Stuart-Smith JA, giving the judgment of the Court, stated at 4 – 5.

"Where the application to strike-out on the basis that the Statement of Claim discloses no reasonable cause of action (Order 18 Rule 19(a)), it is permissible only to look at the pleading. But where the application is also under Order 18 Rule 19(b) and (d), that the claim is frivolous or vexatious or is an abuse of the process of the court, affidavit evidence is admissible. Three citations of authority are sufficient to show the court's approach. In Electra Private Equity Partners (a limited partnership) v KPMG Peat Marwick [1999] EWCA Civ 1247, at page 17 of the transcript Auld LJ said: 'It is trite law that the power to strike-out a claim under Order RSC Order 18 Rule 19, or in the inherent jurisdiction of the court, should only be exercised in plain and obvious cases. That is particularly so where there are issues as to material, primary facts and the inferences to be drawn from them, and where there has been no discovery or oral evidence. In such cases, as Mr Aldous submitted, to succeed in an application to strikeout, a defendant must show that there is no realistic possibility of the plaintiff establishing a cause of action consistently with his pleading and the possible facts of the matter when they are known….. There may be more scope for an early summary judicial dismissal of a claim where the evidence relied upon by the Plaintiff can properly be characterised as shadowy, or where the story told in the pleadings is a myth and has no substantial foundation. See eg Lawrence and Lord Norreys (1890) 15 Appeal Cases 210 per Lord Herschell at pages 219–220'. In National Westminster Bank plc v Daniel [1994] 1 All ER 156 was a case under Order 14 where the Plaintiff was seeking summary judgment, but it is common ground that the same approach is applicable. Glidewell LJ, with whom Butler-Sloss LJ agreed, put the matter succinctly following his analysis of the authorities. At page 160, he said: 'Is there a fair and reasonable probability of the defendants having a real or bona fide defence? Or, as Lloyd LJ posed the test: "Is what the defendant says credible"? If

it is not, then there is no fair and reasonable probability of him setting up the defence'."

17. Alex Potts, who appeared for the Plaintiffs, stressed two points in particular. First, a strike out application should not become a mini-trial on the documents. See eg Wenlock v Moloney [1965] 1 WLR 1238 per Danckwerts LJ at 1244 A – C, with whom Diplock LJ (as he then was) agreed at 1244 D – E:

"But this summary jurisdiction of the court was never intended to be exercised by a minute and protracted examination of the documents and facts of the case, in order to see whether the plaintiff really has a cause of action. To do that is to usurp the position of the trial judge, and to produce a trial of the case in chambers, on affidavits only, without discovery and without oral evidence tested by cross-examination in the ordinary way. This seems to me to be an abuse of the inherent power of the court and not a proper exercise of that power."

18. Second, a strike out application is not an appropriate vehicle for determining controversial points of law in a developing area. See eg Altimo Holdings v Kyrgyz Mobil Tel Ltd [2012] 1 WLR 1804 per Lord Collins at para 84:

"The general rule is that it is not normally appropriate in a summary procedure (such as an application to strike out or for summary judgment) to decide a controversial question of law in a developing area, particularly because it is desirable that the facts should be found so that any further development of the law should be on the basis of actual and not hypothetical facts: …"

18. The Third and Fourth Defendants are clearly "*Indemnified Persons*", as that term is defined in Bye-Law 1 of the Plaintiff's Bye-Laws. Bye-Law 42.1 is drawn in the widest terms possible: indemnifying the Third and Fourth Defendants "*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)… by reason of any act done, conceived in or omitted in the conduct of the Company's business…"*

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19. In paragraph 114 of the Amended Statement of Claim it is alleged that in making, authorising, and/or allowing the Payments to be made, the Third and Fourth Defendants acted in breach of their various statutory, contractual, fiduciary and/or common law duties to the Plaintiff. In paragraph 117 the Plaintiff alleges that as a result of the Third and Fourth Defendants' breaches of duty with respect to the Payments referred to, the Plaintiff has suffered loss and damage, for which the Third and Fourth Defendants are liable represented by:

    (1) the amount of the Payments;

    (2) further or alternatively, loss of interest on the Payments;

    (3) further or alternatively, fees charged to the Plaintiff by its bankers for services in effecting certain of the Payments;

    (4) further or alternatively, loss of profits on the amount of the Payments, had such sums been properly invested on behalf of the Plaintiff;

    (5) further or alternatively, loss of business opportunities on the amount of the Payments, had such sums been properly invested on behalf of the Plaintiff.

