Neutral Citation Number: [2024] EWCA Civ 299

Case No: CA-2023-001259

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
INSOLVENCY AND COMPANIES LIST (ChD)
Tom Smith KC (sitting as a Deputy High Court Judge)
[2023] EWHC 1294 (Ch)

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 26/03/2024

Before:

LORD JUSTICE NEWEY
LORD JUSTICE ARNOLD
and
LORD JUSTICE WARBY

- -

Between:

DURNONT ENTERPRISES LIMITED	**Claimant/ Appellant**
- and -	
(1) FAZITA INVESTMENT LIMITED **(2) WLADYSLAW JAROSZEWICZ** **(3) MICHAEL CARL JAROSZEWICZ** **(4) M-JWK-MANAGEMENT SPÓŁKA Z OGRANICZONA ODPOWIEDZIALNOŚCIA (formerly M-JWK-MANAGEMENT SPÓŁKA Z OGRANICZONA ODPOWIEDZIALNOŚCIA SP.J and M-JWK Sp. z. o.o. SKA)** **(5) ANNA BANDURSKA** **(6) JAN CZEREMCHA** **(7) MACIEJ DE MAKAY** **(8) BNP PARIBAS BANK POLSKA S.A. (formerly BGZ BNP PARIBAS S.A., formerly RAIFFEISEN BANK POLSKA S.A.)**	**Defendants/ Respondents**
-and-	
(9) POLISH REAL ESTATE INVESTMENT LIMITED	**Defendant/ Respondent**

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Philip Riches KC and Andrew Dinsmore (instructed by **Peachey & Co LLP**) for the **Appellant**
None of the Respondents was present or represented

Hearing date: 6 March 2024

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Approved Judgment

This judgment was handed down remotely at 10.30am on 26 March 2024 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

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Lord Justice Newey:

1. This appeal, from a decision of Tom Smith KC ("the Judge"), sitting as a Deputy High Court Judge, relates to whether the appellant, Durnont Enterprises Limited ("Durnont"), should have been given permission to continue derivative claims on behalf of Polish Real Estate Investment Limited ("the Company" or "PREI") against the sixth, seventh and eighth defendants (respectively, Mr Jan Czeremcha, Mr Maciej de Makay and BNP Paribas Bank Polska SA ("the Bank")) as well as against other defendants.

Basic facts

2. This section of this judgment is derived from the materials which were before us at the hearing. Nothing I say in it is to be taken as a finding of fact on any matter.

3. The Company is incorporated in Cyprus and is a joint venture between its shareholders, which are or represent groups of Norwegian and Polish investors, for the purpose of investing in property in Poland. Durnont, which is also a Cypriot company, holds 27.94% of the Company's shares and is a vehicle for Norwegian investors, including Mr Peter Gram and Mr Kim Steimler. The other principal shareholders in the Company have been the first defendant, Fazita Investment Limited ("Fazita"), with a 19.65% holding; Sazia Investments Limited ("Sazia"), with a 19.47% holding; and the Bank, with an 11.19% holding. Fazita is associated with the second defendant, Mr Wladyslaw Jaroszewicz, and his son Michael, who is the third defendant. Sazia is controlled by Mr Jan Jaroszewicz, who is Mr Wladyslaw Jaroszewicz's brother. During the period relevant to this appeal, the Bank was called Raiffeisen Bank Polska SA.

4. The Company's share capital is divided into A Shares, B Shares and Ordinary Shares. The A Shares are held by Fazita and Sazia, the B Shares are held by Durnont and the shares which the Bank has held are Ordinary Shares. The A Shareholders and the B Shareholders are each, between them, entitled to appoint up to four directors, while the Ordinary Shareholders can appoint two. The present board comprises Mr Wladyslaw Jaroszewicz (with Mr Michael Jaroszewicz as his alternate) and Mr Jan Jaroszewicz (appointed in each case by the A Shareholders), Mr Gram and Mr Steimler (appointed by Durnont as the B Shareholder) and, it seems, Mr de Makay (appointed by the Bank). Mr de Makay appears to have taken over from Mr Czeremcha as the Bank's appointee on 7 March 2016.

5. The relationship between the Company's shareholders is governed in part by a share and subscription agreement dated 9 July 2007 ("the SSA"), which has been amended on several occasions, most recently by a deed of amendment ("the Third Deed of Amendment") dated 12 July 2013. Both the SSA and the Third Deed of Amendment are governed by English law. The SSA set out terms on which the Bank would subscribe for both shares in the Company and convertible bonds ("the Bonds") issued by the Company. The parties to the SSA were Durnont, Fazita, Sazia, the Bank and the Company.

6. The SSA, as amended, was supplemented by a framework financial settlements agreement made between the Bank and the Company on 12 July 2013 ("the FFSA") and an escrow accounts agreement made between, among others, the Bank and the Company on the same date ("the Escrow Agreement"). These provided for money standing to the credit of certain specified accounts to be used to repay the Bonds.

7. The Company invested via a closed-ended investment fund called Alpha Real Estate Fundusz Inwestycyjny Zamkniety ("the Fund"). The Company held all the investment certificates ("the Certificates") in the Fund and, according to Durnont, these were worth more than €100 million as at the end of 2015. At that stage, the Fund's assets included shopping centres in Bialystok and Grudziadz.

8. The fourth defendant, M-JWK-Management Spółka z Ograniczona Odpowiedzialnościa ("M-JWK"), is an indirect subsidiary of the Fund. Mr Wladyslaw Jaroszewicz and Mr Michael Jaroszewicz are said to have had effective control over M-JWK.

9. The Bonds for which the Bank subscribed had a total nominal value of €20 million. The Bonds initially had a maturity date of 27 July 2010, but, as amended by the Third Deed of Amendment, the SSA provided for the balance outstanding on the Bonds to be paid on 31 December 2016, with certain "minimum amounts" being repaid by stages before that. By 2014, however, the Bank wished to achieve an exit.

10. By an agreement dated 18 December 2014, the Bank agreed to sell its shares in the Company to PSPT Sp. z. o.o. ("PSPT"), which is said to have been wholly owned and controlled by Mr Michael Jaroszewicz, for €8 million. One of those who signed the agreement ("the SPA") on behalf of the Bank was Mr Czeremcha. The SPA was, however, subject to several conditions precedent and it had not yet been completed by 14 February 2018 when it was amended by "Annex No 1" ("the Annex"). I shall have to return to the terms of the SPA and the Annex later in this judgment. Durnont's case is that it did not see the SPA or the Annex in signed form until November 2022.

11. In 2015, the Bonds were redeemed, but by M-JWK rather than the Company. M-JWK paid the Bank €7,946,977 plus interest of €303,701.58 on 1 July and, on 6 July, the Bank confirmed to the Company that those payments had been made and that the value of bonds remaining to be redeemed was €7,023,260. On 28 October, M-JWK transferred the further sum of €7,158,674.19 to the Bank. In an email dated 9 September, the Bank had told M-JWK that early redemption would be "possible after an appropriate statement is submitted by the Bond Issuer (Polish Real Estate Investment Ltd)". In a reply sent the following day on behalf of the "JWK Group companies", Dr Marcin Tofel of Dentons, the law firm, said:

> "We are surprised to learn that the Bank is creating obstacles to enable JWK Group companies to repay the Bank's debt earlier by virtue of taking up bonds issued by Polish Real Estate Investment Ltd ('PREI'). We would therefore like to draw your attention to the following provisions of Polish law, which, pursuant to Article 15 of the Regulation (EC) No 593/2008 of the European Parliament and of the Council of 17 June 2008 on the law applicable to contractual obligations (Rome 1), are applicable in the present case.
>
> Pursuant to Article 356 § 2 of the Civil Code ('CC'), if a monetary claim is due, the creditor (here: the Bank) may not refuse to accept performance from a third party, even if it acts without the debtor's knowledge. Furthermore, pursuant to Article 518.2 in connection with Article 518.1.1 of the Civil

> Code, if a third party pays a creditor by paying another person's debt for which the third party is liable either personally or with certain assets, the creditor may not refuse to accept a performance that is already due.
>
> This means that the Bank may not refuse to accept the benefit of the said PREI Bonds from the JWK Group companies as soon as it becomes due (on pain of falling into creditor default). However, the Bank may voluntarily accept the benefit of repayment of the bonds from the Principals earlier, i.e. before it becomes due, especially as PREI's consent is not necessary to accept such repayment.
>
> We therefore hope that the Bank will issue a Promissory Note in favour of the JWK Group companies, as requested yesterday, and will work with these companies to obtain satisfaction of the claim for repayment of the bonds issued by PREI."

