COMMONWEALTH OF THE BAHAMAS
IN THE SUPREME COURT
Common Law and Equity Division
2007/CLE/gen/00360

BETWEEN:

(1) PETROLEUM PRODUCTS LIMITED
(2) CARLTON WILDGOOSE
(3) RUPERT WATKINS
(4) AMOS RUSSELL
(5) OSWALD ARCHER

PLAINTIFFS

AND

(1) GULF UNION BANK (BAHAMAS) LIMITED
(2) THE GRAND BAHAMA PORT AUTHORITY, LIMITED
(3) FREEPORT OIL COMPANY, LIMITED
(4) FABIAN INVESTMENTS LIMITED
(5) CITIBANK, N.A.
(6) PAUL MAJOR
(7) F.I.R.M. LIMITED
(8) IANTHE LIMITED
(9) MAURICE GLINTON
(10) RICHARD RAWLE MAYNARD
(11) FELIX STUBBS

DEFENDANTS

Before: The Honourable Mr. Justice Loren Klein

Appearances: Mr. Paul Wallace Whitfield for the 1st, 3rd, 4th and 5th Plaintiffs
Ms. Gail Lockhart Chares for the 1st Defendant
Ms. Pearline Ingraham-Wood for the 2nd Defendant
Mr. Larell Hanchell for the 3rd Defendant
Ms. Tara Cooper Burnside for the 5th Defendant
Mr. Maurice Glinton QC, with Meryl Glinton, for the 1st Plaintiff & 4th to 9th and 11th Defendants

Hearing date(s): 27 January, 28 February, 30 June, 1st July, 2nd July 2020

RULING

Company—Sale of Shares of pursuant to debenture securing loan following default of borrowers—Registration of Records Act, Ch. 187—Whether transfer of shares and change of directors properly registered—Writ Action filed 13 October 1994 alleging sale of shares irregular and/or void—Statement of Claim (SOC) filed 23 January 1995—Amended Statement of Claim filed 2007—Multiple rounds of litigation between parties over the course of three decades concerning ownership of

shares—Hearings by the Supreme Court, Court of Appeal and Privy Council—Privy Council upholding decision that defendant company the beneficial owner of the shares—Notice of Intention to Proceed with trial—Applications to strike out SOC—Order 18, r. 19 Rules of the Supreme Court (RSC) 1978—No reasonable cause of action, frivolous, vexatious or otherwise an abuse of the process of the Court—Delay—Abuse of Process—Res Judicata—Estoppel—Pleadings—Representation of Company—Counsel—Want of authority to sue in name of Company—Individual Plaintiffs no longer beneficial owners of shares in Company—Costs—Whether Counsel should bear costs of instituting action without the authority of the Company—Case Management Order by Supreme Court for trial—Late entry of Appearance to Action—Effect

INTRODUCTION AND BACKGROUND

1. The various strike-out summonses and applications that form the subject matter of this Ruling can only be described as a last-ditch effort to bring closure and finality to litigation involving the sale of shares in a petroleum company that has been waged for three decades—if not longer, by some accounts. It has seen two appeals to the Privy Council, several appeals before the Court of Appeal, and has generated numerous applications and rulings by the Supreme Court.

2. As the Privy Council observed in one of the appeals (**Archer and Anor. v Registrar General and Anor.** [2004] UKPC 31), the matter has been kept alive by the "*strong sense of grievance about these matters*" by several of the claimants, in particular the zeal of Mr. Oswald Archer. Mr. Archer was the only surviving member of the original plaintiffs to appear in person when these applications came before the Court. Sadly, Mr. Archer has since died.

3. For their part, the defendants (or various defendants) have always been of the view that the claimants' sense of grievance was misplaced. Consequently, attempts were made to have the claims struck out without a trial, on the grounds that they do not disclose a reasonable cause of action. However, the strike-out attempts suffered a setback with a Court of Appeal decision in 2005 in which it was indicated (in a short oral ruling) that the claims disclosed a cause of action ("*whether it be tenuous or not*"), and the matter remitted for trial.

4. Thereafter, a battery of interlocutory and other applications ensued, and it was not until 2017 following the second appeal to the Privy Council (**Archer v Fabian Investments Ltd.** [2017] UKPC 9) ("the 2017 PC Ruling"), that the plaintiffs filed a notice of intention to proceed with trial. Remarkably, this was based on case-management directions given in 2007, which decided that the share ownership issue should be tried as a preliminary issue, and in the teeth of the PC's 2017 Ruling deciding that the plaintiffs were no longer the beneficial owners of the shares that are the subject of the dispute.

Factual background and procedural history

5. A full recounting of the background and procedural history of these proceedings would occupy too much space, but a synopsis is necessary to understand the litigation context and the applications that arise. In this regard, I am grateful to the defendants for setting out much of the background in their submissions, which I adopt for the most part, with some modifications based on my reading of other documents, including the summaries in the Privy Council Rulings.

6. Petroleum Products Ltd. ("PPL" or "the Company") was incorporated in 1958. It entered into a licence agreement with the Grand Bahama Port Authority ("GBPA"), the 2nd defendant, on 25 February 1959.

7. In May of 1984, the 2nd to 5th plaintiffs (the "individual plaintiffs") purchased the issued share capital of PPL with a loan of $300,000.00 from Canadian Imperial Bank of Commerce ("CIBC"). The shares were held in the names of the plaintiffs, and one share was held in the name of a nominee. The individual plaintiffs became the officers and directors of the Company. CIBC required, by way of security, the hypothecation of the shares, and the share certificates together with endorsed forms of transfer were executed by the shareholders in blank and deposited with CIBC.

8. In 1986, CIBC demanded repayment of the loan, and the "individual plaintiffs" borrowed $537,000.00 from Gulf Union Bank (Bahamas) Limited, the 1st defendant ("Gulf"), to refinance and pay off the CIBC loan. A complex restructuring agreement was executed between Gulf and PPL (the details of which are not relevant for these applications), except to say that the individual plaintiffs joined as guarantors, and they were required to assign their shares by way of deposit to Gulf.

9. On 29 December 1986, the share certificates were delivered by the attorneys acting for CIBC to Attorney Rawle Maynard, the 10th defendant ("Mr. Maynard"). The capacity in which Mr. Maynard took possession of the shares has historically been a matter of some dispute, and it has been alleged that the shares may have been passed to Mr. Maynard on the assumption that he was the attorney for PPL (and presumably their shareholders). But the position, as irradiated in the later cases (including the PC appeal) and on the evidence before this Court, appears to be that Mr. Maynard obtained the shares as an attorney/agent for Gulf. However, the basis upon which Mr. Maynard came by the shares is now a matter of academic interest only. In any event, Mr. Maynard is now long deceased.

10. Payments to Gulf fell into arrears, and on the 8 August 1988 the corporate and individual plaintiffs entered into a repayment agreement with Gulf, whereby PPL agreed to bring its payments up to date by 23 January 1989. PPL defaulted on its repayment obligations and in February of 1989, under the 1986 debenture, Gulf appointed Mr. Maynard as receiver over the company.

11. On 14 February 1990, Gulf agreed to sell the shares in the Company to the 4th defendant, Fabian Investment Limited ("Fabian"), which apparently financed the purchase with a loan of $400,000.00 from Citibank N.A. ("Citibank"), the 5th defendant. On 13 March 1990, the share certificates were sent by Mr. Maynard's firm to Mr. Maurice Glinton, the 8th defendant ("Mr. Glinton"), the secretary of Fabian and its attorney. On 5 December 1990, Mr. Glinton lodged the Company's annual statement with the Registrar General, which showed that the individual plaintiffs and their nominee had been replaced as shareholders in PPL by Fabian and four nominee defendant shareholders, including Mr. Glinton, who were the new directors of the Company. An amended statement was filed in 1991 to correct the number of shares held by Fabian.