20. Having regard to the breadth of the indemnity provided by Bye-Law 42.1 the claim for damages set out in paragraph 117 in respect of the breaches set out in paragraph 114 of the Amended Statement of Claim is clearly covered by the indemnity provided to the Third and Fourth Defendants under this Bye-Law provision.

21. It is now well established that a company has no cause of action against a director in respect of a matter which the company has expressly agreed to indemnify in its Bye-Laws. Indeed,

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the pursuit of a claim by the company, or its liquidator, in these circumstances would be an abuse of process.

22. In *Peiris v Daniels and others* [2015] Bda LR 16 Hellman J so held at [43] and [45]

> *"43. The second issue is whether, notwithstanding that their conduct is covered by the indemnity, the Defendants are precluded from relying on it. They owe the Company a fiduciary duty of care not to claim an indemnity against loss arising from their wilful neglect or default, per Smellie CJ in In the matter of Bristol Fund Limited [2008] CILR 317 Grand Ct at para 75. But the Company's loss arose from the Defendants' inadvertence. In my judgment this did not amount to wilful neglect or default. So their fiduciary duty of care does not prevent them from relying on the indemnity.*
>
> *45. Article 124 does not purport to exempt the Company's directors from liability but rather to indemnify them in respect of it. However the legal consequence would be the same in either case. A company has no cause of action against a director in respect of a matter in which the company has agreed to indemnify him."*

23. In coming to this conclusion Hellman J relied upon the decision of the Privy Council in *Viscount of Royal Court v Shelton* [1986] 1 WLR 985. In that case the relevant Bye-Law indemnified the directors of a company in the following terms:

> "*Every director, officer or servant of the Company shall be indemnified out of its funds against all costs, charges, expenses, losses and liabilities incurred by him (a) in the conduct of the company's business…"*

24. The defendants were directors of that company and made certain payments to the vendors and sustained trading losses. This action was commenced on the behalf of the company

seeking to recover the loss alleging that it was caused to the Company by acts ultra vires the company. The Privy Council held that the Bye-Law provision was to be construed as exonerating a director from personal liability for the conduct of the company's business even where the innocent participation had resulted in an act ultra vires the company. In giving the judgment of the Board, Lord Brightman held at 991:

> "*The directors, as a matter of construction of article 46, are therefore not liable for the loss which happened to the company. The same answer may also be reached under paragraph (1)(a) of article 46. The directors are prima facie liable to the company for the loss. But that liability was incurred "in the conduct of the company's business." The directors are therefore entitled to be indemnified against such liability. A company has no cause of action against a director in respect of a matter against which the company has agreed to indemnify him."*

25. Given 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, a director is entitled to seek to strike out the claim in these circumstances on the grounds that either the company has no reasonable cause of action against the director or alternatively that the continuation of the proceedings by the company against the director constitutes an abuse of process. It is for these reasons the courts in Bermuda have 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. The leading case in this regard remains the Court of Appeal'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 is to relieve a director from any liability that director is entitled to have the action struck out under order 18 rule 19. The Court of Appeal confirmed this approach in *Focus Insurance Company Limited v Mark Gregory Hardy* (Civil Appeal No. 15 of 1992). In *Focus* the Court of Appeal 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 "*willful negligence, willful default, fraud and dishonesty*" (the relevant statutory exclusion in the *Focus* bye-laws). The Court of Appeal in *Focus* 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.

