IN THE COMMONWEALTH OF THE BAHAMAS

IN THE SUPREME COURT

Common Law and Equity Division

Claim No. 2020/CLE/gen/00329

BETWEEN:

SUNSET EQUITIES LTD.

Claimant

AND

(1) STERLING ASSET MANAGEMENT LTD

(2) DAVID KOSOY

(3) STEPHEN TILLER

Defendants

Before	Hon. Chief Justice Sir Ian R. Winder
Appearances:	Gail Lockhart Charles, KC with Tatyanna Maynard for the Claimant Brian Simms, KC with Ramone Gardiner and Tinarje Moxey for the Defendants
Hearing Date(s):	18, 19, 20 and 21March 2024, 23, 24 and 25 July 2024, 7 October 2024 and 10 June 2025

JUDGMENT

WINDER, CJ

This is the Claim of the Claimant (Sunset) against the Defendants (Sterling, Kosoy and Tiller) for damages for breach of contract, conspiracy to injure by unlawful means and malicious presentation. Sunset asserts that such causes of actions and damages flowed from the presentation of a winding up petition ("the Petition"), which was filed by Sterling against Sunset on 6 April 2017.

Background

[1.] Sunset is a company incorporated and registered under the laws of the Commonwealth of The Bahamas. Yaron "Ron" Hershco (Herscho) is the President and majority shareholder of Sunset. Parris Jordan ("Jordan") is a director and minority shareholder. Sterling is a licensed financial and corporate service provider, of which Kosoy is the Chairman and Chief Executive Officer. Tiller is the Vice President of Sterling.

[2.] Stabilis Capital Management LP, through its affiliated entities including SF IVE BLE LP (used interchangeably as "Stabilis"), is and was at all material times a company which provided lending.

[3.] On 25 March 2013, Sterling advanced a loan to Sunset in the sum of US$2,200,000. Among the agreed terms, besides the repayment of the principal at interest, Sterling or its subsidiary would receive an equity interest in Sunset of 10% of all the issued shares. As security for the loan Sunset executed a Debenture and legal Mortgage in favour of Sterling on 31 May 2013. Shares were issued to Sterling representing a 10% equity in Sunset. Sterling was granted a Debenture and First legal mortgage over Sunset's main asset, the Hotel (now known as the Courtyard Marriot Hotel) including a fixed and floating charge covering all other assets of Sunset.

[4.] At the same time the debenture was executed, a shareholder's agreement was executed between Hershco, Jordan, and Sterling ("the Shareholders Agreement").

[5.] Subsequent to 25 March, 2013, loan, Sterling agreed to and did advance further loans to Sunset in the total amount of USD$10,300,000 (together with the initial loan, the "Previous Credit Facilities".)

[6.] On 10 February 2016, Sunset sought approval from Sterling to proceed with financing from Bixby Capital. In response, Sterling confirmed that as lender, it had no objection to Sunset seeking

financing from a third party to complete the construction and to pay off the loan due from Sunset to Sterling.

[7.] Sunset served Sterling with a Notice on 22 February 2016, indicating that it would pay off the Previous Credit Facilities within 90 days. On 25 June 2016, Lennox Paton (attorneys for Sterling) wrote to Sunset with a formal notice of default indicating that the 90-day notice period had expired and payment under the Previous Credit Facilities became due and payable on 22 May 2016 which had not been received.

[8.] Sterling offered to provide Sunset with funding and issued a Commitment Letter dated 5 July 2016 and a Supplemental Letter dated 6th July 2016 ("the Commitment Letters").

[9.] On 14 July 2016, the Commitment Letters were executed by Hershco, both on behalf of Sunset and in his personal capacity (as a Guarantor) and by Jordan in his personal capacity (as a further Guarantor). On 23 September 2016, Lennox Paton wrote to Sunset requesting them to provide the duly executed loan documents (which had been provided) to complete the new credit facilities. Sunset did not provide Lennox Paton with executed loan documents.

[10.] In response to perceived threats, Sunset commenced CLE/gen 1430 of 2016 (the "Receivership Action") and obtained an ex-parte injunction restraining the appointment of a Receiver by Sterling. The parties came to an agreement by way of a Consent Order, on 2 November 2016, to provide for the repayment of the sums outstanding to Sterling under the outstanding loans.

[11.] On 11 November 2016, pursuant to the settlement of the Receivership Action, Sunset paid off all of Sterling debts from funding obtained from Stabilis, and Hershco also transferred a further 5% shareholding in Sunset to Sterling. Sunset obtained financing from Stabilis.

[12.] On 3 November 2016, Sunset and Beachfront (the Construction Company of which Hershco was affiliated) entered into a Construction Loan Agreement with SF IVE BLE LP as Lender (the "Stabilis Loan"). The Stabilis Loan was for a period of two years subject to an extension at the Maturity Date of 3 November, 2018 ("the Maturity Date") provided that no event of default had occurred or was continuing at the time of the exercise of the Extension Option.

[13.] On 3 November 2018, the maturity date under the Stabilis Loan passed without Sunset having repaid the amount due. On 30 November 2018, Joseph Tuso of SF IV BLE LP wrote to Sunset and Beachfront indicating that multiple events of default had occurred under the Stabilis Loan. The stated specified event of default was Sunset's failure to repay the amount due by the Maturity Date.

[14.] The Hotel was sold by Stabilis following Sunset's failure to repay or refinance the Stabilis Loan upon maturity.

[15.] On 4 January 2017, Sterling's attorneys wrote to Sunset requesting, pursuant to section 68 of the International Business Companies Act, 2000 (the "IBC Act"): (a) Copies of the profit and loss statements for the period of July 2016 to November 2016; and (b) monthly, quarterly and annual reports regarding the operations of Sunset, until such time as Sterling no longer held any interest in Sunset. The letter noted that, prior to July 2016, such information had historically been provided to Sterling. Sunset did not respond to that letter or provide the requested information.

[16.] Sterling filed a winding up petition against Sunset on 6 April 2017. The Petition was supported by the affidavit of Tiller, which stated that the amount of Sunset's liabilities exceeded the value of its assets.

[17.] On 1 August 2017, at the hearing of the Summons for Directions, Sunset filed a Notice seeking an adjournment. The hearing was adjourned to 11 September 2017. On 11 September 2017, at the adjourned hearing of the Summons for Directions, Sunset provided Sterling with a copy of an appraisal prepared by Wilshire Bethel for Sunset. The hearing of the Summons for Directions was therefore adjourned sine die by consent. On 26 July 2018, Sunset filed a Notice of Motion seeking to strike out the Petition.

[18.] Sunset disputed the Petition and demanded that it be withdrawn. On 11 December 2018, Sunset wrote to Sterling requesting that it withdraw the Petition, asserting that Sunset had a commitment for a loan in the amount of $26,000,000 and that the Petition would present an impediment to Sunset's ability to successfully complete the terms and conditions of the new commitment. On 15 January 2019, Sterling indicated that, through its affiliates, it had the capital to complete a loan in the sum of $26,000,000 sought by Sunset.

[19.] The Petition was struck out by the Court on 23 September 2019. Sterling appealed the striking out of the Petition to the Court of Appeal, which reinstated the Petition on 8 April 2021.

