The Court of Appeal for Bermuda

CIVIL APPEAL No. 19 of 2016

Between:

MEXICO INFRASTRUCTURE FINANCE LLC

Appellant

-and-

THE CORPORATION OF HAMILTON

Respondent

Before: **Baker, President**
Bell, JA
Clarke, JA

Appearances: Lord Pannick QC and Mr Ben Adamson, Conyers Dill & Pearman Limited, for the Appellant
Mr. Michael J. Beloff QC, Mr. Ronald H. Myers and Mr. Jonathan White, MDM Limited, for the Respondent

Date of Hearing: **23 March 2017**

Date of Judgment: **12 May 2017**

JUDGMENT

"Loan guarantee by Hamilton Corporation for hotel development - whether guarantee given for municipal purposes and hence whether ultra vires - consent judgment obtained by lender pursuant to guarantee - whether raising issue of vires in proceedings to set aside consent order an abuse of process - applicability of rule in Henderson v Henderson"

Bell, JA

Introduction

1. This appeal concerns the financial arrangements made between Mexico Infrastructure Finance LLC ("MIF") and the Corporation of Hamilton ("the Corporation"), and more particularly the Corporation's agreement to guarantee a loan ("the Loan") of $18 million made by MIF to a local company named Par-La-Ville Hotel and Residences Ltd ("PLV").

2. The trial took place before Hellman J in September 2016, and the parties were represented before him by the same eminent counsel as appeared before this Court. Hellman J delivered his judgment on 18 November 2016, and essentially narrowed down the issues between the parties to two, which he defined as "the *ultra vires* issue" and "the abuse of process issue". Before turning to these issues and the manner in which they were dealt with by the learned judge, it is no doubt helpful to set out some of the background.

The Background

3. The purpose of the guarantee ("the Guarantee") was to facilitate the development ("the Development") by PLV of a hotel ("the Hotel") on the site of the Par-La-Ville Car Park in the City of Hamilton ("the Car Park"). Both Mayor Graeme Outerbridge and his predecessor (and successor) Mayor Charles Gosling viewed the Development as desirable, and as being in the best interests of the Corporation, as had successive governments. The Corporation had leased the Car Park to PLV for the purposes of the Development, but had retained the freehold interest. The Guarantee was secured by a mortgage of that interest in favour of MIF ("the Security"). The purpose of the Loan was not to fund the Development, but to put PLV in a position where it could meet the anticipated costs of borrowing the monies necessary to do so.

4. Under section 80 of the Bermuda Immigration and Protection Act 1956 ("the 1956 Act"), MIF required the permission of the Minister of Home Affairs ("the Minister", and where appropriate "Ministerial") to take a mortgage over the Car Park, since the lender was a company incorporated outside Bermuda. The Minister gave the necessary sanction on 28 March 2013. The Government then sought the approval of the Legislature for the Guarantee and Security, pursuant *inter alia* to section 37(1) of the Municipalities Act 1923 ("the Act"). Approval was given by the House of Assembly on 13 June 2014 and by the Senate on 25 June 2014.

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

6. By originating summons dated 23 June 2016 the Corporation, which by this time had obtained fresh legal advice, sought to set aside the Consent Order. It sought to do so on the ground that the Corporation had no power to provide the Guarantee, which was therefore said to be null, void and of no effect, and accordingly it was maintained that the Corporation had no power to consent to its enforcement.

The Judgment at First Instance

7. In his judgment the learned judge set out the substance of the submissions on both sides, in the form of an overview, and it is no doubt helpful to repeat the judge's summary, which I do by setting out paragraphs 9 to 11 inclusive of his judgment below:

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

(1) The Corporation had only such powers as the Act, as the enabling statute, had ceded to it, whether expressly or by necessary implication, and any such powers could only lawfully be exercised to achieve the perceptible purposes of the Act. The authorities upon which Mr Beloff relied included Hazell v Hammersmith LBC [1992] 2 AC 1 HL (E) *per* Lord Templeman at 22 B – C, 29 B – E, 30 H, 31 B – C, 31 E, 40 E – G, 40 H – 41 B, 41 D – E; Corporation of Hamilton v Attorney-General and the Centre for Justice [2014] Bda LR 104 SC *per* Kawaley CJ at paras 70, 73 and 78; and Ward v Metropolitan Police Commissioner [2006] 1 AC 23 HL(E) *per* Baroness Hale at paras 23 and 24.