26. Mr. Banner QC for the Plaintiff argues that the reliance on Bye-Law 42 as a complete answer to the claim is not a suitable question for the disposal on a strike out application, whether on the ground of abuse of process or under the inherent jurisdiction of the Court. He argues that reliance upon Bye-Law 42 necessarily requires the construction of this Bye-Law to the facts of this case which would usually require a clear understanding of the factual matrix surrounding the creation of the written instrument. In this case, he argues, the factual matrix includes facts surrounding the setting up of the Fund and the Plaintiff which, he says, either must be agreed or be determined by the Court. Determining the true construction of Bye-Law 42, he argues, is a question of law which has to be approached in light of the factual matrix. Mr. Banner QC submits that this is the sort of exercise that the Court ought not to engage in under Order 18 rule 19.

27. The Court is unable to accept the submission. The premise of this argument, in the judgment of the Court, is not well-founded. Both English and Bermuda authorities make it clear that the ordinary rules relating to the construction of commercial contracts do not apply in their entirety to the construction of bye-laws of a company. In particular, there is a prohibition on using extrinsic evidence surrounding the creation of the written instrument. This general prohibition would not allow evidence of facts surrounding the setting up of the Fund or the Plaintiff to be admitted as an aid to the construction of Bye-Law 42.

28. The rationale behind this exclusionary rule is set out in the judgment of Richards J (as he then was) in *In the Matter of Coroin Limited* [2011] EWHC 3466 (Ch), a case relied upon by the Plaintiff, at [60]-[65]:

> *"Relevant principles of construction*

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60. There was disagreement between the parties as to whether the applicable pre-emption provisions were those in clause 6 of the shareholders agreement or those in article 5 of the company's articles of association. Misland argued for the latter and it relied on the authorities which establish that the factual background admissible in the construction of contracts is for the most part not admissible in the construction of articles of association. In the alternative, Misland submitted that even if all the relevant background admissible in the construction of contracts was taken into account, the sale of Misland did not trigger the pre-emption provisions.

61. The particular position of articles of association was considered by the Court of Appeal in Bratton Seymour Services Co Ltd v Oxborough [1992] BCLC 693. It was held that a term might be implied into articles by way of constructional implication but not from extrinsic circumstances.

62. Articles of association have a special status as a "statutory contract", adopted pursuant to the Companies Act, requiring public registration and capable of amendment by special resolution. By reason of these provisions, the court has no jurisdiction to order rectification of articles or to set them aside on grounds of misrepresentation.

63. While these features are important, none of them is sufficient to explain why extrinsic evidence is not admissible in the construction of articles. In my judgment, the reason for excluding such evidence as an aid to construction is as stated by Sir Christopher Slade and Steyn LJ. The articles govern relations between the company and its members and between the members. The members are a fluctuating body of persons. Persons will become members on the basis of the registered articles and without, in most cases, any knowledge of the circumstances existing when the articles were adopted or were subsequently amended, perhaps on many occasions.

64. Sir Christopher Slade said at p.699:

> *"I accept that, in construing the articles of association of a company, evidence of surrounding circumstances may be admissible for the limited purpose of identifying persons, or places or other subject matter referred to*

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therein. Mr Asprey, however, has not invoked extrinsic evidence of surrounding circumstances in the present case for that limited purpose. He has sought to invoke it for the purpose of imposing additional financial obligations on the members far beyond those which the language of the articles of association of the company, read fairly on its own, would impose on them, because, he says, such an implication is required to give the articles business efficacy. No authority has been cited to us which begins to support the proposition that extrinsic evidence is admissible for that wide purpose in construing the statutory contract created by the articles of association of a company. In my judgment, the admission of such evidence for such purpose would be quite contrary to the principles governing this type of statutory contract. If it were to be admissible, this would place the potential shareholders in a limited company, who wished to ascertain their potential obligations to the company, in an intolerable position. They are in my judgment entitled to rely on the meaning of the language of the memorandum and articles of association, as such meaning appears from the language used."

65. Similarly, Steyn LJ said at pp 698 – 699:

"... neither the company nor any member can seek to add to or to subtract from the terms of the articles by way of implying a term derived from extrinsic surrounding circumstances. If it were permitted in this case, it would be equally permissible over the spectrum of company law cases. The consequence would be prejudicial to third parties, namely potential shareholders who are entitled to look to and rely on the articles of association as registered."