[20.] Upon reinstatement of the Petition, Sterling advanced its previous application for discovery. The Court refused Sterling's application for discovery and set a trial date for the hearing of the Petition. Sterling sought to appeal the directions setting the matter down for trial, however by a ruling dated 2 March 2022 the Court of Appeal rejected Sterling's appeal. Sterling thereafter applied for leave to withdraw the Petition, which was granted on 28 March 2022.

[21.] On 15 September 2022, Hershco and Sunset commenced proceedings in New York, against Donald J. Urgo and Associates LLC, Urgo Hotel Management LLC, Urgo Hotels LP, UH Nassau Limited, Donald J. Urgo, Donald J. Urgo Jr, Kevin Urgo and Matthew Jalazo (the "New York

Proceedings") for causing Sunset to breach the Stabilis Loan In the New York Proceedings, Hershco and Sunset alleged that the termination of the Hotel Management Agreement (which pre-dated the presentation of the Petition) constituted an event of default under the Stabilis Loan and from which it was said Sunset "never recovered", resulting in "a complete and total loss" of the hotel redevelopment project.

The Action

[22.] Sunset commenced the action by Writ of Summons. The Re-Amended Statement of Claim seeks relief as follows:

(1) Damages against the Sterling for malicious prosecution of a winding up petition and/or for breach of contract and/or abuse of process.

(2) Damages against the defendants or alternatively against the Kosoy and Tiller, for conspiracy to injure by unlawful means.

[23.] The Re-Amended Statement of Claim provides, in part, as follows:

> 37. Notwithstanding their knowledge as alleged above, the Defendants nevertheless conspired together to file a winding up petition on 2 April, 2017 ('the winding up petition") in breach of Articles 3.2.6 of the Shareholders Agreement and/or Alternatively the second and Third Defendants conspired to cause the First Defendant to file and prosecute the winding up Petition.
>
> 38. The filing of the winding up petition was done maliciously and/or also unlawfully in that it placed the first Defendant in breach of contract and with the intention of causing harm to the Plaintiff.
>
> 39. The filing of the winding up petition was supported by the affidavit of the Third Defendant, Stephen Tiller, which falsely stated that the amount of the Plaintiffs liabilities exceeded the value of its assets. The affidavit purported to verify the statement made in the Petition that were both misleading and untrue. …
>
> 43. Ultimately the First Defendant applied for leave to withdraw the winding up petition (on 11 March. 2022), permission for which was granted by the Supreme Court on 28 March 2022. However, by the time that the winding up petition was withdrawn considerable damage, including bringing about the conditions of default under the Stabilis loan arrangement, had already been caused by the First Defendant's wrongful snd4l malicious filing and continued prosecution of the winding up petition in breach of contract.
>
> 44. The said winding up petition was maliciously and wrongfully presented by the First Defendant in breach of contract.

45. Further or alternatively or the reasons particularized at paragraph 44 above, the presentation and prosecution of the winding up petition was pursued by the First Defendant for an improper purpose and was a tortious abuse of process.

46. Further by reason of the matters aforesaid the Plaintiff has suffered loss and damage, its reputation has been harmed, its credit seriously damaged and its business transactions have been hampered. The quantum of the Plaintiffs reserves the right to plead further on the quantification of its claims in due course.

[24.] The Defence was essentially one of denial and putting Sunset to strict proof of its claims. Specifically, however, the Re-Amended Defence provides, in part as follows:

28. Paragraph 36 is denied in its entirety and the Plaintiff is put to strict proof. The Defendants had no notice of the terms of the Construction Loan Agreement including the maturity date or that the filing of a Petition constituted an event of default, at the time the First Defendant filed the Petition The Potential Financing Proposal letter disclosed in CLE/gen/1403 of 2016 contained no terms in relation to events of defaults and contained only draft terms. The presentation of the petition was not contrary to the Shareholders Agreement as the prohibition under article 3.2.6 of the Shareholders Agreement only applied to Mr. Herscho and did not apply in instances of insolvency. In the event that the clause did apply in instances of insolvency the clause is void as being against public policy.

29. Paragraph 37 is denied in its entirety and the Plaintiff is put to strict proof. At all material times, the Second and Third Defendants acted in their capacities as directors of the First Defendant and it is further denied that there was ever any conspiracy between the Defendants. Further, article 3.2.6 of the Shareholders Agreement was never breached as the prohibition on presenting a petition never applied to the First Defendant and did not apply in instances of insolvency. In the event that the clause did apply in instances of insolvency the clause is void as being against public policy. …

31. In relation to paragraph 39, this is denied in its entirety and the Plaintiff is put to strict proof. The First Defendant had evidence that the Plaintiff was insolvent and filed the petition on such basis in COM/com/00040 of 2017. Therefore, the First Defendant possessed a reasonable and proper cause to present the winding-up Petition in COM/com/00040 of 2017. The Court never ruled on the evidence filed in COM/com/00040 of 2017…

54. Paragraphs 45 and 46 are denied in their entirety and the Plaintiff is put to strict proof. The Defendants repeat that any damage suffered by the Plaintiff was caused by its inability or refusal to pay monies due under its mortgage to SF IV BLE LP and/or Beachfront Equities Ltd defaulting under the terms of the same.

55. Paragraph 47 is denied in its entirety and the Plaintiff is put to strict proof. The Defendants never entered into a combination or understanding to cause injury to the Plaintiff via unlawful means. The Defendants aver as follows:

(i.) The threat to place the Plaintiff in receivership occurred when the claimed sum under the Previous Credit Facilities were outstanding is completely unrelated to the petition. Pursuant to a Consent Order filed on 16 January 2017 in CLE/gen/1403 of 2016, this matter was settled; and

(ii.) The filing and continued prosecution of the petition was not contrary to the Shareholders Agreement as such prohibition only applied to Yaron Herscho and did not apply in instances of insolvency. Additionally, the Third Defendant's Affidavit merely exhibits documents, does not contain false information and the Court in COM/com/0040 of 2017 never considered the merits of the petition.

The Evidence at trial

[25.] At trial, Sunset called Hershco as its only witness of fact. Kosoy and Tiller gave evidence as the witnesses of fact in the Defendants' case.

[26.] Hershco's witness statement provides a detailed account of the events and evidence supporting Sunset claim against Sterling, Kosoy, and Tiller. He says that Sterling was a moneylender that financed the purchase and renovation of the Courtyard Marriott Hotel (formerly Nassau Palm Hotel) by Sunset, initially lending $2.2 million in 2013, later providing four additional loans totaling $10.3 million for renovations. As a condition of lending, Sterling required an equity stake in Sunset, which increased from 10% to 15% over time.

[27.] Hershco alleges that Sterling, led by Kosoy and Tiller, pursued a predatory "lend to own" strategy, making it difficult for Sunset to refinance elsewhere by insisting on onerous terms, including requiring Sunset to buy back Sterling's 15% equity stake for $1.83 million as a precondition for refinancing. He says that when Sunset sought alternative financing in 2016, Sterling responded with a series of legal actions, culminating in the filing of the Petition in April 2017. Hershco claims this was done maliciously, in breach of a shareholders' agreement that prohibited such petitions unless the company was insolvent, and without any genuine belief that Sunset was insolvent.