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

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

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

AC 245 SC (E) *per* Lord Dyson at para 66; Lord Hope at para 170; Baroness Hale at 218; and Lord Collins at 219.

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

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

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

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

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

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

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

8. In relation to the *ultra vires* issue, it was common ground before the learned judge that the Corporation had the power to enter into the Guarantee if it did so for one of the purposes enumerated in section 23 of the Act. This section concerns the ability to levy and collect annual rates, which the Corporations of Hamilton and St. George's were empowered to do, per section 23(1)(f), for "such municipal purposes, being purposes of an extraordinary nature, as the Minister may in any particular case approve". The Minister in the subsection was the Minister for Home Affairs, and although he did not give an approval which was expressed to be for the purposes of the section, since the subsection did not require that Ministerial approval should be in any particular form, the learned judge held that Ministerial approval could be inferred from the fact that the Government of which the Minister was a member had sought and obtained the approval of the Legislature for the Guarantee and Security, and also from the approval given to MIF by the Minister under section 80 of the 1956 Act, enabling MIF to take a mortgage over the Car Park.

9. Lord Pannick submitted that the Guarantee was covered by section 23(1)(f) of the Act, since it was given for a municipal purpose of an extraordinary nature. Mr Beloff submitted that the Guarantee was not covered by that subsection as the purposes for which it was given were not municipal.

10. The learned judge set out the competing arguments. Mr Beloff submitted that in its context "extraordinary" simply meant "not in the ordinary course of events". Construction of the Hotel would, he submitted, represent a commercial venture, and would not involve providing a service to local residents. He submitted that the commercial purpose was underlined by the wording of the Guarantee, which acknowledged that its execution, delivery and performance constituted private and commercial acts done for private and commercial purposes. Since the construction of the Hotel was not a municipal function, neither could the provision of the Guarantee to facilitate its construction be such. Lord Pannick on the other hand submitted that "municipal purposes" should be construed broadly to mean purposes relating to or concerned with the municipality, ie in the interests of the municipality and its people; the Corporation's purpose in giving the Guarantee to assist in the development of the Hotel on its land was closely related to the City of Hamilton and the interests of its inhabitants and was therefore a municipal purpose. Lord Pannick also relied on section 37(1) of the Act, which concerned limits on the powers of the Corporation to borrow, and which included a reference to "guarantee", which had been included by a 2103 amendment to the Act ("the 2013 Amendment"). He submitted that section 37(1) supported the broad construction of section 23(1)(f) for which he contended.

11. The judge then indicated (paragraph 32 of the judgment) his view that the 2013 Amendment was to put beyond doubt that guarantees made by the Corporation and approved by the Legislature did not fall within the statutory borrowing limit in section 37(1) (a), and nothing more. He said that when considered in isolation, the respective interpretations put forward by Mr Beloff and Lord Pannick were equally persuasive, but when the phrase "municipal purposes… of an extraordinary nature" was considered in the statutory context of sections 23(1)(a) – (ee) and (g), the interpretation for which Mr Beloff contended was the correct one. He accordingly declared himself satisfied that the Guarantee was given *ultra vires*.

12. The judge then turned to the abuse of process issue, and the principle that a party may be precluded on grounds of abuse of process from raising in subsequent proceedings points which could and should have been raised in previous proceedings which have been concluded, either by a judgment or settlement - the principle sometimes known as the rule in *Henderson v Henderson* (1843) 3 Hare 100. The learned judge indicated that the fullest modern statement of the rule had been given by Lord Bingham in *Johnson v Gore Wood & Co* [2002] 2 AC 1 HL at 31 A – F and 32 H – 33 A, which passages the judge set out in full in his judgment.

