

ANTIGUA AND BARBUDA

THE EASTERN CARIBBEAN SUPREME COURT
IN THE HIGH COURT OF JUSTICE
(CIVIL)

CLAIM NO HCVANU2011/0478

BETWEEN:

STANFORD INTERNATIONAL BANK LIMITED (IN LIQUIDATION
(Acting by and through its joint Liquidators MARCUS A. WIDE
and HUGH DICKENSON)

Respondent/Applicant/Claimant

AND

[1] ROBERT ALLEN STANFORD

First Defendant

[2] ANDREA STOELKER

Second Defendant

[3] STANFORD DEVELOPMENT COMPANY
LIMITED

Applicant/Respondent/Third
Defendant

[4] MAIDEN ISLAND HOLDINGS LIMITED

[5] GILBERT'S RESORT DEVELOPMENT
HOLDINGS LIMITED

[6] STANFORD HOTEL PROPERTIES
LIMITED

Fourth, Fifth and Sixth Defendants

Appearances

Mr Hugh Marshall Jr and Ms Kema Benjamin of Marshall and Co for the
Applicant/Respondent/Third Defendant

Mr Malcolm Arthurs, Mr Craig Christopher and Ms Nicolette Doherty instructed by Martin
Kenny and Co for the Respondent/Applicant/Claimant

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2012: October 3; 2013: January 21
.....

DECISION

INTRODUCTORY

- [1] **LANNS, J [Ag]:** The Third named Defendant, Stanford Development Company (SDC) applies for an order varying or discharging an order granted by Mme Justice Jennifer Remy on 30th August 2011 restraining the Third to Sixth Defendants from disposing of their assets within the jurisdiction save as provided by certain stipulations contained in the Order. The Claimant Stanford International Bank (SIB) has responded to SDC's application by filing a cross application for various orders and declarations.
- [2] This decision is one of a series of decisions/rulings of other judges in this and related cases which have been judicially determined since the initial appointment of the original Liquidators in 2009.
- [3] The parties herein are involved in a number of other law suits which are affiliated with this matter, yet stand on their own. The outcome of one, may determine the outcome or continuation of the other. Special provisions may be required for proper management of all Stanford cases so as to avoid conflicting and overlapping litigation, duplication of work and inconsistent decisions.

RELEVANT BACKGROUND FACTS AND PROCEDURAL HISTORY

- [4] In so far as they are relevant, the facts, and procedural history are gleaned from the Affidavits of Ms Barbara Street, filed on 7th September 2012, and 19th September 2012, and the Affidavits of Ms Nicolette Doherty filed on 19th July 2012 and 19th September 2012, as well as from other filings in the matter.
- [5] SIB was incorporated in Antigua and Barbuda in 1990 and wound up by the High Court of Antigua and Barbuda in 2009. On 19th February 2009, Nigel Hamilton-Smith and Peter Wastell of the British accounting firm Vantis were appointed joint receivers of SIB. On 15th April 2009, by order of the Court, they were made Liquidators. On 12th May 2011, Michel J removed Hamilton-Smith and Wastell from their responsibilities, and appointed Marcus Wide and Hugh Dickson as Joint Liquidators in their place.
- [6] The First Defendant Robert Allan Stanford (RAS) was, at all material times the Chairman of the Board of SIB. He is currently serving a 110 year prison term in the United States of America for operating a multimillion – dollar fraudulent Ponzi scheme.
- [7] SDC is beneficially owned by RAS. It engages in property development and management. It is also in the business of providing security to a number of properties. These properties include property described in the Land Registry as Registration Section Cassada Gardens & New Winthropes, Block 42 1894 A Parcels 1148, 1175 and 1176.

- [8] The Second named Defendant (Andrea Stoelker), was at all material times a close personal friend of RAS. She previously acted on his behalf under a Power of Attorney which has since been revoked.
- [9] The Third to Sixth Defendants are companies registered in Antigua and Barbuda. RAS is represented as the sole beneficial owner of each of these Companies
- [10] On 28th July 2011, upon ex parte application by SIB, Mme Justice Jennifer Remy granted a freezing injunction in the nature of a Preservation Order against all the Defendants in respect of certain named property assets (the Freezing Order). The Freezing Order has since been discharged as against Andrea Stoelker, and discharged and replaced as against SDC.
- [11] On 12th August 2011, an Amended Claim Form accompanied by a Statement of Claim was filed. In the Statement of Claim, SIB alleges that SDC has received in excess of US\$5,632,800.00 directly or indirectly from SIB, and has been unjustly enriched at the expense of SIB in receipt of such sums. SIB contends that SDC holds all sums received from SIB and paid to it in breach of trust and /or breach of fiduciary duty, or the property currently represented thereby on trust for SIB. SIB claims among other things, compensation for loss of such sums, and or restitution by SDC to SIB in respect of the sums received; an accounting in respect of the sums received; alternatively, an accounting of the profits made by SDC from the use of SIB's assets.
- [12] On 30th August 2011, the matter came before Remy J for inter partes hearing on the merits, and on the parties consent, Justice Remy ordered that the freezing order granted on 28th July 2011, be discharged as against Andrea Stoker; continued until further order of the court, or trial of the action, as against RAS; and discharged and replaced as against SDC and the Fourth, Fifth and Sixth Defendants (the Consent Order).
- [13] By paragraph 2 of the Consent Order, SDC and the Fourth to Sixth Defendants were restrained from disposing of their assets within the jurisdiction "save as provided below". The paragraphs below contained certain stipulations and directions for adherence by both parties.
- [14] Paragraph 3 of the Consent Order permitted SDC to sell any of the real properties which appear in the Schedule A – D, and it sets out the conditions under which SDC may sell.
- [15] Paragraph 4 contain stipulations to SDC in respect of the proceeds of sale and any profits therefrom, as well as proceeds of any sale of chattels by SDC and any of the Fourth to Sixth Defendants.
- [16] Paragraph 5 entitles SDC and the Fourth to Sixth Defendants to apply funds placed in a Designated Account to the settlement of bona fide third party debt and in payment of ordinary business expenses to include settlement of reasonable legal fees and disbursements.