29. The above summary of the principles of construction relating to the construction of bye-laws is consistent with the position set out by Kawaley CJ in *Capital Partners Securities Co Ltd v Sturgeon Central Asia Balanced Fund Ltd* [2017] Bda LR 78 at [39]-[49] and by

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the Court of Appeal (Sir Christopher Clarke JA) in the same case (Civil Appeal No. 14 of 2017) at [34]-[49].

30. Mr. Banner QC referred the Court to paragraphs 68-69 of *Coroin* where Richards J expressed the view that where bye-laws were adopted pursuant to a shareholders' agreement and that where both documents were negotiated by the initial investors and both documents were intended to, and did, govern relations between the investors as members of the company, it may be possible to look at the shareholders' agreement as an aid to the construction of the bye-laws. However, it is to be noted that at paragraph 70 Richards J stated that it was not "*necessary to reach a final conclusion on this point*." Further, in the context of a fund structure, the use of a partnership agreement and placement memorandum, as an aid to the construction of bye-laws, was considered by the Court of Appeal in *Capital Partners Securities* at [48]-[49]:

> *"48 In [53] the Chief Justice recorded that the Fund contended that the only relevant documents were the Bye-Laws and the Placing Memorandum but only to the extent that "those documents" were relied upon for the purpose of evidencing the terms upon which the Participating Shares were allotted. In paragraph 54 he referred to the fact that the wording in the Subscription Agreement:*
>
> > *"on its face gave primacy to the Fund's constitutional documents as regards the substantive legal relationship between the Fund and subscribers once the relevant shares were issued.* ***Accordingly, the Byelaws comprise the crucial document which was must [sic] be interpreted, as the Fund rightly contended."***
>
> *49 The Chief Justice was correct in this conclusion which reflects what was said by Hellman J in Kingate Global Fund Limited v Kingate Management Limited [2015] SC (Bda) 65 Comm at [43]:*
>
> > *"The Information Memorandum [equivalent to the Placing Memorandum] formed part of the contract between the investor and the Fund…, because*

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> *the Subscription Agreement for shares in the Fund provided that the subscription was on the terms of the relevant Information Memorandum and subject to the provisions of the Memorandum and Articles of Association of the Fund.* ***Thus, in the event of a discrepancy between the Information Memorandum and the Articles, the Articles would prevail".*** *"* (emphasis in the original)

31. In the circumstances the Court is not persuaded that the Court can properly look at the terms of the Limited Partnership Agreement or the Private Placement Memorandum as an aid to the construction of the Bye-Law 42. In any event, there is no inconsistency or discrepancy between the terms of the Limited Partnership Agreement and the Information Memorandum and the terms of Bye-Law 42.

32. Other than the reference to the Limited Partnership Agreement and the Private Placement Memorandum, Mr. Banner QC did not articulate what other extrinsic evidence might be relevant to the construction of Bye-Law 42. I accept Mr. Chapman QC's submission that if the Plaintiff considers that extrinsic evidence is required to construe Bye-Law 42 it is incumbent upon the Plaintiff to set out that evidence so that the Court can determine whether the evidence relied upon is indeed relevant. In *ICI Chemicals & Polymers Ltd v TTE Training Ltd* [2007] EWCA Civ 725 (referred to by Kawaley AJ in *Wong and Wong v Grand View Private Trust Co Ltd* [2019] Bda LR 41 at [13]) Moore-Bick LJ stated at [13]:

> *"In cases where the issue is one of construction the respondent often seeks to persuade the court that the case should go to trial by arguing that in due course evidence may be called that will shed a different light on the document in question. In my view, however, any such submission should be approached with a degree of caution. It is the responsibility of the respondent to an application of this kind to place before the court, in the form of a witness statement, whatever evidence he thinks necessary to support his case. Where it is said that the circumstances in which a document came to be written are relevant to its construction, particularly*

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if they are said to point to a construction which is not that which the document would naturally bear, the respondent must provide sufficient evidence of those circumstances to enable the court to see that if the relevant facts are established at trial they may have a bearing on the outcome."