13. The judge then dealt with Mr Beloff's submission, which he described as "bold", that the rule in *Henderson v Henderson* did not apply to a private law claim based upon the *ultra vires* acts of a corporation. The learned judge rejected that submission, and moved on to consider the issue of abuse of process with reference to the factual background. In May 2013, the Corporation had instructed Charles Flint QC to provide an opinion as to whether the Corporation had power under the Act to provide the Guarantee and Security. Mr Flint gave a written opinion dated 10 May 2013, in which he opined that the Corporation did not have such power, since section 23(1) of the Act did not suggest that the Corporation had a general power to provide financial assistance to a commercial developer, even where the development was considered to be beneficial to the municipality and its residents. However, the Corporation then instructed the local law firm of Terra Law Limited ("Terra Law"), and notwithstanding that Terra Law had the benefit of considering Mr Flint's opinion, they advised that the proposed transaction would "appear" to fall within the ambit of section 23(1)(f) of the Act, if Ministerial approval were obtained. Terra Law sent a draft opinion to MIF's attorneys which flagged up the necessity of compliance with section 23(1) of the Act, and the following month the Minister sent a letter to the Mayor, which noted that the Attorney-General's Chambers had considered the Act, and had concluded that the Act did not provide for the Corporation to use its assets for the benefit of third

party financing. This led to the 2013 Amendment upon which Lord Pannick had relied (see paragraph 29 of the judgment). But, as the learned judge held, the 2013 Amendment did not address the concerns which had been raised by Mr Flint in his opinion. Nevertheless, Terra Law in their capacity as the Corporation's attorneys provided an opinion to MIF's attorneys, confirming that the Corporation had power to enter into the Guarantee and Security.

14. The judge then turned to the Consent Order, and Mr Kessaram's advice referred to in paragraph 5 above. Mr Kessaram had not been provided with a copy of Mr Flint's opinion, nor had he been advised that there had ever been an issue as to *ultra vires*, and indeed, to the contrary, had been told that the 2013 Amendment had been passed expressly to enable the Corporation to enter into the Guarantee. In March 2016, by which time Mr Gosling had been elected Mayor, the issue of the *vires* of the Guarantee was raised in another context. This led to a copy of Mr Flint's opinion being forwarded to Mr Kessaram, who advised that a further opinion should be obtained from Mr Flint. That was done, and as a result of Mr Flint's further advice, the present proceedings were issued.

15. As the learned judge noted, Mr Flint could understandably be considered a more authoritative source of legal advice than Terra Law, and his opinion addressed the point in greater depth than that of the Bermuda law firm, which the judge commented, had addressed the point somewhat cursorily, and in any event the legislative amendments effected by the 2013 Amendment had not purported to address the scope of section 23(1) of the Act. The judge then dealt with the evidence filed on behalf of MIF, which indicated that in light of repeated assurances from the Corporation that it would honour the Guarantee, its claim for the return of the loan monies as against the borrower had not been pursued aggressively. MIF's manager, Xavier Gonzalez, expressed himself horrified that creditors could be treated as MIF had been, which "understandable outrage", to use the judge's words, echoed the concern expressed by the Minister in a letter to the Corporation.

16. Lord Pannick's submission was that with respect to the abuse of process point, the question was how a reasonable person in the position of the Corporation would have behaved, which he submitted would have involved informing Mr Kessaram of the historical concerns regarding the *vires* of the Guarantee. This would no doubt have led Mr Kessaram to seek a further opinion from Mr Flint at an earlier stage.

17. Mr Beloff's submission was that the overriding consideration was that the Guarantee was *ultra vires* and therefore null and void. As to the concerns of international lenders (an issue raised in the Minister's letter to the Corporation), he submitted that the Court should focus on the relationship of the parties and not beyond. Mr Beloff also made the point that it would have been prudent for MIF to seek recovery of the loan monies once it became clear that the Corporation could not easily raise the monies needed to honour the Guarantee.

18. In relation to counsel's competing positions, the learned judge expressed sympathy with MIF, given the position in which it found itself, but did not feel able to go so far as to say that the Corporation's behaviour was so unreasonable as to render the application to set aside the Consent Order abusive. In his judgment, the most important contextual feature was that it was in principle undesirable for the court to enforce a guarantee which in law was a nullity.

19. The judge therefore concluded that in providing the Guarantee, the Corporation had acted *ultra vires*, and that the Corporation's application to set aside the Consent Order was not an abuse of process. The judge accordingly directed that the Consent Order should be set aside.

