[2019 Gib LR 232]

LEEDS, WOOD and HELLARD (as joint trustees of the insolvent estate of PLATON ELENIN formerly known as BORIS BEREZOVSKY (deceased)) v. MAINSTAY TRUST LIMITED

CHURCH LANE TRUSTEES LIMITED and SUGARBAY VENTURES LIMITED (applicants)

SUPREME COURT (Restano, J.): December 11th, 2019

Civil Procedure—judgments and orders—default judgment—setting aside—abuse of process to bring claim for repayment of loan against former trustee with no director or assets and obtain default judgment where claimants aware that current trustee challenging validity of loan in claim presently before Supreme Court—multiplicity of actions with numerous parties in different jurisdictions with risk of inconsistent judgments—good reason under CPR r.13.1(1)(b) to set aside default judgment

The claimants sued the defendant for repayment of an alleged loan.

In 2001, Steadfast Trustees Ltd. ("Steadfast") established a trust which was governed by Gibraltar law. As trustee of the trust, Steadfast acquired the entire issued share capital of Sugarbay Ventures Ltd. ("Sugarbay"). Platon Elenin (deceased) (formerly known as Boris Berezovsky ("BB")) had transferred to Steadfast as trustee the sum of £500,000 to enable it to enter into an agreement for the purchase of a residential property in the United Kingdom, which was to be acquired as the private residence of one of BB's daughters. The property was to be purchased through Sugarbay. In February 2002, BB instructed the transfer of £4,745,869.50 (the completion funds). Steadfast lent the sum of £5,190,630 to Sugarbay, its wholly owned company, to enable Sugarbay to fund the purchase of the property.

Steadfast was trustee of the trust until 2005, after which there were a number of changes of trustee: Mainstay Trust Ltd. ("Mainstay," the defendant) was trustee from July 2005 to June 2011; LMC Trustees Ltd. ("LMC") was trustee from June 2011 to January 2013; and Church Lane Trustees Ltd. ("Church Lane") was trustee from January 2013 to date.

In 2005, some three years after the advance to Sugarbay, a facility letter was drawn up which provided *inter alia* that the repayment of the Sugarbay loan was on seven days' notice. In 2007, Mainstay, which was by then the trustee, held a meeting of directors and noted that the trust had

received from BB by way of loan the sum of £4,739,115.14. Mainstay signed a loan deed with BB which provided *inter alia* that the loan was repayable on 60 days' notice. In 2008, Mainstay countersigned a letter from BB recording as loans various other sums (totalling £11,511) provided by BB to the trustee.

In 2014, Church Lane, which was then trustee, as Sugarbay's sole shareholder passed a written resolution to the effect that the debt of £5,201,669 was extinguished and 10 Sugarbay shares were issued to Church Lane. The entire trust fund was appointed to a beneficiary in April 2014.

In July 2018, following extensive pre-action correspondence, Church Lane commenced the 2018 claim against the claimants, Steadfast and LMC seeking declarations that (i) the sums of £4,739,115.14 and £11,511 were transferred by BB to Steadfast to be settled on the terms of the trust; and (ii) Church Lane was not liable to BB's estate for those sums. Mainstay had been struck off the register of companies in 2013 and it was not originally a defendant to the 2018 claim. In June 2018, the claimants had applied successfully for Mainstay to be reinstated. Following its reinstatement, it was added as a defendant to the 2018 claim. In December 2018, shortly after being served with the claim, Mainstay's sole director resigned. In their defence, the claimants claimed that the loans were due and owing by Mainstay. The 2018 claim was now well advanced, with pleadings having closed.

The claimants sued Mainstay for repayment of the sum of £4,750,626.14 under the alleged loan arrangements. As no acknowledgement of service form was filed, the claimants obtained a default judgment which led to enforcement proceedings being commenced in England.

Also in May 2019, the claimants obtained an interim third party debt order against Sugarbay in the sum of £4,837,863.88 and an interim charging order against the property. The claimants also obtained permission to serve those orders out of the jurisdiction on Church Lane and Sugarbay. The applicants then became aware of those proceedings and the default judgment. The claimants applied for a stay of the 2018 claim pending the outcome of the English enforcement proceedings. In June 2019, Sugarbay applied for the setting aside or a stay of the English enforcement proceedings.

The applicants (Church Lane and Sugarbay) contended that the sums due under the Mainstay loan upon which the default judgment was founded were not valid and that the sums had been settled onto the trust. They brought the present application seeking the setting aside of the default judgment. The application was made pursuant to CPR r.40.9 which provided that a person who was not a party but who was directly affected by a judgment or other order might apply to have the order set aside or varied.