33. The Court also notes that the Plaintiff's suggestion that the Court needs extrinsic evidence in order to construe Bye-Law 42 is contrary to the position that the Plaintiff has taken in inter-party correspondence. In correspondence the Defendants sought further and better particulars of the construction of Bye-Law 42 contended by the Plaintiff. In response, the Plaintiff's attorneys stated that the "*Request is not a proper request for particulars, as it relates to matters concerning the legal construction and interpretation of bye-law 42 of the Plaintiff's bye-laws. Matters as to the construction and interpretation of contractual provisions are the subject of legal argument and appropriately reserved for legal submissions."* There was no suggestion at the time that extrinsic evidence was required in order to construe Bye-Law 42.

34. The practice in the Bermuda courts does not support the submission that it is inappropriate for the Court to embark upon the exercise of construing a bye-law indemnity provision in the context of an application to strike out a claim asserted by the company against its directors. The Court of Appeal decisions in the *Intercontinental Natural Resources* and *Focus* cases show that it is indeed proper for a court to strike out a claim asserted by a company against its director, in circumstances where a director is indemnified under the terms of the company's bye-laws, in respect of that claim. Having regard to the Court of Appeal's consideration of the indemnity provisions contained in the bye-laws of a Bermuda company in *Intercontinental Natural Resources* and *Focus*, the Court is unable to accept Mr. Banner QC's further submission that the Court should not entertain a strike out application based upon the existence of a bye-law indemnity as "*this is not a settled area of law in Bermuda*."

35. Secondly, Mr. Banner QC argues that Bye-Law 42.1 does not, on its proper construction, provide an indemnity to the Third and Fourth Defendants in respect of claims made by the Plaintiff. He contends that the provision set out in Bye-Law 42.1, on its proper construction, only indemnifies the Indemnified Party in respect of a claim made by a *third party* and not the Plaintiff itself.

36. Bye-law indemnities in similar terms were considered by the Court of Appeal in Bermuda in the *Intercontinental Natural Resources* and by the Privy Council in the *Viscount of Royal Court of Jersey v Shelton*. In both cases the claim was brought on behalf of a company (by the liquidator in *Intercontinental Natural Resources*). Both the Court of Appeal in Bermuda in *Intercontinental Natural Resources* and the Privy Council in the *Shelton* case held that the directors were entitled to rely upon the bye-law indemnity provision in relation to a claim asserted on behalf of the company itself and if the claim came within the terms of the bye-law indemnity provision the company had no cause of action against the directors. In the circumstances, the Court does not consider that Mr. Banner QC's submission that the indemnity set out in Bye-Law 42.1 only covers claims made by *third parties* is well founded.

37. Thirdly, Mr. Banner QC contends that the claim by the Plaintiff against the Third and Fourth Defendants, its former directors, is exclusively governed by Bye-Law 42.5. As noted earlier Bye-Law 42.5 provides that "*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… 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*."

38. Mr. Banner QC argues that Bye-Law 42.5 provides a self-contained regime for claims by the Company against Indemnified Persons. From that premise he argues that where the claim comes within the terms of Bye-Law 42.5 (waiver of claims) the indemnity provided in Bye-Law 42.1 can have no application. Secondly, in this regard, he argues that the

Plaintiff's claim comes within the second limb of the proviso "*to recover any gain, personal profit or advantage to which such Indemnified Person is not legally entitled."* Critical to this argument is Mr. Banner's proposition that even if ordinarily a claim for "*any gain, personal profit or advantage*" could come within the indemnity provided in Bye-Law 42.1, the existence of Bye-Law 42.5 means that such a claim could never be the subject of indemnity provided in Bye-Law 42.1.