12. In December 2015, M-JWK demanded sums of €8,250,678.58 and €7,158,674.19 from the Company. It did so on the basis that its redemption of the Bonds had given rise to "statutory subrogation". The former sum was said to have become due to the Bank on 30 June and the latter was said to be becoming due on 31 December.

13. In January 2016, M-JWK issued proceedings against the Company in the High Court of England and Wales for €15,409,352.77 (i.e. €8,250,678.58 plus €7,158,674.19) with interest ("the Subrogation Claim"). On 25 April, it is said without the Company's knowledge or authorisation, Mr Wladyslaw Jaroszewicz purported to execute a power of attorney authorising Mr Pawel Tokarski to negotiate on the Company's behalf a settlement of the Subrogation Claim. On the following day, Mr Tokarski purported to conclude an agreement ("the Collateral Agreement") under which the Company was to transfer all the Certificates to M-JWK as collateral for satisfaction of the Subrogation Claim. The transfer appears to have been effected by 11 May.

14. A meeting of the Company's board had been convened for 28 April 2016. One of the resolutions proposed at the meeting would have authorised Mr Steimler and Mr Jan Jaroszewicz to represent the Company in a review of the relationship between the Company and the Bank, including a review of relevant correspondence and documentation. Mr Steimler, Mr Jan Jaroszewicz and Mr Ola Røthe (who attended as alternate director for Mr Gram) voted in favour of the resolution, but Messrs Wladyslaw and Michael Jaroszewicz maintained that the meeting was invalid because the company secretary had resigned the previous day. Mr de Makay abstained on the resolution.

15. In May and June 2016, Mr Gram and Mr Steimler discovered that the Company no longer owned the Certificates, received copies of Mr Tokarski's power of attorney and the Collateral Agreement and saw an annex to the latter. Discussions regarding a potential exit from the Company by Durnont ensued, culminating in a framework agreement between, among others, Durnont, PSPT, Mr Steimler and Mr Gram dated 2 March 2017. On the following day, however, a default judgment ("the Default Judgment") was entered in M-JWK's favour on the Subrogation Claim, in the sum of €16,248,116 plus interest. This is said to have been possible because Mr Gram and Mr

Steimler believed that exit arrangements had been generally agreed and so did not cause the Company to file a defence.

16. The Certificates were returned to the Company in the latter part of 2018, but by early December M-JWK had executed the Default Judgment against them by way of a bailiff seizure and sale of Certificates. A second bailiff sale took place in 2019. In each case, it is said that Certificates were sold to M-JWK for less than their true value. A further complaint is that, in 2018, 2019 and 2020, the Fund issued further series of certificates without the Company's knowledge, thus diluting its interest in the Fund.

17. On 22 July 2019, PSPT issued proceedings against the Company in the High Court of England and Wales in which it claimed damages for breach of the SSA. On 1 November 2019, PSPT obtained judgment in default for damages and interest to be assessed. On 4 February 2020, the damages and interest were quantified by a further order at respectively €4,119,527 and €66,085.35. Thereafter, perhaps in April 2020, the remaining Certificates were seized and sold by way of execution in a third bailiff sale. The Certificates are said to have been bought by a company controlled by Mr Michael Jaroszewicz and/or Mr Wladyslaw Jaroszewicz for significantly less than their true value. It is also said that neither Durnont nor the Company had any knowledge of the PSPT proceedings, the default judgment it obtained or the subsequent bailiff sale until November 2022 at the earliest.

18. The end result, according to Durnont, is that the Company has been entirely divested of assets which had been worth over €100 million in 2015. Durnont suggests that the Certificates, or their proceeds, have found their way into the hands of entities owned and/or controlled by Mr Wladyslaw Jaroszewicz and/or Mr Michael Jaroszewicz.

The legal framework

19. CPR 19.17 provides that where, as in the present case, a member of a company incorporated outside the United Kingdom makes a claim for the company to be given a remedy to which it is alleged to be entitled, the member must apply to the Court for permission to continue the claim. By CPR 19.17(4), the procedure for applications in relation to companies under section 261, 262 or 264 (as the case may be) of the Companies Act 2006 ("the 2006 Act") will apply to the permission application as if the company in question had been one incorporated in the United Kingdom.

20. Section 261 of the 2006 Act (which is the relevant provision in the present case) provides for a two-stage approach. By section 261(2), the Court must dismiss the permission application at the first stage if it appears to it that the application and evidence do not disclose a prima facie case for giving permission. An application which is not dismissed at that point will proceed to a second stage at which, following a hearing, the Court may give permission, refuse it and dismiss the claim, or adjourn the application.

21. Where a member of a United Kingdom-incorporated company applies for permission to continue a derivative claim, section 263 of the 2006 Act will apply. That instructs the Court to refuse such an application in certain specified circumstances and otherwise to take particular matters into account when considering whether to give permission. I do not understand section 263 to be applicable, however, in the case of an overseas company such as the Company. CPR 19.17 makes no mention of section 263.

22. The Court will instead apply common law principles. These were explained by the Court of Appeal in *Prudential Assurance Co Ltd v Newman Industries Ltd (No. 2)* [1982] Ch 204. At 221-222, the Court said:

> "the plaintiff ought at least to be required before proceeding with his action to establish a prima facie case (i) that the company is entitled to the relief claimed, and (ii) that the action falls within the proper boundaries of the exception to the rule in *Foss v. Harbottle*".

At 211, the Court had noted that in *Edwards v Halliwell* [1950] 2 All ER 1064 Jenkins LJ had said this about the exception to the rule in *Foss v Harbottle*:

> "There is an exception to the rule where what has been done amounts to fraud and the wrongdoers are themselves in control of the company. In this case the rule is relaxed in favour of the aggrieved minority, who are allowed to bring a minority shareholders' action on behalf of themselves and all others. The reason for this is that, if they were denied that right, their grievance could never reach the court because the wrongdoers themselves, being in control, would not allow the company to sue."

23. In *Abouraya v Sigmund* [2014] EWHC 277 (Ch), [2015] BCC 503, David Richards J said this at paragraph 53 about what a "prima facie case" involves in this context:

> "A prima facie case is a higher test than a seriously arguable case and I take it to mean a case that, in the absence of an answer by the defendant, would entitle the claimant to judgment. In considering whether the claimant has shown a prima facie case, the court will have regard to the totality of the evidence placed before it on the application."

These proceedings

24. In the present case, Durnont seeks to pursue claims on behalf of the Company against each of the defendants. The proceedings were issued on 25 April 2022 and Durnont immediately applied for permission to continue the derivative claims. Meade J granted "first stage" permission on paper on 16 September 2022. What was before the Judge was the "second stage" application. Neither the Company nor any other defendant appeared at that hearing.

25. Following the hearing, Durnont supplied the Judge with draft amended particulars of claim ("the APOC"), and the Judge took that document into account when arriving at his conclusions. He delivered his judgment ("the Judgment") on 26 May 2023.

26. The Judge gave Durnont permission to continue a variety of claims against Wladyslaw Jaroszewicz, Mr Michael Jaroszewicz, Fazita, M-JWK and the fifth defendant, Ms Anna Bandurska. He declined, however, to sanction the continuation of any derivative claim against the Bank, Mr Czeremcha or Mr de Makay: see paragraph 185 of the

Judgment. He did not consider that Durnont had shown a prima facie case against any of these: see paragraphs 120, 128 and 143 of the Judgment.

27. Durnont now appeals against the Judge's decision as regards the Bank, Mr Czeremcha and Mr de Makay.

The claims against the Bank, Mr Czeremcha and Mr de Makay

28. Durnont maintains that there is a prima facie case against the Bank, Mr Czeremcha and Mr de Makay under article 415 of the Polish Civil Code ("Article 415"); against the Bank for breach of the SSA; and against Mr Czeremcha and Mr de Makay for breach of fiduciary duty.