12. The gravamen of the plaintiffs' complaint appears to be that the sale of the shares was unlawful/void, because the shares were never physically possessed by Gulf to perfect the deposit

of the shares required under the debenture, and that in any event, no notice was given to them as guarantors/equitable mortgagees that Gulf intended to realize its security. There are also general allegations of dishonesty or fraud levelled against various of the defendants connected with the sale of the shares.

History of litigation

13. Although the present action is concerned mainly with the alleged unlawful sale of the shares in 1990, the litigation associated with PPL and some of the defendants preceded that event.

14. For example, in 1969, the Company lodged a complaint with GBPA that the GBPA was allegedly allowing another company to compete with PPL in breach of the licence agreement. On 8 February 1979, PPL filed a writ of summons against GPBA in Action No. 776 of 1978 in respect of those complaints. This action was settled on 24 October 1980 by the parties.

15. On 9 June 1991, PPL and Fabian issued a writ of summons against GBPA in action No. 1327 of 1991 ("the License Action") in respect of the same complaints and cause of action as were raised in action No. 776 of 1978. On 22 January 1992, GBPA filed a summons to strike out the License Action.

16. In 1994, by Writ of Summons filed 13 October 1994, the plaintiffs brought proceedings under case number FP/0155 of 1995, filed in the Supreme Court Registry in Freeport ("the Freeport action") seeking, *inter alia*, damages for theft of intellectual property or for conversion of the plaintiff's intellectual property, damages for unjust enrichment, interest and costs. A statement of claim ("SOC") was filed on 23 January 1995, which pleaded disparate allegations against different defendants, including bad faith and breach of trust as against Mr. Maynard as receiver, bad faith and dishonesty against several of the other defendants connected with the sale of the shares, and sought an accounting and other reliefs on the basis that a constructive trust was imposed.

17. A judgment in default of defence in the Freeport Action was entered against the 3rd, 4th, 6th, 7th, 8th, 10th and 11th defendants on 1 February 1996, but this was later set aside by Lyons J. by Order dated 25 October 2006.

18. In 1997, by Order dated 12 December 1997, the Court appointed provisional liquidators over the assets of Gulf, pursuant to an application by the Governor of the Central Bank under the *Companies Act 1992*.

19. The 1st plaintiff and several of the other defendants, subsequently filed an application for the Freeport action to be struck out on the grounds that the SOC disclosed no reasonable cause of action. In a ruling dated 7 April 1999, Ganpatsingh J, ordered the Freeport Action struck out. His ruling was appealed to the Court of Appeal (Civ. Appeal No. 0041 of 1999), and the Ruling and order were set aside by that Court on 17 November 2005. I will have more to say about this Ruling a little later.

20. The individual plaintiffs then applied on 25 February 1998 in Action FP 26 of 1999, under s. 57 of the *Companies Act 1992*, to rectify PPL's register of members to list them as the shareholders, officers and directors of that Company. The Company was named as the first respondent to the rectification application.

21. The rectification application was dismissed by Lyons J. in a judgment dated 3 April 2000, which was appealed by notice of appeal lodged on 7 April 2000. The Court of Appeal ruled that the notice of appeal was irregular, and also refused the individual plaintiffs' application (by notice filed 24 October 2000) for leave to appeal out of time.

22. On 26 April 2001, the Supreme Court dismissed the License Action on the grounds that the statement of claim was founded on a previous cause of action that had been settled. On 16 July 2001, the plaintiffs appealed this ruling, which was upheld by the Court of Appeal. This was the final decision to have been made in the Licence Action.

23. On 25 February 1998, in Action 2002/Com/gen/No. FP/12, the individual plaintiffs sought an order of *certiorari* to "*rectify the Register of Members of Petroleum Products Limited*". In a judgment dated 7 May 2002, Moore J. refused to make the Order and observed that "*the Plaintiffs attempt to achieve the same objective, as in the case heard by Lyons J., asking the court to rectify the Register of members of Petroleum Products Limited*". Moore J's decision was upheld on appeal on 7 November 2002.

24. The Privy Council dismissed the plaintiffs' further appeal from the Court of Appeal on 24 June 2004 (**Archer v The Registrar General,** *supra***)**, finding in material part that the plaintiffs were seeking review on a matter which was outside the Registrar General's functions. Importantly, the PC held that while the Registrar General had a statutory responsibility for maintaining the Registers required by the Act, "*…the register of shareholders of any particular company is maintained, not by the Registrar General, but by the officers of the company (section 56) and it is for the company to prepare and authenticate the annual statement required by section 58 (section 284)"* (para. 18).

25. It is also of some significance that the PC made the following observation in dismissing the appeal in their closing paragraph:

> "The appellants may be able to continue their campaign on other fronts, although they face formidable difficulties, not least because of the passage of time. Their Lordships cannot comment further on that possibility."

26. At a case management conference held on 30 January 2007, Maynard J. held, *inter alia*, that: (i) the trial proceed by determining the preliminary issue of the ownership of the shares; and (ii) that the statement of claim filed 25 January 1995 stand as the relevant claim (and not the amended 2007 SOC). The Freeport Action was therefore transferred to Nassau and designated its current action number: 2007/CLE/gen/No. 0360.

27. The preliminary issue in the main action was tried before Adderley J. on 26 February 2009, apparently without the participation of the defendants, and the Judge determined on the evidence before him that the 2nd to 5th plaintiffs were the legal but not beneficial owners of the shares in

PPL, and that beneficial ownership had passed to Fabian. By notice of motion filed 9 March 2009, the 2nd and 4th plaintiffs applied for leave to appeal from Adderley J's decision, which was granted, and a notice of appeal was lodged on 30 March 2009. The Court of Appeal agreed with the majority of the findings by Adderley J., (SCCiv App. No. 55 of 2009) but held the 4th defendant, Fabian, was both the legal and beneficial owner of the shares in PPL, reasoning that the decision of the Court below had strayed into matters that were properly part of the internal management of companies.

28. The plaintiffs further appealed to the Privy Council, in which the defendants did not participate, and the Privy Council dismissed the appeal on 10 April 2017 (**Archer and anor v. Fabian Investments Ltd. et. al.** [2017] UKPC 9).

29. In a concise Ruling, the Board made a number of findings that are important for the applications currently before the Court. Firstly, the PC held that even though there was no formal assignment of the shares to Gulf and that they never acquired physical possession of the share certificates, "…*the agreement to assign them by way of deposit (and thereby create a mortgage with an implied power of sale, following* ***Stubbs v Slater)*** *was, however, sufficient to transfer to Gulf a beneficial interest in the shares by way of security, as the judge rightly held*".

30. Secondly, it was held that Gulf was entitled to sell the shares and give good title to Fabian. As the Privy Council said [at 19]:

> "Since the agreement [between the plaintiffs and Gulf] was specifically enforceable, it conferred on Gulf a beneficial interest in the shares by way of security in accordance with the agreement. On the expiry of the period fixed for payment, Gulf was then entitled to realise its security by selling the shares to Fabian. Gulf did not require a legal (as distinct from beneficial) title to the shares in order to exercise a power of sale. Nor was Gulf's physical possession of the shares essential, but in any event they were in the possession of its agent, Mr. Maynard."

31. Importantly, the Privy Council observed that the shares could not be sold by the receiver of PPL, since they did not form part of its assets, but held, consistently with the findings of both Courts below, that the involvement of Mr. Maynard in the delivery of the shares could only have been in the capacity of an agent acting on behalf of Gulf.

32. Thirdly, the Board upheld the finding of Adderley J. (departing from the Court of Appeal) that the individual plaintiffs remained the legal owner of the shares "…*in the absence of any evidence that the transfer of title to Fabian and its nominees had been registered in accordance with Petroleum's articles of association*".

33. The Board also dealt with a collateral argument made by the appellants, the effect of which, as I will explain later, seems to have been glossed over by the plaintiffs. This is what they said at paragraph 20:

> "Fourthly, it was argued that the courts below could not override an earlier decision of the Court of Appeal in these proceedings in 2005, in which it had allowed an appeal against a decision that the action should be struck out on the ground that the statement of claim disclosed no reasonable cause of action. There is, however, no inconsistency between that decision and the decision now under

appeal. The Court of Appeal's decision that the action should be allowed to proceed to trial did not entail that it should succeed at trial." [Emphasis supplied.]