The Argument before this Court - MIF

20. MIF's skeleton argument set out the factual background, and included a helpful chronology of the pertinent events. In relation to the two issues identified by the judge, these were addressed in the context of section 23(1)(f) of the Act, and with reference to the dictionary definition of the word "municipal". Lord Pannick contended that the application of the *ejusdem generis* principle to narrow section 23(1)(f) of the Act would contradict the plain legislative purpose of the Act, which it was contended was shown by the phrase "purposes of an extraordinary nature", and, unlike the other provisions of section 23(1), by the requirement for Ministerial control. It was contended that the judge had erred in the conclusion that he reached at paragraph 32 of the judgment, insofar as his finding was contrary to the evidence of both parties regarding the intention of the legislature. The argument for MIF went further, and contended that by enacting the 2013 Amendment, the Legislature must have understood section 23 (1)(f) of the Act as already conferring power on the Corporation to enter into the Guarantee.

21. Lord Pannick then turned to the relevant principles of statutory construction, arguing that where legislation has been amended to advance a specific purpose, the court when considering the meaning of the amended statute, should have regard to the legal mischief which the amendment sought to address.

22. The skeleton argument then moved to the issue of whether the Guarantee was given for a purpose which had been approved by the Minister, contending that the contrary position was unsustainable.

23. The skeleton argument next turned to the second of the two issues identified by the learned judge, that of abuse of process. It was contended that there were two aspects of the abuse of process issue in the present case. First, whether, as contended for by the Corporation in its cross notice, abuse of process was inapplicable in principle in the present context if the Corporation lacked legal power to enter into the Guarantee. Secondly, if the doctrine did apply in

principle in the present context, whether, contrary to the learned judge's finding, abuse of process applied on the facts of this case. In relation to the first issue, it was contended for MIF that the Corporation's reliance on the decision in *Great North-West Central Railway v Charlebois* [1899] AC 114 was misplaced. It was maintained that the court must have and does have power to maintain the integrity of its own processes, and to prevent abuse of them. It was therefore submitted that the learned judge was correct to reject, as he did at paragraph 37 of his judgment, the argument that the rule in *Henderson v Henderson* or some equivalent principle was inapplicable to a private law action to set aside an *ultra vires* contract.

24. Turning to the application of the abuse of process principles to the facts of this case, the argument was that it was an abuse of process for the Corporation to raise an *ultra vires* argument in relation to its application to set aside the Consent Order, when the point had not been raised in the summary judgment proceedings which led to that order. While the Corporation had the benefit of advice from Mr Flint before the Consent Order was made in May 2015, that advice had not been shared with Mr Kessaram, who was then advising the Corporation in relation to the application for summary judgment.

25. The public interest factors referred to by Lord Bingham in *Gore Wood* were said to have been undermined by the Corporation's conduct. In particular it was contended that there was no excuse for the Corporation's failure to inform the lawyer advising it in relation to the summary judgment proceedings of the advice it had previously received on the legal issue which it now raised. It was contended that MIF had been caused prejudice by the Corporation's conduct, identified in the affidavit sworn by Mr Gonzalez, in that it had not prosecuted any claim against PLV for the return of the loan monies because of the Corporation's repeated promises that it considered the Guarantee binding and had repeatedly promised to pay. Mr Gonzalez indicated that if MIF had realised that the Corporation was disputing the Guarantee, it would of course have

focused on recovery of the funds represented by the loan monies, and said that MIF had refrained from pursuing aggressive recovery action against PLV because of the Corporation's promises.

26. The submissions for MIF closed by referring to the judge's comments at paragraph 59 of his judgment, where he indicated that, considering matters in the round, his view was that it was in principle undesirable for the court to enforce a guarantee which is in law a nullity, and that this feature outweighed those pointing in the other direction, including the serious prejudice which may be caused to MIF by not enforcing the Guarantee.

27. In relation to the potential for reputational damage to Bermuda, and the judge's finding at paragraph 60 of the judgment that the likelihood of such damage should not be exaggerated, the point made for MIF was that in applying the law as to abuse of process, it was relevant that raising the *ultra vires* point, which had not previously been raised, was damaging to the reputations of both the Corporation and Bermuda.

28. Finally, criticism was made of the judge's finding that MIF had the opportunity to take independent advice as to the *vires* of the Guarantee, and that while competent legal advisors considering the question in depth could reasonably have concluded that the Corporation had power to give the Guarantee, MIF should have appreciated that there was a good arguable case that the Corporation did not have such power, and that there was a real possibility that a court, if called upon to adjudicate, would find the Guarantee was *ultra vires*. This, it was said for MIF, confused issues of procedure and those of substance. MIF concluded this submission by relying upon the advice given to MIF through the Corporation's legal advisors, Terra Law.