29. There is expert evidence about Article 415 from Mr Pawel Moskwa, an advocate and partner in a Polish law firm. As Mr Moskwa states, Article 415 states, "Anyone who by fault on his part causes the damage to another person is obliged to remedy it". The prerequisites of liability under Article 415 are, Mr Moskwa says, (a) the occurrence of a harmful event, (b) the occurrence of damage, (c) the existence of an adequate link between the harmful event and the damage, (d) unlawfulness of the conduct of the perpetrator and (e) fault on the part of the perpetrator. With regard to the requirement for "unlawfulness", Mr Moskwa explains that the relevant act must be "contrary to the applicable legal order, which is understood as orders and prohibitions resulting from specific legal provisions or moral norms and customs (the community principles of coexistence)". The "community principles of coexistence", Mr Moskwa says, are "moral norms commonly accepted in the whole society or social group, ordering or prohibiting a specific behaviour, even though it is not prescribed or prohibited by a specific legal norm". So far as "fault" is concerned, "According to commonly accepted approach, the essence of the fault is personal culpability of a given behaviour, that is assessment whether, in the given circumstances, the perpetrator should have and could have acted in such a manner, as not to cause the damage". What matters is not whether the person "was willing to or was aware of committing a tort", but "whether in the given circumstances he could be expected to have foreseen that his behaviour would cause or might cause the above effect".

30. In his submissions, Mr Philip Riches KC, who appeared for Durnont with Mr Andrew Dinsmore, focused first on matters relating to the Subrogation Claim and then on the SPA and Annex. I shall do likewise before turning to the allegations of breach of fiduciary duty, on which Mr Dinsmore presented Durnont's case.

The Subrogation Claim

The claim as outlined by Mr Riches

31. Mr Riches argued that the Bank breached the SSA by accepting early repayment of the Bonds from M-JWK. The parties, he said, had agreed sophisticated arrangements for repayment, as seen not only in the SSA but also in the FFSA and the Escrow Agreement, and it was not open to the Bank to depart from them without the Company's consent. Alternatively, it was wrong for the Bank to take payment from M-JWK when it knew or suspected that M-JWK was going to use the payments to bring a subrogated claim and without alerting the Company to what was happening. By acting in this way, the Bank not only breached the SSA, but incurred liability under Article 415. As a result of

the Bank's misconduct, Mr Riches said, M-JWK was able to bring the Subrogation Claim and, in time, to obtain the Default Judgment and execute it against the Certificates through the first two bailiff sales.

The Judgment

32. The Judge said this about the Subrogation Claim in paragraphs 117 and 118 of the Judgment:

> "117. There is however no real evidence that the Bank or Mr Czeremcha or Mr de Makay were involved in, or were aware of, the steps being taken in relation to grant of the 2016 PoA or the entry into the Collateral Agreement, still less that they were aware of or a party to what is said to have been their intended purpose. The Bank and its representatives were aware that M-JWK was paying the Convertible Bonds early and that such payment may not have been consistent with the arrangements put in place under the FFSA and the Escrow Agreement for repaying the Convertible Bonds. There is also some evidence that the Bank and Mr de Makay may have been aware that M-JWK's purpose in making the payments was to enable it to bring a subrogated claim against the Company …. However, it is difficult to see that this supports the case that the Bank and its representatives had any involvement in the alleged misconduct of Wladyslaw and Michael Jaroszewicz in relation to the grant of the 2016 PoA and the entry into the Collateral Agreement. In any event, as explained above, it does not appear that the Collateral Agreement itself has caused the Company any loss (since the Certificates were subsequently returned by M-JWK to the Company).
>
> 118. As described above, the key events which appear to have caused loss to the Company were the entry of the Default Judgment followed by the Bailiff Sales and the issuance of the Series H-K certificates. However, there is no evidence which I was shown of the involvement of the Bank, Mr Czeremcha or Mr de Makay in these matters."

The pleaded case

33. The passage in the APOC which says most about the Bank's role in relation to the redemption of the Bonds is to be found in paragraph 67. The opening words of paragraph 67 allege that "Mr Czeremcha and/or Mr De Makay and/or the Bank at least suspected (or failed to carry out due diligence in respect of) the wrongdoing of Wladyslaw Jaroszewicz, Michael Jaroszewicz, Fazita and/or M-JWK". Paragraph 67(b) addresses the position as regards Mr Czeremcha and Mr de Makay and, within that, paragraph 67(b)(ii) alleges:

> "Mr Czeremcha and/or Mr De Makay knew that (on or around 9 September 2015) the Bank was initially reluctant to allow an early repayment of the Convertible Bonds by M-JWK without

> PREI's approval. They at least suspected that the proposal, which was part of Wladyslaw Jaroszewicz's and/or Michael Jaroszewicz's plan to procure the Subrogation Claim in furtherance of the intended expropriation of PREI's assets, was not in PREI's interests and/or required PREI's approval (which they knew had not been given). Despite this knowledge and/or suspicion, the Bank ultimately decided to accept the early repayment of the Convertible Bonds by M-JWK. Durnont understands that Wladyslaw Jaroszewicz and/or Michael Jaroszewicz and/or M-JWK put the Bank under pressure to accept the proposal."

34. Mr Riches accepted in the course of his submissions that the words "which was part of Wladyslaw Jaroszewicz's and/or Michael Jaroszewicz's plan to procure the Subrogation Claim in furtherance of the intended expropriation of PREI's assets" are descriptive of the part which, on Durnont's case, the proposal for early repayment was to play in the plan of Mr Wladyslaw Jaroszewicz and/or Mr Michael Jaroszewicz and that it is not alleged that Mr Czeremcha or Mr de Makay knew of or suspected any intended expropriation.

35. Neither in paragraph 67(b)(ii) nor elsewhere in the APOC is there any positive allegation that the repayment *in fact* required the Company's consent, still less an explanation of why that should be so. Nor does the pleading expand on the basis on which it is alleged that Mr Czeremcha and Mr de Makay "at least suspected" that repayment "was not in PREI's interests and/or required PREI's approval".

36. Later in paragraph 67 it is asserted that "[i]n circumstances where the Bank was motivated primarily by a desire to achieve an exit from the joint venture, the Bank and/or Mr Czeremcha and/or Mr De Makay were prepared to turn a blind eye to the wrongdoing of Wladyslaw Jaroszewicz, Michael Jaroszewicz, Fazita and/or M-JWK and/or permitted it and/or facilitated it where it suited its interests" (paragraph 67(b)(v)) and that, because "[t]he knowledge and/or suspicions of Mr Czeremcha and/or Mr De Makay … are each to be attributed to the Bank", "the Bank knew of or at least suspected or failed to carry out due diligence in respect of the wrongdoing of Wladyslaw Jaroszewicz, Michael Jaroszewicz, Fazita and/or M-JWK" (paragraph 67(c)). However, these general statements take matters no further as to whether (and, if so, on what basis) the Bank acted wrongfully in accepting repayment of the Bonds.

37. Paragraph 80 of the APOC alleges that the Bank breached clause 24.1 of the SSA or "the implied terms pleaded at paragraphs 26 to 29 above" through "wrongdoing on the part of Mr Czeremcha and Mr De Makay" and by "procuring, enabling, acquiescing in and/or otherwise permitting and failing to prevent such wrongdoing and concealment of the same, insofar as such wrongdoing was concealed from PREI and other PREI members as set out herein". Clause 24.1 of the SSA reads as follows:

> "Each of the parties (other than the Company) undertakes to the others that he will exercise all powers and rights available to him as a director, officer, employee or shareholder in the Company (or in any other Group Company) in order to give effect to the provisions of this Agreement and to ensure that the Company complies with its obligations under the Agreement."

In paragraphs 26 to 29 of the APOC, it is alleged that:

i) On the true construction of clause 24.1, each shareholder undertook that it and its nominees would "act in good faith in the best interests of the joint venture and of the members of PREI [i.e. the Company] as a whole" and "comply with their fiduciary duties and other duties arising by virtue of their position as director, officer or shareholder of any entity within the Fund";

ii) Alternatively, such terms were implied;

iii) On the true construction of the SSA, the shareholders agreed to act "honestly and transparently in their dealings with PREI and its assets"; and

iv) Alternatively, such a term was implied.