The applicants submitted that (a) Sugarbay was directly affected by the default judgment *inter alia* because (i) it stood to lose the property (which was registered in its name) as a result of the enforcement of the default

judgment in the English enforcement proceedings; and (ii) it would not be able to impugn the validity of the loans in the English enforcement proceedings; (b) Church Lane also claimed to be directly affected by the default judgment for a number of reasons including the letters of demand that had been sent to it by the claimants' lawyers demanding repayment of the amounts due under the loan; the trust assets, of which it was trustee, were in jeopardy due to the default judgment; and the default judgment was inconsistent with its case in the 2018 claim; (c) the default judgment was obtained by an abuse of the process of the court: (i) the claimants obtained the restoration of Mainstay to the register of companies on two bases that were untrue, namely that BB was a creditor of Mainstay and that they intended to place Mainstay in liquidation; (ii) it was an abuse of process to commence the English enforcement proceedings without notice to the applicants; (iii) the claimants' request for a stay of the 2018 was also abusive; (iv) the claimants acted abusively when they obtained judgment in default against a company without directors and which they knew would not defend itself, to the prejudice of the applicants and the beneficiaries of the trust, without informing them of the proceedings and despite knowing of the 2018 claim; and (v) the claimants were seeking in the English enforcement proceedings to recover the loans against the trust's property despite knowing that they were alleged shams and thus frustrating the determination of that question by the Supreme Court; (d) the subject of the claim was already before the court in the 2018 claim; and (e) the court issued the default judgment by mistake since, if it had been aware of the true facts it would not have done so.

The claimants opposed the application, submitting that (a) the applicants did not have standing pursuant to CPR r.40.9 because they were not "directly affected" by the default judgment; (b) Sugarbay was not directly affected by the default judgment because it had no recognizable interest as the subject of the default judgment was not the Sugarbay loan, and as Sugarbay was not bound by the default judgment it could seek to challenge the validity of the loans in the English enforcement proceedings; (c) Church Lane was also not directly affected because it did not own the property, only the Sugarbay shares, and it did not have standing as a result of being a Sugarbay shareholder; Church Lane's concern about a possible shortfall was mere speculation; and the court should be cautious as to the 2018 claim, which was a claim for a negative declaration; and (d) there were no grounds on which to set aside the default judgment.

Held, ruling as follows:

(1) CPR r.40.9 provided that a person who was not a party but who was "directly affected" by a judgment or order could apply to have the judgment or order set aside or varied. Although the "directly affected" test appeared to be wide, the circumstances in which a person claimed to be directly affected by a judgment or order had to be carefully scrutinized in light of the general policy that a judgment or order should not be easily set aside. To be directly affected, there must be some interest capable of

recognition by the law which was *prima facie* materially and adversely affected by the enforcement of the judgment or order. The effect of the judgment or order must be direct not indirect (paras. 21–23).

(2) The applicants had standing. Sugarbay wished, together with Church Lane, to challenge the validity of the loans. If this were not successful, Sugarbay stood to lose the property registered in its name. It was clear that in practical terms Sugarbay would not get very far in the English enforcement proceedings in mounting a challenge to the validity of the loans. In the circumstances, Sugarbay had a recognizable interest and the effect of the default judgment was sufficiently direct to bring Sugarbay within the scope of CPR r.40.9. When the claimants commenced this claim, it was clear that the structure of the transaction as a whole was such that it would invariably lead to the property in one way or another. The facts of the case called for recognition of Sugarbay's interest. In respect of Church Lane, the court rejected its claim to be directly affected by reference to the letters of demand made by the claimants against it. The letters of demand were made before the claimants had been provided with the deeds of retirement and appointment of trustees which they had been requesting and, when those were provided, the claimants set their sights on the defendant. The court also agreed with the claimants that Church Lane could not claim that the property was its asset or that it was directly affected as a trustee/shareholder. Although Church Lane was not the owner of the property, it might well be sued for a shortfall in due course. It was understandable that Church Lane, as professional trustees, wished to resolve this position without further delay. Further, the court agreed with Church Lane that its claim in the 2018 claim was inconsistent with the default judgment which conferred standing on it. The court's assessment in applications of this sort must be pragmatic and this required the court to give weight to Church Lane's desire for its position to be resolved expeditiously, clearly and consistently by the courts. The fact that the 2018 claim concerned a claim for a negative declaration did not militate against a finding that Church Lane had standing. In all the circumstances, it was right for the validity of the loans to be adjudicated upon before enforcement proceedings were pursued in London, which would become redundant if the claimants failed in establishing that they were judgment creditors. No abuse or injustice arose from the commencement of the 2018 claim. With respect to the submission that Church Lane's appointment was defective, the court agreed with the applicants that even if there had been a defect in the documentation, that did not mean that Church Lane automatically fell away as an interested party as it might well be impressed with some form of trusteeship (paras. 29–33; paras. 38–43).

(3) The court had not issued the default judgment by mistake. The jurisdiction to enter default judgments was purely an administrative act which did not require the court's consideration of the factual background of the case. There was no mistake in the computation of time and the procedural requirements were met in the sense that the conditions in CPR

r.12.3(1) and (3) were satisfied. In those circumstances, the default judgment was regularly entered (para. 48).