The Corporation

29. I now turn to summarise the skeleton argument filed on behalf of the Corporation. In relation to the *ultra vires* issue, Mr Beloff for the Corporation similarly relied upon the terms of section 23(1)(f) of the Act. He maintained that the provision for Ministerial approval could not extend the meaning of the word "municipal" beyond that which it would otherwise bear, noting that the Minister was not empowered by subsection 1(f) otherwise to enlarge the Corporation's powers. Mr Beloff relied upon the fact that the Development was a commercial venture "catering for international business guests" as the skeleton argument for MIF submitted, and indeed the Mayor's letter of 3 June 2013 to Terra Law referred to "the strong demand by affluent business travellers to our city". The language of the Guarantee itself recognised the private and commercial purposes of the Development. In relation to the 2013 Amendment, the Corporation endorsed what the judge had said at paragraph 32 of his judgment, namely that the 2013 Amendment was intended to put beyond doubt that guarantees made by the Corporation and approved by the Legislature did not fall within the statutory borrowing limit contained in section 37(1) of the Act, and nothing more.

30. Turning to the abuse of process issue, Mr Beloff for the Corporation began by contending the judge had been wrong in failing to accept the argument, based on *Charlebois*, that the rule in *Henderson v Henderson* or its modern equivalent was inapplicable to a private law action. The contention was that *Charlebois* was decisive of the issue, since all considerations relevant to any abuse of process, including delay, were considered and rejected in that case, and, secondly, that the overriding principle articulated in the case was that such considerations did not enable a court to treat as lawful that which was inherently unlawful.

31. Reliance was placed upon the need for there to have been a previous adjudication by a court of competent jurisdiction for the rule in *Henderson v Henderson* to engage (citing the authority of *Thompson v Thompson* [1991] Bda L R 9), Mr Beloff made the point that a consent order which is neither valid nor

binding was not only not a previous adjudication by a court of competent jurisdiction, it was not an adjudication at all. In relation to the basis upon which the learned judge had sought to distinguish *Charlebois*, namely that the Privy Council had found it unnecessary to address the consequences of delay, he contended that the issue of delay had been before the Privy Council, that the authority applied, and that the judge's analysis of the rule in *Henderson v Henderson* was flawed.

32. The skeleton argument then addressed the issue of *Henderson v Henderson* abuse of process in the context of appeals, citing the passage which the learned judge had set out in paragraph 34 of the judgment. The skeleton argument emphasised the danger of adopting too dogmatic an approach and the need to adopt a broad merits-based judgment which takes account of all interests involved and all the fact of the case, focusing attention on the crucial question whether a party is misusing or abusing the process of the court by seeking to raise before it the issue which could have been raised before. Since it was not possible to list all possible forms of abuse, so it was not possible to formulate any hard and fast rule to determine whether, on given facts, abuse is to be found or not. Emphasis was placed on a passage from the judgment of Lord Millett in *Gore Wood*, which emphasised the distinction to be drawn between re-litigating a question which has been already decided, and denying a party the opportunity of litigating for the first time a question that had not previously been adjudicated upon. Finally, in relation to this aspect of matters, the skeleton referred to the authorities in relation to the appropriate approach for an appellate court in relation to an appeal against a finding with respect to abuse of process, citing the case of *Aldi Stores Ltd v WSP Group PLC* [2008] 1 WLR 748. In that case, Thomas LJ noted (page 762) the reluctance of an appellate court to interfere with the decision of the judge on whether there is or is not an abuse of process, noting that an appellate court "will generally only interfere where the judge has taken into account immaterial factors, omitted to take account of material factors, erred in principle or come to a conclusion that was impermissible or not open to him".

33. The skeleton then turned to deal with the various grounds of appeal. In regard to those, I would not propose to rehearse the arguments, but would refer to the Corporation's notice of affirmation, and particularly the fact that the advice from Terra Law provided an obvious basis for the Corporation having reached the view that it was entitled to enter into the Guarantee.

34. In relation to the position should the court be of the view that it was entitled to re-balance the factors considered by the judge and substitute its own view, the Corporation relied upon a number of factors, including that Terra Law gave its advice to MIF.