39. In considering this argument the Court reminds itself that, leaving aside the prohibition relating to the use of extrinsic evidence, the general rule remains that bye-laws of a company must be construed according to their plain and ordinary meaning unless that produced a commercial absurdity. In *Thompson v Goblin Hills Hotel Ltd* [2011] UKPC 8, Lord Dyson, delivering the judgment of the Board, said at [18]:

> *"In the opinion of the Board, the plain and ordinary meaning of the words used in article 91(1) and clause 5(b) can only be displaced if it produces a commercial absurdity: see, for example, per Lord Diplock in Antaios Cia Naviera SA v Salen Rederierna AB, "The Antaios" [1985] AC 191, 201: "if a detailed semantic and syntactical analysis of words in a commercial contract is going to lead to a conclusion that flouts business common sense, it must be made to yield to business common sense."*

40. The starting point of this analysis is the breadth of the indemnity set out in Bye-Law 42.1. The indemnity provided in Bye-Law 42.1 could not be cast in wider terms. It is an indemnity against "*all liabilities, loss, damage or expense (including but not limited to liabilities under contract, tort and statute..,)*".

41. The indemnity provided by Bye-Law 42.1 is not limited to claims by third parties. It expressly refers to "*all liabilities*".

42. The provision of indemnity in Bye-Law 42.1 is not made subject to any limitations contained in any subsequent provision of Bye-Law 42. Specifically, the indemnity granted in Bye-Law 42.1 is not made subject to the waiver provision set out in Bye-Law 42.5.

43. Bye-Law 42.1 and Bye-Law 42.5 are independent provisions. Bye-Law 42.1 provides indemnity to Indemnified Persons even if there was no waiver provision contained in terms of Bye-Law 42.5. There is no reason in principle why the existence of a partial waiver of claims on the part of the Company and its Shareholders, such as that contained in Bye-Law 42.5, should lead to the entire elimination of the comprehensive indemnity set out in Bye-Law 42.1.

44. The scheme of Bye-Law 42 appears to be cumulative in the sense that each subparagraph provides additional protection to the Indemnified Persons:

    (1) Bye-Law 42.1 provides *indemnification* against all liabilities, loss, damage or expense.

    (2) Bye-Law 42.2 provides the additional protection that no Indemnified Person shall be liable to the Company for the acts or omissions of other Indemnified Persons.

    (3) Bye-Law 42.3 provides that the indemnity is to be provided out of the assets of the Company.

    (4) Bye-Law 42.4 provides that the amounts paid by the Indemnified Person shall take effect as an obligation of the Company to reimburse the person making the payment.

    (5) Bye-Law 42.5 deals with the subject matter of *waiver* by the Company and its shareholders. Waiver by shareholders provides additional protection to the Indemnified Person and has commercial value in circumstances where the Company is insolvent and unable to fulfill its obligations to indemnify the

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Indemnified Persons. This provision has commercial value in relation to actions by shareholders in circumstances where the Company is unable to honour its obligation to indemnify under Bye-Law 42.1.

(6) Bye-Law 42.6 provides the additional benefit to the Indemnified Persons in the form of an obligation on the part of the Company to pay *expenses* incurred in defending any civil or criminal action for which indemnification is required pursuant to these provisions.

45. In the circumstances the Court does not accept that the claims for recovery of "*any gain, personal profit or advantage*", as referred to in Bye-Law 42.5, are incapable of being indemnified in accordance with the indemnity provisions set out in Bye-Law 42.1.

46. Further, the Court does not accept that the pleaded claims in the Amended Statement of Claim fall within the proviso relating to claims "*to recover any gain, personal profit or advantage to which such Indemnified Person is not legally entitled*", as set out in Bye-Law 42.5.

47. As noted earlier at paragraph 10, the original Writ and the Statement of Claim did indeed contend that the Defendants had acted in bad faith and that they had personally benefited from their breaches of duty. The Plaintiff claimed that the Defendants have been unjustly enriched (directly or indirectly) by the Payments and therefore that the Plaintiff was entitled to restitution of those sums.

48. However, by its 2016 Amendments the Plaintiff expressly abandoned its claims that (i) the Third and Fourth Defendants have been unjustly enriched and for the restitution of that enrichment; and (ii) the Third and Fourth Defendants should be deemed to have benefited from payments made to parties related to them. On a fair reading of the Amended Statement of Claim, it is plain to the Court that the claim asserted by the Plaintiff against the Third and Fourth Defendants is a claim for damages and compensation for breach of various statutory, contractual, fiduciary and/or common-law duties which the Third and Fourth

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Defendants allegedly owed to the Plaintiff (see paragraph 114 and 117 of the Amended Statement of Claim).