[28.] Hershco points to inconsistencies in Sterling's position: while they claimed Sunset was insolvent for the purposes of the Petition, they simultaneously valued their 15% equity stake at $1.83 million, which would not be the case if the company were truly insolvent.

[29.] Hershco alleges that Sterling and its principals manipulated financial information to create an illusion of insolvency, using outdated or selective data in court filings, while ignoring more current and favorable appraisals and financials. He points to reliance on a 2014 PKF Market Study rather than a more recent CBRE appraisal that valued the property higher.

[30.] Hershco details the harm caused by the winding up petition, including the inability to refinance the Stabilis loan or sell the hotel at market value, leading to a "fire sale" of the hotel and significant losses for Sunset. He asserts that no lender or buyer would proceed while a winding up petition was pending, and that the Petition was only withdrawn after the hotel was sold and the petition was no longer useful as leverage.

[31.] Hershco emphasizes that the Petition was filed in breach of Clause 3.2.6 of the shareholders' agreement, which prohibited any party from presenting such a petition. Hershco maintains that Sterling's actions were calculated to harm Sunset and force it back into Sterling's control.

[32.] Hershco provides a detailed chronology of key events, including attempts to refinance, legal threats and actions by Sterling, and the sequence of litigation culminating in the Petition and its eventual withdrawal.

[33.] Hershco concludes that Sterling's conduct was in bad faith, intended to force Sunset into disadvantageous financing or to take over the hotel, and that the winding up petition was a malicious abuse of process that directly caused Sunset's losses.

[34.] When cross examined, Hershco stated that he oversaw financing, development, and management of the Courtyard Marriott project in Nassau. Sunset borrowed ~$12.5M from Sterling between 2013–2015 for hotel acquisition and renovation. Sterling was granted a 15% equity stake, which Hershco claims was a last-minute demand. Hershco contends Sunset met its repayment obligations until 2016.

[35.] Sunset issued a 90-day repayment notice to Sterling in February 2016, intending to refinance via Bixby Bridge Capital. Hershco claims Sterling initially encouraged repayment but later obstructed refinancing efforts. He alleges Sterling interfered with other potential lenders (e.g., CrossHarbor, Titan Capital, Rosdev) although documentary evidence was limited or disputed.

[36.] Hershco acknowledged that he had previously been subject to a fraud judgment in the United States. He did not dispute the existence of the judgment but downplayed its relevance to the current proceedings. Sterling's counsel suggested that Bixby Bridge Capital withdrew from refinancing Sunset after discovering this judgment during due diligence. Hershco denied that the judgment influenced Bixby's decision.

[37.] Hershco testified to receiving weekly threats from Sterling representatives, including Kosoy. He referenced emails and verbal exchanges suggesting coercion and manipulation, including alleged extortionate terms in refinancing offers. He claimed Sterling's conduct amounted to a "lend-to-own" strategy, aiming to force Sunset into default and acquire the hotel. Hershco denied threatening Sterling's principals but acknowledged a police report was filed against him. He claimed the report was false and part of Sterling's intimidation tactics.

[38.] Hershco asserted that a $12.8M shareholder loan existed from him to Sunset, later converted to equity. Sterling disputed its existence, citing inconsistent disclosures and lack of Central Bank approval. Hershco admitted the loan was removed from financial statements at Sterling's request, then reinstated later.

[39.] Sunset secured a $23.5M construction loan from Stabilis in November 2016. Hershco testified that Sunset defaulted due to Sterling's winding-up petition, which blocked Central Bank approvals and refinancing. Payments were allegedly made via Beachfront entities in the Bahamas and U.S., though bank records were not fully disclosed. Hershco claimed that Beachfront Bahamas Ltd. and Beachfront LLC (U.S.) were used for hotel management and construction. Hershco claimed Beachfront invested $4M in the project, though its shareholder status and financial role were unclear. He maintained that Beachfront was a legitimate affiliate, not a vehicle for misappropriation.

[40.] Hershco faced extensive cross-examination on missing documents, including financial statements, emails, and loan agreements. He attributed gaps to a fire at the hotel and lack of access to servers post-sale. Sterling's counsel challenged the credibility of these claims and the completeness of discovery. Hershco claimed Sterling induced the repayment notice yet had already signed a commitment letter with Bixby prior to issuing it. He alternated between describing the $12.8M as a shareholder loan and equity, depending on context. He asserted Sterling's "lend-to-own" strategy despite no evidence Sterling sought to acquire the hotel. He asserted financing options were blocked but provided no lender testimony or correspondence.

[41.] When re-examined, Hershco asserted that Sunset made regular payments until defaults triggered by the winding-up petition. He described efforts to refinance and extend the loan, including negotiations with Rosdev. He reaffirmed that Stabilis allowed time to cure defaults and that the Petition was the primary obstacle.

Kosoy

[42.] David Kosoy's witness statement provides a detailed account of the events and evidence from his perspective as the Second Defendant and Chairman/CEO of Sterling. Kosoy states that all dealings with Sunset were in his capacity as a director/officer of Sterling, not personally. He claims neither he nor Tiller had personal dealings with Sunset.

[43.] Sterling provided a series of credit facilities to Sunset from 2013 onwards, with terms set out in commitment letters and a Shareholders Agreement. Sterling became a 10% shareholder in Sunset. Sunset defaulted on its loan obligations in May 2016 after giving notice of intent to repay but failing to do so. Sterling initially sought only interest payments as a concession, rather than enforcing full security. Further negotiations led to new loan documentation in July 2016, but Sunset allegedly breached these by refusing to execute required security documents and failing to provide financial information.

[44.] Sterling reserved its rights and issued formal notices of default, but Sunset commenced litigation (the "Receivership Action") to restrain the appointment of a receiver. Sunset obtained alternative financing from Stabilis, in breach of Sterling's right of first refusal. Sterling was not provided with the Stabilis loan agreement at the time.

[45.] Kosoy notes that the Stabilis Loan made both Sunset and Beachfront jointly liable, and that default by either constituted default by both. After the Stabilis loan, Sunset repaid Sterling, and disputes the previous credit facilities ended. Kosoy says that thereafter Sterling commenced further proceedings for breach of the loan documentation and for alleged breach of fiduciary duty by Sunset's directors. Sterling, as a minority shareholder, was denied access to Sunset's books and records, raising concerns about Sunset's solvency. An unaudited balance sheet showed liabilities exceeding assets, leading Sterling to believe Sunset was insolvent.

[46.] Sterling filed a winding up petition in April 2017, supported by affidavit evidence and documents prepared by Sunset itself. Kosoy maintains that the petition was based on the best available evidence and was a reasonable and genuine action in the circumstances. Both parties obtained appraisals of the property, with values ranging from $24.8 million to $35 million, but liabilities still exceeded assets. Kosoy claims Sunset refused to provide up-to-date financial information or access for appraisals.

[47.] Sterling made several offers to refinance Sunset's debt, which were refused. Kosoy argues that these offers would have made Sunset solvent on a cash-flow basis.