The claim for breach of the SSA

38. By paying the Bank, M-JWK was able to bring a claim against the Company. That M-JWK took that course is, on the face of it, very odd, as the Judge recognised. The Judge observed that "it appears unusual for what was in effect a wholly owned subsidiary of the Fund to bring an action against the Company which owned all the Certificates in the Fund". It is not surprising that the Judge concluded that the Court could infer that M-JWK and, through it, Messrs Wladyslaw and Michael Jaroszewicz were seeking to obtain ownership and control of the Certificates.

39. In the context of the present appeal, however, we are concerned with the allegations against the Bank, Mr Czeremcha and Mr de Makay, not with those against other defendants. The question is whether the Judge was wrong to decline to allow Durnont to pursue claims against the Bank, Mr Czeremcha and Mr de Makay. There is no challenge to his decision to give permission for the claims against the other defendants.

40. I do not think that the claim that the Bank breached the SSA by accepting payment from M-JWK stands any real chance of success. It is true that the SSA, FFSA and Escrow Agreement set out dates and mechanisms for the repayment of the Bonds, but these were clearly intended for the benefit of the Bank. The Bank was to be able to complain if it was not repaid in accordance with these documents. It cannot be inferred that the Bank was agreeing that it would not accept payment earlier or in a different way, and no such obligation is anywhere imposed explicitly. Nor, in fact, do the APOC contain any clear allegation that the Bank breached the SSA simply by reason of accepting early payment from M-JWK.

41. On top of that, the Bank was told by Dr Tofel that, under Polish law, it "may not refuse" to accept payment from M-JWK where the Bonds were due for repayment and "may voluntarily accept" such repayment earlier without the Company's consent. Mr Riches pointed out that the Bank had said that early redemption would be possible "after an appropriate statement is submitted by the Bond Issuer", but Dr Tofel made his remarks in response and Mr Riches accepted that there is no evidence that Dr Tofel was wrong about the relevant Polish law. I cannot see, in the circumstances, that there is a prima facie case that the Bank, Mr Czeremcha or Mr de Makay "suspected that the proposal [for early repayment by M-JWK] … required PREI's approval" (as is alleged in paragraph 67(b)(ii) of the APOC).

42. Mr Riches argued that, even if the Bank was contractually entitled to accept the payments from M-JWK, it was obliged to inform the Company of what it was doing. That, Mr Riches said, flowed from the obligations of good faith, honesty and transparency alleged in paragraphs 26 to 29 of the APOC. Of course, the SSA does not in terms impose such duties. Even assuming, however, that they are implied (which is far from obvious, especially as regards the supposed obligations of honesty and transparency), (a) the Company was plainly told of the payments soon after they were made (by means of M-JWK's demands if not otherwise), (b) the Bank appears to have confirmed to the Company in July 2015 that the first payment had been made and (c) the APOC do not contain any allegation that the Company would have been any better off if it had been told of each payment before it was made. In fact, the APOC do not include a clear allegation that the Bank was contractually bound to tell the Company about the repayment proposals.

43. Further, I do not think the fact, if it be one, that the Bank did not consider the repayments to be in the Company's interests makes any difference. The Bank must, I think, have been entitled to act in its own interests in deciding whether to accept the repayments. The SSA did not say otherwise, and I cannot see that any implied term will on that account have barred the Bank from taking M-JWK's payments.

44. In any event, it is not apparent that any loss which the Company sustained was attributable to any breach of the SSA on the part of the Bank. The events which, on Durnont's case, ultimately occasioned loss to the Company were far removed from any breach of the SSA, and it is not suggested that they were in the Bank's contemplation. The Company is said to have suffered loss as a result of allowing the Default Judgment to be entered and Certificates then being sold to M-JWK by way of the first two bailiff sales for less than their true value. It is not alleged that the Bank, Mr Czeremcha or Mr de Makay was aware that any such misappropriation was intended; none of them can be blamed for the apparent invalidity of the meeting of the Company's board on 28 April 2016; and none of them, either, had any involvement in the grant of the power of attorney to Mr Tokarski, the conclusion of the Collateral Agreement, the failure of Mr Gram and Mr Steimler to cause the Company to file a defence to the Subrogation Claim (because, it seems, of the progress they thought had been made with exit arrangements), the Certificate sales or the issue of further series of Certificates.

The claim under Article 415

45. For similar reasons, I do not consider Durnont to have established a prima facie case against the Bank, Mr Czeremcha or Mr de Makay under Article 415 in relation to the Subrogation Claim.

46. Arguing to the contrary, Mr Riches stressed Mr Moskwa's evidence, to which, he said, the Judge had attached too little significance. The Judge said this about Mr Moskwa's evidence in the Judgment:

> "101. That said, whilst I have taken into account the views which Mr Moskwa has expressed about whether the pleaded facts would, if assumed to be true, satisfy the requirements of Article 415, I have also considered the question for myself. That is not least because Mr Moskwa's conclusions are expressed in summary form and do not elaborate on how the underlying facts,

> which I have set out above, are said to give rise to claims against each of the Defendants. Further, I also note that his views were expressed in relation to the original Particulars of Claim which has subsequently been amended.
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> …
>
> 120. I have taken into account that Mr Moskwa opines that, if the facts pleaded in the original Particulars of Claim are assumed to be true, then he considers that the requirements under Article 415 are satisfied in relation to the claims against the Bank, Mr Czeremcha and Mr de Makay. However, as noted above, his evidence contains no attempt to link the evidence and the chronological narrative to the requirements for a claim under Article 415."

47. Mr Moskwa said the following in his report as the potential liability of Mr Czeremcha under Article 415:

> "Assuming (as instructed) that the factual matters pleaded in the Particulars of Claim are established, it is my opinion, that PREI would be able to establish liability against Mr Jan Czeremcha based on art. 415 of the PCC in connection with: (i) breach of community principles of life; (ii) breach of general prohibition of appropriation of someone else's movable property or property rights (derived out of art. 284 of the Criminal Code); (iii) breach of general prohibition of causing another person to disadvantageously dispose of property by misleading him, or by taking advantage of a mistake or inability to adequately understand the actions undertaken (derived out of art. 286 of the Criminal Code); iv) breach of general prohibition of causing damage to an entity by person managing its business by way of exceeding powers granted to such person or by failing to perform his duties (derived out of art. 296 of the Criminal Code) as the abettor to Fazita Investment Limited, Mr Wladyslaw Jaroszewicza, Mr Michael Carl Jaroszewicz and M-JWK Management sp. z o.o. (as regarding points (i) - (iii) above) and as the direct perpetrator (as regarding point (iv) above). The liability would stem from acts and omissions indicated in paragraphs 33-65 and 67(b) of the Particulars of Claim and constituting breaches referred to in previous sentence."

The next two paragraphs of Mr Moskwa's report dealt with Mr de Makay and the Bank in turn in a comparable way.

48. It seems to me that the Judge was amply entitled to approach Mr Moskwa's evidence in the way he did and, in particular, to consider that the evidence was not such as to require him to conclude that there is a prima facie case against the Bank, Mr Czeremcha or Mr de Makay under Article 415. As the Judge said, "Mr Moskwa's conclusions are expressed in summary form and do not elaborate on how the underlying facts, which I have set out above, are said to give rise to claims against each of the Defendants".

Moreover, Mr Moskwa stated in terms that he was proceeding on the basis that the facts alleged in the particulars of claim are established. He will thus have been assuming, for example, that Mr Czeremcha and Mr de Makay "at least suspected that the proposal … was not in PREI's interests and/or required PREI's approval" (as alleged in paragraph 67(b)(ii)), that "there was collusion between Mr De Makay on the one hand and Mr Wladyslaw Jaroszewicz and/or Mr Michael Jaroszewicz" (as alleged in paragraph 67(b)(iv)), that "the Bank and/or Mr Czeremcha and/or Mr De Makay were prepared to turn a blind eye to the wrongdoing of Wladyslaw Jaroszewicz, Michael Jaroszewicz, Fazita and/or M-JWK and/or permitted it and/or facilitated it where it suited its interests" (as alleged in paragraph 67(b)(v)) and that "Mr Czeremcha and/or Mr De Makay at least suspected (or failed to carry out due diligence in respect of) the wrongdoing of Wladyslaw Jaroszewicz, Michael Jaroszewicz, Fazita and/or M-JWK" (as alleged in paragraph 67(c)).

