In The Supreme Court of Bermuda

COMMERCIAL COURT
CIVIL JURISDICTION
2016 No: 241

IN THE MATTER OF A CONSENT JUDGMENT BETWEEN MEXICO INFRASTRUXTURE FINANCE LLC AND THE CORPORATION OF HAMILTON DATED 27TH MAY 2015

BETWEEN:-

THE CORPORATION OF HAMILTON

Plaintiff

-and-

MEXICO INFRASTRUCTURE FINANCE LLC

Defendant

JUDGMENT

(In Court)

Action to set aside money judgment by consent – whether guarantee on which judgment based is ultra vires – if so, whether application to set aside is abuse of process – Municipalities Act 1923 ss 23(1) and 37(1)

Date of hearing: 27th – 28th September 2016
Date of judgment: 18th November 2016

Mr Michael J Beloff QC and Mr Ronald H Myers, MDM Limited, for the Plaintiff

Lord Pannick QC and Ms Robin J Mayor, Conyers Dill & Pearman Limited, for the Defendant

Introduction

1. The Plaintiff is the Corporation of Hamilton ("the Corporation"). By a written guarantee dated 9th July 2014 ("the Guarantee") the Corporation agreed to guarantee a bridging loan ("the Loan") of $18 million made by the Defendant, Mexico Infrastructure Finance Limited LLC ("MIF") to a local company called Par-La-Ville Hotel and Residences Ltd ("PLV").

2. The purpose of the Guarantee was to facilitate the development by PLV ("the Development") of a hotel ("the Hotel") on the site of the Par-la-Ville car-park in Hamilton ("the Car Park"). The Corporation, both under the administration of Mayor Graeme Outerbridge, who was in office at the date of the Guarantee and during the negotiations leading up to it, and the previous administration of Mayor Charles Gosling, viewed the Development as desirable in the best interests of the municipality, as had successive Governments. The Corporation had leased the Car Park to PLV for purposes of the Development but had retained the freehold interest. The Guarantee was secured by a mortgage of that interest in favour of MIF ("the Security").

3. The purpose of the loan was not to fund the Development but to put PLV in a position to meet the anticipated cost of borrowing the monies required to do so.

4. Under section 80 of the Bermuda Immigration and Protection Act 1956 ("the 1956 Act") MIF required the permission of the Minister of Home Affairs to take a mortgage over the Car Park as the lender was a company incorporated outside Bermuda. The Minister gave the necessary sanction on 28th March 2013.

5. The Government sought the approval of the Legislature for the Guarantee and Security. This was done pursuant *inter alia* to section 37(1) of Municipalities Act 1923 ("the Act"). Approval was given by the House of Assembly on 13th June 2014 and the Senate on 25th June 2014.

6. PLV defaulted on the loan and on 31st December 2014 MIF issued a demand to the Corporation, in its capacity as guarantor, to pay the entire outstanding balance of $18 million plus interest. When payment was not forthcoming, MIF brought an action against the Corporation in the Supreme Court to enforce the Guarantee. On the advice of its then attorney, David Kessaram of Cox Hallett Wilkinson, the Corporation concluded that it had no defence to the claim. On 27th May 2015 by consent I entered summary judgment for MIF against the Corporation for the full amount claimed ("the Consent Order").

7. By an Originating Summons dated 23rd June 2016 the Corporation, which has obtained fresh legal advice, seeks to set aside the Consent Order. This is on the ground that the Corporation had no power to provide the Guarantee, which is therefore said to be null, void and of no effect, and accordingly had no power to consent to its enforcement.

Submissions: overview

8. The Court had the benefit of submissions from distinguished counsel: Michael Beloff QC for the Corporation and Lord Pannick QC for MIF.