(4) The court did not consider the claimants' application to restore the defendant to amount to an abuse of process. The challenge on the loans was adverted to in the application and the fact that the claimants changed their minds about proceeding with a Part 7 claim rather than with a liquidation was not significant. The court also rejected the allegation that it was abusive for the claimants to apply for the interim third party debt order and interim charging orders against Sugarbay and its property without notice to the applicants. The claimants followed the correct procedure under the CPR and the applicants could oppose the final making of the interim orders. Nor did the court consider that the claimants' application for a stay of the 2018 claim was abusive. The 2018 claim was not commenced abusively, however the same could not be said about the circumstances in which the present claim was commenced. The claimants were aware that shortly after Mainstay was added to the 2018 claim, its sole director resigned. It was also aware that it was likely that Mainstay, once restored, would not have any substantial assets with which to pay the sum claimed. In the circumstances, a judgment without an adjudication on the merits appeared highly likely. The claimants also knew that Church Lane, Mainstay's successor trustee (as well as Steadfast and LMC), was challenging the validity of the loans in the 2018 claim and that an adjudication on the issue was underway. The effect of this claim was to stymie the 2018 claim. Church Lane had to bring this application together with Sugarbay and would need to resist the claimants' application for a stay of the 2018 claim. Sugarbay was also resisting the English enforcement proceedings. There was thus a multiplicity of actions with numerous parties in different jurisdictions with the risk of inconsistent judgments. Whilst there would be cases where bringing a claim and obtaining a default judgment against a company with no assets and no directors was not objectionable, this was not such a case. The court's broad merits-based assessment given the facts of this case was that the claimants' conduct was abusive. Furthermore, the applicants' case on the underlying merits was not fanciful. The payments in question were made at a time when Mainstay had not yet been appointed as trustee of the trust and there were genuine disputes on a number of factual and legal issues such as the basis on which the moneys in question were advanced, a determination as to whether the presumption of advancement would apply to those payments and the legal status of the waiver letter. The claimants had acted abusively which amounted to a good reason under CPR r.13.1(1)(b) to set aside the default judgment (paras. 56–67).

Cases cited:

(1) *Abdelmamoud* v. *Egyptian Assn. in Great Britain*, [2015] EWHC 1013 (Ch); [2015] Bus. L.R. 928; on appeal, *sub nom. Mohamed* v. *Abdelmamoud*, [2018] EWCA Civ 879; [2018] Bus. L.R. 1354, considered.

(2) *Ageas Ins. Ltd.* v. *Stoodley*, [2019] Lloyd's Rep. IR 1, considered.
(3) *Aldi Stores Ltd.* v. *WSP Group plc*, [2007] EWCA Civ 1260; [2008] 1 W.L.R. 748; (2008), 24 Const LJ 334; 115 Con LR 49; [2008] BLR 1; [2008] C.P. Rep. 10; [2008] PNLR 14, considered.
(4) *Dexter* v. *Vlieland-Boddy*, [2003] EWCA Civ 14, considered.
(5) *Employers' Liability Assur. Corp*. v. *Sedgwick, Collins & Co. Ltd*., [1927] A.C. 95, considered.
(6) *Henderson* v. *Henderson* (1843), 3 Hare 100; 67 E.R. 313; [1843–60] All E.R. Rep. 378, considered.
(7) *Hunter* v. *Chief Constable*, [1982] A.C. 529; [1981] 3 W.L.R. 906; [1981] 3 All E.R. 727, considered.
(8) *Johnson* v. *Gore Wood & Co.*, [2002] 2 A.C. 1; [2001] 2 W.L.R. 72; [2001] 1 All E.R. 481; [2001] C.P.L.R. 49; [2001] BCC 820; [2001] 1 BCLC 313; [2001] P.N.L.R. 18, applied.
(9) *Latif* v. *Imaan Inc*, [2007] EWHC 3179 (Ch), followed.
(10) *Messier-Dowty Ltd.* v. *Sabena*, [2000] EWCA Civ 48; [2000] 1 W.L.R. 2040; [2001] 1 All E.R. 275; [2000] CLC 889, referred to.

Legislation construed:

Civil Procedure Rules (S.I. 1998/3132), r.13.3: The relevant terms of this rule are set out at para. 46.

r.19.2(2): "The court may order a person to be added as a new party if—

(a) it is desirable to add the new party so that the court can resolve all the matters in dispute in the proceedings; or
(b) there is an issue involving the new party and an existing party which is connected to the matters in dispute in the proceedings, and it is desirable to add the new party so that the court can resolve that issue."

r.40.9: "A person who is not a party but who is directly affected by a judgment or order may apply to have the judgment or order set aside or varied."

P. Caruana, *Q.C.* and *C. Allan* for the applicants;
E. Talbot Rice, *Q.C.*, *D. Lilly* and *J. Phillips* for the claimants/respondents.

1 **RESTANO, J.:**

Introduction

In this case the claimants (who are the respondents to this application) have sued the defendant for repayment of the sum of £4,750,626.14 under alleged loan arrangements. Following the defendant's failure to file an acknowledgement of service form, the claimants applied for and obtained a default judgment dated May 10th, 2019 ("the default judgment") which has led to enforcement proceedings being commenced in the High Court of Justice.