49. I have already indicated that (a) the Bank did not, in my view, commit any breach of contract by accepting payment from M-JWK, (b) there is no evidence that Dr Tofel was wrong to say that, as a matter of Polish law, the Bank was at least entitled to take payment from a third party such as M-JWK without obtaining the Company's consent, (c) there is not, to my mind, a prima facie case that the Bank, Mr Czeremcha or Mr de Makay "suspected that the proposal [for early repayment by M-JWK] … required PREI's approval", (d) the APOC do not allege that the Company would have been better off if it had been told of the repayments sooner, nor even contain a clear allegation that the Bank was bound to do so, (e) the Bank, Mr Czeremcha and Mr de Makay were not involved in the subsequent events which are said to have caused the Company loss and (f) more generally, the events which, on Durnont's case, occasioned loss to the Company were far removed from the Bank's acceptance of the repayments and were outside the Bank's contemplation. As the Judge said, "the key events which appear to have caused loss to the Company were the entry of the Default Judgment followed by the Bailiff Sales and the issuance of the Series H-K certificates" and "there is no evidence … of the involvement of the Bank, Mr Czeremcha or Mr de Makay in these matters".

50. In the circumstances, it seems to me that it was certainly open to the Judge to conclude that there was no prima facie case that the Bank, Mr Czeremcha or Mr de Makay had incurred liability under Article 415 in relation to the Subrogation Claim, and I share that view myself.

The SPA and Annex

The claim as outlined by Mr Riches

51. Mr Riches explained that the Bank's shares in the Company are still thought to be registered in its name. He argued, however, that the Bank breached the Company's articles of association ("the Articles") and, in consequence, the SSA by agreeing to sell its shares to PSPT and granting PSPT rights in respect of those shares. Mr Riches further argued that the Company and Durnont should have been informed of what the Bank was doing and that the conduct of the Bank, Mr Czeremcha and Mr de Makay in relation to these matters gave rise to liability under Article 415 as well as a contractual claim. The misconduct, Mr Riches submitted, enabled PSPT to bring its proceedings against the Company and so led to the third bailiff sale and the loss of the remaining Certificates.

The Judge's assessment

52. The Judge said this about the allegations in respect of the SPA in paragraph 142 of the Judgment:

> "The Claimant also pleads that the Bank breached clauses 17 and 24.2 of the SSA (which in turn refer to relevant restrictions on the transfer of shares in the Company's Articles of Association: see regulations 22 to 26) by entering into the 2014 SPA, which it is said involved the Bank's shares in the Company being agreed to be purchased by PSPT. However, I do not see that this is correct since the 2014 SPA appears to envisage that, prior to any transfer of the shares taking place, there would be compliance with the pre-emption provisions contained in the Articles: see e.g. Clause 4.2, the definition of 'Transfer Notice' and the form of Transfer Notice attached as Schedule 1 to the 2014 SPA, and Clause 5.1. As noted above, it does not appear that any transfer of the shares has in fact taken place. Further, I have not seen any evidence that, even if there had been a breach in this respect, that this has itself caused any loss to the Company. Accordingly, I do not consider there is a prima facie case in relation to this claim against the Bank either."

53. When refusing permission to appeal, the Judge said this:

> "10. The Claimant says that even if there was not a transfer of the shares there is still a real prospect of the Court of Appeal concluding that there was a breach of clauses 17 and 24.2 of the SSA. This particular argument was not put to me in the course of the hearing. Even assuming that the Claimant would be permitted to run it on appeal, it does not seem to me to have any prospect of success; the short point is that the 2014 SPA precisely appears to envisage and anticipate there would be compliance with the pre-emption provisions in the Articles before any transfer of the shares took place: see [142] of the Judgment.
>
> 11. In any event, I do not see that there is any real prospect of the Claimant establishing that any such breach of the SSA by the Bank as it alleges has caused loss to the Company."

The pleaded case

54. The core of Durnont's pleaded case in respect of the SPA is to be found in paragraph 81 of the APOC, where it is alleged that, "as a result of the Bank's entry into the 2014 SPA (as amended on 14 February 2018), the Bank breached clauses 17 and 24.2 of the SSA in that each of the agreements to transfer the shares and the transfer of shares was contrary to the restrictions in Articles 22 to 26 and/or Article 12 of the Articles and concealed such wrongdoing from PREI and/or Durnont and/or failed to alert them to it". Elsewhere in the APOC, Durnont alleges the following:

i) The SPA was concealed from Durnont and the Company by, among others, Mr Czeremcha, including in communications with other directors of the Company in January 2015 (paragraph 35);

ii) The Bank "was aware (because it was self-evident) or at least suspected that the 2014 SPA involved a breach of the SSA and/or was not in PREI's best interests (and/or that Michael Jaroszewicz and/or Wladyslaw Jaroszewicz and/or Mr Czeremcha were acting contrary to the duties they owed to PREI)" (paragraph 36(b));

iii) Mr Czeremcha and/or Mr de Makay "had knowledge of the 2014 SPA (as amended on 14 February 2018) but were involved in concealing it from PREI's other directors" and they "were aware (or at least suspected) that the 2014 SPA (as amended on 14 February 2018) involved a breach of the SSA and/or was not in PREI's interests" (paragraph 67(b)(i));

iv) On or around 11 April 2018, the Bank "purported to give PREI, Fazita, Sazia and Durnont notice that it had transferred all of its rights and obligations under the SSA to PSPT pursuant to the 2014 SPA (as amended on 14 February 2018)" (paragraph 55);

v) PSPT issued a claim against the Company on 22 July 2019 for "alleged breach of the SSA (as amended) in the sum of €4,119,527", obtained a default judgment on 1 November 2019 and had the damages and interest quantified on 4 February 2020 (paragraphs 62A, 62B and 63A); and

vi) The third bailiff sale which probably took place in April 2020 was used as a means of enforcing the default judgment which PSPT had obtained (paragraph 64(c)(iv)).

Provisions of the SSA and Articles

55. By clause 17 of the SSA, the Bank agreed to abide by regulations 11 to 26 of the Articles and, by clause 24.2, it undertook more generally to comply with the Articles.

56. Regulations 19 to 26 of the Articles are concerned with the transfer of shares in the Company. Regulation 22 prohibits the "transfer" of any "Shares" otherwise than in accordance with regulations 23 to 26 and defines "transfer" to include "any form of disposal and the creation of any right or interest in favour of any person other than the holder" and "Share" to include "any interest (whether legal or equitable) in" any share in the Company. Regulation 24 provides for pre-emption rights. By regulation 24, subject to immaterial exceptions:

> "any shareholder (Proposing Transferor) desiring to sell, transfer or otherwise dispose of any Shares which it holds shall … give notice in writing to the Company (Transfer Notice) specifying the number and classes of Shares the Proposing Transferor desires to sell, transfer or otherwise dispose of (Sale Shares) … and the price (Sale Price) at which the Sale Shares are offered by it and the third party (if any) to whom it proposes to transfer the

> Sale Shares if they are not purchased by the other shareholders pursuant to the following provisions of this Regulation 24".

Provisions of the SPA and Annex

57. The SPA, which is governed by Polish law, provided for the Bank to sell its shares in the Company to PSPT "[s]ubject to the Conditions Precedent being satisfied": clause 2. Clause 4, headed "Conditions Precedent", read:

> "4.1 The Seller's obligation to sell the Shares and the Purchaser's obligation to purchase the Shares … is conditional on the satisfaction of the following Conditions Precedent:
>
> (a) completion of the Sale of Alfa Centrum Bialystok;
>
> (b) repayment in full of the Loan Facility by the 31st January 2015;
>
> (c) none of the A Transferees [i.e. the A Shareholders], B Transferees [i.e. the B Shareholders] and/or Ordinary Transferees [i.e. other holders of Ordinary Shares] exercise their pre-emption right, provided in Regulation 24 of the Articles of Association.
>
> 4.2 The Seller shall send the Company a Transfer Notice only on the completion of the Conditions Precedent referred to in paragraphs 4.l(a) and 4.l(b)."