34. Finally, the Privy Council's ruling in this matter is subject to several caveats expressed by their Lordships. Firstly, they accepted that parts of the essential history of the events were "obscure" because "*some of the documents which are central to those events are not before the Board*." Secondly, in relation to the history of the matter, the Board made it clear that it "*cannot and does not make any findings of fact, and that it has heard only one side of the story*."

The current applications

35. As indicated, the current applications before the Court appear to be in response to a notice of intention filed in 2017 by the plaintiffs to proceed with trial. In response, various of the defendants filed a number of summonses, although not all of them arise for consideration here. Strike-out summonses were filed by the defendants as follows: (i) the 2nd defendant GBPA on 25 February 2019 (as amended); (ii) the 3rd defendant Freeport Oil Company Ltd. ("FOCOL") on 19 February 2019 (curiously entitled as an *ex-parte* summons); and (iii) by the 5th defendant (Citibank) on 25 February 2019 (as amended). There was also a summons filed 27 November 2018 by the 2nd defendant for transfer of the matter to the Northern Region (which is no longer being pursued), and a summons on behalf of the 1st, 3rd and 5th plaintiffs for pre-trial review, filed from August 2017.

36. It is important to note that the strike-out summonses which came before this Court had already been part-heard by Forbes J. (Acting) who, for reasons that are not relevant to these applications, later recused himself. In order to avoid dealing with this matter piecemeal, and considering the passage of time, I gave directions for *all* of the defendants or their representatives to appear in the hearings. Pursuant to those directions, appearances were entered on the 6 March 2020 for the 4th, 6th to 8th and 11th defendants, as well as for the 1st plaintiff, along with a summons to strike out.

ANALYSIS AND DISCUSSION

Striking-out principles

37. The rules and principles on which these applications are to be determined are not in dispute. Order 18, r. 19 of the *Rules of the Supreme Court* 1978, (R.S.C. 1978) provides in material part as follows:

> "19. (1) The Court may at any stage of the proceedings order to be struck out or amended any pleading or the indorsement of any writ in the action, or anything in any pleading or in the indorsement, on the ground that —
> (a) it discloses no reasonable cause of action or defence, as the case may be; or
> (b) it is scandalous, frivolous or vexatious; or
> (c) it may prejudice, embarrass or delay the fair trial of the action; or
> (d) it is otherwise an abuse of the process of the court,
> and may order the action to be stayed or dismissed or judgment to be entered accordingly, as the case may be."

38. A similar power inheres under the inherent jurisdiction of the Court to stay or dismiss actions which are vexatious, frivolous or otherwise an abuse of the process of the Court: see "The Supreme Court Practice 1997", Vol. 1, at para. 18/19/18; *Reichel v Magrath* (1889) 14 App. Cas. 665).

No reasonable cause of action

39. The requirement of a reasonable cause of action has been described as *"...a cause of action with some chance of success, when…only the allegations in the pleadings are considered. If when those allegations are examined it is found that the alleged cause of action is certain to fail, the statement of claim should be struck out":* **Drummond-Jackson v British Medical Association** [1970] 1 All ER 1094, CA, per Lord Pearson, at p. 1101-f.

40. Thus, the court will strike out the pleading or part of it if satisfied that even if the allegations of facts set out in the pleading are proved, those facts would not establish the essential ingredients of a cause of action. But it will not strike out an action on these grounds if it discloses some cause of action or question fit to be decided by a court, even if the claim is weak (**Davey v Bentnick** [1893] 1 QB 185, CA).

41. No evidence is admissible under this ground (Ord. 18, r. 19(2)), and when considering the pleadings the court is inhibited from conducting a mini-trial on the papers to ascertain whether there is a cause of action (*see* **Wenlock v Moloney** *[1965] 2 All ER 871*). But when an application is made under the inherent jurisdiction of the Court, or on any of the other grounds, all the facts can be gone into, and affidavits are admissible: **Willis v Earl Howe** [1893] 2 Ch. 545, pp. 551, 554. The defendants rely on all limbs of Ord. 18, r. 19(1), and they have invoked both the statutory and inherent jurisdiction of the court.

Submissions on striking out

1st Plaintiff, 4th to 9th and 11th Defendants

42. As indicated, a summons was filed on 16 March 2020 on behalf of the 1st first plaintiff, and 4th to 9th and 11th defendants by Maurice O. Glinton and Co. The summons sought, on behalf of the 1st plaintiff, an Order: (1) staying all proceedings in the name of PPL Ltd. ("the Company") on the grounds of abuse of process of the court; (ii) that the name of the Company be struck out of the writ and any subsequent proceedings; and (iii) that the Company's costs of the action and the application, including any costs liable to the first, second and third named defendants be taxed on a party and party basis and paid by the firm of Paul Wallace Whitfield of Wallace Whitfield and Co., the attorney on record for PPL when the writ was issued. On behalf of the defendants represented by Mr. Glinton, an order was sought striking out the action on the traditional Order 18, rule 19 grounds, that the action—(a) discloses no reasonable cause of action; (b) is scandalous, frivolous and vexatious; or (c) is otherwise an abuse of process.

<u>1st Plaintiff's argument</u>

Want of capacity, lack of instructions

43. As indicated, Mr. Glinton's summons and submissions were bifurcated with respect to arguments brought on behalf of the 1st plaintiff and the defendants he represented. It is convenient to first deal first with the preliminary argument that it was never competent for the current application to have been instituted in the name of the Company, PPL, and that Attorney Paul Wallace Whitfield could not have been authorized to bring the action. This is based on the trite (but fundamental) principle of company law that it is the "…*directors and managers who represent the directing mind and will of the Company, and control what it does*" (**H.L. Bolton (Engineering) Co. Ltd. V T. J. Graham & Sons** [1957] 1 QB 159), and that based on the facts of this matter and the evidence before the Court, it is clear that those controlling the company, or entitled to do so, did not authorize the action.

44. In fact, Mr. Glinton takes as a point *in limine* that Mr. Wallace Whitfield should be required to "*show proof of his retainer*", so that the record can be correct to show who is the Company's correct attorney, notwithstanding that he appears in the 2007 Directions Order as attorney for the Company. It was drawn to the Court's attention that it was Mr. Wallace Whitfield who, on 21 June 2017, filed a notice of intention to proceed in Action No. 2007/CLE/gen/ No. 0360, naming the Company and Rupert Watkins and Oswald Archer as plaintiffs. It appears that Mr. Wallace Whitfield filed a Notice of Change of Attorney on 12 January 2007, in which he purported to replace Alonzo Lopez of Lopez and Co. as attorney for the Company. However, Mr. Glinton submits that at no time was Mr. Wallace Whitfield (or for that matter any of the previous attorneys) authorized to act for the Company. Reference was made to the affidavit of Beverly Seymour, filed in 1998 in the strike-out actions, and made in her capacity as secretary for PPL, which categorically stated that the Company did not authorize any of the former attorneys to use the Company's name in litigation, and Mr. Glinton submitted that the position had not changed since then.

45. Of course the answer to whether the Company's action is competent depends on who "owns" the shares in PPL, which was the preliminary issue ordered to be tried. As noted, at first instance Adderley J. held that the defendants were the beneficial owners of the shares, but the plaintiffs remained legal owners pending compliance with the formalities for transfer in the Company's Articles of Association. The Court of Appeal endorsed most of the findings of Adderley J., but found that Fabian was both beneficial and legal owners of the shares (the formalities of transfer being an internal company matter). However, on appeal to the Privy Council, the Board basically agreed with the Supreme Court Ruling (that Fabian was undoubtedly the beneficial owners), but that the plaintiffs retained legal title in the absence of any evidence before the Board that the transfer to Fabian and its nominees had been registered in accordance with PPL's Articles of Association.