- [17] Paragraph 6 directs SDC and each of the Fourth to Sixth Respondents to prepare a list of the ordinary and business expenses; of any bona fide third party debts and or third party claims known to each of the Third to Sixth Respondents; and their outstanding legal costs.
- [18] Paragraph 7 contains directions for SIB in relation to the removal of restrictions that may be registered upon the lands.
- [19] Paragraph 8 gives each party liberty to apply to the court to vary or discharge the order, upon the provision of written notice to the other parties.
- [20] Paragraph 9 contains an undertaking by SIB not to interfere with sales notified to it, save by application to the court.
- [21] Paragraph 10 speaks to rights and remedies and cross undertaking as to damages and costs.
- [22] Paragraph 11 requests that SDC and the Fourth to Sixth Respondents compile and deliver to SIB an inventory of all chattels, plant or machinery owned by any of them, and it contains a timeline for so doing.
- [23] To the Consent Order was attached a penal notice warning of the consequences of disobeying the Order.
- [24] By letter dated 19th January 2012, SDC's legal representative Mr Hugh Marshall Jr, wrote to Ms Nicolette Doherty, attorney for the Joint Liquidators, expressing SDC's intention to enter into certain agreements pertaining to the sale and purchase of two parcels of land, and a house, and proposed lease of certain buildings. The Joint Liquidators became concerned as to the reasonableness of the valuations of the subject properties by SDC's valuer.
- [25] The Joint Liquidators responded by letter dated 17th February 2012, objecting to the Sales proposed on the basis that the subject properties were intended to be sold at undervalue. They also sought permission for a valuer to enter the property for the purpose of preparing a valuation report. Valuations reports were obtained from Mr Wayne Martin on behalf of SIB. There was a wide disparity in the valuations obtained by SDC and SIB. SIB continued to object on the basis of undervalue. The Joint Liquidators requested further evidence to assist them in determining the reasonableness or otherwise of the proposed sales prices. This was not forth coming. So the parties resorted to the court for directions.
- [26] On 18th June 2012, Justice Remy convened a hearing to give directions to the Joint Liquidators and SDC concerning the dispute which had arisen between the SIB Estate and SDC in respect of (a) the proposed sale of two parcels of land and one house all located in Registration Section Cassada Gardens & New Winthropes (the Cedar Valley Properties); and (b) the proposed lease of property numbered 15 in Schedule A of the Consent Order, which property is the former premises of the Antigua Sun Offices and Sun Building (the Sun Building).

[27] At the 18th June 2012 hearing, Remy J made an Order, which, among other things restrained SDC from selling, disposing, leasing, parting with possession or otherwise dealing with any interest or right in or over the properties in the letter dated 19th January 2012 and proposed lease terms until such time as SIB has indicated in writing that it no longer objects to the Proposed Sales and or Proposed Letting or until further order of the court.

[28] At paragraph 23 of her judgment, Remy J declared that the Joint Liquidators of SIB had a fiduciary duty to ensure that any sale or lease of SDC properties was done at a fair market price and not at an undervalue. In the words of the Learned Judge

“It could not be outside the contemplation of the parties that SIBL would want to ensure that the properties were being sold at fair market price and not at an under value. The Joint Liquidators would be failing in their fiduciary duty if they did not ensure this was so.”

[29] Subsequent to the 18th June 2012 order, a series of letters passed between counsel for the parties, (4th, 9th, 18th and 23rd July 2012) which, among other things (a) disputed the accuracy of SDC’s valuation report; (2) communicated objections to the terms of the lease of the Sun Building; and of the Cedar Valley properties; (3) requested details of marketing proposals, advertisements etc relating to proposed sales of the Cedar Valley Properties; (4) justifying the terms of the rental of the Sun Building; (5) explaining how marketing was done; (6) confirming that no advertisements were done and why none had been done; (7) listed outstanding issues for SDC to deal with; (8) suggested that the Liquidators apply to the court if they were not prepared to accept the sale of the Cedar Valley properties and the lease of the Sun Building.

[30] On 7th September 2012, SDC filed the present application to “vary or discharge” the 30th August 2011 Consent Order to exclude the properties listed in Schedule A items 1, 4 and 5 of the letter of 19th January 2012, so as to enable SDC to dispose of those properties in the ordinary course of business.

[31] On 19th September 2012, SIB filed a cross application objecting to SDC’s application and seeking the court’s direction on SDC’s failure to fully comply with the terms of the 18th June 2012 Order. These then are the applications now pending before me. Both applications were heard together.

SDC’s Application

[32] As previously stated, **SDC** seeks an order varying the Consent Order granted by Her Ladyship Mme Justice Jennifer Remy on 30th August 2011.

[33] Alternatively, SDC seeks an order discharging the said Consent Order as against SDC and its dealings with the properties identified in Schedule A of the injunction order as items 1, 4 and 5.

[34] SDC also seeks an order that SIB pay the costs of the application; and that all necessary directions be given.

Bases of SDC's Application

[35] The grounds of SDC's application are stated to be:

- (a) The Applicant is a party to an Order dated 30th August 2011;
- (b) Since on or about the 19th January 2012, the Applicant advised the Respondent of its intention to effect sales of properties, namely two vacant parcels of land and one dwelling house;
- (c) The agreements entered into by the applicant for the sale of the properties are in the ordinary course of its business;
- (d) The Applicant has provided full details of the intended sale but the Respondent objects to the sale as being under value;
- (e) The sales are made at a value the Applicant is best able to obtain given the Market, this Action brought by the Respondent and proceedings in the United States of America brought against R. Allen Stanford, the principal shareholder of the Applicant.
- (f) The injunction Order of 30th August 2011 is a prejudgment injunction intended only to prevent the Applicant from removing its assets from the jurisdiction so as to avoid the consequences of a judgment or to prevent the Applicant from dissipating or otherwise from disposing of its assets in the ordinary course of its business;
- (g) The Respondent's subsisting claim against the Applicant is for an amount of US\$5,632,800;
- (h) The Applicant has assets in excess of the US\$5,632,800;
- (i) The injunction operates to stifle the business of the Applicant.

[36] Ms Barbara Street swore to an Affidavit in support of the Application, and Ms Nicolette Doherty swore to an affidavit in opposition to the application.

SIB's Application

[37] The second application is that of SIB (acting through its Joint Liquidators **MARCUS A. WIDE and HUGH DICKENSON**). I propose to refer to the Claimant interchangeably as "SIB" and "the Joint Liquidators". SIB's application was filed on the 19th September 2012 as its response to SDC's application. By its application, SIB seeks the following orders:

1. That SDC provide SIB with complete and updated inventory of all chattels as set out under paragraph 11 of the Order issued by Remy J on 30th August 2011, within 5 days of service of this Order;
2. That the Affidavit of Barbara Street in support of SDC's 7th September 2012 application be withdrawn as she is not a properly appointed director of SDC pursuant to article 80 of SDC's Articles of Association which requires that a director of the company must also be a shareholder;
3. That SDC has no legal capacity to conduct any business including but not limited to the sale of the properties listed in Schedule A as items 1, 4 and 5, pursuant to the 3rd September 2012 decision of Michel J in **Ricki Comacho Registrar of Companies et al v Stanford Development Company et al** (Claim No ANUHCV2010/0402).
4. That SDC provide an affidavit sworn by a properly appointed director scheduling all assets that should have been on the original chattel inventory but which, prior to service of the updated inventory required by paragraph 1 above, have been sold by SDC together with the prices achieved by such sales, and the identity of the respective purchasers, its officers, agents or directors or any affiliated parties;
5. That the lease entered into by SDC with Observer Group dated 24th February 2012 is void and, consequently, the Observer Group are on a monthly tenancy that can be determined with 30 day's notice;
6. That the lease purportedly entered into by SDC with Observer Group dated 24th February 2012 be renegotiated on commercial terms for the benefit of SDC in line with the valuation of Mr Martin dated 26th June 2012 at such time as SDC shall have the legal capacity to do so.
7. Alternatively, if SDC cannot renegotiate with the Observer Group reasonable terms, SDC seek that the Observer Group vacate the premises within 30 days of service of this Order;
8. That the draft lease proposed by SDC with Bau Panel Systems Ltd for use of the Stanford Trust Building (STC Building) shall not be executed as (a) SDC does not have the legal capacity to enter into such agreement and (b) the proposed rent in the draft is at a significant undervalue to the market value of the STC Building;