2 There is before me an application dated August 22nd, 2019 made by Church Lane Trustees Ltd. ("Church Lane") and Sugarbay Ventures Ltd. ("Sugarbay") (jointly referred to as "the applicants") for the setting aside of the default judgment which requires the defendant to pay the claimants the sum of £4,750,626.14 together with interest and costs. This application is made pursuant to CPR r.40.9 which provides that a person who is not a party but who is directly affected by a judgment or order may apply to have the judgment or order set aside or varied. Further, the applicants seek an order that they be added as parties pursuant to CPR r.19.2(2). If these orders are made, the applicants seek 28 days to file and serve a defence and that this claim be consolidated with a related claim, namely 2018 Ord 46 ("the 2018 claim").

3 The application is supported by the first witness statement of Robert Guest dated August 21st, 2019. Mr. Guest is a director of Church Lane which is in turn Sugarbay's sole shareholder and corporate director. Mr. Guest alleges at para. 5 of his witness statement that the default judgment was obtained as a result of "a pre-meditated and intended abuse of the process of this court" which prejudiced the applicants. Further, he states at para. 57 that the court issued the default judgment by mistake "since had it been aware of the true and relevant facts, it would not have done so." In particular, the applicants refer to the fact that the defendant was, when this claim was served on it, a company with no directors or substantial assets and would therefore have been unable to defend the claim. Further, the subject of this claim was already before the court in the 2018 claim.

4 Following the entering of the default judgment, the claimants commenced proceedings in the High Court of Justice (BL-2019–001 007) ("the English enforcement proceedings") seeking its enforcement. Witness statements which have been filed in those proceedings were also relied on by the applicants, namely two further witness statements of Mr. Guest dated June 28th and September 9th, 2019 and a witness statement of Brendan Murphy dated June 24th, 2019.

5 The claimants oppose the application and allege that the applicants do not have standing pursuant to CPR r.40.9 because neither is "directly affected" by the default judgment. The claimants consider that the question of standing is the first issue which the court should determine because if they are correct about the applicants having no standing, the rest of the application falls away. Alternatively, they allege that there are no grounds on which to set aside the default judgment. The claimants rely on two witness statements of the second claimant filed in the English enforcement proceedings dated May 26th and July 30th, 2019.

The factual background

6 On August 15th, 2001, Steadfast Trustees Ltd. ("Steadfast") established the Warren Trust ("the trust") by a deed of declaration of trust of the same date. The trust is governed by Gibraltar law and is subject to the jurisdiction of the Gibraltar courts. The sole trustee of the trust was originally Steadfast ("the trustee"). On August 17th, 2001, Steadfast, as trustee of the trust, acquired the entire issued share capital of Sugarbay (a company incorporated in the British Virgin Islands). Steadfast was established as a vehicle for the purchase of Warren Mere House, a luxurious residential property in Surrey ("the property"). The funds to purchase Warren Mere House came from Platon Elenin (deceased), formerly known as Boris Berezovsky ("BB") and the property was acquired as the private residence of Elizaveta, one of BB's daughters. Church Lane was Sugarbay's sole shareholder. The beneficiaries of the trust were originally BB's daughter, her husband and their named children and all future children born to them jointly.

7 Around August 16th, 2001, BB transferred to Steadfast (as trustee of the trust) the sum of £500,000 to enable it to enter into an agreement for the purchase of the property through Sugarbay. By an unsigned letter sent by BB to Steadfast dated August 16th, 2001, he said that this sum "is to be treated as a contribution by me into the Warren Trust" and added "there will be additional contribution of capital to conclude the purchase at a later date." The receipt by Steadfast (as sole trustee of the trust) was also recorded in a contemporary trustee minute dated August 16th, 2001 as follows:

> "5. Resolved that the initial contribution referred to above should be applied by the Trust in providing capital of that amount to Sugarbay Ventures Limited in order to enable Sugarbay Ventures Limited to proceed with an exchange of contracts for the purchase of a property called Warren Mere at a price of £5,000,000.
>
> 6. Noted that further contributions into the Trust Fund are expected in order to enable the purchase to be completed."

8 In a letter dated February 20th, 2002, BB instructed Clydesdale Bank to transfer the sum of £4,745,869.50 ("the completion funds") to his client account held with Curtis & Co., the English solicitors handling the purchase of the property, which was also held with Clydesdale. This amount was debited from his account on February 27th, 2002. Following receipt of the completion funds, Steadfast lent the sum of £5,190,630 to Sugarbay, its wholly owned company ("the Sugarbay loan") to enable Sugarbay to fund the purchase of the property.

9 Steadfast remained as trustee of the trust until 2005 after which time there were a number of changes of trustee by virtue of three deeds of retirement and appointment of trustee ("DORA") as follows:

Trustee	*Period*
Steadfast	August 15th, 2001 to July 20th, 2005
Mainstay Trust Ltd. (the defendant)	July 20th, 2005 to June 8th, 2011
LMC Trustees Ltd.	June 8th, 2011 to January 31st, 2013
Church Lane	January 31st, 2013 to date

10 Some three years after the advance to Steadfast referred to above, a facility letter dated September 2nd, 2005 ("the Sugarbay facility letter") was drawn up. This provides that the repayment of the Sugarbay loan is on seven days' notice, that no interest is payable unless and until the loan is called in, and that it is unsecured unless notice requiring security is given. Further, Gibraltar law is the governing law and it is subject to the jurisdiction of the Gibraltar courts.