46. Mr. Glinton urges that these differences in judicial findings may be somewhat explained by the state of the evidence before the various courts, in that neither Adderley J. nor the Privy Council had before them the entire record and the contributions of opposing counsel, which the Court of Appeal and Ganpatsingh had the benefit of. As mentioned, the PC accepted that they were without some of the documents that were central to the events before them. Although the decision of Ganpatsingh J. was later overturned by the Court of Appeal, it is useful to set out the

learned Judge's observations on the striking out application, as they serve to provide context to the arguments that were made in respect of PPL being named as a plaintiff:

> "It is pellucidly clear therefore that when this action was filed by Mr. Godfrey Pinder on the 13th October 1994, none of the second to fifth named plaintiffs were on record as officers of the company. Neither were they when Mr. Simeon Brown replaced Mr. Pinder as counsel. I am not sure how this was done. But in my view Mr. Brown quite properly accepted that he had no authority to continue proceedings on behalf of the first-named plaintiff. The result is that both counsel have now withdrawn from the proceedings; no doubt having advised themselves. In the final analysis, it was the evidence of Ms. Seymour that the Board of Directors had not in any manner, shape or form authorized the bringing of the action on behalf of the first-named plaintiff against the defendants.
>
> In their answers the defendants could in no way deny or traverse the certificate of the Registrar General certifying the corporate record of the company as to the composition of the Board of Directors and Officers. Indeed, they have not attempted to do so. It was their contention rather that they had never ceased to be the owners of the shares in the company as deposed by Ms Seymour. She had averred in her affidavit that pursuant to an agreement made the 14th February 1990 between the first-named defendant and the fourth-named defendant all the shares in the first-named plaintiff were acquired by Fabian from Gulf Union Bank exercising its powers of sale under securities executed in its favour by the first-named plaintiff. The original share certificates she deposed had been executed in blank and delivered to the bank by way of security and these were subsequently delivered to Fabian. The sale took place when the first named-plaintiff, the defaulting debtor was under receivership and being managed by the tenth-named defendant. The other plaintiffs have taken issue with this sale as being improper and illegal.
>
> In my opinion, the second to fifth-named plaintiff wholly miss the point. I am not concerned to know how or if the shares were lawfully obtained or not. For I am abound by the corporate record and the certificate of the Registrar General as to the persons who are authorized to conduct business on behalf of the company. In this regard, I need only refer to an affidavit filed by the fifth-named plaintiff on 11th March 1998 in which he stated that he conducted a search of the records of the registry of companies and discovered that, commencing in 1990, Mr. Glinton, acting as company secretary and director, had filed annual statements and returns listing the shareholders. Those returns were exhibited and they all bore the stamp of the Registrar General. Until such time as the corporate records and the official register of officers are rectified, I am of the opinion that I must give legal effect to them. This is trite corporate law.
>
> It is quite clear from the evidence that Mr. Pinder had no authority to institute this action nor did Mr. Simeon Brown have license to continue it. In the result, the reliefs prayed for were granted and the first-named plaintiff struck from the record."

47. The point currently advanced before the Court and the position maintained before Ganpatsingh J was that the individual plaintiffs lacked standing after Gulf's sale of the PPL shares to protest any ownership transfers onto and off the Register of members, and that legal title in the shares was duly converted and duly perfected in Fabian, as transferee upon its registration on 23 February 1990 as their holder. For this proposition, Mr. Glinton relied on a line of cases such as **Shropshire Union Railways and Canal Co. v R** (1875) LR HL 496 and **Ireland v Hart** (1902) 1 Ch. 522, which generally state the principle that a person holding the indicia of legal ownership in shares (or other property) cannot displace the title of the person entitled to the whole equitable

interest, and that the latter can in any event compel the former to take the necessary steps to perfect their ownership.

48. Mr. Glinton fortified this argument with reference to s. 9 of the *Registration of Records Act*, which provides as follows:

> "9. All deeds, documents and other writings which have a certificate thereon in accordance with the provisions of any Act, the records thereof, and all copies of such records certified by the Registrar to be true copies, shall be admitted in evidence in any court of law or equity in The Bahamas without further proof."

In addition to the annual statement dated 5 December 1990 (stamped by RG on 5 September 1991), this Court also had before it a copy of a Certificate of Incumbency of the Company dated 29 June 2020, bearing a stamp of the Company and listing its officers and the officers and directors of the Company as follows:

Felix N. Stubbs	President & Director
Maurice O. Glinton	Secretary & Director
Marvin Bethel	Treasurer & Director
V. Stephanie Cox	Assistant Secretary

49. On behalf of PPL, Mr. Glinton argued that based on the historical facts and additional evidence presented before this Court, it is clear that the individual plaintiffs are no longer members of the Company. It follows, therefore, that the Court should order the Writ and all subsequent proceedings struck out, and that the attorney who acted without authority should be made to pay the costs of the action, including any costs which the Company is and may be liable to pay to the other named defendants. The latter result is said to follow from and be justified by the decision in **Gas Del Tropico, SA. v Paso Del Norte International Ltd** (S.C. No. 38/1988), where the Court granted an application for payment of costs by counsel, and helpfully reviewed a number of authorities on the point of counsel's liability to pay the costs of an unauthorized Action as follows: **Carl Zeiss Siftung v Rayner & Keeler Ltd.** [1965] CH. 596; **Yonge v Toynbee** [1910] 1 KB 215; **Re Weston Kumar v Julien** (1963) 6 WIR 385; and **Newbiggin-By-The-Sea Gas v Armstrong** [1879] 13 Ch. D. 310.

4th to 9th and 11th Defendants

50. For their part, these defendants assert that the claims are (i) an abuse of the process of the Court; and (ii) are also caught by the doctrine of *res judicata* estoppel.

51. On the abuse of process point, counsel referred to **Bragg v Oceanus Mutual Underwriting Association (Bermuda) Ltd**. [1982] 2 Lloyds LR 132 for the well-known principle that an attempt to litigate in another action issues which have been fully investigated and decided in a former action may constitute an abuse of process, apart from any question of *res judicata*. Reference was made to the speech of Stephenson LJ [at p. 139], who said:

> "…[I]t is the duty of the judge…to shut out the defence if it is an abuse of the court's procedure to repeat it, in accordance with the decisions of this Court in *Remmington v Scoles* [1897] 2 Ch 1 and

> the House of Lords in *Reichel v Mcgrath* [1889] 14 AC 665, and *Hunter v Chief Constable of the West Midlands*….Every repetition of a defence (or claim) may be said to mount a collateral attack on a previous judicial decision, and to invite those derogatory reference to "a side wind" or a "back door" which are in favour with advocates whose clients are not open to a frontal attack. But in my judgment, it is only those defences (or claims) that are sham and not honest and not bona fide which abuse the process of the court and call for the inherent exercise of its jurisdiction to prevent such abuse."

52. In this regard, it is contended that the Privy Council's decision on the preliminary matter conclusively determined the matter, and that to pursue the current claim would represent a collateral attack on the Privy Council's decision, and the decision of the Court of Appeal and Supreme Court.

53. For the argument on *res judicata*, counsel cited the well-known speech of Lord Upjohn in **Carl Zeil Stiftung v Raynor & Keeler Ltd.** (No.2) 946, where he said:

> "It [*res judicata*] goes beyond the mere record; it is part of the law of evidence for, to see whether it applies, the facts established and reasons given by the judge, his judgment, the pleadings, the evidence and even the history of the matter may be taken into account (see *Marginson v Blackburn Borough Council*). Res judicata itself has two branches: (1) cause of action estoppel-that it where the cause of action in the second case has already been determined in the first. To such a case the observations of Wigram V.C. in *Henderson v Henderson* apply in their full rigour. ...(2) Issue estoppel…".

54. It was further submitted that both cause of action estoppel and issue estoppel (where an issue is sought to be re-litigated which has been raised and decided as a fundamental step in arriving at the earlier judicial decision) are in play in the instant case. Further, it is said that the exception to the application of the rule, which arises where further material relevant to the correct determination of a point involved in the earlier proceedings becomes available which could not by reasonable diligence have been adduced in those proceedings (see **Arnold v. NatWest Bank Plc** [1991] 2 AC 93) does not apply. This case is said not to come within the exception, as the plaintiffs are not relying on anything new.