[48.] Kosoy details multiple events of default under the Stabilis Loan, including failure to pay, failure to provide financial statements, termination of the hotel management agreement, and other breaches unrelated to the winding up petition. He references litigation in New York where Sunset itself alleged that defaults were caused by third parties (Urgo Defendants), not by Sterling's actions.

[49.] Kosoy repeatedly emphasizes that Sunset refused to provide financial records or allow inspection, both before and during litigation, compounding Sterling's concerns about insolvency.

[50.] The hotel was eventually sold under a power of sale for $23 million after Sunset defaulted on the Stabilis loan. Kosoy notes that Sunset and Beachfront were sued multiple times for unpaid debts, further evidencing financial distress.

[51.] Kosoy alleges that the current action is part of a pattern of harassment by Hershco, including threats and intimidation against Kosoy and others associated with Sterling. He reiterates that all actions were taken in his capacity as a director of Sterling, not personally, and that he and Tiller always acted in Sterling's interests, which generally aligned with improving Sunset's financial position.

[52.] Kosoy's evidence is that Sterling's actions—including the winding up petition—were reasonable responses to Sunset's defaults and lack of transparency, and that Sunset's financial difficulties and defaults were not caused by Sterling or its directors, but by Sunset's own conduct and external factors.

[53.] When cross examined. Kosoy admitted that Sterling relied on Sunset's 2015 unaudited balance sheet when filing the winding-up petition in April 2017. He acknowledged that more recent financials and appraisals existed but claimed Sterling was not obligated to consider them. He was shown a 2017 CBRE appraisal valuing the hotel at over $39M, which contradicted Sterling's insolvency claim. Kosoy denied seeing the CBRE report before filing the petition but conceded Sterling had requested and received valuations from Sunset in 2016 and 2017. He was challenged on why Sterling did not disclose these more favorable valuations to the court. He maintained that Sterling believed Sunset was insolvent based on its own analysis.

[54.] Kosoy was asked why Sterling did not withdraw the Petition after Sunset secured the Stabilis loan and obtained a certificate of occupancy. He responded that Sterling had lost confidence in Sunset's management and believed the company remained at risk. He admitted that Sterling received offers to buy out its shares for $1.83M but rejected them.

[55.] Kosoy confirmed that Sterling made alternative financing proposals to Sunset, including a $27M offer in 2019. He claimed these offers were made in good faith and were superior to Sunset's refinancing options. He denied that Sterling's conduct was coercive or intended to force a default. Kosoy asserted that Sterling had a right to file the Petition under the Companies Act and the shareholders agreement. He was challenged on whether Sterling's actions were consistent with its fiduciary duties as a minority shareholder. He maintained that Sterling acted to protect its investment and enforce its rights.

[56.] Kosoy confirmed that Sterling filed a tortious interference claim against Stabilis in the U.S., alleging it disrupted Sterling's contractual relationship with Sunset. He admitted that this

lawsuit was filed after the winding-up petition and was later discontinued. He denied that the lawsuit was part of a broader strategy to pressure Sunset. Kosoy strongly denied that Sterling pursued a "lend-to-own" strategy or sought to acquire the hotel through default. He rejected Hershco's allegations of threats or coercion and insisted Sterling acted transparently. He acknowledged that Sterling had considered acquiring the hotel but only through lawful means, such as foreclosure or sale.

Tiller

[57.] Tiller, in his witness statement, states that all his dealings with the Sunset were in his capacity as a director and officer of Sterling, never personally. He is advised that Mr. Kosoy's dealings were also only in his official capacity. He adopts Mr. Kosoy's account of the dispute regarding Sunset's default under previous credit facilities. Tiller supported Sterling's efforts to assist Sunset, including offering additional funding and forbearing from exercising security rights, but also supported reserving Sterling's legal rights, including appointing a receiver.

[58.] Tiller and Kosoy, as Sterling's directors, became seriously concerned about Sunset's solvency after reviewing an unaudited balance sheet dated 31 December 2015 and other financial information. They believed Sunset was "very seriously balance sheet insolvent," especially as Sunset failed to provide requested financial information. This led to the decision to present a winding-up petition, supported by Tiller's verifying affidavit, based on the best available evidence at the time (including appraisals and balance sheets). Tiller maintains that the petition was justified and that Sunset's refusal to provide financial records reinforced their concerns.

[59.] Tiller insists that the Petition was not to harm Sunset but to protect Sterling's financial interests as a minority shareholder and the interests of Sunset's creditors. He was unaware at the time that presenting the petition would trigger a default under the Stabilis Loan. He also states that legal advice was sought regarding the Shareholders' Agreement and the decision to file the petition. Tiller says that he supported refinancing discussions in 2018 and believed Sterling was justified in not withdrawing the petition, as Sunset appeared to remain insolvent. He also supported further offers of refinancing in hopes of improving Sunset's financial position.

[60.] Tiller continued to be concerned about Sunset's solvency, especially given Sunset's reluctance to provide access to financial records. He adopts Kosoy's account of subsequent events, including applications for discovery and inspection. Tiller claims that this action is part of a pattern of harassment against the Defendants, orchestrated by Hershco. He recounts a specific threat made by Hershco at the airport, which led Tiller and Kosoy to hire security guards.

[61.] Tiller reiterates that all his actions were in his official capacity, always seeking to act in Sterling's interests, which generally included improving Sunset's financial position. He notes that the final sale price of the property validated their concerns about Sunset's solvency.

[62.] When cross-examined Tiller confirmed Sterling relied on Sunset's 2015 unaudited balance sheet and outdated appraisals (PKF, BCQS, DHP) to assess insolvency. He admitted that concerns from creditors were not mentioned in the petition or verifying affidavit. He maintained that Sterling believed Sunset was insolvent based on available data, despite later receiving updated financials and appraisals.

[63.] Tiller was shown emails from February 2016 where Sterling demanded $1.83M for its 15% equity stake as part of any refinancing. He claimed this was a "request," not a demand, and denied that Sterling insisted on payment for its shares in every negotiation. He acknowledged that the shareholders agreement did not require Sunset to buy out Sterling's equity.

Expert evidence

[64.] Sunset called Edy Gross and Barry Robinson as expert witnesses to assess (amongst other things) the value of the Hotel and whether Sunset was solvent at the time of the presentation of the Petition. The Defendants relied on the expert evidence of Alam Pirani and Edmund Rahming to provides its evidence on these issues.