11 On March 14th, 2007 and some five years after the payments referred to above were made, the defendant (who had by then taken over as trustee of the trust) held a meeting of directors and noted that "the Trust had received from Boris Berezovsky, by way of loan, the sum of £4,739,115.14." The defendant then went on to sign a loan deed ("the Mainstay loan deed") with BB. The Mainstay loan deed refers to the fact that BB had loaned the sum of £4,739,115.14 to Mainstay on February 27th, 2002 and that this sum is repayable by the defendant on 60 days' notice in writing ("the first loan"). The loan deed further provides that no interest will be charged until 60 days after the loan has been called in by BB and that the amount loaned would be unsecured.

12 On May 19th, 2008, the defendant also countersigned a letter dated May 11th, 2008 from BB recording as loans various other small sums paid totalling £11,511 provided by BB to the trustee ("the loan facility letter"). These amounts were paid to enable the trustee to pay certain trust expenses and were paid during the period August 22nd, 2001 to September 27th, 2005 ("the second loan") (collectively "the loans").

13 On April 2nd, 2014, Church Lane as Sugarbay's sole shareholder passed a written resolution to the effect that the debt of £5,201,669 was extinguished and 10 Sugarbay shares were issued to Church Lane. This had the effect of capitalizing the Sugarbay loan by converting it into equity in Sugarbay. Further, according to a letter from Peter Caruana & Co. dated January 10th, 2018, the entire trust fund of the trust was appointed to a beneficiary of the trust in April 2014.

14 On July 27th, 2018, the 2018 claim was commenced in which Church Lane brought a claim against the claimants, Steadfast and LMC. The

claim seeks declarations that: (1) the sums of £4,739,115.14 and £11,511 (*i.e.* the first and second loans) were paid by BB to Steadfast by way of addition to the trust fund of the trust and thus were settled by BB on the terms of the trust; and (2) Church Lane is not liable to BB's estate for the sums of £4,739,115.14 and £11,511.

15 This claim was issued following extensive pre-action correspondence dating back to July 26th, 2017 when the second defendant as trustee of BB's estate wrote to Abacus Financial Services Ltd. for the trustee of the trust requesting copies of the Mainstay loan deed and other documents. The Mainstay loan deed was provided and on September 20th, 2017 the claimants' London solicitors, Holman Fenwick Willan LLP ("HFW") demanded payment under the first and second loans from Church Lane. A reply from Church Lane's lawyers, Peter Caruana & Co., followed on November 18th, 2017 which denied liability on its client's behalf and stated that Church Lane was not a party to the Mainstay loan deed or the loan facility letter which, according to them, were not genuine recoverable loans.

16 HFW disagreed with the position taken by Caruana & Co. in a letter dated November 10th, 2017 and also requested copies of the DORAs which Peter Caruana & Co. had previously refused to provide. HFW referred to strong evidence in their possession that the moneys had been loaned pursuant to the Mainstay loan deed and the loan facility letter. In the absence of a reply, a follow-up letter was sent by HFW to Peter Caruana & Co. dated December 14th, 2017 requesting a substantive response as well as copies of the documentation requested. On January 10th, 2018, Peter Caruana & Co. wrote to HFW setting out detailed reasons why the demand for payment under the loans had no merit and invited the claimants to withdraw their claim. Further exchanges took place where HFW rejected the position taken by Caruana & Co. and continued to request disclosure of certain documents which had not been provided and which included the DORAs. On July 20th, 2018, HFW requested that Church Lane reconsider its position and provide full disclosure of the documentation requested including the DORAs. Further, a reply was demanded by Monday, July 30th, 2018 failing which proceedings were threatened against Church Lane without further notice. Three days before the deadline set by HFW expired, namely on July 27th, 2018, the 2018 claim was commenced by Church Lane. The DORAs which HFW had been demanding were eventually provided by Church Lane on October 30th, 2018, three months after the commencement of the 2018 claim.

17 Mainstay, the defendant herein and which was struck off the register of companies in 2013, was not originally included as a defendant to the 2018 claim. On June 18th, 2018, however, the claimants herein applied for the defendant to be restored to the register of companies and this

application was granted on July 30th, 2018. Following the defendant's reinstatement, Church Lane applied on November 7th, 2018 for Mainstay to be added as a defendant in the 2018 claim. The claimants neither opposed nor supported this application and on November 29th, 2018, Ramagge Prescott, J. granted the application and ordered that Mainstay be added as a defendant to the 2018 claim. On November 30th, 2018, Church Lane served on all parties an amended claim form and amended particulars of claim. In December 2018, and shortly after being served with the claim, Mainstay's sole director resigned leaving it without directors.