55. In the circumstances, it is submitted that the claims should be struck out for being an abuse of process, on either branch of the res judicata doctrine, and also because it does not disclose any reasonable cause of action.

56. In addition to the Order 18, r. 19 grounds, Mr. Glinton relied on a few subsidiary arguments as follows. Firstly, it was contended that this Court was "*functus officio*" as the Privy Council's decision could not be varied, and therefore this Court lacks jurisdiction to entertain any challenge which purports to litigate post the PC judgment. I do not think that this argument adds anything to the *res judicata* claim, and Mr. Glinton did not press the point. But I am not of the opinion that the doctrine of *functus officio* is properly invoked in this case. While the determination of a preliminary point which finally determines a claim by holding it statute barred or struck out may trigger the doctrine, the plaintiffs pleaded multiple allegations (which may not be viable), but which were not specifically ruled on by the PC.

57. He also took the point, in reliance on ss. 23(2) of the *Law of Property and Conveyancing Act*, which it was said applied to the sale of shares (as choses in action) for the principle that the validity of the sale of the shares by Gulf could not be impeached on the grounds that no notice was give or that the power of sale was improperly or irregularly exercised (which was part of the plaintiffs' claim), although a remedy may sound in damages. I do not consider it necessary to have recourse to those provisions, in light of the judgments of all the Courts, including the PC, deciding that the sale was valid in the circumstances of this case.

58. Mr. Glinton also pointed out that one of the plaintiffs, Mr. Watkins had long been dead (since 2010) and his estate had not been substituted (which he described as a "small" point). Mr. Wallace Whitfield did lay over an affidavit showing that the son of Rupert Watkins (Rupert Watkins Jr) had been granted letters of administration and had appointed "counsel" (Mr. Wallace Whitfield) to represent his father's estate in App. No. 34 of 2010 (an appeal brought by Archer and Watkins only), but there is indeed no person appointed to represent the estate of the deceased in this claim. In fact, as pointed out, since then Mr. Archer has also died. These may be "small" points, but they are of some significance when considered against the passage of time and the fact that the persons most central to the claim are no longer alive to give evidence if the matter were to proceed to trial.

First Defendant

59. Mrs. Gail Lockhart-Charles appeared for Gulf and supported the submissions of counsel advocating strike out, although no summons was filed for that process. In any event, as indicated in the history, the first defendant has been in liquidation since December 1997. The point was therefore taken that, although the filing of the SOC predates the liquidation, it is clear that no action can be continued against a company in liquidation without the leave of the Court (s. 194, *Companies Act 1992*). There was no evidence before the Court that leave was sought and none was given, and therefore the claim against Gulf is incompetent in any event.

Second Defendant

60. The 2nd defendant's summons filed 26 February 2019 also sought an Order striking out and/or staying all further proceedings by PPL as plaintiffs on the grounds that the action discloses no reasonable cause of action, is frivolous, vexatious or otherwise an abuse of the process of the Court (i.e., Order 18, r. 19). In written submissions the second defendant contended that the plaintiffs' conduct is a "*blatant and unmeritorious attempt to 'try again', contrary to all established doctrines of precedent, res judicata and finality in litigation*" and that the plaintiffs' proceedings against them have been dismissed by the Court of Appeal as being *res judicata*.

61. In this regard, Mrs. Ingraham-Wood relied on the well-known authority of **Virgin Atlantic Airways Ltd. v Premium Aircraft Interiors UK Ltd.** [2013] UKSC 46, where the UK Supreme Court comprehensively reviewed the common law principles and authorities on *res judicata*; and **Arnold v National Westminster Bank Plc** (which was cited by Mr. Glinton). There is no need to examine these authorities in any detail, but in **Virgin Atlantic** the UK Supreme Court explained that "res judicata" was a "portmanteau term" which not only included both forms of estoppel (cause of action estoppel and issue estoppel) but also embraced the wider "Henderson abuse"

principles (**Henderson v Henderson** [1843] 3 Hare 100, 115). Under the *res judicata* doctrine, parties are estopped from seeking to re-litigate in subsequent proceedings issues which have been litigated and decided in a first action, or from bringing causes of action identical to a cause in the first action. The rationale behind the *Henderson* principle is that a party is also estopped from seeking to raise issues that *could* have been determined in an earlier action.

62. The second defendant argues that the instant case falls squarely within the principle of cause of action estoppel, in that what appears to be pleaded as against the second defendant, is the Licence Action, which was dismissed by the Supreme Court by ruling dated 26 April 2001 and which decision was upheld by the Court of Appeal by decision dated 16 June 2001. Those decisions conclusively determined that there was no cause of action against the GBPA as pleaded in the License Action. Counsel points out that in fact para. 28 of the SOC merely sets out in quotation marks the earlier statement of claim in the Licence Action and purports to seek the same relief. The 2nd defendants say that the plaintiffs are clearly bound by the Court of Appeal's decision and therefore the plaintiff's claims against GBPA should be struck out as it amount to an "*egregious abuse of the process*".

63. It is also further contended that the plaintiffs' argument (in their written submission), that the doctrine of *res judicata* is not applicable because they do not seek to re-litigate the issue of the ownership of the shares and the 2007 Directions envisaged that the matter would proceed to trial after determination of the preliminary issue, is misconceived. This is because the issue of the ownership of the shares was a threshold or preliminary issue to be established before considering the merits of any of the other claims, all of which were premised on the claim that the plaintiffs had the legal and beneficial ownership of the shares. The second defendants therefore submit in their written submissions that:

> "The 2017 Privy Council decision has determined that they [plaintiffs] have a mere bare legal title and hold effectively as nominee for Fabian; in the terminology of the ***Virgin Atlantic Airways*** case that amounts to a conclusive cause of action estoppel in relation to the ownership point which had to be decided and which establishes the non-existence of the cause of action."

64. Thus, the second defendant submits that the action for damages as set out in the SOC must fail in its entirety, and the plaintiffs having failed to establish that they are the owners of the shares, the remaining claims for relief are hopeless. Further, and more importantly, the individual plaintiffs have no authority to bring or continue proceedings on behalf of the Company. They are not the shareholders, directors or office holders, and cannot cause the Company to continue this litigation.

Third Defendant

65. The third defendant FOCOL filed a summons on 28 February 2019, pursuant to O. 18(19)(1)(a) and under the inherent jurisdiction of the Court on the grounds that the action discloses no reasonable cause of action against them and is frivolous and/or vexatious and otherwise an abuse of the process of the Court. Mr. Hanchell adopted the arguments of the other defendants, so far as they were relevant to the case of the 3rd defendant, and in particular the argument of Mr. Glinton that the Company's name was improperly lent to the action.

66. Mr. Hanchell submitted that none of the three paragraphs which mention the third defendant (paragraphs 5, 25 and 28) allege any cause of action against it. At paragraph 5, the 3rd defendant is only identified; at paragraph 25, the plaintiffs only assert that the 10th defendant (presumably in his capacity as receiver) could have sold the assets of the plaintiffs to the 3rd defendant for a higher price than it sold to another of the defendants; and paragraph 28 simply mentions that the 3rd defendant was joined to an earlier round of litigation (1327 of 1991, filed 31 July 1992) which was instituted by the ninth defendant against the second defendant seeking specific performance of a licence agreement between the first and second defendant.

Fifth Defendant

67. Citibank filed also filed a summons to strike out under Ord. 18, rule 19 and its paragraphs. Counsel points out that only a few of the paragraphs in the SOC refer to the fifth defendant (paras. 7, 8 and 26) and none of them disclose any cause of action based on the pleadings alone.