58. Clause 5, dealing with completion, stated in clause 5.1:

> "Completion will take place at the offices of Allen & Overy (or any other place agreed between the Parties) on the 30th day following the day on which the Company's directors sent, In accordance with Regulation 24 (g) (iii) notices to the Ordinary Transferees, the A Transferees and B Transferees inviting them to exercise their respective rights According to Reg. 24 of the Articles of Association."

Under clause 5.2, the parties were to sign the share transfer only after the Bank had "deliver[ed] confirmation from the Company's directors that the Company did not receive acceptances from any A Transferees, B Transferees and/or Ordinary Transferees in respect of the Shares".

59. Recitals to the Annex explained that the conditions precedent for which the SPA provided had not yet been satisfied and that the parties wished to amend the provisions of the SPA. The price at which the Bank was selling its shares was reduced from €8 million to €6 million, but the Bank was now to be paid €4 million of the €6 million by way of deposit and to be entitled to retain it in specified circumstances. Clause 4 of the SPA was varied so that:

i) The conditions precedent were now to be the completion of the sale of a different shopping centre, that in Grudziadz, and "none of the A Transferees, B Transferees or Ordinary Transferees exercis[ing] their pre-emption rights, pursuant to the Transfer Notice and as provided for in Regulation 24 of the Articles of Association";

ii) PSPT could waive the first of these conditions precedent from the beginning of 2019;

iii) The Bank was to send the Company a transfer notice within 14 days after fulfilment or waiver of the first condition precedent.

The Bank undertook that, if it retained the deposit, it would exercise its powers under the Articles to appoint nominees of PSPT's choosing to the Company's board, refrain from exercising rights under the SSA and, on request from PSPT, provide a power of attorney authorising persons chosen by PSPT to exercise rights attaching to the Bank's shares and under the SSA. Further, a new clause 8(1) was inserted into the SPA under which the Bank undertook:

> "i. not to sue, transfer. pursue, endorse the pursuit of, instruct or assist in the pursuit by any other person of any claims or initiate any proceeding before any court or any public authority regarding the Collateral Agreement, the April Power of Attorney, the Collateral Claims or Other Claims, including future Other Claims;
>
> ii. that as being in the best interest of the Company, they will not prepare, instruct, assist in preparing, finance or in any other way endorse the defence of: (i) Claim No. CL-2016-000048 lodged by M-JWK against PREI in the High Court of Justice, (II) Claim No. XX Geo 273/16 lodged by Mr. Wladyslaw Jaroszewicz and Fazita Investments Limited against, among others, the Company in the Warsaw District Court, (iii) Claim No. 1223/2016 lodged by Mr. Wladyslaw Jaroszewicz and Fazita Investments Limited against, among others, the Company in Cyprus and (iv) any ancillary motions for injunctive relief filed by M-JWK, Mr. Wladyslaw Jaroszewicz, Fazita Investments Limited or their Affiliates concerning or relating to the proceedings specified in (i), (ii) and (iii) above;
>
> iii. that as being in the best interest of the Company, they will not prepare, instruct, assist in preparing, finance or in any other way endorse the filing of counterclaims or motions for injunctive relief or auxiliary motions, documents, requests, applications or filings relating to or concerning: (i) Claim No. CL-2016-000048 lodged by M-JWK against PREI in the High Court of Justice …."

60. The Annex further provided for the Bank to retain the deposit if, among other things, a sale of the Grudziadz shopping centre was not completed by 6 April 2018. It appears that no such sale had been effected by that date and, according to the APOC, on about 11 April 2018 the Bank "purported to give PREI, Fazita, Sazia and Durnont notice that it had transferred all of its rights and obligations under the SSA to PSPT pursuant to the 2014 SPA (as amended on 14 February 2018)".

Construction of the Articles

61. Since the Company is Cypriot, the construction of its articles must depend on the law of Cyprus. Not only, however, are the articles in English, but they are framed as the articles of a private company incorporated in England and Wales might be and there is no indication that the law of Cyprus differs in a material respect from that of England and Wales. It is therefore relevant to consider authorities from this jurisdiction dealing with provisions in company articles relating to share transfers.

62. In *Re Sedgefield Steeplechase Co (1927) Ltd, Scotto v Petch* [2000] 2 BCLC 211 ("*Sedgefield Steeplechase*"), shareholders had agreed to sell the equitable interests in their shares, undertaken to transfer the shares as the buyer might direct and granted the buyer irrevocable powers of attorney to represent them at company meetings. It was, however, expressly provided that the buyer could not transfer shares, or require their transfer, in a way that would contravene subsisting pre-emption provisions. Lord Hoffmann, sitting as an additional Judge of the Chancery Division, held that pre-emption provisions in the company's articles had not been triggered. He said at 221:

> "The general principle which I would derive from the cases is that a shareholder who has done nothing inconsistent with an intention to comply, at the appropriate moment, with the subsisting provisions of the articles, cannot be required to serve a transfer notice at an earlier stage. The obligation attaches only when the shareholder has entered into arrangements … which place him under a contractual obligation to execute and deliver a transfer in violation of the rights of pre-emption.
>
> With these principles in mind. I return to the terms of the old documentation. The vendors agree to sell the beneficial interest in their shares to Northern Racing. [Counsel for the petitioner/claimant] accepts, for the purposes of these preliminary issues, that 'transfer' in art 23(b) means a transfer of the legal title to the shares and that a sale of a beneficial interest, whereby the vendor becomes trustee of the shares for the purchaser, does not of itself infringe the articles. What makes it an infringement is the fact that, as [counsel for the petitioner/claimant] submits, the beneficial ownership of Northern Racing entitles it to demand a transfer of the legal title and puts him in the same position as if it had been granted an option to acquire the shares.
>
> In my view the sale of the beneficial ownership by the old documentation was so qualified that … it did not give Northern

> Racing the right to call upon a shareholder to do anything inconsistent with the pre-emption rights."

63. The Court of Appeal ([2001] BCC 889) dismissed an appeal from Lord Hoffmann's decision, but focused on the particular provisions at issue. Nourse LJ, having quoted the "general principle" which Lord Hoffmann had derived from the cases, said in paragraph 19:

> "For my part I have found the authorities to be of little help. In each of them the decision depended on the particular facts …. In each of the other cases the facts as a whole were clearly distinguishable. I do not feel able to derive any general principle from the authorities and certainly not from *Lyle & Scott Ltd v Scott's Trustees* [[1959] AC 763], on which Lord Hoffmann particularly relied. Nevertheless, I am, for the reasons I have given, satisfied that he came to a correct decision."

Chadwick LJ, the other member of the Court to give a detailed judgment, did not cite any previous authority.

64. In *Re Coroin Ltd, McKillen v Misland (Cyprus) Investments Ltd* [2012] EWHC 2343 (Ch), [2013] EWCA Civ 781, [2013] 2 BCLC 583 ("*Coroin*"), clause 6.1 of the company's articles provided for a shareholder "desiring to transfer" shares to give notice of that desire and the provisions applied to "the transfer, sale or other disposal not only of shares, but also of any interest in shares" (see paragraph 283 of the judgment of David Richards J at first instance). Further, clause 6.17 of the articles stated that no share or interest in one was to be transferred, sold or otherwise disposed of save as provided in clause 6. The petitioner contended that arrangements between a Mr Quinlan, who was a shareholder, and what were termed "the Barclay interests" had the practical effect of bringing about a transfer of the shares, leaving Mr Quinlan with only an equity of redemption, and that, viewed realistically, Mr Quinlan had shown a "desire" to transfer his shares within the meaning of article 6. Upholding David Richards J, however, the Court of Appeal rejected that contention.