9. If the parties cannot agree a suitable sale price for the Cedar Valley properties once the Board of Directors of SDC is properly constituted, the parties may apply to Court to determine a market value price for the Cedar Valley properties;
10. SDC's officers, agents and directors (if any are properly appointed) disclose details of all payments made in connection with the lease agreement and sale of the Cedar Valley properties either to SDC, its officers, agents or directors or any connected party, such disclosure to be provided by way of affidavit as to the accuracy of the information.

Bases of SIB's Application

[38] SIB put forward 18 grounds of application spanning 5 pages. They are summarised thus

1. The former Joint Liquidators, Messrs Hamilton-Smith and Wastell (the former Joint Liquidators) were appointed as Receiver Managers and subsequently Joint Liquidators, of SIB on or about 26th February 2009. The former Joint Liquidators were removed in a judgment dated 8th June 2010 issued by the Honorable Thomas J;
2. On 12th May 2011, the current Joint Liquidators (Marcus Wide and Hugh Dickson) were appointed to take over conduct of the liquidation of SIB by Honourable Michel J.
3. On 30th August 2011, Remy J of the Eastern Caribbean Supreme Court (Antigua and Barbuda) issued an Order by consent stating at paragraph 2 that:

"The Third to Sixth Respondents are hereby restrained and enjoined by themselves, their employees, servants and agents or howsoever from disposing of their assets within the jurisdiction save as provided below. ..."

4. Subsequently, and by a judgment dated 18th June 2012, Remy J at paragraph ii (b) and (d) ordered that:

"The Third Defendant shall, within 7 days allow the Claimant and its valuer to inspect the property described as Registration Section Barnes Hill & Coolidge, Block 41 2294 A, Parcel 96, being the building known as the Antigua Sun Offices and Printery and adjoining area. The Claimant shall within 7 days of the said inspection taking place indicate in writing to the Third Defendant whether it objects to the proposed letting of the property (the Proposed Letting). The Claimant shall have a further 7 days to

apply to the court should it consider that proposed letting is being made on uncommercial terms.”

“The Third Defendant is restrained from selling, disposing, leasing, parting with possession or otherwise dealing with any interest in or over the properties described in the letter dated 19 January 2012 and proposed lease until:

- (i) Such time as the Claimant has indicated in writing that it no longer objects to the proposed Sales and / or the Proposed Letting pursuant to the terms of this Order; or
- (ii) Further Order of the Court.”

Lease of Antigua Sun Building

5. SDC proposed lease of the Sun Building came to the attention of the SIB by letter dated 19th January 2012;
6. The lease is void. The Observer Group only has a month to month tenancy determinable on 30 day’s notice as it was entered into in breach of Court Order dated 30th August 2011. Barbara Street is not a director of SDC in accordance with article 80 of SDC’s Articles of Association and has no authority to conduct business on SDC’s behalf;
7. The Observer Group would have been, or ought to have been aware of the Order dated 30th August 2011 at the time it entered into the lease, or would have been aware that Barbara Street was not a director of SDC, and that SDC lacked capacity to enter into such a lease.
8. The lease has been entered into on bad commercial terms in that
 - a. The agreed rent of US120,000.00 is below what SIB considers to be market value for a property of this size and value;
 - b. The obligation on SDC to pay insurance premium and taxes relating to the property appears strange in light of the discounted rent and lack of use of the property SDC is entitled to;
 - c. The right of first refusal for the sale of the property for the benefit of the Observer Group appears to give SDC no advantage if it were to choose to sell the property on the open market. Rather, it will prevent optimum marketing of the property;
 - d. The agreed rent has been waived for the first 12 months of the lease term and a reduced rent fixed.

Lease of Stanford Trust Building

9. SDC's proposed lease of the STC Building to Bau Panel System Ltd came to the attention of SIB by letter dated 10th August 2012. Counsel for SIB responded on 13th August, 2012 indicating that it intended to ensure that the lease is made at fair value;
10. By letter dated 24th August 2012, Counsel for SIB wrote to counsel for SDC indicating (a) that the proposed monthly rental of the STC Building to Bau Panel System at a monthly rent of US\$7,500.00 was significantly below assessed market value of US\$17,222, 22 per month; and (b) that this fact was troubling in light of the fact that in the proposed lease Bau Panel System Ltd retained a right of first refusal if the property was subsequently sold;

Cedar Valley Property Sales

11. The proposed sale of the Cedar Valley properties are at an under value. SIB has provided expert evidence to support this view and SDC has failed to provide any information as to how the valuation of Cedar Valley properties were reached, despite several requests for it to do so;
12. SIB believes that the properties are being sold at a significant undervalue and will effectively curtail the value. In a judgment handed down on 18th June 2012, in **Stanford International Bank Limited v Robert Allan Stanford et al** Justice Remy said at paragraph 23 that the Joint Liquidators have a fiduciary responsibility to ensure that the property of SDC is sold at fair market value and not at an undervalue;
13. By letter dated 17th February 2012, SIB indicated to SDC that it believes that the properties were being sold at undervalue by SDC. By a further letter dated 4th July 2012 SIB requested that SDC provide further details of all marketing proposals, plans, materials and advertisements relating to the proposed sales. SDC replied on 9th July 2012, but it failed to provide the information requested;
14. SDC does not have the number of directors required by article 78 of its Articles of Association; therefore the company does not have the legal capacity to enter into these real estate transactions. On 3rd September 2012 Michel J handed down a Ruling in **Rickie Camacho et al v Stanford Development company et al, Claim No ANUHCV2010/0402**. At page 13 of the Ruling, the Learned Judge said that without the minimum number of directors required by SDC's Articles, the Board of Directors has no legal capacity to conduct business of the company.
15. Barbara Street is not a shareholder of SDC; so she cannot act validly on SDC's behalf to execute the lease with Observer Group nor to execute the

sale agreement for Cedar Valley properties; nor the proposed lease for the STC Building.