9. Mr Beloff summarised the Corporation's case as follows:

   (1) The Corporation had only such powers as the Act, as the enabling statute, had ceded to it, whether expressly or by necessary implication, and any such powers could only lawfully be exercised to achieve the perceptible purposes of the Act. The authorities upon which Mr Beloff relied included Hazell v Hammersmith LBC [1992] 2 AC 1 HL(E) *per* Lord Templeman at 22 B – C, 29 B – E, 30 H, 31 B – C, 31 E, 40 E – G, 40 H – 41 B, 41 D – E; Corporation of Hamilton v

Attorney-General and the Centre for Justice [2014] Bda LR 104 SC *per* Kawaley CJ at paras 70, 73 and 78; and Ward v Metropolitan Police Commissioner [2006] 1 AC 23 HL(E) *per* Baroness Hale at paras 23 and 24.

(2) The Act did not accord the Corporation power to guarantee the liability of a third party property developer, with or without security, and the Corporation therefore lacked capacity to do so.

(3) Alternatively, if the Corporation did have capacity to guarantee the liability of a third party property developer, it did not have capacity to do so where the third party was not incurring such liability to assist the Corporation in the performance of its statutory functions. Mr Beloff relied upon Attorney General v Fulham Corporation [1921] 1 Ch 440 Ch D per Sargant J at 453 – 454.

(4) On either footing, the provision by the Corporation of the Guarantee supported by the Security was *ultra vires* the Corporation, with the consequence that the Guarantee and the Security were void and unenforceable. Mr Beloff relied upon Credit Suisse v Allerdale Borough Council [1997] QB 306 EWCA *per* Neill LJ at 340 G, 343 D – E; Peter Gibson LJ at 347 D; but cf Hobson LJ at 357 D; R (WL (Congo)) v Home Secretary [2012] 1 AC 245 SC(E) *per* Lord Dyson at para 66; Lord Hope at para 170; Baroness Hale at 218; and Lord Collins at 219.

(5) The Consent Order could not validate the Guarantee or the Security. Mr Beloff relied upon Great North-West Central Railway v Charlebois [1899] AC 114 PC *per* Lord Hobhouse at 123 – 124.

(6) Accordingly, the Court must set aside the Consent Order, which falls into that category of orders which a person affected by the order is entitled to have set aside *ex debito justitiae* in the exercise of the inherent jurisdiction of the court. As to which, see Isaacs v Robertson [1985] 1 AC 97 PC *per* Lord Diplock at 103 A – D.

(7) Alternatively, if, which was disputed, the Court had any discretion as to whether or not to set the Consent Order aside, it should be exercised in favour of the Corporation. MIF knew or ought to have known that the Corporation's powers were conferred and therefore limited by statute, and should therefore have been aware that the Corporation was acting *ultra vires*. Mr Beloff referred me to the analogous case of Sutton LBC v Morgan Grenfell (1996) 95 LGR 574 EWCA *per* Peter Gibson LJ at 576.

10. Lord Pannick did not take issue with the entirety of the Corporation's case, but sought to punch a hole in it with the following submissions:

(1) The Corporation, in making the Guarantee and providing the Security, was acting pursuant to powers expressly conferred on it by the 1923 Act. The underlying premise of the Corporation's application, ie that in so doing its actions were *ultra vires*, was therefore wrong in law. ("*The ultra vires issue*".)

(2) If the Corporation wished to take the *ultra vires* point it should have done so in the action in which the Consent Order was made but before the making of that Order. It was too late to take it now and to attempt to do so was an abuse of process. ("*The abuse of process issue*").

11. Where Mr Beloff's submissions have not been contested I accept them. The live issues on this application are therefore those raised by Lord Pannick. I shall consider them in turn.

The *ultra vires* issue

12. The *ultra vires* issue falls to be considered within the context of the Act. Although the Act does not state in express terms what the powers of the Corporation are, section 23 of the statute sets out the purposes for which the Corporation may levy and collect annual rates. It was common ground that the Corporation had power to enter into the Guarantee if it did so for one of the purposes enumerated in section 23. This provides:

"***General power of Corporations to levy rates***

23 (1) The Corporations of Hamilton and St. George's may levy and collect annually rates on valuation units within the limits of Hamilton and St. George's respectively, for all or any of the following purposes—

(a) the maintenance of any force of security guards, traffic wardens or watchmen for duty within the municipal area;

(b) [repealed]

(c) sanitation or health purposes of all kinds including sewerage disposal and garbage collection, whether within or outside the municipal area;

(d) the construction, maintenance, upkeep and renewal of any municipal sewerage, drainage or water system;

(e) the widening, improvement, lighting and maintenance of any street, alley, lane, wharf, landing place, park or other amenity within the municipal area;

(ee) for the construction, maintenance, upkeep and renewal of off-street parking;

(f) such municipal purposes, being purposes of an extraordinary nature, as the Minister may in any particular case approve;

(g) any other purpose which is incidental to the general administration of the municipal area in accordance with this Act."