The Issues

[65.] The Agreed Statement of Issues and Amended Statement of Claim identifies the following issues:

> The consequences of the Petition
> 69. Whether or not at the time of the presentation of the Petition:
> (a) Sunset was in fact insolvent, on a cash flow and/or a balance sheet basis;
> (b) Sunset was already in default under the terms of the Stabilis Loan.
> 70. Whether or not the filing of the Petition caused Sunset to default under the Stabilis Loan.
> 71. Whether or not Sunset have been able to repay or refinance the Stabilis Loan by the maturity date but for the presentation of the Petition.
> 72. Whether or not Sunset failed to mitigate any losses resulting from the presentation of the Petition – including the alleged special damages – by refusing Sterling's offers of refinancing made in February and May 2019.
> 73. In light of the answers to the above questions, what harm (if any) did Sterling's presentation of the Petition cause to Sunset's interests and is Sunset entitled to any damages?
> The presentation of the Petition

74. Whether or not Sterling's presentation of the Petition was a breach of Clause 3.2.6 of the Shareholders' Agreement. If so, did Sterling and/or its directors (Mr Kosoy and Mr Tiller) know that fact?
75. Whether or not Sterling's presentation of the Petition was:
(a) done maliciously and without reasonable and probable cause; and/or
(b) done with the intention of causing harm to Sunset or securing a collateral commercial advantage for Sterling, rather than with the intention of securing the repayment of Sunset's indebtedness to Sterling, or of procuring the administration of Sunset's assets in accordance with the statutory insolvency scheme?
76. Whether or not, at the time the Petition was filed:
(a) Sterling and/or its directors (Mr Kosoy and Mr Tiller) had reasonable and probable cause to believe that Sunset was insolvent;
(b) Sterling and/or its directors (Mr Kosoy and Mr Tiller) knew that an extant petition filed in the Supreme Court of The Bahamas for the winding up of Sunset would amount to an event of default under the Stabilis loan;
(c) Sterling and/or its directors (Mr Kosoy and Mr Tiller) know, or ought to have known (if it be the case in light of the matters below), that if a petition filed in the Supreme Court of The Bahamas for the winding up of Sunset were advertised or otherwise became known to potential lenders to Sunset prior to the Maturity Date under the Stabilis Loan then this would likely prejudice Sunset's ability to secure an extension of the term of the Stabilis Loan or otherwise to secure third party funding with which to satisfy its liabilities under the Stabilis Loan?
77. Whether or not the statements made in the Petition and/or the Verifying Affidavit concerning the financial position of Sunset false or misleading. If so, did Sterling and/or its directors (Mr Kosoy and Mr Tiller) know that such statements were false or misleading, or were they reckless as to the truth of such statements?
78. Whether or not, at the time Sunset requested Sterling to withdraw the Petition, Sterling and/or its directors had reasonable and probable cause (or legitimate and bona fide grounds) for refusing to do so.

[66.] Counsel for Sunset has helpfully distilled these issues into 4 main general issues. I agree with her categorization, which is as follows:

(i.) What is the correct interpretation of Article 3.2.6 of the Shareholders Agreement entered into between Sunset, Sterling and Ron Hershco, and was the filing of the Winding up petition in breach of this provision?
(ii.) Was the filing and prosecution of the Winding up petition an abuse of the process of the court?
(iii.) If the filing of the Winding up petition by D1 was in breach of the Shareholders' agreement or an abuse of the process of the Court, did D2 and D3 participate in

these wrongful acts and are they relieved of liability for this conduct because they are directors of D1?

(iv.) Did the Claimant suffer damage and loss as a result of the filing of the Winding up petition, and if so, what was the amount of that loss and damage?

Law Analysis and Discussion

[67.] Central to all of the complaints of Sunset is the filing of the Petition on 6 April 2017 (the Petition). Sunset claims that the Petition that was filed in breach of the shareholders agreement, was an abuse of process and a part of a wider conspiracy by the Defendants to injure it. Ultimately, Sunset asserts that the filing of the Petition caused the loss of its financing and the hotel project.

[68.] The Petition was brought pursuant to section 186 (c) of the Companies Act on the basis of the insolvency of Sunset. Section 186 provides:

> **186. Circumstances in which a company may be wound up by the court.**
> A company may be wound up by the court if-
> (a) the company has passed a resolution requiring the company to be wound up by the court;
> (b) the company does not commence its business within a year from its incorporation, or suspends its business for a whole year;
> (c) the company is insolvent;
> (d) the members are reduced in number to less than two;
> (e) the court is of the opinion that it just and equitable that the company should be wound up; or
> (f) a regulator petitions for the winding up of a company over which it has regulatory authority and whose license or registration has been suspended or revoked.
> **187. Meaning of "insolvent".**
> A company is insolvent if-
> (a) the company is unable to pay its debts as they fall due; or
> (b) the value of the company's liabilities exceeds its assets.

[69.] It is appropriate at the outset that I provide my assessment of witnesses of fact who gave evidence at the trial, as although the trial was document heavy, the factual evidence was nonetheless crucial in understanding what transpired.

[70.] Having observed all the witnesses as they gave their evidence, including their demeanor and response to the questioning, I have little hesitation in indicating that I preferred the evidence of Kosoy and Tiller to that of Hershco. I am cautious of much of the evidence of Hershco who I found to be evasive on some important inquiries and often exaggerated the circumstances of what transpired. I was therefore not satisfied that Hershco was entirely truthful, frank and forthright in giving his evidence. In the face of some of the material presented, it was difficult to rely on many of the assertions made by him. Most notably. the pleadings in the New York Action in which he

alleges that another party was responsible for the very losses and damages asserted in this claim. This New York Action was not properly disclosed during discovery and Sterling only became aware of it after instructing their attorneys in New York to search for information. His oral testimony was often contradictory and did not accord with the documentary evidence or his witness statement.

[71.] In relation to Kosoy and Tiller, I generally found them to be truthful and forthright in their testimony. I accept that there was considerable mistrust of Hershco following the commitment made by him and Sunset to take the loan while at the same time finalizing the Stabilis Loan.

What is the correct interpretation of Article 3.2.6 of the Shareholders Agreement entered into between Sunset, Sterling and Ron Hershco, and was the filing of the Petition in breach of this provision?

[72.] As part of the consideration for the agreement to grant the loan to Sunset in March 2013 Sterling received an equity stake in Sunset. The parties also agreed to enter into a shareholders agreement dated 31 May 2013 (the Shareholder's Agreement), to provide for the management of Sunset. The parties to the agreement were Hershco, Jordan, Sterling and Sunset.

[73.] Clause 3.2 of the Shareholders' Agreement provides:

> 3.2 Notwithstanding the provisions of Section 3.1 and elsewhere in this Agreement, the Shareholders and the Company covenant with each other that for so long as the Shareholders are the holders of the Shares in the capital of the Company, Herscho as President and majority shareholder shall not cause the Company to do any of the following without the unanimous prior written consent of the Shareholders of the Company:
>
> > 3.2.1 ...
> >
> > 3.2.6 Pass a resolution for the winding up of the Company (unless it shall have become insolvent) nor shall any of the parties present or cause to be presented any petition for the winding up of the Company. ...

[74.] Sunset contends that the Shareholders' Agreement is binding on the parties to it, and its breach entitles the aggrieved party to damages. Sunset says that Clause 3.2.6 of the Shareholders' Agreement explicitly prohibited any party from presenting a winding-up petition against Sunset and that Sterling's filing of the Petition was a clear and unequivocal breach of this provision. Sunset invites the Court to find Sterling liable for this breach and award damages to Sunset, as the Petition was not only wrongful, but also caused significant harm to the company's operations and reputation. Sunset relies on the English High Court case of **Score Draw Limited v PNH International Limited** [2021] EWHC 756.

[75.] Sterling denies that its presentation of the Petition constituted a breach of Clause 3.2.6 of the Shareholders' Agreement on the alternative grounds, namely:

(a) that as a matter of construction, the prohibition in Clause 3.2.6 applies only to Hershco;
(b) that as a matter of construction, the prohibition in Clause 3.2.6 does not apply where Sunset has become insolvent (and if it does, then as a matter of public policy it is void); and
(c) that an issue estoppel arises.