16. It appears that Mr Hugh Marshall, Jr, does not have the requisite authority from a validly constituted Board to take instructions from SDC.

[39] SIB's application is supported by the Third and Fourth Affidavits of Ms Nicolette Doherty sworn to and filed on 19th July 2012 and 19th September 2012 respectively.

Issues

1. Should the 30th August 2011 Consent Order be varied to exclude the properties listed in Schedule A as items 1, 4 and 5 to allow SDC to dispose of those properties in the ordinary course of business?
2. If not, should it be discharged in its entirety in relation to SDC?

Issue 1

Positions of the parties

[40] I am of the view that it would be more prudent to deal first with the application to discharge the order. If the Order is discharged then there will be no need to vary. If it is not discharged, then the court may consider varying it. However, variation is the substantive order asked for, and discharge being the alternative order applied for, although the submissions tended to support the application for discharge. I will deal with the application as applied for in the application.

[41] The gist of the position taken by SDC is that the injunction against it should be varied or discharged because:

- (d) The operation of the injunction is rendering legitimate hardship upon SDC who is in the business of selling properties and now is unable to do so;
- (e) The actions of SIB are causing an unmarketability of SDC's assets;
- (f) SIB's interests are being placed in priority to those of SDC and other legitimate creditors. SIB is not entitled to be placed in priority to other legitimate creditors – (**Jamaica Citizens Bank Limited v Dalton YAP**¹ relied on).

[42] SIB takes the position that the court ought not vary or discharge the injunction granted on 30th August 2011 because

¹ (1994), 31JLR 42, letters I; A - D

- (a) SDC has breached the 18th June 2012 Order of Remy J in that the precondition has not been met, that is, neither has there been any indication in writing from SIB that it no longer objects nor has there been any further order.
- (b) The Joint Liquidators are entitled to request that SDC demonstrate, with evidence that the proposed sale of the Cedar Valley properties and the lease of the Sun Building are made in the best interest of preserving assets of SDC.
- (c) In a letter dated 4th July 2012, counsel for SIB requested that SDC provide further details of all marketing proposals, plans, materials and advertisements relating to the proposed sales of the Cedar Valley properties. The letter also made it clear that SIB objected to the lease of the Sun Building on the current terms;
- (d) SDC failed to provide any evidence justifying the lease of the Sun Building on the proposed terms. In flagrant breach of the 18th June 2012 and 30th August 2011 Orders of Remy J, SDC went ahead and leased the Sun Building to the Observer Group;

Discussion and decision in relation to issue 1

- [43] It is clear, and there is no dispute that paragraph 8 of the 30th August 2011 Consent Order makes provision for each of the parties to apply to vary or discharge the Order upon the provision of written notice to the other parties. SDC has invoked that paragraph one year later, and after various subsequent inter partes hearings before the judge who granted the order.
- [44] A consent order has been described as a contract, although it has been said that it is more accurate to describe it as evidence of a contract. A consent order sets out in the form of an order the agreement which the consenting parties have made²
- [45] Since a consent order is a contract, or sets out the agreement between the consenting parties, the rules for variation of a contract apply. A contract, and thus a consent order, can generally only be varied on grounds of common mistake, misrepresentation or fraud³.
- [46] SDC does not allege any mistake, misrepresentation or fraud when the consent order was made. It relies on hardship and oppression, and on unfair conduct on the part of SIB in objecting to the sale and lease of properties based on undervalue.
- [47] The hardship which SDC claims to be suffering and the alleged oppressive and unfair conduct on the part of SIB are set out in Barbara Street's Third Affidavit filed on 7th

² 155569 Can Ltd v 248524 Alta, [1992], A.J. No 135 (Q.B.)

³ Simonelli v Ayrton Developments Inc., (2010) ABQB 565 (CanLII); Purcell v FC Trigell Ltd, [1970] 3 All ER 671

September 2012, and in her Fifth Affidavit filed on 3rd October 2012 at paragraphs 8 and 9 in particular.

[48] **Third Affidavit of Barbara Street:** The relevant portions of Ms Street's Third Affidavit are contained in paragraphs 8 to 13:

- "8. The Applicant in or about January 2012 entered into two agreements for the sale of parcels 1148 and 1175 and 1176. These agreements were made in the ordinary course of the Applicant's business. The two vacant lots were being sold at \$213,785.00 and a dwelling house is being sold at \$550,000.00. Notice of these sales was fully given to the Respondent by letter dated 19th January 2012. In previous proceedings both the Applicant and the Respondent sought from the Court directions as to whether or not these transactions could continue. The Court gave a ruling on the 18th day of June 2012."
- "9. Notwithstanding the position taken by the Applicant, it fully complied with the directions of the Court but the Respondent continues to object to the sales on the basis of value... At no time has the Respondent introduced the Applicant to any prospective purchaser let alone any prospective purchaser willing to pay a price in excess of the prices the properties agreed to be sold at."
- "10. The Respondent has requested the marketing plans. The Applicant via its attorney has sought from the Respondent its own suggested plan and the necessary financial resources to give effect to it in order to reach a compromise, but the Respondent has not in any manner responded on this issue"
- "11. The effect of this is that the Applicant cannot carry on its ordinary business of sales. These properties would be the third and fourth sale since the injunction. The process of effecting a sale has been almost one year and still no success. The position of the Respondent is simply understood as not consenting to any sale at a value it considers is not market value. ...
- "12. At no time has the Respondent accused the applicant of dissipating the assets so as to avoid judgment. These sales are necessary to meet the mounting legal costs, and operating costs of the Applicant. The Applicant has recurring monthly costs in excess of \$150,000.00 in terms of staff operations."
- "13. Mr Fisher, the intended purchaser of the dwelling house parcel 1148 has communicated that the period for accepting financing is about to expire ..."

[49] Ms Street exhibited a copy of Mr Fisher's correspondence advising of the impending expiration of acceptance of financing.

[50] **Fifth Affidavit of Barbara Street:** The relevant portions of Ms Street's Fifth Affidavit state

"8. "I humbly wish to draw the court's attention to growing financial difficulties resulting from the action of the ... Claimant. ... Many persons now question whether I have authority to conduct business on behalf of the company. Rental income has greatly fallen with the non renewal of a Hangar lease. Lessees of the Athletic Club facilities have raised the very same issue. .. "

"9. The Company has the challenge to maintain and provide security to the several properties it owns. Its recurrent income is being reduced forcing it to make sales of assets. The current sales before the court would be the second sales since making of this order in August 2011. Rental income however low allows the Company to retain ownership of its assets and continue its functions. This is not possible now as the Company has been brought to a position where the recurrent expenditure on wages is \$130,000.00 monthly for 60 staff. Its bank balance is now \$15,000.000...

"10. If the Company is unable to obtain income immediately, it will be unable to pay its staff and meet its recurrent expenditure."