35. There are other facts and matters relied upon both in relation to this ground and others, but having set out the arguments in some detail already, I would not propose to go into further detail at this stage.

Oral Argument

36. Similarly, I would not propose to summarise the oral arguments made to this Court, which would involve substantial repetition of the positions of both sides. I would instead move to the principal issues which require determination on the appeal.

The *Ultra Vires* Issue

37. As the learned judge held in paragraph 33 of the judgment, the resolution of the *ultra vires* point turns on the correct construction of section 23(1)(f) of the Act. The critical finding by the judge was his view that the provision of the Guarantee to facilitate a hotel development by a commercial developer was not a service provided by the Corporation to its ratepayers, notwithstanding that it may have been of benefit to them. No doubt it will be helpful to set out the terms of section 23(1) in full at this point. The subsection provides that the Corporation may:

"levy and collect annually rates… for all or any of the following purposes:

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

(b) [repealed]

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

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

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

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

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

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

38. I am in complete agreement with the judge's view on the *ultra vires* issue. Mr Beloff made the point in argument that there is no definition of the word "municipal" in the section, so that it takes its colour from the context. "Municipal" is a description of "purpose", the word that follows it. Even if "of an extraordinary nature", the words that follow "municipal purposes", namely "being purposes of an extraordinary nature", qualify "municipal purposes", so the purposes still have to be municipal, as well as being of an extraordinary nature.

39. During the course of argument, Lord Pannick submitted that the wording of section 23(1)(f) of the Act was sufficiently wide to apply, if the Corporation took the view that the Development was for the benefit of the City of Hamilton. In

response to a query from the Court, Lord Pannick said that the wording of the subsection was designed to empower the Corporation to act innovatively. Whether that is or is not the case, the fact remains that the entering into the Guarantee by the Corporation has to be for "municipal purposes", whether or not those be of an extraordinary nature, and whether or not approved by the Minister. Lord Pannick accepted that the purpose must be concerned with or relate to the municipality. During the course of argument, there was consideration of matters which might or might not fit within the definition of "municipal purposes". I would propose to refer to two, only one of which was raised in the course of argument, and which might be said to be at opposite ends of the spectrum. One example might be the construction of a casino, raised by Clarke JA. While such a commercial endeavour might well be profitable for the Corporation, for my part I would not regard such a development as being for "municipal purposes". Such a development might be beneficial for Bermuda taken as a whole, but it does not seem to me to fit within the dictionary definitions on which Lord Pannick relied, the first of which was for purposes "of or relating to, or involving a city". Mr Beloff's preferred definition was that "municipal" relates to "the function of the local or corporate government of a city, town or district". In the present context, I prefer the latter. Where, in terms of Bermuda, the development would be something which would clearly be for the benefit of the whole Island, but does not relate to the functions of the local government of the City of Hamilton in particular, that, it seems to me, would necessarily mean that such development could not fall within the definition of "municipal". At the other end of the spectrum might be the acquisition of a parcel of land for the purpose of providing an area of open space for the residents of the city. There would, in my view, be no doubt but that such an expenditure would be within the definition of "municipal purposes". That would clearly relate to the function of the local or corporate government of the City of Hamilton. The fact that the Development might "enhance the city and raise revenue" as submitted by Lord Pannick, does not in my view mean that the Development would be for "municipal purposes".

40. Lord Pannick went through the arrangements made for the 2013 Amendment, arguing that because the Legislature enacted the amendments, it removed doubt in regard to the true analysis. For my part, I do not agree that the Act of the Legislature gave any weight to the interpretation for which Lord Pannick contended, and I agree with the comment of the learned judge made at paragraph 31 of the judgment, where he rejected the reliance placed by Lord Pannick on section 37 of the Act, which concerned the limit on the powers of the two Bermuda corporations to borrow money. The judge indicated that he found such submissions unconvincing, saying that "it would be remarkable if the Legislature had intended that a section designed to limit the powers of the Corporation to borrow money had the effect of expanding the purposes for which it could do so in such a way as to by-pass section 23(1) altogether". I respectfully agree.

41. At the end of the day, I think the question is to be looked at as a simple and straightforward one, involving taking a view, and the view that I take is that the judge was correct, as he held in paragraph 33 of the judgment, to conclude that the provision of the Guarantee to facilitate a hotel development by a commercial developer was not a service provided by the Corporation to its ratepayers, although it may have been of benefit to them. This led the judge to his conclusion that the Guarantee was given *ultra vires*. I agree with this view, and would similarly hold that the Corporation's submissions in relation to the *ultra vires* nature of the Guarantee are correct.