68. For example, paragraph 7 simply identifies Citibank as a banking company incorporated in the Bahamas; paragraph 8 asserts that the sixth defendant was an agent or servant of the Bank and part owner of a company called "F.I.R.M.", controlled by the ninth defendant (Mr. Glinton); and at paragraph 26 it states that the 6th defendant, in his capacity as Vice-President of the Bank, "*in bad faith and for personal gain*" loaned the fourth defendant (Fabian) monies on behalf of himself and the 7th to 11th defendants to pay off the debts owed to the 1st defendant and thereafter converted the said assets of the plaintiffs to their own use. This was said to be contrary to the *Companies Act,* the *Law of Property and Conveyancing Act,* and the common law.

69. When these pleadings are deconstructed, Mrs. Cooper Burnside submitted that paragraph 26 (which may be said to include the substantive allegation against the 5th defendant), merely discloses that the bank (which, after all, is in the business of lending money) loaned money to the fourth defendant to purchase the shares of PPL. This, it is said, does not disclose any cause of action, as the Bank owed no obligations to the individual plaintiffs of PPL, and none was pleaded. Further, it was submitted that adding "*in bad faith*", which connotes dishonesty, does not add anything to the claim, as there are no pleadings to set up bad faith or dishonesty. In this regard, counsel referred the Court to the well-worn principle that allegations such as fraud and their particulars have to be specifically pleaded and particularized (referring to the Court of Appeal case of **West Island Properties Limited v Sabre Investments and Others** [BHS J. No. 57], and the authorities cited therein).

70. There are more minor mentions of the 5th defendant in paragraph 28, where it is said that the 5th defendant, along with others, helped the 9th defendant convert the assets of the 1st plaintiff and again at paragraph 40 that the 5th defendant aided and abetted certain actions of the 9th defendant in relation to the shares, which was said to be contrary to the Companies Act, Bahamas Bar Act and "other principles of equity" of The Bahamas. It was submitted that the allegation at paragraph 28 was directed at the 9th plaintiff and raised no claim against the 5th defendant, and that the claim at paragraph 40 likewise was directed to actions of the 9th defendant, and it was never explained how any law or equitable principle was violated.

71. Counsel also argued that to the extent that the plaintiffs are placing any reliance on the decision of the Court of Appeal, which set aside the Ruling of Ganpatsingh J. that the SOC did not disclose any cause of action, the COA's ruling may be clearly distinguished on the basis that it was limited to the parties who appeared in the appeal. The Court of Appeal's ruling, which did not elaborate reasons, said that the SOC disclosed a cause of action "*which may or may not be tenuous*", but that it was against all of the respondents as a whole as the claims were "intertwined". However, neither Ganpatsingh J. nor the Court of Appeal ever specifically considered whether there was any cause of action against the 5th defendant.

72. Mrs. Cooper Burnside also endorsed the observations of Mr. Glinton in respect of the Ruling of Gatpansingh striking out PPL as a plaintiff on the basis that the Company's name was improperly used by counsel then appearing for the plaintiffs. The Court had indicated as follows [pg. 6 of the Ruling]:

> "The first-named plaintiff having been struck from the proceedings, there was no basis if there ever was, which does not appear to be the case, on which the action can be sustained against the second and third named defendants for breach of contract and restraint of trade. Nevertheless, I proceeded to deal with their case on the merits."

73. It was pointed out that, even apart from the issue of the competency of an appeal by the 1st plaintiff, Ganpatsingh J. dealt with the claims on the merits of the individual plaintiffs' assertion that they were owners of the shares, and he found that there was no pleaded cause of action in respect of those plaintiffs. Counsel stressed that it was important to remember that the plaintiffs' claims to ownership of the shares had not yet been ventilated or determined at that stage, and this might explain why the COA was prepared to afford them an opportunity to test their claims in a trial.

74. In addition to the specific arguments made that no cause of action was disclosed against the 5th defendant, Mrs. Cooper Burnside supported the wider arguments made by Mr. Glinton as to abuse of process in allowing the plaintiffs to continue with this claim. She argued that the entirety of the plaintiffs' claims could be distilled into three main elements: (i) that the sale to Fabian was unlawful; (ii) that the process was irregular and that they should have gotten a higher price for the sale; (iii) that the actions taken by the 9th defendant (Mr. Glinton) in respect of PPL was improper, and therefore the plaintiffs still purport to assert rights in the company.

75. All of these claims, however, were predicated on the assumption that the individual plaintiffs had not been properly divested of their shares, which we now know is not the case based on the elucidation of certain facts and with the benefit of the cases. Counsel contended further that it had been conclusively known from the PC's 2017 Ruling that Gulf had the right to exercise its power of sale, and that Fabian acquired the beneficial interest in the shares, so that the individual plaintiffs had no interest in PPL to cause it to do anything. As the PC stated, all that was necessary for the perfection of the sale was for the transfers to be registered and several (if not all) of the plaintiffs were aware that this had taken place at the point when the PC made that observation.

76. Thus, the only claim that the plaintiffs are potentially left with is the claim against Gulf, which is effectively stayed by operation of law, based on s. 194 of the *Companies Act* (1992). As noted, that section precludes the continuation of any proceedings against a company in liquidation

without the leave of the Court. The 3rd defendant submits that in all the circumstances, it would therefore be an abuse of process for the action to continue.

Plaintiffs' arguments

77. Mr. Wallace-Whitfield filed general submissions directed to the strike-out applications, as well as submissions specifically in opposition to the submission made by Mr. Glinton in support of the summons filed 16 March 2020.

78. The primary argument resisting the strike-out applications is that the remedy is a draconian one which should only be invoked in clear and obvious cases, and not where there is a cause of action disclosed which might be weak. In this regard, reference was made to the well-known authorities of **Wenlock v Moloney** [1965] 1 WLR 1238, 1244, and a passage approved by the Bahamas Court of Appeal in **Sandyport Homeowner's Association Limited v. Nathanial Bain** (SSCivApp & CAIS No. 289 of 2014), where it was said:

> "…this summary jurisdiction of the Court was never intended to be exercised by a minute and protracted examination of the documents and facts of the case in order to see whether the Plaintiff really has a cause of action. To do so is to usurp the position of the trial judge and to produce a trial of the case in Chambers, on affidavit evidence only, without discovery and without oral evidence tested by cross-examination in the ordinary way."

79. Thus, it is said that there are issues in this case which are not suited for summary disposal, and as a result, the various summonses for strike-out should be dismissed with costs awarded to the plaintiffs.

80. Mr. Wallace Whitfield's submissions intended to resist the submissions made by Mr. Glinton on behalf of the 1st plaintiff and the defendants represented by him were disparate, but can be grouped under two heads: (i) those in opposition to Mr. Glinton's representation of the 1st plaintiff; and (ii) those related to the substance of the claim.

81. In respect of the first, he takes issue with (i) the late entry of appearance on behalf of the defendants, which he contends cannot be done without leave and is contrary to *R.S.C. Ord. 12, rule 5(2)*; (ii) the contention that a firm cannot act for a plaintiff and several defendants in the same action; and (iii) that there was no notice of change of attorney to place Mr. Glinton on record as counsel for PPL.

82. In answer to the allegation by Mr. Glinton that he is suing in the name of the company without authority, Mr. Wallace Whitfield submits that "*from the first day, counsel has acted with the authority and instructions of the Directors and the legal owners of the shares in the First Plaintiff*". He contends that Adderley J. found (at para. 29 of his judgment) that the purported Extraordinary General Meeting of Fabian Investments Ltd. of 23 February 1990 (prior to the registration of the change of directors) was a nullity and therefore anything flowing from it is also a nullity. Therefore, it is contended that Mr. Glinton is not authorized to appear on behalf of the Company.

83. As to the substantive points, the argument against striking out and why the matter should proceed to trial appears to be based on two arguments. The first is related to the Court of Appeal's decision on 17 November 2005, in which that court allowed an appeal against the decision of Ganpatsingh J, and remitted the matter for trial. During the course of its oral Ruling, the Court stated, *inter alia*, that: "*It is quite clear that the Statement of Claim discloses a cause of action…and thirdly, what has happened is that the case by the Appellants is against all of the respondents as a whole and they are all intertwined, the allegations implicate all of them*…".