[51] Exhibit "BS 5" includes copies of SDC's payrolls and bank statements for the period August to September 2012.

[52] Ms Doherty's affidavit in response narrated among other things, the events leading up to the present applications. She gave details of the correspondence passed between counsel for the respective parties concerning the proposed sale of 2 parcels of land and a house, and proposed lease terms in relation to property number 15 in Schedule A of the Consent order. She referred to the valuations carried out by Mr Wayne Martin and she outlined a number of outstanding information that SDC is required to provide to enable the Claimant to make an informed decision to continue or discontinue its objection to the proposed transactions. The Affidavit also admitted the Joint Liquidators' continued objection to the sale of the Cedar Valley Properties for less than the fair market price, and to the lease of the Sun Building Property on terms that are not in the best interest of SDC.

[53] Ms Doherty's affidavit also referred to the 18th June 2012 Order of Remy J restraining SDC from selling, disposing, leasing, parting with possession or otherwise dealing with any interest or right over properties described in the letter dated 19th January 2012 and proposed lease terms until SIB has indicated in writing that it no longer objects to the sales and letting; or until further order of the court.

- [54] Ms Doherty's affidavit expressed concern as to how SDC will deal with the 18th June 2012 Order of Remy J especially since SDC has, in breach of that order and, notwithstanding SIB's objections, leased the Sun Building.
- [55] Ms Doherty has also alleged that SDC has not fully complied with the 30th August 2011 Consent Order in that it has failed to provide a complete Chattel List and /or Schedule. SDC has not denied this allegation.
- [56] I do not take Ms Doherty's affidavit as denying that SDC has been experiencing hardship as a result of SIB's objections to SDC's proposed transactions. Nor do I view it as admitting that SIB's conduct has been unfair or oppressive. What I understand her to be saying is that the Joint Liquidators are not seeking to inhibit or fetter legitimate SDC business, but they have a fiduciary duty to ensure that the subject properties are being sold at a fair market value and not at undervalue. They also have a duty to ensure that the Sun Building and the STC Buildings are being leased on terms that are in the best interest of SDC. They would wish for SDC to cooperate by providing the information requested by SIB that would enable them to make an informed and sound decision as to whether or not they should continue objecting to the proposed transactions and the transactions which SDC has already entered, despite their objections. As far as they are concerned, they are not satisfied that the proposed transactions are in the best interest of SDC, hence they are unable to express in writing that they no longer object to the proposed sales and or proposed lettings.
- [57] Additionally, I understand Ms Doherty's Affidavit to be saying that SIB is concerned as to whether it is permissible for SDC to ask the Court to vary or discharge the 30th August 2011 Consent Order when it has not fully complied with that Order. Further, I understand Ms Doherty's Affidavit to be saying that SIB is concerned as to whether it is permissible for SDC to ask the Court to vary the 30th August 2011 Consent Order when it has breached the 18th June 2012 Order which it has not appealed. These, to my mind are legitimate concerns.
- [58] It is apparent that the 18th June 2011 Order stemmed from disputes over the interpretation and operation of the Consent Order of 30th August 2011. In that regard, I note, that the meaning of paragraphs 3, 7, 9 and 12 of the Consent Order (which pertain to the properties listed in Schedule A as items 1, 4 and 5) were in issue before Remy J who, in the order dated 18th June 2012, rendered a ruling on, among other things, the interpretation of those paragraphs.
- [59] SDC's application, (although it purports to put on a different complexion) seems to be seeking a rehearing of issues that were already canvassed before the Court on 18th June 2012. The common denominator was the same lands/buildings which are the subject of these present applications. Issues as to disposition of properties 1, 4 and 5 of Schedule A, objections, and the provision of information were canvassed. Although it is not expressly stated in the 18th June 2012 Order, that Order in my view effectively varies, if not replaces or supersedes paragraph 3 of the Consent Order in relation to SDC. If that is so, then the question which comes to the fore is whether SDC is estopped from re-litigating the very

issues relating to the proposed sales of the same lands and letting of the same buildings which were the subject matter of the dispute canvassed before a court of competent jurisdiction, and may be characterized as *res judicata* or an abuse of the court's process. I think the answer should be yes.

- [60] When a court of competent jurisdiction has decided an issue between parties, the same issue cannot be re-litigated between them in the same court. The decision stands until it is reversed on appeal. (per Rawlins, J.A [Ag] in **Bertha Compton qua Administratrix of the Estate of Macrina Blaze v Dr Christiana Nathaniel et al** St Lucia Civil Appeal No 12 of 2004.
- [61] As I have said, the 18th June 2012 Order of Remy J arises from concerns over the interpretation and operation of the 30th August 2011 Consent Order. The Order of 18th June 2012, prohibited SDC from selling, disposing, leasing, parting with possession or otherwise dealing with any interest or right in or over the properties described in letter dated 19th January 2012 and proposed terms until such time as the Claimant has indicated in writing that it no longer objects to the Proposed Sales and/or the Proposed letting pursuant to the terms of this order; or until further order of the court." SDC has not denied that it had, in breach of that Order, gone ahead and leased the Sun Building to the Observer Group. It is trite law that unless and until set aside the Court's Orders are to be obeyed.⁴ So no matter how wrong or undesirable an order may seem to be, unless it is set aside, it stands and it must be obeyed.

Disposal of issue no 1

- [62] I have concluded that SDC's application is tantamount to an appeal through the back door against the 18th June 2012 Order of Remy J. This court cannot act as an appellate court.
- [63] That being said, I do not find the facts of SDC's application establish any ground on which I could vary the Consent Order made 30th August 2011. Significantly, SDC has failed to do something which it was obliged to do under the Consent Order of 30th August 2011. Furthermore, it has done something which the order of 18th June 2012 prohibits it from doing unless the stipulated conditions are satisfied.
- [64] Perusal of the 30th August 2011 Consent Order suggests that SDC's right or entitlement to sell, dispose, lease part with possession or to otherwise deal with any interest or right over the properties described in the letter dated 19th January 2012, and the proposed lease terms, was conditional, since it depended upon the performance of certain conditions precedent on the part of both parties. Ultimately, it depended upon the written consent of SIB, or a further order of the court. Obviously, SIB must be satisfied that the subject properties are not being sold at undervalues; and that the letting of SDC's buildings are negotiated on terms that are proper and reasonable. SIB is not satisfied. As a result, it has objected, and continues to object, and it has given plausible reasons for its continued objection. Moreover, there has been no further order of the court. Therefore, neither of the two conditions precedent has been met. Consequently, SDC continues to be restrained

⁴ *Robinson v Isaacs* 43 WIR, 123; *Hadkinson v Hadkinson* [1952], C.A. 285 at 288.

from selling, disposing leasing parting with possession or otherwise dealing with any interest or right over properties described in the letter dated 19th January 2012, and other wise under the proposed lease.