18 Except Mainstay, the defendants to the 2018 claim filed defences and counterclaims/Part 20 claims on January 16th, 2019. The defences filed by Steadfast and LMC deny the existence of the loans and aver that the sums in question were advanced as contributions to the capital of the trust fund. In the alternative, indemnities are sought. The defence of the claimants herein avers that the loans are due and owing by Mainstay and that Mainstay and its successors in title are estopped from contending otherwise. Further, it alleges that a letter signed by BB on December 11th, 2012 and addressed to Mainstay ("the waiver letter"), the then trustee, is void. In this letter, BB waived any right to receive repayment of any capital, interest or any amounts arising from any advances made by him to the trustees of the Warren Trust. The claimants herein also filed a counterclaim in the 2018 claim in which they seek a declaration that the waiver letter did not release Mainstay's indebtedness to BB and insofar as it did that it should be set aside as a transaction at an undervalue under English law. The 2018 claim is now well advanced with pleadings having closed and directions questionnaires and disclosure reports filed.

19 On May 28th, 2019, the claimants herein obtained an interim third party debt order against Sugarbay in the sum of £4,837,863.88 and also an interim charging order as against the property. The claimants also obtained permission to serve those orders out of the jurisdiction on Church Lane and Sugarbay which occurred on May 29th, 2019 (two days before a CMC scheduled in the 2018 claim). It was upon service of these papers that the applicants first became aware of those proceedings and the default judgment. On May 29th, 2019, the claimants applied for a stay of the 2018 claim pending the outcome of the English enforcement proceedings as they contend that the 2018 claim may be rendered otiose if the claimants succeed with their enforcement action. That stay application has now been adjourned pending the outcome of this application. On June 28th, 2019, Sugarbay applied for the setting aside or a stay of the English enforcement proceedings.

The issues to be decided

20 The applicants contend that the sums due under the Mainstay loan deed and loan facility letter upon which the default judgment is founded

are not valid and that the amounts in question were settled into the trust. The applicants, however, are not parties to the Mainstay loan deed or the loan facility letter which were entered into by BB and the defendant, the then trustee. They are therefore applying to be added to this claim as persons who are directly affected by the default judgment and for the setting aside of the default judgment. The claimants submit that the applicants are not directly affected by the default judgment and that the question of standing should be determined first because if they are right about that, the rest of the application falls away. I agree that the question of standing should come first and the issues to be determined are therefore as follows:

(1) Are Church Lane and Sugarbay "directly affected" by the judgment and do they therefore have standing to bring this application? and

(2) If the applicants have standing, should the court exercise its discretion in favour of the setting aside of the default judgment?

Issue 1: Are Church Lane and Sugarbay "directly affected" (CPR r. 40.9) by the judgment and do they therefore have standing to bring this application?

Legal principles

21 CPR r.40.9 provides that a person who is not a party but who is "directly affected" by a judgment or order may apply to have the judgment or order set aside or varied. 1 *Civil Procedure*, at 40.9.5 (dealing specifically with default judgments) further states:

> "CPR r.40.9 states, simply, that an application may be made by a person who, although not a party, is 'directly affected by a judgment or order', a formulation that gives the court all of the flexibility necessary to accommodate the circumstances in which applications by non-parties to set aside or vary should be countenanced by the court in this context."

22 On its face, the "directly affected" test is a wide one but despite the apparent breadth of the words used in the rule, the circumstances in which a person claims to be directly affected by a judgment or order need to be carefully scrutinized in light of the general policy, set out in *Civil Procedure* at 40.9.1, that a judgment or order should not be easily set aside.

23 There have been a number of cases that have provided some guidance as to when parties are "directly affected" under CPR r.40.9 and which can be summarized as follows:

(1) To be directed affected, there must be some interest capable of recognition by the law which is *prima facie* materially and adversely

affected by the enforcement of the judgment or order (recognizable interest) (see *Abdelmamoud* v. *Egyptian Assn. in Great Britain* (1) ([2015] Bus. L.R. 928, at paras. 58–59)); and

(2) That the effect of the judgment or order is direct and not indirect, *i.e.* "without any further intermediate step" (direct effect): *Ageas Ins. Ltd.* v. *Stoodley* (2).

Sugarbay

Submissions

24 Sugarbay submits that, having been relieved of its liability to repay the Sugarbay loan by Church Lane, it now stands to lose the property (which is registered in its name) as a result of the enforcement of the default judgment in the English enforcement proceedings. Although Sugarbay is not a party to either the Mainstay loan deed or the loan facility letter, it submits that it is artificial to say that it has no standing by looking only at the parties to the Mainstay loan deed and the loan facility letter which is too narrow an approach and one which decontextualizes the matter. Sugarbay submits that there would be no English proceedings were it not for the default judgment and it is materially and adversely affected if it is unable to challenge the subject matter of the default judgment.

25 Further, Sugarbay submits that any challenge it might bring in the English enforcement proceedings will not in practice allow for the validity of the loans to be impugned. In support of this submission, Sugarbay relies on an attendance note prepared by the claimants' English lawyers, HFW, dated May 28th, 2019 in relation to the *ex parte* hearing before Birss, J. for, *inter alia*, an interim charging order against the property where he stated as follows:

> "The underlying merits to some extent don't matter because you have a Gibraltar judgment against Mainstay on the loan. The other tenet is the loan to Steadfast which was used to buy property. The current trustee contends that the document which evidences the loan which was the trust deed was a sham, you have shown some evidence that it was not a sham but *it is not the function of this court to resolve that issue . . . The Default judgment against Mainstay gives you ability to enforce in this country, that where the whole thing starts*." [Emphasis added.]