84. In another appeal related to this matter on 3 May 2012, the Court of Appeal (differently constituted) made *obiter* observations as follows: "*There has been no declaration, no decision of any Court that these proceedings are a nullity. You see, the Court of Appeal overturned Ganpatsingh and so the Statement of Claim survived, the action survived*"; and "…*the result of the Court of Appeal's decision was that there was nothing wrong with the parties; they reinstated the statement of claim*."

85. Reliance is also placed on what is said to be the effect of the case management Order of 2007, and in his written case Mr. Wallace Whitfield submitted as follows:

> "On a true construction of Peter Maynard, J's Order, it was envisaged that once the preliminary issue of the share ownership was settled, the action would proceed to trial on the substantive issues in the Statement of Claim."

86. The plaintiffs accept that the preliminary issue of the ownership of the shares "*has been settled to date*", but contend that the "*substantive issues and claims in the Statement of Claim remain live issues*". On this basis, they argue that the strike-out claims should be dismissed and the matter proceed to trial.

Court's Discussion and Conclusions

4th to 9th and 11th Defendants

87. The position of Mr. Glinton representing the 1st plaintiff and several of the defendants (including himself) must instantly strike one as odd, and as creating an irreconcilable conflict of interest, contrary to settled legal principles that a solicitor cannot advocate for and against the same position (**Earl of Cholmondely v Lord Clinton** (1815) 34 ER 515). In **Archer v Registrar General et. al.** (*supra*), the Privy Council made the observation that the position of Mr. Glinton appearing in the earlier strike-out applications (before Ganpatsingh J.) as counsel for PPL while himself being a defendant as "*remarkable*".

88. I agree that at first blush this seems an impossible position for counsel to take in respect of representation of parties, and Mr. Wallace Whitfield did object to Mr. Glinton representing the 1st plaintiff. However, what appears to be an irreconcilable position in respect of representation of the 1st plaintiff and several defendants is, in substance, a preliminary and antecedent challenge to the legal propriety of using the Company's name to institute an action against the defendants, who include the adjudicated corporate and nominee beneficial owners of the 1st plaintiff, and who were the registered shareholders at the time of the institution of the action. In fact, the relief sought on behalf of the 1st plaintiff by Mr. Glinton could equally have been sought by the defendants he

represents. Consequently, the real issue raised on the preliminary point is whether Mr. Wallace Whitfield was authorized to institute an action on behalf of PPL.

89. Despite the highly unusual position of counsel representing both the 1st plaintiff and various defendants, I think Mr. Glinton's argument that an action cannot be maintained in the name of the Company is entitled to succeed when the matter is considered in the light of the Privy Council's decision, the state of the evidence before this Court and having regard to the applicable legal principles.

90. Firstly, the conclusion (by Adderley J and the PC) that the plaintiffs remained the legal owners of their shares was predicated on the finding that there was no evidence before those Courts that the transfer to Fabian and its nominees had been registered in accordance with the Company's articles of association. However, as explained, in addition to the certificates which were registered and lodged with the Registry in the 1990 annual statement and which was stamped December 1991, this Court also had before it a 2020 Certificate of Incumbency with the Company's seal showing the Defendants as shareholders and nominees. That was not challenged by any of the plaintiffs.

91. Secondly, Mr. Wallace Whitfield made heavy weather of the fact that Adderley J. found that the purported AGM of the Company, at which the resolutions were made removing the plaintiff shareholders and replacing them with the defendant shareholders was a nullity, and that other formalities had not been complied with. However, the law is clear (and Mr. Glinton relied on several of these cases and the principles) that shares may be properly transferred even if the instrument does not comply with all the formalities required by the articles: see, for example, the principle expressed in **Re Paradise Motor Co. Ltd.** [1968] 2 All ER 625, followed in **Nisbet v Shepherd** [1994] 1 BCLC 300.

92. In **Nisbet v Shepherd**, Lord Justice Leggatt (with whom Hoffman and Balcome LJJ agreed) said (p. 304, h):

> "In this case, the article required the transfer to be executed by the transferee, but, as I have indicated, Mr. Craig accepts that he is precluded by authority from relying upon that defect. As it was put in a passage from Buckley on the Companies Act (13th ed.) pp. 810-811, also cited in the judgment in *Re Paradise Motors Co. Ltd*., the lapse of time coupled with recognition of the transferee as a shareholder may render the transfer incapable of being impeached." [Emphasis supplied.]

93. Thirdly, the comments of the Privy Council, that the stamping of the returns by the Registrar General could not verify their accuracy, must be understood against the trite principle of company law that while information shown in a Register and on share certificates is "prima facie" documentary evidence of title to the shares in question, like all *prima facie* evidence, this can be defeated by contrary evidence: **Longman v Bath Electric Tramways Ltd**. [1905] 1 Ch. 646. However, it is clear that the Supreme Court, Court of Appeal and the PC all determined that Gulf had the right to exercise its power of sale and that Fabian and its nominees (the defendant shareholders) were therefore the legitimate beneficial owners of the shares from the date of the sale. This point is no longer capable of dispute.

94. Further, as it is clear that the individual plaintiffs no longer have any interest in PPL to cause it to do anything, they therefore could not have authorized Mr. Wallace Whitfield (or any other attorney) to bring an action on the Company's behalf. Therefore, I find on the evidence and legal authorities that the 1st plaintiff cannot maintain an action as against any of the defendants, and in particular the shareholder defendants, which as Mr. Glinton points out, would be akin to the 1st plaintiff suing itself. I therefore accede to the prayer to strike out the 1st plaintiff from the action.

95. I would also strike out the statement of claim as against the defendants represented by Mr. Glinton, whether as an abuse of the process of the Court or on the basis of *res judicata*. As indicated, stripped to its essence, the claim of the individual plaintiffs is that they have somehow been divested of their shares by fraud, dishonestly or irregular sale. The Ruling of the Privy Council in *Archer and Anor. v Fabian*, affirming in effect the rulings of the Courts below, rejected all of these claims, and they must be considered as having been determined.

96. The plaintiffs have attempted to turn the Court of Appeal's direction that the action should proceed to trial into some sort of philosopher's stone capable of turning a claim (which even the Court of Appeal itself accepted was probably tenuous) into something more than it is. In fact, the suggestion before the Privy Council that the ruling and appeal on the preliminary issue was somehow incompatible with the direction that the matter should be tried was rebuffed by the rejoinder that a direction to proceed to trial "*did not mean that it should succeed*." This ought to have been a clear signal to the plaintiffs that the Board was expressing the view that their claim foundered on the determination of the preliminary point.

First Defendant

97. As has been expressed, the 1st defendant is in liquidation and no claim could properly have been brought without leave in any event. The claims against Gulf are therefore incompetent. In any event, to the extent that the claims against the 1st defendant are predicated mainly on the allegations that the Bank was negligent in the sale of the shares by the 10th defendant as receiver, no cause of action is disclosed, as the Privy Council has held that the shares were sold by Gulf pursuant to its mortgage, and not by the 10th defendant as receiver.

Second Defendant

98. It is clear beyond dispute that, to the extent that the SOC only purports to reiterate the Licence Claim as against the second defendants, this matter is *res judicata* and to attempt to exhume it in the SOC is an abuse of process. I strike out the claims against the 2nd defendant in their entirety.

Third Defendant

99. In my view, the third defendant is peremptorily entitled to succeed on the contention that the SOC discloses no reasonable cause of action against it when considering only the facts pleaded. The SOC does not espouse any legally recognizable claim against the third defendant, and the issue of whether or not there is a claim with some reasonable prospect of success is not even

engaged. I am of the opinion that without more, the claim as against the third defendant must be dismissed.

Fifth Defendant

100. I agree with counsel for the 5th defendant that this pleading could not give rise to any viable claim against the 5th defendant, and to the extent that there are any imputations of bad faith or dishonesty, there are no pleadings to support those allegations. I would therefore strike out the claim as against Citibank. I also agree, however, for the reasons given by Mrs. Cooper Burnside in support of the submissions made by Mr. Glinton on the point, that it would also be an abuse of process for this claim to proceed.