- [65] What is more, is that the Consent Order which I am being asked to vary or discharge is an effectively an injunctive Order. Injunctions are equitable remedies. "He who comes to equity must do equity." And "he who comes to equity must come with clean hands." These two maxims are applicable to SDC. The court is of the view that if it were to vary the injunction order in the manner suggested by SDC, or at all, it would be sanctioning the failure of SDC to honour its contractual obligations contained in the 30th August 2011 Consent Order. Ultimately, the court will also thereby be sanctioning SDC's breach of the injunction of 18th June 2012. This, the Court cannot do. The court cannot countenance contumelious conduct which in my view amounts to an abuse of the process of the court on this application. In the premises, I am unable to accede to SDC's application to vary the Consent Order of Remy J dated 30th August 2011 in the manner suggested by SDC. That limb of SDC's application is accordingly dismissed.

Should the 30th August 2011 Order be discharged

- [66] Perhaps the application to discharge the order can be disposed of for the same reasons given for the refusal of the application to vary. However, in case I am wrong, I will go on to look at the submissions relating to alternative application which is to discharge the Consent Order.
- [67] In summary, SDC's position is that the injunction order of 30th August should be discharged in its entirety because
- (a) It has resulted in hardship as SDC is no longer able to carry on its ordinary business of sales of properties;
 - (b) A freezing order may only continue where there is an existing and a continuing cause of action within the jurisdiction.
 - (c) The Claims are premised on a finding of wrong doing against RAS
 - (d) No claim currently exists against or is being prosecuted against RAS; The court has declared the purported service on RAS to be of no effect and has set aside such service. The Claim Form has expired as against RAS and there is no evidence of its renewal.
 - (e) The Claim against SDC is pleaded at most for US\$5,632,800 and for an Accounting;
 - (f) The burden is on SIB to show that there is a subsisting cause of action and it has not done so.
 - (g) SIB has not accused SDC of dissipating its assets so as to frustrate any

judgment that SIB may obtain.

- (h) There is no real risk that a judgment will go unsatisfied.
- (i) There is no suggestion that SDC does not have assets sufficient to meet a judgment of US\$5,632,800.
- (j) The injunction is wider than US\$5,632.800.

[68] The gist of SIB's counter-argument is that:

- (a) The Claim which caused the Court to grant injunctive relief on 28th July 2011; and later on 30th August 2011 still obtains and in this connection, there remain serious issues between SIB and the Defendants arising out of the claim which caused the court to grant injunctive relief and which still obtain.
- (b) In light of the flagrant breach of the 18th June 2012 Order, the injunction should not be discharged.

Discussion

[69] A party who is seeking to keep an interlocutory injunction in place at an inter partes hearing must satisfy the court that there is a serious issue to be tried.⁵

Is there a serious issue to be tried?

[70] The reliefs sought in the prayer for relief suggests that SIB's claim against SDC is founded on allegations of unjust enrichment. SIB's Claim has not sought injunctive relief. Indeed, SDC claim seeks as against SDC

- i. A declaration that all sums and/or assets received from the Claimant and /or paid in breach of trust and or breach of fiduciary duty, or the property represented thereby, are held in trust for the Claimant;
- ii. A declaration that all such sums and or assets are to be returned to the Claimant and or;
- iii. A declaration that the Claimant is entitled to restitution in respect of such sums and or;
- iv. An order that the Third to Sixth Defendants and each of them account to the Claimant for these sums and or assets; and or compensate the

⁵ American Cyanamid Co v Ethicon Ltd [1975] A.C. 396

Claimant for the loss of such sums and or assets; and or make restitution to the Claimant in respect of such sums and or assets; and or

- v. An account of any and all profits made by the Third to Sixth Defendants and each of them from the use of such funds and or assets;
- vi. All necessary accounts, directions or enquiries, such further or other relief as may be necessary or desirable and costs.

[71] Before the court, Mr Arthurs agreed that there is no active claim against RAS. However, he does not agree that that fact would kill the Claimant's claim against RAS. He pointed to the extension of the life of the Claim by this Court immediately before the commencement of hearing of the present applications, on an application without notice to serve the Claim Form and Statement of Claim outside the jurisdiction on RAS.

[72] As to Mr Marshall's submission that the claim is limited to US\$5,632,800, and that the Claimant is bound by that pleading, Mr Arthurs pointed to paragraph 29 of the Statement of Claim, submitting that that pleading does not limit the Claimant to US\$5,632,800.00. I am entirely in agreement with that submission because of the language of the pleading which reads "SIB believes that the Third Defendant (SDCL) has received in excess of US\$5,632,800 directly or indirectly from SIB." (Emphasis mine).

[73] Additionally, Mr Arthurs pointed to the reliefs sought and submitted that it is not fair to say that the claim is limited to US\$5,632,800. Relying on the contents of paragraph 17 of the affidavit of Mark MacDonald filed on 27th June 2012, Mr Arthurs asserted that it was investor funds that were used to finance SDC, and other affiliate companies, and that the sums allegedly received by SDC far exceed the amount of US\$5,632,800. Mr Marshall offered no reply to these assertions.

Disposal of Issue 2

[74] I have examined the reliefs sought in the Claim Form and Statement of Claim filed by the Claimant on 12th August 2011. I have read the affidavit filed by SDC in support of its application and the affidavits in opposition to that application. I have also read the affidavit filed by SIB in support of its application and the affidavit filed by SDC in answer to that affidavit. I have also considered the written and oral submissions of counsel for SDC and SIB for and against the discharge of the injunction order of 30th August 2011.

[75] In the exercise of my discretion, I am satisfied that SIB has established that there is a serious question of unjust enrichment to be tried and that SIB has a realistic prospect of succeeding on its claim for the various declaratory orders and for restitution and or compensation and an accounting at trial. I therefore hold that the 30th August 2011 injunction order should not be discharged for the following reasons:

- (i) SIB has reasonable grounds for bringing the claim against SDC; since the pleadings seem to have been prepared from valuable information obtained

from reliable sources as evidenced by exhibits produced.

- (ii) The court is satisfied that (a) the Claimant has established that the Amended Claim Form and Statement of Claim filed herein on 12th August 2012 raise serious questions of unjust enrichment by SDC to be tried. In particular, it has shown that it has realistic prospects of succeeding on the claim at trial; (b) that it has not been suggested that material facts which were, or ought to have been within the knowledge of the Claimant were not disclosed to the court on 28th July 2011 when the ex parte injunction was granted, nor on 30th August 2011 when the inter partes injunction was granted against SDC and the Fourth to Sixth Defendants on the consent of the parties.
- (iii) The evidential materials in the form of certificates of deposits and the like, and documentary evidence that trace the flow of funds from SIB into other Stanford entities including SDC establish that there are reasonable prospects of success.