The Abuse of Process Issue

42. The first aspect of matters which falls to be considered is the reliance placed by Mr Beloff on the Corporation's behalf on the decision in *Charlebois*, referred to in paragraph 30 above, in support of his contention that that case, which is of course binding on this Court, is authority for the proposition that the rule in

Henderson v Henderson is inapplicable to a private law action to set aside an *ultra vires* contract.

43. The learned judge dealt with his aspect of matters relatively briefly, in reaching the view that the case did not furnish authority for the proposition advanced by Mr Beloff.

44. The judgment of Lord Hobhouse in *Charlebois* seems to me to be entirely on point. The case was concerned with a contract which was *ultra vires* the company, on which a consent judgment had been given. Lord Hobhouse had referred to the difficulty in reconciling an opinion that the contract was *ultra vires* with an opinion that a judgment obtained as occurred in that case was a binding judgment. Lord Hobhouse concluded (page 124) that such a judgment, i.e. one based on an *ultra vires* contract, "cannot be of more validity than the invalid contract on which it was founded". He had previously referred to the difficulty in reconciling an opinion that the contract is *ultra vires* with an opinion that a judgment obtained as the one in that case was a binding judgment. Although the passage in Lord Hobhouse's judgment is relatively brief, it seems to me that the case does indeed support the proposition for which Mr Beloff contended.

45. Lord Pannick argued that *Charlebois* was not an authority on the application of abuse of process, but in doing so his skeleton argument accepted that "where a contract is entered into *ultra vires*, a consent judgment obtained on that contract carries no greater legal force than the *ultra vires* contract itself". Lord Pannick then relied upon the Irish case of *Arklow Holidays Ltd v An Bord Pleanala* [2011] I ESC 29. That was a judicial review case, and dealt extensively with the rule in *Henderson v Henderson*. However, although Lord Pannick's submissions refer to the public authority having acted *ultra vires*, the facts were not four square with the case of an *ultra vires* contract, and the judgment itself did not refer to *Charlebois*. The judgment was made on pure *Henderson v*

Henderson grounds, and was concerned with applying the rule derived from that case in a public law context. And that is of course quite separate and apart from the fact that *Charlebois* is binding on this Court and the *Arklow Holidays* case is not. Further, it does seem to me that the basis upon which the learned judge sought to distinguish *Charlebois*, namely delay, cannot be supported, since that issue was, as submitted by Mr Beloff, before the Privy Council. I would therefore hold that the rule in *Henderson v Henderson* has no application in this case, and that the Corporation's application to set aside the Consent Order did not represent an abuse of process.

46. The other point made by Mr Beloff for the Corporation in relation to the rule in *Henderson v Henderson* was that in this case there was no previous adjudication by a court of competent jurisdiction, the entry of a consent order not being an adjudication at all. I would also agree with that submission, which seems to me to be a fundamental one.

47. However, it is necessary to look at matters on the basis that the learned judge was correct in regard to the abuse of process issue. I would regard the passage from Lord Bingham's judgment in *Gore Wood* as being on point, with particular reference to the fact that one cannot either list all possible forms of abuse, or formulate any hard and fast rule to determine whether, on given facts, abuse is or is not to be found. And applying the principles enunciated by Thomas LJ in *Aldi Stores*, referred to in paragraph 32 above, I accept that the task of the Court is as set out in the extracts cited in that paragraph. The issue is whether there was or was not an abuse of process. In that regard, an appellate court will be reluctant to interfere with the decision of the judge in the judgment he reaches on abuse of process by the balance of the factors (page 162 of Thomas LJ's judgment). It seems to me that the judge went through the competing factors in this case with great care, between paragraphs 38 and 59 of his judgment. He identified all of the factors which might be relevant, and did not

take into account any irrelevant or immaterial factors, or err in principle, or come to a conclusion which was not open to him.