26 The claimants submit that Sugarbay fails at both hurdles of the "directly affected" test. First, the claimants argue that Sugarbay has no recognizable interest as the subject of the default judgment is not the Sugarbay loan. As far as the Sugarbay loan is concerned, they say that the only question which arises in that regard is the identity of the creditor

under that loan. Under the claimants' construction of the DORAs, the creditor under the Sugarbay loan is Mainstay but they accept that there is a counter-argument that it may be Church Lane. The claimants argue, however, that these are matters which should properly be determined in the English enforcement proceedings and which do not confer standing on Sugarbay.

27 Further, the claimants submit that as Sugarbay is not bound by the default judgment, it is open to it to seek to persuade the English court that there is some relevance to the question of the validity of the loans. As for Birss, J.'s comments, the claimants draw a distinction between the defendant's ability to argue that point and the relevance or otherwise of that issue in the English enforcement proceedings. In their submission, Birss, J.'s comments are an indication that the English court does not regard the question of the validity of the loans as a relevant one, not that there is a legal bar to Sugarbay advancing its case in this regard. In support of this submission, the claimants relied on *Employers' Liability Assur. Corp.* v. *Sedgwick, Collins & Co. Ltd.* (5), where Sedgwick had obtained a default judgment against Rossia Insurance Co. ("Rossia") (which had been put into liquidation under the confiscatory legislation of the Government of Soviet Russia) and then obtained garnishee order *nisi* attaching all debts due by the Employer's Liability Assurance Corporation Ltd. ("ELAC") to Rossia. ELAC's application to set aside the default judgment failed and it was held that it did not have sufficient interest in the default judgment and Viscount Cave, L.C. stated as follows ([1927] A.C. at 105):

> "Apart from the objection that the Rossia Co. had not been served with this application, the appellants have no such direct interest as to entitle them to apply to set aside the judgment. The liquidator does not attack it, and no reason is shown why it should be set aside. Of course it will be open to the appellants in the garnishee proceedings to argue that nothing is due from them to the Rossia Co. which can be attached . . ."

28 The claimants argue that Sugarbay can challenge the validity of the loans in the English enforcement proceedings just as it was said that it was open for ELACL to make its challenge in the garnishee proceedings. The claimants further submit that because it is only the intermediate step of an application for a third party debt order which causes Sugarbay prejudice, it falls foul of the "directness" requirement required to establish standing.

Conclusions

29 In considering whether a non-party should be recognized as having a direct interest under CPR r.40.9, a full inquiry into the facts of the case is required and this should not take place in a rigid manner: see *Latif* v.

Imaan Inc. (9). In *Latif* the claimants, Hamra Financial Associates, had obtained a default judgment in the Queen's Bench Division against the defendant, Imaan Inc. ("Imaan"), in respect of an alleged loan. On the strength of the judgment, the claimants executed a charge in relation to one of the properties provided as security for the alleged loan ("the charge") and also obtained a third party debt order in relation to rent payable to Imaan. In separate proceedings in the Chancery Division, Lexi Holdings plc ("Lexi"), which claimed that it was the victim of a fraud by Imaan, wished to challenge the charge which it said, together with the said alleged loan, was a device designed to put assets beyond its reach. Lexi was joined as an additional defendant in the proceedings between Hamra and Imaan and applied to set aside the default judgment obtained against Imaan. Briggs, J. (as he then was) treated Lexi as having sufficient interest in the matters recorded in the judgment which it was seeking to set aside because the existence or non-existence of the loan was "a highly material fact" relevant to the charge and the judge went on to hold that "in those circumstances it seems to me perfectly appropriate and proper for Lexi to be treated as having a sufficient interest in the matters recorded by the judgment" ([2007] EWHC 3179 (Ch), at paras. 11–12). The approach adopted by the judge was a pragmatic one as to the effect of the judgment and he observed that, whilst not reflected in any previous reported case, that case was a proper one to recognize an interest in a third party.

30 Sugarbay wishes, together with Church Lane, to mount a challenge as to the validity of the loans. If this is not successful, it stands to lose the property registered in its name. The fact that Sugarbay is not strictly debarred as a matter of law from challenging the validity of the loans in the English enforcement proceedings is not an answer to this application. It is clear that, in practical terms, Sugarbay will not get very far in the English enforcement proceedings in mounting a challenge to the validity of the loans. As the English High Court said in *Latif*, it is important to adopt a pragmatic approach as to the effect of the judgment and the court must ultimately determine on the facts of each particular case whether a proper case to recognize an interest has been established.