65. In the course of her judgment, Arden LJ said at paragraph 30:

> "the arrangements between Mr Quinlan and the Barclay interests neither resulted in Mr Quinlan having a desire to transfer shares for the purposes of cl 6.1 nor breached cl 6.17 because the sale and transfer contemplated by the February agreement was subject to compliance with the shareholders' agreement and Coroin's articles. The position is on all fours with that in *Re Ringtower Holdings plc* [1989] BCLC 427 and *Re Sedgefield Steeplechase Co* (*1927*) *Ltd* [2001] 1 BCLC 211, where the court held that there was no relevant desire or intention to transfer shares for the purpose of pre-emption provisions where what was proposed was to transfer the shares subject to a similar condition. It cannot, therefore, be said that the Quinlan shares had been 'transferred, sold or otherwise disposed of save as provided in this clause 6' for the purposes of cl 6.6. It follows that the

> February agreement is also not an attempt to transfer shares within cl 6.6."

Turning to an argument that Mr Quinlan had transferred a contingent proprietary interest in his shares, Arden LJ said:

> "[38] In my judgment, the short answer to this point is that, by virtue of cl 6.17, no interest in shares could be conveyed other than in a manner for which cl 6 provided. I shall have more to say about cl 6.17 below.
>
> [39] There is a further reason for rejecting [counsel for the petitioner's] submission. The fundamental characteristic of the February agreement is that it was conditional on compliance with Coroin's pre-emption articles. In my judgment, an interest in shares would not pass under a contract for the sale of shares which is subject to a true condition precedent until the condition precedent is fulfilled: *Wood Preservation Ltd v Prior* [1968] 2 All ER 849 at 845–856 (affirmed on other grounds [1969] 1 All ER 364, [1969] 1 WLR 1077). Fulfilment of the condition precedent was under the control of the Barclay interests, but that did not, in my judgment, prevent it from being a true condition precedent so far as Mr Quinlan as transferor was concerned (cf *Michaels v Harley House* (*Marylebone*) *Ltd* [1999] 1 BCLC 670, [2000] Ch 104). (Contrary to [counsel for the petitioner's] submission, Mr Quinlan could not waive the condition as to the chargee's consent.)"

66. In a similar vein, Moore-Bick LJ said at paragraph 136:

> "The agreement of 17 February 2011 was an agreement for the sale of Mr Quinlan's shares subject to compliance with the pre-emption provisions. The agreement to transfer ownership of the shares was therefore conditional in nature. In order to perform the agreement it was necessary as a first step for Mr Quinlan to give a transfer notice pursuant to cl 6.1. The agreement does not contain any express requirement for him to do that, but it does oblige him to provide assistance to the buyer to the extent reasonably necessary to give effect to the terms of the agreement and in my view it is not difficult to find within the agreement an obligation on him to give such a notice forthwith or whenever asked to do so. Given the nature of the subject matter, the court would in my view compel compliance with that term, but that is not the same as saying that as from the time the agreement was entered into the contract to transfer the ownership of the shares was specifically enforceable."

Having referred to *Wood Preservation Ltd v Prior* [1969] 1 WLR 1077, Moore-Bick LJ went on:

> "[137] … Until the pre-emption provisions have been triggered by the giving of a transfer notice and the existing shareholders' rights under them have been exhausted the purchaser does not have the right to call for the title to any remaining shares to be transferred to him. This tends to support the conclusion that no proprietary interest of any kind could pass to the Barclay interests under the agreement of 17 February 2011 until the whole of the pre-emption process had been completed.
>
> [138] Even if that is wrong, however, and the Barclay interests would otherwise have acquired a contingent equitable interest in Mr Quinlan's shares under the agreement, cl 6.17 is, in my view, effective to prevent the creation of any such interest …."

67. Rimer LJ, the third member of the Court, said in paragraph 165 that he considered that, "in a case where there has been no prior compliance with the pre-emption provisions, cl 6.17 renders ineffective both a purported transfer of shares and a purported transfer of any proprietary interest in shares". Later in his judgment, Rimer LJ said:

> "[169] … The sale agreement was in substance one for the sale of such (if any) shares as were available to be sold after compliance with the pre-emption provisions; and it was a condition of the agreement that those provisions should first be complied with.
>
> [170] Prior to compliance with such condition, EHGL could not, by a claim for specific performance, compel the transfer to it of any part of Mr Quinlan's shareholding, let alone the entire shareholding; and, if it could not do that, the agreement cannot have given it any proprietary interest in the shares. As the identification of the sale shares and their price was conditional upon the outcome of prior compliance with the pre-emption provisions, it follows that if any relevant 'interest' in shares was destined to pass under the agreement it could only so pass at the earliest once the sale shares had been identified, which could not happen until after such compliance."

The present case

68. Until the Annex was concluded on 14 February 2018, the sale of the Bank's shares under the SPA was subject to several unfulfilled conditions precedent. The Annex served to vary the conditions precedent, and one of them could now be waived by PSPT from 2019. However, the sale of the Bank's shares has remained conditional on other shareholders electing not to exercise their pre-emption rights under regulation 24 of the Articles. In the circumstances, it is hard to see how, having regard to such cases as *Sedgefield Steeplechase* and *Coroin*, the Bank can yet be said to "desire" to transfer the shares themselves for the purposes of regulation 24.

69. There is also a compelling argument for saying that the Bank has not to date given PSPT any "interest (legal or equitable)" in its shares. *Coroin* tends to confirm that the

existence of an unsatisfied condition precedent will prevent a purchaser from acquiring any proprietary interest.

70. However, Mr Riches understandably stressed the wide definition of "transfer" given in regulation 22 of the Articles. The Annex, he argued, must have involved "the creation of any right … in favour of any person other than the holder" within the meaning of regulation 22 and, as a result, the Bank must by the date of the Annex, if not before, have "desir[ed] to sell, transfer or otherwise dispose of any Shares" within the meaning of regulation 24. Further, the Bank must in fact have "transfer[red] any Shares" otherwise than "in accordance with the provisions of Regulations 23 to 26" within the meaning of regulation 22 in breach of that regulation.

71. Perhaps it could be objected that regulation 22 of the Articles rendered the purported creation of rights in favour of PSPT ineffective if and to the extent that doing so would contravene regulation 22. It seems to me, however, that there is a plausible case that the Annex gave rise to breaches of regulations 22 and/or 24 of the Articles and, hence, clauses 17 and 24.2 of the SSA. When the Bank retained the deposit, which it seems to have done in April 2018, the Annex provided for PSPT to control rights attaching to the Bank's shares in various ways. That being so, there is a persuasive argument that the Bank created rights in favour of someone other than the shares' holder at that stage. There is also, I think, reason to suppose that the Bank would at least have suspected that the Annex involved breach of the Articles and SSA. As things stand, of course, there is no evidence to the contrary from the Bank.

72. Even assuming, however, that there is a prima facie case that the Bank breached the Articles and the SSA with the conclusion of the Annex, a number of the allegations made against the Bank in connection with the SPA and Annex can, I think, be seen at this stage to lack any substantial basis since:

    i) The SPA would not have given rise to any breach of the Articles or SSA before the SPA was amended in 2018;

    ii) The Bank cannot, therefore, have been aware of any such breach before 2018;

    iii) Aside from the Articles (and the requirements to abide by them imposed by the SSA), there would appear to be no good reason to conclude that the Bank was obliged to act in the Company's interests in its dealings with its shares. Shares in a commercial company are property, and a shareholder can generally do what it likes with them: see e.g. *Peters' American Delicacy Co Ltd v Heath* (1939) 61 CLR 457, at 504.

73. Another theme evident in Durnont's case seems to lead nowhere. It is said that the SPA was concealed from Durnont and the Company. On Durnont's own case, however, both it and the Company were informed in April 2018 that the Bank had "transferred all of its rights and obligations under the SSA to PSPT pursuant to the 2014 SPA (as amended on 14 February 2018)". There is no apparent reason to believe that Durnont or the Company would have been any better placed if they had learned of the SPA earlier. The Company is said to have suffered loss as a result of the proceedings which PSPT brought and the bailiff sale which flowed from them. Those proceedings were not, however, issued until more than a year after Durnont and the Company had been told of "the 2014 SPA (as amended on 14 February 2018)".