48. On the facts of this case, the high water mark for MIF seems to me to be the fact that, in failing to advance a defence of *ultra vires* in the proceedings which led to the making of the Consent Order, the Corporation had neither taken further advice from Mr Flint, nor disclosed Mr Flint's earlier advice to Mr Kessaram. But this, it seems to me, ignores the reality of the advice given by the Corporation's attorneys, Terra Law, to MIF's attorneys. I commented during the course of argument that I found it surprising that MIF appears not to have relied upon advice from its own attorneys (and perhaps the point should be spelled out that MIF was represented by Bermuda attorneys in relation to this transaction), which I indicated would accord with my understanding of general practice in regard to transactions such as this one. Be that as it may, the fact is that Terra Law had, as MIF was aware, referred at an earlier stage to there being at least a risk of the Guarantee being *ultra vires*. Further, as submitted for the Corporation, knowledge of the risks involved in transactions with local authorities was a matter well known in the marketplace. So if MIF chose to rely on the advice of Terra Law rather than advice from its own attorneys, one of the Island's pre-eminent firms, that is a significant factor to be weighed in the balance.

49. I would refer at this point to Lord Pannick's criticisms of the Corporation, which led the learned judge to indicate that he had every sympathy with MIF for the positon in which it now found itself. The learned judge had referred to Mr Gonzalez's affidavit evidence as to the reason for MIF's failure to prosecute any claim against PLV for the return of the loan monies.

50. It does seem to me that this is a matter which is of real significance, in the event that it would have been necessary for this Court to re-balance the factors considered by the learned judge. Were it to be necessary for me to have come to

a view in regard to that aspect of matters, I would regard MIF's attitude towards effecting recovery from its borrower as being a matter of considerable significance. And, as was submitted for the Corporation, MIF entered into the loan transaction voluntarily and for the purposes of profit. It would not appear unrealistic to describe them as sophisticated lenders. If I were called upon to decide the issue as between the Corporation and MIF, I would have no hesitation in holding that the various factual features of this case would not operate so as to render the Corporation's application to set aside the Consent Order abusive.

Conclusion

51. In the circumstances, I would dismiss the appeal and uphold the learned judge's conclusion that:

> (i) in providing the Guarantee, the Corporation acted *ultra vires*, and
> (ii) the Corporation's application to set aside the Consent Order was not an abuse of process.

Accordingly, I would agree with the judge's order that the Consent Order should be set aside.

Costs

52. I would expect costs to follow the event, such that whatever order as to costs was made by the learned judge in respect of the costs of the trial before him should stand, and the costs of the appeal should be the Corporation's in any event. I would make an order in those terms in the absence of any application on the part of MIF to be heard on the issue of costs, such application to be made within 21 days.

Signed

Bell, JA

Clarke, JA

53. I agree.

54. In relation to the abuse of process, I would sound one note of caution. In *Charlebois* Lord Hobhouse said this:

> "It is quite clear that a company cannot do what is beyond its legal powers by simply going into court and consenting to a decree which orders that the thing shall be done. If the legality of the act is one of the points substantially in dispute, that may be a fair subject of compromise in court like any other disputed matter. But in this case both the parties, plaintiff or defendant in the original action and in the cross-action, were equally insisting on the contract. The president, who appears to have been exercising the powers of the company, had an interest to maintain it, and took a large benefit under the judgment. And as the contract on the face of it is quite regular, and its infirmity depends on extraneous facts which nobody disclosed, there was no reason whatever why the Court should not decree that which the parties asked it to decree. Such a judgment cannot be of more validity than the invalid contract on which it was founded."

55. That paragraph leaves open the possibility that a judgment obtained by consent may be valid if it represents a compromise of a disputed issue as to legality, including any issues as to *vires*. There might be thought to be some tension between the latter proposition and the proposition that a judgment cannot be of more validity than the invalid contract on which it was founded. The answer may be that the validity of a judgment which results from a bona fide compromise of the disputed issue rests on the fresh agreement to compromise. That, itself, would beg the question as to whether the corporation

had power to compromise such a dispute. I express no opinion on these matters since in the present case it is apparent that there was no compromise of any dispute. The Corporation never raised the ultra vires point.

56. Similarly, I express no view as to whether truly egregious delay or other factors (such as the fact that the setting of the judgment aside might prejudicially affect innocent third parties) might make the attempt to set it aside an abuse of process, since I am satisfied in the present case that the Corporation, particularly having regard to its duty to ratepayers, is not acting abusively.

Signed

Clarke, JA

I agree with both judgments

Signed

Baker, P.