[76.] Sterling says that on the proper construction of Clause 3.2.6, the prohibition on presenting a Winding-Up Petition, was to apply only to Hershco. Sterling also says that the preamble to Clause 3.2 indicates that its purpose is to set out various things which Hershco is prohibited from doing without the unanimous prior written consent of the shareholders. It provides "*Hershco as President and majority shareholder shall not cause the Company to do any of the following*" and then goes on to list those things. Finally, Sterling says that this interpretation is inconsistent with the context and purpose of the Shareholders' Agreement more broadly.

[77.] I accept that the drafting of the Shareholders Agreement could reflect a level of ambiguity. The overarching language of Clause 3.2 does suggest that the clause is directed to Hershco and not the other contracting parties, however the inclusion of the words, *nor shall <u>any</u> of the parties* suggest that the presentation of a winding up petition is a restriction to all of the parties to the Shareholder Agreement.

[78.] Sterling says that "the wording "*nor shall any of the parties*" can more naturally be read as referring to the parties <u>to which the prohibitions in Clause 3.2 apply</u> namely, in this particular Shareholders' Agreement, Hershco. I am not entirely swayed by this argument as such a reading could lead to absurd results by rendering the use of the words *"any of the parties"* by the draftsman, meaningless.

[79.] Similarly, the suggestion that the ground of insolvency is excluded from the operation of Clause 3.2.3 is likewise unsupported by a plain reading of the Clause. When joined, the clause reads:

> Herscho as President and majority shareholder shall not cause the Company [...] without the unanimous prior written consent of the Shareholders of the Company to [p]ass a resolution for the winding up of the Company (unless it shall have become insolvent) nor shall any of the parties present or cause to be presented any petition for the winding up of the Company.

Sterling says that the insolvency exception most naturally applies to both prohibitions. Had this been the intent, one would have expected it to have said so specifically, rather than with a prohibition directed to Hershco alone. The placement of the words *(unless it shall have become insolvent)* is important. Clearly, the words relate to the passage of a resolution for the winding up and is a restriction directed only to Hershco. Sterling suggests that such a restrictive reading of the Clause is an issue of form over substance. In the circumstances however, as the authors of the Shareholders' Agreement, such ambiguity must be read against them.

[80.] Sterling submits that Sunset's interpretation of Clause 3.2.6 would be contrary to public policy and should be avoided. In ***Exeter City AFC Ltd v Football Conference [2004] EWHC 831 (Ch)*** the English Court High Court found that the right of a contributory to apply for a winding-up order, was an inalienable statutory right which could not be limited by agreement, since both were conditions of incorporation under the [Companies] Act. Accordingly, the right conferred on shareholders to apply for relief at any stage of the existence of a company could not be diminished or removed by contract or otherwise. In that case the Court held that an agreement to submit disputes to arbitration could not override the right to apply for relief under Companies Act and could not be invoked to require a stay of the petition.

[81.] The case of ***Exeter City AFC Ltd v Football Conference*** appears to have been determined on an entirely different statutory regime than persists in the Bahamas. In my view, Sterling's public policy argument is unsustainable in the face of Section 191(2) of the Companies Act. Section 191(2) of the Companies Act provides that:

> "*The court shall dismiss a winding up petition or adjourn the hearing of a winding up petition on the ground that the petitioner is contractually bound not to present a petition against the company.*"

The Companies Act specifically empowers a contributory to petition for the winding up of the Company, however, fair reading of Section 191(2) does not exclude a contributory's petition. Clearly therefore, the public policy of The Bahamas does not frown on a shareholder being contractually bound not to present a petition against the company to which he is a contributory.

[82.] I also did not find merit in the assertion of Sterling that an issue estoppel arose, as a fair reading of the judgments revealed that this issue was never adjudicated by any court.

[83.] I am satisfied that the Petition was filed in breach of contract as it was clearly prohibited as per the terms of the Shareholders' Agreement to which Sterling and Sunset were partis. It must still be determined whether any loss or damages flowed from this breach by Sunset.

Was the filing and prosecution of the Petition an abuse of the process of the court?

[84.] Sunset says that the prosecution of the Petition was an abuse of process and was brought maliciously. They contend that Sterling had no probable cause to believe Sunset was insolvent and the Petition deliberately ignored the Stabilis loan proceeds as assets, double counted liabilities, and relied on outdated financial data.

[85.] According to the learned authors of Commonwealth Caribbean Tort Law Fourth Ed. (2009) at pages 46 and 48:

> "The tort of malicious prosecution is committed where the defendant maliciously and without reasonable and probable cause initiates against the plaintiff a criminal prosecution which terminates in the plaintiff's favor, and which results in damage to the plaintiff's reputation, person or property… In Wills v Voisin (1963) 6 WIR 50 p 57, Wooding CJ listed the essentials which must be proved by the plaintiff in order to establish a case of malicious prosecution:
>
> (a) That the law was set in motion against him on a charge of a criminal offence;
> (b) That he was acquitted of the charge or that otherwise it was determined in his favour;
> (c) That the prosecutor set the law in motion without reasonable and probable cause;
> (d) That, in so setting the law in motion, the prosecutor was actuated by malice.
>
> Failure to establish any one or more of these requirements will result in the plaintiff losing his action for malicious prosecution."

[86.] In **Willers v. Joyce** [2016] UKSC 43 the UK Supreme Court allowed an appeal against strike out on the ground of no cause of action of the appellant's claim for malicious prosecution in respect of civil proceedings that had been brought against him at the respondent's instigation and discontinued shortly before trial. The Supreme Court confirmed that the tort of malicious prosecution included the prosecution of civil proceedings.

[87.] Sunset says that the evidence shows that Kosoy and Tiller's admissions under cross-examination confirm they lacked credible evidence of insolvency at the time of filing. Their actions were motivated by malice, aimed at pressuring Sunset into repurchasing Sterling's shares or surrendering control of the Hotel. The resulting damage (loss of refinancing opportunities, reputational harm, and the forced sale of the Hotel) warrants substantial compensation.

[88.] Sunset says that the Petition was an abuse of process, designed to harass Sunset and gain leverage in unrelated disputes. They contend that Sterling, having been fully repaid its loans, had no legitimate creditor interest and that its minority shareholder status provided no tangible benefit from liquidation, as winding up would extinguish any residual equity value. They rely on the

decisions in **Re Rica Gold Washing Co Ltd** (1879) 11 Ch D 36 and **In Re Chesterfield Catering Co. Ltd.** [1977] Ch. 373, which affirm that a petitioner must have a tangible interest in winding up the company.

[89.] In the case of **Cox v English Scottish and Australian Bank** [1905] A.C. 168 at 175 the Privy Council considered what constitutes reasonable and probable cause for the commencement of insolvency proceedings. The Board stated, at page 175:

> "if there was reasonable and probable cause for the belief that the appellant was keeping out of the way in order to delay his creditors, then, although the truth may be otherwise and his innocence may be established, still the action will fail."