13. Lord Pannick submitted that the Guarantee was covered by section 23(1)(f) as it was given for a municipal purpose of an extraordinary nature. Mr Beloff submitted that the Guarantee was not covered by that subsection as the purpose for which it was given was not municipal. I have set out subsections (a) – (ee) and (g) so that subsection (f) can more readily be considered in its statutory context.

14. "*The Minister*" as used in section 23(1)(f) is defined in section 1 of the Act, which is headed "*Interpretation and Construction*", as "*the Minister responsible for municipalities*", ie the Minister of Home Affairs ("the Minister"). The question therefore arises as to whether the Guarantee was given for purposes which had ministerial approval.

15. The Minister did not give an approval which was expressed to be for the purposes of section 23(1)(f). However the subsection does not require that ministerial approval should take any particular form. The approval of the Minister may be inferred from the fact that the Government of which he was a member sought and obtained the approval of the Legislature for the Guarantee and Security.

16. Ministerial approval may further be inferred from the approval given to Mexican Infrastructure by the Minister under section 80 of the 1956 Act to take a mortgage over the Car Park. Such approval necessarily implied approval for the Corporation to accept a mortgage over the Car Park as security for the Guarantee.

17. However, as Mr Beloff rightly submitted, the Minister was not empowered by section 23(1)(f) to approve the Corporation acting for a purpose falling outside that subsection. Thus if the Guarantee was *ultra vires*, its *ultra vires* status could not be cured by ministerial (or indeed legislative) approval.

18. As ministerial approval was not in issue, whether the Guarantee was covered by section 23(1)(f) hinged upon the meaning of "*municipal purposes ... of an extraordinary nature*".

19. Mr Beloff submitted that the phrase "*municipal purposes*" was to be narrowly construed as denoting services to be provided to local residents. It took its colour from the preceding provisions of section 23(1), which were all concerned with the provision of such services. Thus of the various meanings of "*municipal*" recorded in the Oxford English Dictionary ("OED"), the one applicable here was:

> "*That relates to the function of the local or corporate government of a city, town or district.*"

20. As to the function of a municipal corporation, Mr Beloff relied upon an extract from Handbook of Municipal Corporations by Roger W Cooley,

published in 1914 and cited in the respected American reference work, Black's Law Dictionary, 10th Edition:

"*The municipal corporation is duly incorporated not primarily to enforce state laws, but chiefly to regulate the local affairs of the city, town, or district incorporated by proper legislation and administration.*"

21. Mr Beloff referred the Court to the Scottish decision of Arnot v Wm M'Ewan (1894) 1 SLT 500 as illustrating the correct approach, in which the court stated that the words "*municipal purposes*" in The General Police and Improvement (Scotland) Act (1862) must be construed consistently with their context and the preamble to the 1862 Act, which set out the objects of the legislation. However this authority does not assist me in deciding whether the approach adopted by the Scottish court is the correct approach in the present case.

22. He submitted that, considered in context, "*extraordinary*" simply meant "*not in the ordinary course of events*". Thus municipal purposes of an extraordinary nature for which ministerial approval was required would include large scale one-off projects such as the construction of a sports stadium. They did not include the construction of the Hotel as, unlike a sports stadium, this would not involve providing a service to local residents. The Hotel was a commercial venture. It was one, moreover, which was intended to be developed by and for the financial benefit of a third party, namely PLV, and was intended to cater mainly to visitors and in particular affluent business travellers. Its commercial purpose was underlined by the wording of the Guarantee, which stated that the Corporation as guarantor:

"*agrees that the execution, delivery and performance by it of this Guaranty constitute private and commercial acts done for private and commercial purposes*".