74. The real question which remains in this context is whether there is a prima facie case that the PSPT proceedings and ensuing bailiff sale caused the Company loss for which the Bank is liable as a result of any breach of the Articles and SSA arising from its entry into the Annex. In this respect, the APOC are distinctly thin, and the evidence we have seen takes matters little further. In the first place, while the APOC record that the PSPT proceedings were for breach of the SSA, there is no explanation of what breach(es) were alleged, and there is no averment that the claim was unfounded. Secondly, there is no plea that the Bank had any involvement in, or even any knowledge of, the PSPT proceedings. Thirdly, it is not suggested that the Bank knew, or even suspected or had reason to suspect, that PSPT would use rights granted to it under the Annex to bring a baseless claim against the Company. Fourthly, it is not asserted that, had the Bank given notice under regulation 24 of the Articles, the outcome would have been any better for the Company. In particular, there is no suggestion that Durnont, Sazia or anyone else would have bought the Bank's shares. Nor again is it said that compliance by the Bank with the Articles would have meant that the Company ceased to be deadlocked. In the circumstances, I do not consider there to be a prima facie case that any breach of the SSA or Articles which the Bank committed as a result of the conclusion of the Annex caused the Company any loss for which the Bank is liable.

75. For similar reasons, I have not been persuaded that there is a prima facie case that the Bank, Mr Czeremcha or Mr de Makay is liable under Article 415 in connection with the SPA and Annex. I have already indicated that, in my view, the Judge was justified in considering that Mr Moskwa's evidence was not such as to require him to conclude that there is a prima facie case against the Bank, Mr Czeremcha or Mr de Makay under Article 415.

Conclusion

76. The Judge was right that there is no prima facie case that the Bank has transferred its shares as such in breach of the Articles. As can be seen from paragraph 53 above, it was not argued before him that there was a real prospect of establishing breach of clauses 17 and 24.2 of the SSA in the absence of a transfer of the shares themselves. As the matter was presented to us, there does appear to be a plausible argument that the Annex gave rise to breach of the SSA because it involved the grant to PSPT of rights in respect of the shares. Even supposing that that is correct, however, I agree with the Judge that no prima facie case of loss has been demonstrated.

Fiduciary duty

The Judge's view

77. On Durnont's case, Mr Czeremcha was a director of the Company until 7 March 2016 and Mr de Makay was one from then on. The Judge accepted that there is a prima facie case that, while in those roles, they owed duties to the Company under Cypriot law not to place themselves in positions of conflict, not to make unauthorised profits, to act in good faith and not to misapply property of the Company. He nonetheless did not consider that a prima facie case had been demonstrated in relation to the claims of fiduciary duty against Mr Czeremcha and Mr de Makay.

The pleaded case

78. Paragraphs 76 and 77 of the APOC contain general allegations that Mr Czeremcha and Mr de Makay breached fiduciary duties they owed to the Company through "conflicts of interest (including in particular their advancing of the Bank's interests, contrary to PREI's interests)", "failing to disclose relevant matters" and "failing to act in good faith" and that, as a result, the Company suffered harm through the loss of the Certificates and the issue of new series of Certificates. The paragraphs do not themselves spell out what "conflicts of interest" there are said to have been, what "relevant matters" ought to have been disclosed and how Mr Czeremcha and Mr de Makay "fail[ed] to act in good faith". However, there is a cross-reference to paragraphs 67 and 68 of the APOC.

79. I have already commented on some of what is said in paragraph 67 of the APOC. Paragraph 68 takes matters little further. It is in these terms:

> "In the circumstances set out in paragraph [67] above, Ms Bandurska and/or Mr Czeremcha and/or Mr De Makay and/or the Bank acquiesced in and/or failed to take steps to prevent and/or failed to inform PREI about the wrongdoing of Wladyslaw Jaroszewicz, Michael Jaroszewicz, Fazita and/or M-JWK."

80. One problem with paragraph 67 of the APOC is that it takes no account of the fact that neither Mr Czeremcha nor Mr de Makay was a director of the Company for all of the relevant period. Thus, paragraph 67(b)(i) alleges that Mr Czeremcha and Mr de Makay "had knowledge of the 2014 SPA (as amended on 14 February 2018)" and were aware (or suspected) that "the 2014 SPA (as amended on 14 February 2018) involved a breach of the SSA and/or was not in PREI's interests", yet Mr Czeremcha had ceased to be a director in 2016. Again, paragraph 67(b)(ii) makes allegations against both Mr Czeremcha and Mr de Makay in respect of the repayment of the Bonds in 2015, but Mr de Makay did not become a director until the following year.

81. A further difficulty arises as regards the allegation that Mr Czeremcha and Mr de Makay failed to act in good faith. The duty of good faith which a fiduciary owes focuses on his subjective intentions. Thus, in *Regentcrest plc v Cohen* [2001] 2 BCLC 80, Jonathan Parker J explained at paragraph 120:

> "The duty imposed on directors to act bona fide in the interests of the company is a subjective one …. The question is not whether, viewed objectively by the court, the particular act or omission which is challenged was in fact in the interests of the company; still less is the question whether the court, had it been in the position of the director at the relevant time, might have acted differently. Rather, the question is whether the director honestly believed that his act or omission was in the interests of the company. The issue is as to the director's state of mind. No doubt, where it is clear that the act or omission under challenge resulted in substantial detriment to the company, the director will have a harder task persuading the court that he honestly believed

> it to be in the company's interest; but that does not detract from the subjective nature of the test."

The APOC, however, makes no attempt to identify steps which Mr Czeremcha and/or Mr de Makay believed that they ought to take in the interests of the Company, but nevertheless failed to take.

Assessment

82. The claims of fiduciary duty are, as I have indicated, lacking in particularity. There are broad assertions of breach of duty, but the APOC do not adequately identify and explain specific ways in which Mr Czeremcha and Mr de Makay are alleged to have breached their fiduciary duties.

83. Aside from that, one answer to the allegations of breach of fiduciary duty is that, were there any, there is no prima facie case that they caused the Company loss. Take the allegation made against Mr de Makay in paragraph 67(b)(iv) of the APOC relating to a bankruptcy petition presented in 2020. Whatever may be the rights and wrongs of that, it will not have contributed to the loss which the Company is said to have suffered. Again, paragraph 67(b)(i) alleges that Mr Czeremcha and Mr de Makay "were involved in concealing [the 2014 SPA (as amended on 14 February 2018)] from PREI's other directors", but, as mentioned above, both Durnont and the Company were apparently informed in April 2018 that the Bank had "transferred all of its rights and obligations under the SSA to PSPT pursuant to the 2014 SPA (as amended on 14 February 2018)". Further, it would not seem to matter whether, as alleged in paragraph 67(b)(ii), Mr Czeremcha and/or Mr de Makay suspected that the repayment proposal "was not in PREI's interests and/or required PREI's approval". It appears that the proposal did not in fact require the Company's approval, but in any case (a) the decision whether to accept the repayments must have been for the Bank, not for Mr Czeremcha or Mr de Makay as a director of the Company, (b) the Bank appears to have been entitled to accept the repayments and (c) the loss that the Company is said to have suffered is far removed from the repayments and outside the contemplation of the Bank, Mr Czeremcha or Mr de Makay.

84. The prayer to the APOC claims an account of profits as well as equitable compensation. There is, however, no reason to suppose (still less one pleaded) that either Mr Czeremcha or Mr de Makay will have made any relevant profit.

85. In the course of his submissions, Mr Dinsmore pointed out that Mr Czeremcha signed the SPA on behalf of the Bank. While, however, that may confirm that he knew of the SPA, it does not show him to have committed any breach of fiduciary duty. The fact that he was a director of the Company will not have precluded him from executing documents on behalf of the Bank even where they had a connection with the Company. Nor do the APOC allege that it was a breach of fiduciary duty for Mr Czeremcha to sign the SPA for the Bank.

86. In short, I agree with the Judge that Durnont has not made out a prima facie case against Mr Czeremcha or Mr de Makay in respect of the breach of fiduciary duty allegations.

Conclusion

87. I would dismiss the appeal.

Lord Justice Arnold:

88. I agree.

Lord Justice Warby:

89. I also agree.