[90.] Sterling says that the evidence demonstrates that it was not seeking to harm Sunset in presenting the Petition but to safeguard Sterling's financial interest as a minority shareholder as well as wider creditors who were exposed. Sterling contends that it became concerned when Sunset produced conflicting balance sheets:

a) In May 2016, Sunset provided conflicting balance sheets. The original balance sheet which was sent on 4 May 2016, included a shareholder's loan in the amount of $12M. After being reminded that a shareholder loan was prohibited under the Shareholders' Agreement, Sunset amended their balance sheet to remove the shareholders loan and added a line item for preferred owners' equity in the amount of $12M which was sent on 5 May 2016.
b) Sterling did not discover that Sunset was still relying upon the original balance sheet with the shareholders loan until the Receivership Action in October 2016. During the course of such proceedings, Sunset exhibited to an Affidavit a letter from Valentines Grime to Central Bank indicating that the directors approved and accepted a shareholders loan in the amount $12M. Prior to this time Sterling was of the view that no shareholders' loan existed.

Sterling asserts that based upon this information it was fair for it to conclude that Sunset was seeking to hide its financial state and was in fact insolvent. Sterling says that it had a reasonable and probable cause to lodge a winding up petition to protect the interests of Sunset, Sterling and Sunset's creditors.

[91.] Sterling contends, and I accept, that Sterling theoretically could gain from the Petition, the possibility of improving Sunset's financial position and thereby restoring some value to its minority shareholding, or as Sterling puts it "to avert the total loss of value from that shareholding". In **Re Land and Property Trust Co Plc (No.1 [1991] B.C.C. 446 Ch D,** Harman J, of the English High Court, speaking of a Petition by a company to wind itself up, stated:

> "In my judgment, that is because there is a sufficient interest in the company as an entity, quite apart from the members as contributories who would have no interest in a company

that is wholly insolvent, in having its affairs properly conducted and adequately wound up and in satisfying its duty to pay its debts or, at least, to have them met pari passu out of its assets when it is wholly insolvent. ..."

I accept the submission that although a shareholder may have no financial interest in a company which is wholly and irrecoverably insolvent, nonetheless, a shareholder does have a legitimate interest (albeit it may be only a non-financial) in ensuring that the company's affairs are "properly conducted and adequately wound up.

[92.] I do find that the legal proceedings may have been misconceived by Sterling, in that they were seeking principally to obtain information from Sunset. I also accept that Sterling was led by aggressive businessmen believing that they were protecting their financial interests. The evidence which accepted was that Sterling was concerned that its reputation was being impacted through its involvement in the Hotel and that Sunset was less than forthcoming in its obligation to provide Sterling, a shareholder, with the records of the company. I also accepted the evidence that:

a) When the Petition was filed, Sunset withheld information and Sterling was operating with poor information;
b) Sterling believed it was pursuing its legitimate business interests; and,
c) The decision to present the Petition was based upon legal advice.

[93.] Even if the proceedings, misconceived as they were, could be described as an abuse of process, I did not find, on the evidence, that there was the necessary element of malice on the part of Sterling.

If the filing of the Winding up petition by D1 was in breach of the Shareholders' Agreement or an abuse of the process of the Court, did D2 and D3 participate in these wrongful acts and are they relieved of liability for this conduct because they are directors of D1?

[94.] Sunset asserts that Kosoy and Tiller acted in concert to file the petition despite knowing it breached the Shareholders' Agreement and lacked merit. They contend that: (1) This coordinated effort demonstrate a shared intent to harm Sunset; (2) Kosoy and Tiller actively participated in the wrongful filing, with full knowledge of its impropriety; Their conduct, Sunset says, extended beyond mere boardroom decisions; they orchestrated the Petition to advance Sterling's predatory agenda; and, the Court should pierce the corporate veil and impose personal liability on both individuals.

[95.] The elements of the claim of Conspiracy to Injure by Unlawful Means are the following: -

(1) concerted actions between two or more persons (a combination);
(2) use of unlawful means;
(3) knowledge of the unlawfulness;

(4) intention to injure the claimant, whether or not it is the predominant purpose of the defendant to do so;
(5) overt act in pursuance of the agreement or undertaking; and
(6) loss or damage as a result.

See **Revenue and Customs Commissioners v. Total Network SL** [2008] UKHL 19 and **Lonhro plc v. Fayed** [1992] 1 AC 448.

[96.] Sunset argues that, in the cases of Lifestyle **Equities CV v Ahmed** [2024] UKSC 17 and **Njord Partners v Astir Maritime Ltd.** [2024] EWHC 1682 (Comm), the courts have clarified that directors are personally liable for tortious acts committed in their corporate roles.

[97.] Sterling contends however, that in the English Court of Appeal decision of **Barclay-Watt and others v Alpha Panareti Public Ltd and others** [2023] 1 All ER 165 the Court cautioned against holding directors responsible for the actions of a company in absence of fraud or circumstances where personal dealings were involved. In that case, the claimants were individuals who were persuaded to put much of their personal savings into a property investment in Cyprus by the first defendant. The second defendantol was a director of APP and the driving force behind the marketing of the properties to UK residents. The Claimants sought to hold the director responsible for their losses and were unsuccessful at first instance and on appeal on such issue. The case looked at the principles of a director and a company entering a conspiracy or being liable jointly for the same tort. The Court held that the principle of separate legal personality as established in Salomon and Salomon still applied to companies.

[98.] Having examined the witnesses, I am not satisfied that this is the case of a conspiracy by Kosoy and Tiller. The evidence is that the Defendants took advice, and that the legal advice was that the claim was possible. Sunset has not proven the essential element of unlawful means conspiracy as I do not find that there was evidence of a concerted action between the Defendants to injure Sunset. I am satisfied that the actions of Kosoy and Tiller were always within the ambit of Sterling's true business pursuits, as its directors and not in any personal capacity. I did find that while Sterling (through Kosoy) aggressively pushed its business interests upon Sunset, I did not find that Kosoy and Tiller, pursued a predatory "lend to own" strategy. I did not find any personal animus towards Sterling. Further, it cannot be said (and I do not find) that the Defendants' conduct was knowingly unlawful, having regard to the fact that they procured legal advice.

[99.] In any event, it must be also determined whether any loss or damages flowed from the Defendants' actions, before the tort of conspiracy could be made out.

Did the Claimant suffer damage and loss as a result of the filing of the Petition, and if so, what was the amount of that loss and damage?

[100.] I am not satisfied, on a balance of probabilities, that Sunset's principal allegation, that the filing of the Petition caused it to lose the Stabilis Loan, has been made out. The contention was that this act by Sterling constituted an event of default under the Stabilis Loan. I am satisfied, on the evidence which I accept, that the principal default was the failure to repay the loan when it became due, when it matured. I also did not accept that this prohibited the ability of Sunset to secure an extension of the Stabilis Loan.