23. As the construction of the Hotel was not a municipal function within the meaning of section 23(1)(f), neither, Mr Beloff submitted, was the provision of the Guarantee to facilitate its construction. For the Guarantee was not, *per* Sargant J in Attorney General v Fulham Corporation at 454, "*ancillary*

to or consequential upon" that which the Corporation was entitled to do under the Act. True it was that section 20(2) of the Act permitted the Corporation to build, or cause to be built, buildings on its land where such buildings were calculated to facilitate or were conducive or incidental to the discharge of any function of the Corporation. But as Lord Templeman stated in Hazell v Hammersmith LBC [1992] 2 AC 1 HL(E) at 31 E: "... *a power is not incidental merely because it is convenient or desirable or profitable*".

24. Lord Pannick, on the other hand, submitted that "*municipal purposes*" should be construed broadly to mean purposes relating to or concerned with the municipality, ie in the interests of the municipality and its people. The definition of "*municipal*" in the OED which best captured this sense was:

> "*Of or belonging to a municipality; esp. under the ownership or control of the local governing authority*".

25. He also relied upon the definition of "*municipal*" in Black's Law Dictionary as:

> "*Of, relating to, or involving a city, town or local government unit*".

26. As to the meaning of "*extraordinary*", Lord Pannick submitted that the word was intentionally broad and covered any municipal purpose to which the Minister gave his approval. If Mr Beloff was correct the word "*extraordinary*" would be superfluous and one would have expected section 23(1)(f) to contain the phrase "*other municipal purposes*" rather than "*municipal purposes ... of an extraordinary nature*".

27. Lord Pannick submitted that the Corporation's purpose in giving the Guarantee to assist in the development of the Hotel on its land was closely related to the City of Hamilton and the interests of its inhabitants and was therefore a municipal purpose. The Corporation gave the Guarantee because in its judgment to do so would benefit the ratepayers of Hamilton.

28. He further submitted that it made no difference that the Corporation was not undertaking the development itself, but facilitating it by guaranteeing the liabilities of a third party developer, as the Corporation took the view that this was appropriate to advance the interests of the municipality and its ratepayers.

29. Lord Pannick also relied upon section 37(1) of the Act. This provides:

> "***Limit on powers of Corporations to borrow money***
> *37 (1) The Corporations of Hamilton and St. George's respectively shall not borrow, receive or hold upon loan any sums exclusive of any sums which the Legislature has authorized or shall authorize either of such Corporations to borrow or guarantee for specific purposes, in the whole exceeding at one time—*
>
> *(a) in the case of the Corporation of Hamilton, thirty million dollars; or*
>
> *(b) in the case of the Corporation of St. George's, one million dollars.*"
>
> [Emphasis added.]

The words "*or guarantee*" were added by section 16 of the Municipalities Amendment Act 2013 ("the 2013 Act").

30. Lord Pannick submitted that the broad wording of the section authorised the Corporation to borrow or guarantee for any purpose whatsoever, even a non-municipal one, if authorised by the Legislature. Further or alternatively, he submitted that section 37(1) supports the broad construction of section 23(1)(f) for which he contended. Section 37 was, he submitted, intended to remove any doubt that the Guarantee was lawful, and, as stated by Lord Bingham in R (Quintavalle) v Health Secretary [2003] 2 AC 687 HL(E) at para 8:

> "*The court's task, within the permissible bounds of interpretation, is to give effect to Parliament's purpose.*"

31. I find the submissions on section 37(1) unconvincing. It would be remarkable if the Legislature had intended that a section designed to limit the powers of the Corporation to borrow money had the effect of expanding

the purposes for which it could do so in such a way as to by-pass section 23(1) altogether. I am satisfied that that is not what section 37(1) provides.

32. As to the amendment made by the 2013 Act, I am satisfied that, as appears from the language of the amended section, this was intended was to put beyond doubt that guarantees made by the Corporation and approved by the Legislature do not fall within the statutory borrowing limit in section 37(1)(a): nothing more.