49. Based on the current pleading, there is no plea that monies represented by the Payments belong to the Plaintiff (they belong to the Fund) or that they were made for the personal benefit of the Third and Fourth Defendants. In the original Statement of Claim such a claim appeared to be asserted by the Plaintiff but it was expressly deleted in the 2016 Amendments (see paragraphs 114.1, 114.2 and 114.5 of the Amended Statement of Claim).

50. On the basis of the current pleading there is no claim for restitution based upon unjust enrichment. Such a claim was indeed pleaded against the Third and Fourth Defendants in the original Writ and Statement of Claim. However, it was expressly deleted in the 2016 Amendments (see paragraph 2, 23.2, 119, 122(2) of the Amended Statement of Claim).

51. Mr. Banner QC points out that by paragraphs 4 and 121 of the Amended Statement of Claim the Plaintiff reserves the right, at its election, to claim an account of any profit made by the Defendants as a result of the Payments. However, as Mr. Chapman QC rightly contended, this bare assertion that the Plaintiff reserves its right to seek an account of profits does not transform a claim for compensation into a claim for disgorgement (coming within the terms of the proviso in Bye-Law 42.5).

52. The Court accepts 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

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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.

53. In the circumstances the Court is bound to conclude that the current case, as pleaded in the Amended Statement of Claim, does not come within the proviso in Bye-Law 42.5 dealing with a claim by the Company for the recovery from the Third and Fourth Defendants of "*any gain, personal profit or advantage*" to which they are not legally entitled.

54. Finally, Mr. Banner QC advised the Court that, without prejudice to his submissions set out above, 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.

55. The Court accepts Mr. Chapman QCs submission that the Plaintiffs' suggestion that it would be "*willing*" to amend its Statement of Claim in the form of the Re-Amended Statement of Claim is entirely unsatisfactory. The Court can only deal with the pleaded case as it exists since Mr. Chapman QC contends that the application to amend is bound to fail.

56. The Court is concerned that the proposed amendments seek to reintroduce allegations that the Plaintiff has previously deliberately abandoned. Paragraphs 114.2 and 121 reintroduce the argument that the Defendants benefited from payments to entities in which they held an ownership interest or controlled notwithstanding that this argument was abandoned (paragraph 114.1) by the Plaintiff in its Amended Statement of Claim served in January 2016. It is to be noted that this argument was abandoned in 2016 "*to reflect the further information and evidence*" after further investigations have been carried out following preparation of the original pleading (paragraphs 9 and 10 of Mr. Haston's Second Affirmation). No explanation has been offered as to why the Plaintiff considers it appropriate to reintroduce allegations of wrongdoing which were abandoned in 2016.

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57. The Court accepts Mr. Chapman QC's submission that the Plaintiff issued its Statement of Claim over five years ago (in July 2015), has known about this application since February 2017 and has been on notice of this hearing since July 2021. The Plaintiff has therefore had ample time to investigate its claim and produce adequate amendments (and issue an application to amend) ahead of the hearing. No explanation is offered for why the amendments are defective or for the delay in bringing them forward. Accordingly, the Court declines to consider this application to strike out proceedings on the basis that the relevant pleading is the draft unfiled Re-Amended Statement of Claim in respect of which the Plaintiff is "*willing*", if this Court thought appropriate, to seek leave to amend.

58. In the circumstances the Court finds that the indemnity contained in Bye-Law 42.1 and the waiver contained in Bye-Law 42.5 have the result that the Plaintiff has no cause of action against the Third and Fourth Defendants and/or provide the Third and Fourth Defendants with a complete defence to the claims. Accordingly, the Court orders that the amended Writ of Summons and Amended Statement of Claim be struck out.

59. The Court also orders that pursuant to the indemnity contained in Bye-Law 42.1 and 42.6 the Third and Fourth Defendants are entitled to their costs on an indemnity basis.

Dated this 13th day of October 2021.

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NARINDER K HARGUN

CHIEF JUSTICE

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