- [76] Having said that, I am mindful of the fact that going forward will require a number of steps on the part of both parties, not the least of which is effecting of proper service of the Claim Form and Statement of Claim on RAS to facilitate a speedy trial; and in the short term it requires the provision of the information requested by SIB to avert the alleged hardship being experienced by SDC. SDC would need to cooperate, for its failure to do so would mean that it is contributing to the hardship which it claims to be experiencing. At the same time, SIB would not want to appear to be abusing its right to object to proposed sales and lettings, especially in a situation where the market is depressed. There must be some balancing exercise - some degree of compromise. Both parties should consider reviewing their respective positions in the interest of all stakeholders/investors/victims. In the absence of compromise, they should consider making a joint application to the court for an order ascribing a value to the subject properties.
- [77] If the order is not continued, there will be nothing to stop SDC and the Fourth to Sixth Defendants from dealing with their assets in a manner that is prejudicial or adverse to the best interests of the investors/victims. It would mean encouraging conduct that would likely amount to conduct that is oppressive, or conduct that unfairly prejudices or unfairly disregards the rights of SIB and investors and victims of the Ponzi Scheme.
- [78] Justice to SIB and investors and victims of the Ponzi scheme, requires the Liquidators to be vigilant. If they are not vigilant, this too would amount to conduct that is oppressive and which unfairly prejudices and unfairly disregards the rights of the creditors of SIB. Indeed, if they are not vigilant, their lack of vigilance would likely amount to a breach of their fiduciary duty as expressly declared by Remy J.
- [79] Ultimately, justice for SIB requires the continuation of the Consent Order of 30th August 2011, as well as the 18th June 2012 Order. Justice for SDC whose assets have been frozen, requires the ability to dispose of its properties in Schedule A so that it can continue to pay for legitimate ongoing ordinary business expenses including its legal expenses.

The court has very little jurisdiction to discharge the order unless SDC provides SIB with the requested information and until the Consent Order and the 18th June Order have been complied with. On the balance of convenience, I find that SIB will suffer greater harm if the order were discharged.

- [80] I note that there has been little progress in moving the action forward, but that fact is not sufficient reason to discharge the Consent Order. In all the circumstances, I find that there is no or no sufficient cause for discharging the 30th August 2011 Order.

Other issues

- [81] The Applications before the court have raised other matters on which the court has been asked to rule.

(a) Whether Barbara Street is a Director of SDC

- [82] The record shows that Ms Street has been holding herself out as a director of SDC. Indeed, paragraph 1 of the affidavits sworn to by Ms Street in support of SDC's application and in opposition to SIB's cross application, commences with the words "I am a director of the Applicant Corporation" In fact, apart from the affidavits sworn to by Ms Street, nowhere is it recorded that Ms Street is a director of SDC. Interestingly and instructively, she is not recorded as a director at the Companies Registry.

- [83] To qualify as a director of SDC, Ms Street is required to hold shares or stock of the nominal value of at least One Hundred Dollars. This is pursuant to Article 80 of the Articles of Association of SDC. It is common ground that Ms Street holds no shares or stock in SDC. It is also common ground that as a consequence of not being the holder of any shares in SDC, Ms Street does not meet the required qualification. So, prima facie, it appears that Ms Street's purported directorship is in serious doubt and by extension the status of the business transactions which she has negotiated on behalf of SDC. Both parties made submissions on the issue.

Mr Arthurs' submissions

- [84] Learned counsel, Mr Arthurs argued that Ms Street is not a director of SDC. He pointed to article 80 of the Articles of Association and submitted that his interpretation of that article is that there is one qualification to be a director and that is to hold one hundred worth of shares in the company. Without that qualification, counsel submits, the directorship of Ms Street is not defective; it is void.

- [85] To support that submission, Mr Arthurs placed reliance on the case of **Morris v Kanssen and Others**⁶ wherein the House of Lords looked at the actions of two directors, one who was not validly appointed and the other whose appointment lapsed. In **Morris**, the House

⁶ [1946] 1 All ER 586

of Lord held that Section 143 of the 1929 Act and Table A, art 88 (which is equivalent to section 68 of the Antigua Act) did not validate the transactions of 30th March 1942 (viz the allotment of shares to M and his appointment as a director) because on the facts of the case, neither C nor S were directors at the time; C's appointment had terminated at the end of 1941, and S had never been appointed. Section 143 and Table A, article 88, applied only to acts done by persons acting as directors whose appointment or qualification was afterwards found to be defective. They did not cover a case where there had been a total absence of appointment or a fraudulent usurpation of authority.

- [86] Mr Arthurs makes the further submission that Ms Street's purported appointment has never been accepted by the Registrar of Companies as is evidenced by the Affidavit of the Registrar Rickie Camacho filed 22nd June 2010. So far as Mr Arthurs was concerned, Ms Street did not have defective qualification; she had no qualification at all. For this submission, Mr Arthurs placed heavy reliance on the case of **Morris**. He quoted Lord Simmons in **Morris'** case, at page 6 paragraph 4 as saying:

"There is ... a vital distinction between (a) an appointment in which there is a defect, or in other words a defective appointment, and (b) no appointment at all. In the first case, it is implied that some act is done which purports to be an appointment but is by reason of some defect, inadequate for the purpose: in the second case, there is not a defect; there is no act at all. The section does not say that the acts of a person acting as a director shall be valid notwithstanding that it is afterwards discovered that he was not appointed a director. Even if it did, it might well be contended that at least a purported appointment was postulated. But it did not do so, and it would, I think it would be doing violence to plain language to construe the section as covering a case in which there has been no genuine attempt to appoint at all. These observations apply equally where the term of a director has expired, but he nevertheless continues to act as a director, and where the office has been from the outset usurped without the colour of authority. ..."

- [87] Mr Arthurs next drew the court's attention to the decision of Michel J delivered on 3rd September 2012 in the case of **Rickie Camacho, Registrar of Companies and the Attorney General v Stanford Development Company Ltd; Stanford Bank Holdings Limited; Bank of Antigua Limited; Gilberts Resort Holdings Limited; and Maiden Islands Holdings Limited**⁷ In that case, the Registrar of Companies sought and obtained directions of the court pursuant to section 245 of the Companies Act, concerning several documents presented for filing or registration. Mr Arthurs referred to the following directions given at paragraph [28]. At paragraph [28], the Court directed, among other things that

"As to the defendant companies known to the Registrar to be the owner of land, the Registrar is at liberty to refuse to accept (a) any documents purporting to appoint or giving notice of appointment of Andrea Stoelker as a director; and (b)

⁷ Claim No ANUHCV2010/0402

any Power of Attorney purporting to give her control of such company so long as she remains an unlicensed non-citizen for the purposes of the Non Citizens Act"⁸

"As regards a shareholders resolution reducing the number of directors below the minimum: (a) such a shareholders resolution removing a director (s) is valid notwithstanding that it thereby reduces the total number of Directors below the minimum required in the Articles of the Company;

"However,

(b) Thereupon, the Board of Directors, without the minimum number of directors required by the Articles, is unable to be constituted as a Board and has no legal capacity to conduct the business of the company..."⁹

[88] Based on the above directions, Mr Arthurs submitted that both Ms Street and Mr Marshall have been, and are acting without proper instructions of SDC which at the moment cannot give instructions.