33. The resolution of the *ultra vires* point, then, turns on the correct construction of section 23(1)(f). When the phrase "*municipal purposes … of an extraordinary nature*" is considered in isolation, the respective interpretations advanced by Mr Beloff and Lord Pannick are both equally persuasive. But when the phrase is considered in the statutory context of subsections 23(1)(a) – (ee) and (g), the interpretation for which Mr Beloff contends is in my judgment the correct one. I am satisfied that the provision of the Guarantee to facilitate a hotel development by a commercial developer was not a service provided by the Corporation to its ratepayers, although it may have been of benefit to them, and that neither was it ancillary to or consequential upon such a service. I am therefore satisfied that the Guarantee was given *ultra vires*.

The abuse of process issue

34. The principle at issue here is the procedural rule that a party may be precluded on grounds of abuse of process from raising in subsequent proceedings points which could and should have been raised in previous proceedings which have been concluded, whether by a judgment or settlement. This principle is sometimes known as the rule in Henderson v Henderson (1843) 3 Hare 100 as that case contained an early statement of the rule by Wigram V-C at 114 – 115. However the fullest modern statement of the rule was given by Lord Bingham in Johnson v Gore Wood & Co [2002] 2 AC 1 HL at 31 A – F and 32 H – 33 A:

"*It may very well be, as has been convincingly argued (Watt, The Danger and Deceit of the Rule in Henderson v Henderson : A new approach to successive civil actions arising from the same factual matter (2000) 19 CLJ 287), that what is now taken to be the rule in Henderson v Henderson has diverged from the ruling which Wigram V-C made, which was addressed to res judicata. But Henderson v Henderson abuse of process, as now understood, although separate and distinct from cause of action estoppel and issue estoppel, has much in common with them. The underlying public interest is the same: that there should be finality in litigation and that a party should not be twice vexed in the same matter. This public interest is reinforced by the current emphasis on efficiency and economy in the conduct of litigation, in the interests of the parties and the public as a whole. The bringing of a claim or the raising of a defence in later proceedings may, without more, amount to abuse if the court is satisfied (the onus being on the party alleging abuse) that the claim or defence should have been raised in the earlier proceedings if it was to be raised at all. I would not accept that it is necessary, before abuse may be found, to identify any additional element such as a collateral attack on a previous decision or some dishonesty, but where those elements are present the later proceedings will be much more obviously abusive, and there will rarely be a finding of abuse unless the later proceeding involves what the court regards as unjust harassment of a party. It is, however, wrong to hold that because a matter could have been raised in earlier proceedings it should have been, so as to render the raising of it in later proceedings necessarily abusive. That is to adopt too dogmatic an approach to what should in my opinion be a broad, merits-based judgment which takes account of the public and private interests involved and also takes account of all the facts of the case, focusing attention on the crucial question whether, in all the circumstances, a party is misusing or abusing the process of the court by seeking to raise before it the issue which could have been raised before. As one cannot comprehensively list all possible forms of abuse, so one cannot formulate any hard and fast rule to determine whether, on given facts, abuse is to be found or not. Thus while I would accept that lack of funds would not ordinarily excuse a failure to raise in earlier proceedings an issue which could and should have been raised then, I would not regard it as necessarily irrelevant, particularly if it appears that the lack of funds has been caused by the party against whom it is sought to claim. While the result may often be the same, it is in my view preferable to ask whether in all the circumstances a party's conduct is an abuse than to ask whether the conduct is an abuse and then, if it is, to ask whether the abuse is excused or justified by special circumstances. Properly applied, and whatever the legitimacy of its descent, the rule has in my view a valuable part to play in protecting the interests of justice.*

. . . . .

An important purpose of the rule is to protect a defendant against the harassment necessarily involved in repeated actions concerning the same subject matter. A second action is not the less harassing because the defendant has been driven or thought it prudent to settle the first; often, indeed, that outcome would make a second action the more harassing."