Plaintiffs

101. On the point of the late appearances, I apprehend that Mr. Wallace Whitfield's argument is based on a misreading of the Rule. What *Ord. 12, r. 5(2)* actually provides is as follows:

> "Except as provided by paragraph (1) [notice of intention to defend cannot be given after judgment without leave] nothing in these rules or any writ or order shall be construed as precluding a defendant from acknowledging service in an action after the time limited for doing so, but if a defendant acknowledges service after that time, he shall not, unless the Court orders otherwise, be entitled to serve a defence or do any act later than if he had acknowledged service within that time."

102. As indicated in the Commentary to the Rule (see *The Supreme Court Practice* "The White Book") 1995, Vol. 1, para. 12/6/1) the effect of this rule is as follows:

> "Although a notice of intention to defend may be given after the time limited for acknowledging service and before judgment, this does not by itself extend the time for the defendant to serve his defence or do any other act; if he desires such extension of time, he must apply for an order in the usual way."

103. Thus, there is no prohibition against entering a late appearance, although extensions of time must be sought in the usual way for pleadings, etc., or any other steps in the action. What is before the Court are applications to strike out, which do not require any extensions of time and are not acts of the kind contemplated by the Rule. Furthermore, the Court gave directions for all of the defendants to appear in the matter, to avoid the piecemeal way in which the matter had been litigated up to that point, and the summonses and appearance were therefore filed in obedience to the Court orders.

104. As to the point of the proper party to represent the 1st plaintiff, I would agree with Mr. Wallace Whitfield (as has already been noted by the Court) that the position of appearing for both a plaintiff and a defendant in the same matter may be irregular as a matter of procedure. However, as pointed out, this is a technical objection that overlooks the true issue before the court.

105. Firstly, as to the point that no notice of change of attorney was filed by Mr. Glinton, Mr. Wallace Whitfield overlooks the fact that Mr. Glinton in fact represented the 1st plaintiff in the strike-out applications in FP/155 of 1994, which was converted to the current Action before the

Court. Therefore, he came on the record as counsel for the 1st plaintiff in this matter following the sale of the shares to Fabian and its nominees, whom Mr. Glinton represents. Therefore, Mr. Wallace Whitfield's claim that he acted "*with the full legal authority and instruction of the Directors and legal shareholders of the First Plaintiff*" begs the question, as he could not have been instructed by those having the right in equity to direct and control the Company. He would have long been alerted to the fact that a challenge had been taken to the ability of counsel to bring an action in the name of the Company at the behest of the individual plaintiffs following the sale of the shares, as highlighted in the decision of Ganpatsingh J.

106. True it is that Ganpatsingh's decision was overturned, with the effect that the SOC was reinstated. But the COA never considered the issue of want of authority in respect of the Company, or its capacity to bring an action. The observation that "*there was nothing wrong with the parties*" was made *obiter* and in a different appeal. Further, even if a claim to represent the interest of the Company could possibly have been asserted while the dispute between the shareholders as to the ownership of the shares in equity was still alive, it certainly could not be made after the Privy Council's 2017 decision, a decision which the plaintiffs have accepted. As the bare legal holders of the shares, they had no right to carry on any action on behalf of the Company, and indeed could only hold as nominees for Fabian. They could not authorize Mr. Wallace Whitfield to use the Company's name in any action, and Mr. Wallace Whitfield is not able to adduce any evidence to that effect.

107. Mr. Wallace Whitfield further takes the point that the 1990 resolution by PPL was declared to be void by the decision by Adderley J., because it predated the registration of the new shareholders and officer of the Company. But this overlooks the fact that the change was subsequently registered, and that the current Register reflects the defendant shareholders as members of the Company. The earlier attempts by the plaintiffs to rectify the Register failed because of procedural grounds, but following the 2017 PC decision, there was no longer any dispute as to the ownership of the shares in equity and the plaintiffs no longer had any rights vis-a-vis the Company to seek rectification. It is true that Mr. Glinton himself did not provide any ostensible authority to represent the Company, but as appears from the Register and Certificate of Incumbency, Mr. Glinton is *ex facie* the Secretary and a Director of the Company, and he represents several of the nominee defendant shareholders and Fabian, which owns the majority of shares. He is certainly better placed to have an implied warranty of authority to represent the Company than Mr. Wallace Whitfield and, as noted, represented the Company in the early action.

108. I accept the arguments of Mr. Glinton, which it is noted has been supported by counsel for the other defendants, that Mr. Wallace Whitfeld had no authority to act on behalf of the Company. While I do not sanction Mr. Glinton putting himself on record for the first plaintiff while simultaneously representing several of the defendants (including himself), it is plain that the arguments as to want of capacity and authority in respect of the first plaintiff could properly have been taken on behalf of any of the defendant shareholders or members of the Company (and indeed was taken by counsel for several of the other defendants) and they are entitled to succeed.

109. As to the reliance on the Court of Appeal's observation on the SOC and the case-management Order, these are clearly misconceived. Whatever currency they may have held at the point when they were made, it is now extinguished in light of the subsequent court rulings,

including the PC's 2017 Ruling. As has been noted, the PC specifically commented that the claim that the matter was ordered to proceed to trial was not the same thing as saying it should succeed. Further, the whole point of taking the share ownership issue as a preliminary issue was that it was appreciated that the determination of this issue might be dispositive of the claim.

110. For example, Mr. Adams, who then appeared for the first and fifth defendants had submitted at the 2007 case management hearing that:

> "It [the preliminary point] would lead to a saving of costs and time for the other defendants because it may well be that at the end of the day it's determined that the individual plaintiffs do not have the right to bring an action on behalf of the Company.

Maynard J. accepted that it was not "*incompatible with the Court of Appeal's decision*" that the trial proceed with the determination of the ownership of the shares, and then proceed with the other issues (obviously if necessary).

111. I therefore think that the defendants are right to point out that the preliminary issue did in fact dispose of the basis for the claims made by the plaintiffs and effectively put an end to the claims.

112. As to issue of who is responsible for the costs of an action instituted without authority, the cases (which were cited to the Court and the more recent authorities) have held that the liability is strict and exists whether the legal professional acted in good faith or was negligent (**Yonge v Toynbee**, **Warner v Merriman White (A Firm)** [2008] EWHC 1129 (Ch)). Although the modern authorities highlight the requirement for reliance by a third party on the attorney's implied warranty of authority (which is said not to be made out when authority is itself the issue in the proceedings, as implied authority then ceases—see for example, the comprehensive discussion of the case law in **St. John's Trust Company (PVT) Ltd. V. Watlington and others** (2020) 98 WIR 210)—the jurisdiction to award costs is also rooted in the court's inherent jurisdiction. As said in **Nelson v Nelson** [1996] EWCA Civ. J1206-18 (per Waller LJ), "…*where the court orders a solicitor to pay costs when he is acting without authority the court is acting under its inherent jurisdiction*." On the facts and the law that have been elucidated before the Court, the conclusion is almost ineluctable that a costs order against counsel is appropriate.

CONCLUSION AND DISPOSITION

113. For the reasons given above, I agree that the SOC should be struck out in its entirety against the various defendants, and I so order. Whatever the sense of grievance held by the original plaintiffs, having regard to the various Court rulings and in particular the 2017 decision of the Privy Council, and the passage of time, it can no longer be pretended that there is some vestige of a claim left to be pursued in this matter—if indeed there ever was.

114. As to costs, the defendants are generally entitled to their costs against the plaintiffs, to be taxed if not agreed. However, in the circumstances, and as argued by Mr. Glinton based on the state of the authorities, Mr. Wallace Whitfield should be responsible for part of the costs of these proceedings incurred as a result of the action brought without the authority of the 1st plaintiff,

which I will assess at 20 percent of the defendants' costs of these proceedings, to be taxed if not agreed.

Klein J.

24 July 2025