[89] Mr Arthurs concluded his submissions on this issue by stressing that when Ms Street holds herself out as a director of SDC, she exposes herself in a personal capacity to millions of Dollars of liability.

Mr Marshall's submissions.

[90] Learned counsel, Mr Marshall's position is that directors are created by resolution of shareholders. Counsel conceded that Ms Street does not have the share qualification to be appointed a director, yet he asserts that she was validly appointed. He submitted that Ms Street, having been validly appointed, is protected by section 68 of the Antigua and Barbuda Companies Act No 18 of 1995 as amended (the Act), notwithstanding her non-qualification. In Mr Marshall's opinion, Article 4 of SDC's Articles of Association is not reconcilable with section 68 of the Act. The fact that Ms Street does not have the required share qualification does not mean that her directorship is void.

[91] As regards the decision of Michel J, Mr Marshall contended that Michel J made no finding as to the appointment of Ms Street and to say otherwise would be misleading.

Finding

[92] Based on the facts before me, and having considered the submissions of counsel for the parties, the court prefers and accepts the submissions of counsel for SIB. Accordingly, the court finds it impossible to say that Ms Street meets the qualification required by article 80 of the Articles of Association of SDC. In the result, I am of the opinion that she cannot act validly or authoritatively transact business on behalf of SDC. In my judgment, Ms Street's position falls squarely within the explanation and opinion of Lord Simmons in **Morris'** case,

⁸ See page 12, paragraph 28, lines 10-15.

⁹ See page 13, paragraph 28, lines 7-14.

and thus, she may wish to consider the wisdom of continuing to hold herself out as director of SDC and thus open up herself to personal liabilities which may arise by reason of her lack of authority. Even if it could be said she was validly appointed up to a certain point, on Mr Marshall's interpretation, Ms Street's appointment lapsed in 2010. On the authority of **Morris'** case, section 68 cannot protect Ms Street in circumstances where the term of her directorship has expired. As it stands, RAS is the sole director on record. He is still the holder of 10,000 shares in SDC.

- [93] Mr Marshall quite rightly submitted that Justice Michel did not make any specific finding in relation to the directorship of Ms Street in the context of having lawful and or ostensible authority to transact business on behalf of SDC. However, in my judgment, implicit in Justice Michel's directions, is the virtual finding that if RAS is the only director of SDC, then SDC does not have a validly constituted Board to give instructions to anyone (including Mr Marshall) to act on its behalf because SDC does not have the number of directors required by article 78 of its Articles of Association. In those circumstances, SDC does not have the legal capacity to enter into any transaction regarding its estate.

(b) The Leased Properties

- [94] **Antigua Sun Building:** SIB asked the Court to order (1) that the lease entered into by SDC with Observer Group dated 24th February 2012 is void and, consequently, the Observer Group is on a monthly tenancy that can be determined with 30 day's notice; (2) that the lease purportedly entered into by SDC with Observer Group dated 24th February 2012 be renegotiated on commercial terms for the benefit of SDC in line with the valuation of Mr Martin dated 26th June 2012 at such time as SDC shall have the legal capacity to do so; (3) Alternatively, if SDC cannot renegotiate with the Observer Group reasonable terms, that SDC cause the Observer Group to vacate the premises within 30 days of service of the relevant Order ;
- [95] **Stanford Trust Building:** SIB also seeks an order that the draft lease proposed by SDC in favour of Bau Panel Systems Ltd for use of the Stanford Trust Building (STC Building) be not executed because (a) SDC does not have the legal capacity to enter into such agreement and (b) the proposed rent in the draft is at a significant undervalue to the market value of the STC Building.

Discussion and finding

- [96] If SDC has no validly constituted Board, and if Ms Street and Mr Marshall lack authority to conduct affairs on behalf of SDC; then neither of them has the standing to properly renegotiate the terms of these leases.
- [97] Perhaps an order appointing someone to represent the estate of SDC is required to enable the proceedings to be carried on. However, such an order may only be made on application. Alternatively, the parties would need to cooperate with each other to arrive at an amicable resolution of this apparent impasse which has the potential to delay the proceedings to the detriment of both sides.

- [98] In so far as SDC has failed to provided SIB with all of the required information pertaining to the leases, it certainly has been the author of its own distress, and it is therefore not permissible for it to ignore parts of the Consent Order prohibiting it from dealing with the assets of SDC unless SIB gives its approval in writing, or further court order.
- [99] That said, the court is reluctant to make any determination in respect of the leases. In one breath SIB is asking me to declare the lease void, and in another, it is asking me to cause the leases to be renegotiated. The question is would it be appropriate to declare the lease void without the Lessees having been given an opportunity to make representations? By whom must these leases be renegotiated? Are they to be re-negotiated by the very persons who do not qualify to legally conduct business on behalf of SDC? In any event the court on 18th June 2012 had set out the conditions under which SDC may let these properties. These conditions have not been met. And SDC has not appealed that order, and has not applied for any extension of time within which to comply. As the pre-conditions have not been met, the court finds it unnecessary to make any orders in respect of the leased properties. Furthermore, the court has already said that it cannot sanction a breach of its order. It is open to SIB to invoke the penal notice endorsed on the Consent Order.
- [100] Finally, in light of the fact that I have found that SDC has no validly constituted Board, and that Ms Street and Mr Marshall lack authority to conduct affairs on behalf of SDC; the court is unable to accede to the applications sought by SIB, except those orders ask for in relation to the directorship of Barbara Street, the status of SDC and the standing of Mr Hugh Marshall.

CONCLUSION

- [101] For all the foregoing reasons, it is hereby ordered and declared that
- (1) The application by SDC to vary or discharge the Consent Order of 30th August 2011 is denied.
 - (2) SDC has no properly constituted Board of Directors and as such it has no legal capacity to conduct the business of SDC;
 - (3) Ms Barbara Street is not a director of SDC and should cease holding herself out as such. At best, her directorship expired in 2010.
 - (4) In light of the orders /declarations at paragraphs (2) and (3) above, the court is unable to grant the orders sought by SIB in its cross application save and except the orders in relation to the directorship of Ms Barbara Street, the status of SDC and the standing of Mr Hugh Marshall.
 - [5] Success was divided, so there shall be no order as to costs.

[102] I am grateful to counsel for their helpful submissions and authorities.

Pearletta E Lanns
High Court Judge [Ag]