35. Mr Beloff made the bold submission that the rule in Henderson v Henderson does not apply to a private law claim based upon the *ultra vires* acts of a corporation. He relied upon the decision of the Privy Council in Great North-West Central Railway v Charlebois [1899] AC 114. This was an appeal from a decision of the Supreme Court of Canada which is reported as Charlebois v Delap 26 Sup Ct Can Rep p 221. The issues included whether the railway company was entitled to have a consent judgment against it set aside even though the judgment was based upon an *ultra vires* contract.

36. King J, giving the judgment of the majority in the Supreme Court, held that it was not. Although he did not refer to Henderson v Henderson, his reasoning was to similar effect:

"*Between the same parties or privies, and in respect to the same cause of action, the judgment binds not only as to defences in fact raised, but as to such as might have been raised. It would seem against all reason to leave it open to a company, upon a change of management, to re-open litigation. If the judgment binds the company when recovered, it binds notwithstanding any change in the constitution of its governing body. Otherwise you would never get to the end of litigation with an incorporated company, and no one would be safe in acting upon a judgment against such a company. The effect of a judgment must be the same whether the claim sued on is ultra vires or not. The judgment forms a new obligation having a character of its own, and it is not ultra vires for a company to pay the amount of judgment recovered against it. Balkis Consolidated Company v Tomkinson [1893] AC 407.*"

37. Reversing the Supreme Court, the Privy Council held that the consent judgment should be set aside, notwithstanding that it was founded upon an *ultra vires* contract, as the judgment could not be of more validity than the contract on which it was founded. See the judgment of the Board, given by Lord Hobhouse, at 124. The Privy Council found it unnecessary to address the consequences of the delay in applying to set aside the consent judgment,

no doubt because King J's observations on that point were founded upon the false premise that the consent judgment was valid. I am therefore unable to accept Mr Beloff's submission that as the Privy Council allowed the appeal it must by necessary implication have decided that the rule in Henderson v Henderson or some equivalent principle was inapplicable to a private law action to set aside an *ultra vires* contract.

38. It is therefore necessary to consider the abuse of process issue in more detail. In order to do so it will be helpful to set out some background information. In May 2013 the Corporation instructed Charles Flint QC to provide an opinion as to whether under the Act the Corporation had power to provide the Guarantee and Security. By a written opinion dated 10th May 2013 Mr Flint advised that The Corporation did not as section 23(1) of the Act did not suggest that it had a general power to provide financial assistance to a commercial developer, even where the development was considered to be beneficial to the municipality and its residents.

39. The Corporation also instructed the local law firm Terra Law Limited ("Terra Law") for an opinion. Notwithstanding that Terra Law had the benefit of considering Mr Flint's opinion, they advised in a written opinion dated 21st May 2013 that the proposed transaction would "*appear*" to fall within the ambit of section 23(1)(f) if ministerial approval were obtained.

40. In their capacity as the Corporation's attorneys, Terra Law sent a draft opinion dated 10th June 2013 to MIF's attorneys Conyers, Dill & Pearman Limited ("CD&P") which flagged up the necessity of compliance with section 23(1) of the Act.

41. On 10th July 2013 the Minister of Home Affairs sent a letter to the Mayor which noted that the Attorney General's Chambers had considered the Act and reviewed representations from the Corporation's counsel, and had concluded that the Act did not provide for the Corporation to use its assets for the benefit of third party financing.

42. The Act was amended by the 2013 Act, which came into force on 15th October 2013. The amendments were intended *inter alia* to facilitate the Corporation's role in the proposed hotel development. As noted above, the 2013 Act amended section 37 to include express reference to a guarantee. It also amended section 20, which in its unamended form empowered the Corporation to lease its land, to require that any such lease agreement for a term exceeding 21 years, eg the lease of the Car Park, must be approved by the Cabinet and the Legislature. However none of the amendments addressed the concerns raised by Mr Flint as to section 23(1).

43. Nonetheless, the Corporation concluded that the amendments to the Act, combined with the aforesaid approvals given by the House of Assembly and the Senate, were sufficient to allay any concerns as to *vires*. On 9th July 2014 it proceeded to sign the Guarantee and Security. The Guarantee included an express representation that the Corporation possessed the power and authority to enter into and perform the obligations to which it gave rise.