[101.] Clause 8 of the Stabilis Loan provided that there were 21 events of default which would cause a breach of the Stabilis Loan. If Beachfront and/or Sunset breached one of the events of default under 9(c) of the Stabilis Loan, the entire loan immediately became due and payable. Clause 9 (c) of the Loan provided:

> "Upon the occurrence and during the continuation of any Event of Default, Lender, in addition to availing itself of any remedies conferred upon it by law and by the terms of the Note, the Mortgage and the other Loan Documents, may pursue any one or more of the following remedies first, concurrently or successively with each other and with any other available remedies, it being the intent hereof that none of such remedies shall be to the exclusion of any others:
>
> ...
>
> (c) If an Event of Default occurs pursuant to clauses....(q), ... (t) ...Section 8 above, the Indebtedness and all other obligations of Borrower hereunder and under the other Loan Documents shall immediately and automatically become due and payable, without notice or demand, and Borrower hereby expressly waives any such notice or demand in such cases, anything contained herein or in any other Loan Document to the contrary notwithstanding."

[102.] In his evidence, Hershco himself accepted that other events of default occurred, contrary to the Stabilis Loan:

(1) Failure to pay any of the Indebtedness or any other amounts due under the Loan when due and payable. (Sunset and Beachfront failed to re-pay the Stabilis loan when it matured which was the Specified Event of Default raised by SF IV LP/ Stabilis).

(2) Failure or neglects to perform, keep or observe any term, provision, condition, covenant, warranty or representation contained in this Agreement or in the Loan Documents (Sunset acknowledged that neither it nor Beachfront ever prepared certified audited financial statements completed by certified accountants containing (i) a balance sheet, (ii) income statements and (iii) statement of changes in financial condition, which was stated as events of default under the Loan.)

(3) Being in default of the payment or performance of any material obligation, indebtedness or other liability to any third party and such default is not cured within any cure period specified in any agreement or instrument governing the same. (Sunset and Beachfront Bahamas have judgments and actions against them for debts that arose

prior to the maturity of the Stabilis Loan in November 2018 for failing to pay for services rendered.)

(4) Upon the termination of the Management Agreement and breach of the Franchise Agreement, the full Stabilis Loan became immediately and automatically due and payable as of 24 February 2017, (2 months before the filing of the Petition). (Sunset, therefore, was already in default of the Stabilis Loan).

[103.] In respect of the Petition, Hershco's evidence at trial was that Stabilis advised them that, so long as Sunset contested the Petition, Sunset was not in default of the Loan

[104.] On the evidence, it appears that when Sunset/Beachfront sought an extension of the Stabilis Loan they never remedied the then pending events of default. The evidence, which I accept, also revealed that in October 2018 Stabilis was prepared to extend the Stabilis Loan some 18 months after the Petition had been filed. Stabilis had been aware of the Petition.

[105.] The Notice of Default issued to Sunset on 30 November 2018, provided specifically that:

> "Events of Defaults have occurred and are continuing under the Loan Documents as a result of, among other things, the Borrower's failure to pay amounts under the Loan Agreement on or before the Maturity Date (the "Specified Default"). ....

[106.] Hershco sought to produce correspondence from Stabilis' attorneys to clarify the notice of default to say that the Petition was to be included, among other things. I have rejected the letter as useful evidence on the basis of the caveats given in the letter. Those caveats were to the effect that:

> "Please note that this is being delivered for information purposes only and does not constitute a legal opinion as to any of the information contained herein and <u>may not be relied on for any purpose</u>. This letter does not constitute a representation or warranty as to the outcome of any litigation relating to any of the matters set forth herein...
>
> [Emphasis added]

[107.] Sunset has not produced any evidence, which I accept, that it would have been able to repay or refinance the Stabilis loan but for the presentation of the Petition.

[108.] The New York Action provides support for the contention that the Petition, even in Sunset's eyes, was not the cause of the loss of the Sunset Loan. In the New York Action, Sunset and Hershco claimed that the Urgo Defendants caused Sunset to default under the Stabilis Loan. The very same claim is pleaded against the Defendants in this action. Sunset and Hershco, the Plaintiffs in the New York Action, claimed damages in excess of $23,000,000, the amount which Stabilis sold the hotel under its power of sale.

[109.] The Verified Complaint filed in the New York Action stated at paragraphs 119, 130-133, 142 and 163 as follows:

> "J. [Urgo] Defendants Caused a Default under Plaintiff's Loan Agreements 119. Although Beachfront was approved by Marriott to operate the Hotel, and both licensed and authorized by the Bahamian Government to so act, the lack of an independent third-party operator constituted an event of default under existing financing agreements covering the Hotel.
>
> ...
>
> 130. Plaintiffs subsequently learned that while holding themselves out as managers of the Hotel, and unbeknownst to Plaintiffs, the Urgo Defendants had simultaneously been putting in offers to purchaser the Project through brokers put in place by the lenders on the defaulted financing agreements.
>
> 131. Upon information and belief, the Urgo Defendants true intent in securing control of the Project, and in managing the Hotel, was to depress the business and acquire the Project at a distressed price.
>
> 132. Plaintiffs never recovered from the events of default precipitated by the [Urgo] Defendants and as a result thereof suffered a complete and total loss of the Project.
>
> 133. On March 15, 2022, the Hotel and the Site were conveyed as a result of a non-judicial sale forced upon the Plaintiffs as a result of their default in the financing agreements.
>
> ...
>
> 142. By virtue of the foregoing, Plaintiffs have been damaged in an amount to be proven at trial, believed to be in excess of Twenty-Three Million 00/100 ($23,000,000) Dollars.
>
> ...
>
> 163. As a direct and proximate result of [Urgo] Defendants' fraud and deceit, Plaintiffs have been damaged in an amount to be proven at the time of trial, but believed to be in excess of Twenty-Three Million ($23,000,000) Dollars.

Herscho admitted to authorizing the New York action and to signing the usual affidavit verifying the truth of the pleading.

[110.] Sunset concedes that the Urgo Defendants (in the New York Action) caused Sunset to default under the terms of the Stabilis Loan by terminating the Hotel Management Agreement, which also led caused a breach of the Franchise Agreement. At paragraph 132 of the Amended Complaint in the New York Action Sunset stated:

> "132. Plaintiffs [Sunset and Hershco] never recovered from the events of default precipitated by the Defendants [Donald J Urgo Associates LLC et als] and as a result thereof suffered a complete and total loss of the Project."

[111.] The termination of the Hotel Management Agreement occurred prior to the filing of the Petition and made the loan immediately due and payable as of 24 February 2017 when the Notice of Termination was issued.

[112.] Sunset blamed the Urgo Defendants entirely for causing it to default under the Stabilis Loan. As Sterling points out in its submissions, "[n]either the New York action nor the present action seeks an apportionment of liability or claims that the Urgo Defendants and the Defendants in the instant action are joint or separate tortfeasors. One action blames the default of the Stabilis Loan entirely on Sterling and its directors and the other places the entire blame for default under the loan on the Urgo Defendants."

[113.] Having found that such losses as may have been occasioned to Sunset, were not caused by the filing of the Petition, the need to assess quantum of damages has been made otiose.

[114.] I do find however that the filing of the Petition was made in breach of contract and that Sunset is entitled to some damages for this breach, albeit nominal having secured orders for cost arising from the failed petition. In the circumstances, I order Sterling to pay the sum of $10,000 as damages for breach of the Shareholder's Agreement.

[115.] I will hear the parties by way of written submissions on the question of costs. These Submissions should be lodged within the next 21 days of this decision.

Dated this 17th day of September 2025

Sir Ian. Winder
Chief Justice