44. Terra Law, in their capacity as the Corporation's attorneys, provided an opinion of even date to CD&P, in their capacity as MIF's attorneys, confirming that the Corporation had power to enter into the Guarantee and Security. The Court was not informed whether MIF instructed CD&P to advise independently on the point.

45. Fast forward to the Consent Order. Mr Kessaram and his firm had not been involved in the negotiations resulting in the Guarantee and Security. The Corporation had not supplied him with a copy of Mr Flint's opinion or informed him that there had ever been an issue as to *ultra vires*. Indeed, Mr Kessaram stated in affidavit evidence that it was mentioned in passing more than once by attorneys representing the Corporation, the Mayor and Council members that legislation had been passed expressly to enable the Corporation to enter into the Guarantee. It is therefore unsurprising that he advised the Corporation that there was no basis for resisting MIF's claim.

46. In March 2016, at a meeting with Mr Gosling, who was elected Mayor in May 2015, Mark Diel, an attorney instructed by the Corporation in another matter, questioned the *vires* of the Guarantee. As a result, the Corporation forwarded a copy of Mr Flint's opinion to Mr Kessaram. He advised that a further opinion should be obtained from Mr Flint. Such opinion was duly obtained, and as a result of Mr Flint's advice the Corporation issued the present proceedings. Its attorneys advised MIF that there was a distinct possibility of it doing so by a letter dated 31st March 2016.

47. Thus, in order to enter into the Guarantee the Corporation must have been satisfied either that Terra Law was right on the section 23(1)(f) point and that Mr Flint was wrong, or alternatively that insofar as there was a difficulty with respect to section 23(1) this was resolved by the amendments to the Act and/or the approvals given by the Legislative Assembly and the Senate. It is difficult to understand how the Corporation could reasonably have reached either of these conclusions.

48. With due respect to Terra Law, Mr Flint was a more authoritative source of legal advice and his opinion addressed the point in greater depth than that of the law firm, which addressed the point somewhat cursorily. As to the legislative amendments, these did not purport to address the scope of section 23(1). If, notwithstanding those amendments, the Guarantee fell outside the scope of that section, then that was not something which the approvals given by the Legislature were capable of remedying.

49. Having read some of the correspondence generated by the Corporation during the discussions leading up to the Guarantee, I am left with the strong impression that the political will to get the Hotel development done – in what I accept was a genuine belief that it was in the public interest – influenced the view which the Corporation formed as to whether the Guarantee was something which it could lawfully provide.

50. Lord Pannick submitted with respect to the abuse of process point that the question was how a reasonable person in the position of the Corporation

would have behaved. He suggested that, when instructing Mr Kessaram, a reasonable person would have informed him of the historical concerns regarding the *vires* of the Guarantee and supplied him with a copy of the legal opinions which the Corporation had obtained on the subject. Mr Kessaram would then undoubtedly have acted as he did when the question of *vires* was brought to his attention and sought a further opinion from Mr Flint or someone of equal weight as to whether the legislative amendments and the approvals given by the Legislature resolved the *ultra vires* issue.

51. Xavier Gonzalez, the manager of MIF, gave affidavit evidence that in light of repeated assurances from the Corporation that it would honour the Guarantee the lender had not prosecuted any claim for the return of the loan monies. Had it realized that the Guarantee was disputed, MIF would have done so aggressively, bearing in mind that speed was likely to be critical. Eg in February 2015 MIF knew that the loan monies had been transferred to a bank in Cayman: in light of the Guarantee MIF chose not to instruct Cayman attorneys to seek an order requiring the bank to provide information about the monies. Whereas MIF had consented to the appointment of liquidators over PLV, it had no control over the liquidators' actions.

52. Mr Gonzalez concluded by stating that MIF was an international lender, and had carefully reviewed Bermuda before committing any funds to the jurisdiction. He was horrified that creditors could be treated by a public borrower in the way that MIF had been treated by the Corporation. Were it not for the Guarantee, MIF would never have lent $18 million to PLV. If MIF could not look to the Corporation for reimbursement, then the loan monies would likely prove irrecoverable.

53. Mr Gonzalez' understandable outrage chimes with a concern expressed by the Minister in a letter to the Corporation dated 13th May 2016 that an action to set aside the Consent Order may do irreparable harm and damage to the reputation of both the Corporation and Bermuda as a whole in the eyes of the international business community.

54. Mr Beloff submitted that the overriding consideration was that the Guarantee was *ultra vires* and was therefore null and void. He urged the Court to uphold the rule of law by declining to uphold an *ultra vires* contract. As to the concerns of international lenders, the Court should focus on the relationship of the parties and not beyond.

55. Mr Beloff further submitted that MIF knew or ought to have known that the Corporation's powers were limited by statute. It was responsible for satisfying itself that the Corporation had capacity to enter into the Guarantee and it had sufficient material to reach an independent conclusion on the issue, as to which it was always open to MIF to take independent legal advice.

56. As to the Corporation's assurances that it would honour the Guarantee, CD&P wrote to the Corporation on 2nd June 2015 with a formal demand for payment. The Corporation sought time to pay while it discussed its indebtedness to MIF with the Government and attempted to arrange a loan to pay off the debt. Following lengthy negotiations, MIF gave the Corporation until 1st January 2016 to repay the loan, a deadline which it reluctantly extended to 15th January 2016. The Corporation was unable to meet the extended deadline, and on 14th January 2016 issued a summons for an order restraining MIF from enforcing the Consent Order. Mr Beloff submitted that it would have been prudent for MIF to seek recovery of the loan monies once it became clear that the Corporation could not easily raise the monies needed to honour the Guarantee.

57. The Corporation had obtained independent legal advice from Terra Law that it could properly enter into the Guarantee. Mr Beloff submitted that it had acted reasonably in acting upon that advice without obtaining further advice from Mr Flint. Having resolved the *ultra vires* issue to its satisfaction, the Corporation could, he submitted, be forgiven for not raising it with Mr Kessaram prior to the Consent Order.

58. As to the delay between the date of the Consent Order and the date of the Originating Summons, Mr Beloff submitted that, once Mr Kessaram had obtained a second opinion from Mr Flint that the Consent Order could properly be challenged, the Corporation issued the Originating Summons, which required the approval of the Minister, as soon as was reasonably practicable. In so doing the Corporation was acting properly to protect the interests of its ratepayers.

59. There is considerable force in Lord Pannick's criticisms of the Corporation and I have every sympathy with MIF given the position in which it now finds itself. Nonetheless I would not go so far as to say that the Corporation's behaviour was so unreasonable as to render the application to set aside the Consent Order abusive. When considering the matter in the round, in my judgment the most important contextual feature is that it is in principle undesirable for the Court to enforce a Guarantee which is in law a nullity. This outweighs the various contextual features pointing in the other direction, including the serious prejudice to MIF which may be caused by not enforcing the Guarantee.

60. As to possible reputational damage to the jurisdiction: *fiat justitia ruat caelum*.[1] But the likelihood of such damage should not be exaggerated. Jurisdictions which do not enforce *ultra vires* guarantees are likely to command greater commercial confidence than those which do. MIF had the opportunity to take independent advice as to the *vires* of the Guarantee and accepted the instrument at its own risk. Competent legal advisors considering the question in depth could reasonably have concluded that the Corporation had power to give the Guarantee. But they should have appreciated that that there was a good arguable case that it did not, and that there was therefore a real possibility that a court, if called upon to adjudicate the issue, would find that the Guarantee was *ultra vires*.

[1] Let justice be done though the heavens fall.

61. There may be other causes of action available to MIF against the Corporation. This judgment does not determine that MIF cannot recover the amount of the loan monies from the Corporation: merely that it cannot do so by enforcing an *ultra vires* Guarantee.

Summary

62. The issues before the Court are resolved thus:

    (1) In providing the Guarantee, the Corporation acted *ultra vires*.

    (2) The Corporation's application to set aside the Consent Order is not an abuse of process.

63. I therefore direct that the Consent Order should be set aside.

64. I shall hear the parties as to costs.

Dated this 18th day of November 2016

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Hellman J