31 I do not consider that the claimants' reliance on *Sedgwick* (5) takes matters any further for them as there are important distinguishing features between that case and the present case. In *Sedgwick*, Rossia's liquidator had fully investigated the matter and had confirmed that he did not propose to contest the validity of the judgment obtained against Rossia. Accordingly, Lord Cave stated that the validity of the judgment was established beyond controversy ([1927] A.C. at 103). In this case, the defendant can hardly be said to have admitted the judgment in positive terms after a full investigation as happened. The defendant's admission only arises from the fact that it has not filed an acknowledgement of service form within the prescribed time which is not surprising given that

it has neither directors nor assets. Further, Church Lane as a successor trustee has set out in some detail why it considers that the loans are not valid.

32 In the circumstances, I conclude that Sugarbay has a recognizable interest. The next question is whether the effect of the default judgment is sufficiently direct to bring Sugarbay within the scope of CPR r.40.9. The directness requirement was considered in *Ageas Ins. Ltd.* v. *Stoodley* (2) which concerned claims made under two motor insurance policies following a traffic accident. Whilst driving a car belonging to another person, Mr. Stoodley was involved in a car accident which resulted in a catastrophic injury which in turn led to large claims. Ageas Insurance Ltd. ("Ageas") insured Mr. Stoodley's motorhome but this policy had an extension in relation to the driving of other vehicles. Advantage Insurance Co. Ltd. ("Advantage") had issued a separate policy in relation to Mr. Stoodley's car and this also had an extension in relation to the driving of other vehicles. It later emerged that Ageas had grounds to avoid the policy and it commenced proceedings against Mr. Stoodley which resulted in a declaration being given by the courts to that effect. Mr. Stoodley did not attend the hearing which was effectively unopposed. Advantage later applied to set aside the judgment and the question arose as to whether it was "directly affected" by the declaration. HHJ Cotter, Q.C. referred to the need to approach the "directly affected" requirement flexibly in the light of the overarching need to ensure that injustice is not done to those affected by the judgment or order. The judge held that Advantage was directly affected by the declaration as the effect of that declaration materially and adversely affected Advantage in its pocket, because its bill went up substantially. Further, it was held that the effect was direct and not indirect in that the axiomatic result of the declaration was the significant increased financial liability.

33 The claimants draw attention to the fact that in *Ageas*, Advantage's increased liability arose "without any further intermediate step" unlike the present case where, they submitted, the separate enforcement proceedings were not a direct consequence of the default judgment but rather a consequence of the third party debt order application. In my judgment this represents a mechanical rather than a contextual and pragmatic assessment of the position. The first claimant's affidavit dated June 12th, 2018 in support of the restoration of Mainstay states that the purpose of the first loan was to fund the purchase of the property by Sugarbay. Further, the claimants' stated intention at that stage was to seek the appointment of a liquidator over Mainstay which although without substantial assets, would in all likelihood enable the enforcement of indemnities, against ultimately Church Lane. He also referred to the fact that whilst Church Lane had suggested that the assets of the trust had been appointed out to a beneficiary, they had not seen documentary evidence to support this

appointment but that Church Lane was also likely to have been given an indemnity by the relevant beneficiary upon receipt of any distribution. The claimants therefore knew that the defendant had no assets and had set their sights on the indemnities as a means to recovery which would ultimately lead to the property. Even though the proposed appointment of a liquidator did not take place, when the claimants commenced this claim it was clear that the structure of this transaction as a whole was such that it would invariably lead to the property in one way or another. In all the circumstances, the effect of the default judgment is sufficiently direct to bring Sugarbay within the scope of CPR r.40.9. It is therefore my judgment that the facts of this case are such that call for a recognition of Sugarbay's interest.

Church Lane

Submissions

34 Church Lane (which is Sugarbay's trustee shareholder) submits that it is directly affected for a number of reasons. It refers to letters of demand from HFW addressed to it dated September 20th, 2017 and December 14th, 2017 demanding repayment of the amounts due under the loans. It also refers to the claimants' pleaded case against it in the 2018 claim which it says contains claims made against it, in particular para. 23 of the defence and counterclaim that the defendant herein was obliged to pay the sums claimed and that it was "entitled at common law and/or by operation of the MTL/LMC DORA and the LMC/CLT DORA to indemnification from the Trust funds in respect of such liability. Such right of indemnity lies against CLT as the current trustee of the Trust." It also relies on the fact that the trust assets, of which it is the trustee, are in jeopardy due to the default judgment. Church Lane also submits that if there is a shortfall upon the sale of the property (which Sir Peter for the applicants indicated was a real possibility at the oral hearing) it will be liable for that amount under the chain of indemnities. Finally, applying the reasoning in *Latif* (9), Church Lane relies the fact that the default judgment is inconsistent with its case in the 2018 claim.

35 In response, the claimants say that when the demands were made against Church Lane in pre-action correspondence the DORAs had not been provided by Church Lane despite repeated requests and that the claimants did not therefore have the full picture at that time. Since then, they say that they have established the true position and have now brought a claim against the defendant. Further any reference to a claim against Church Lane relates to the chain of indemnities as between the trustees.

36 The claimants submit that Church Lane's analysis of the ownership structure is lacking in rigour. The only assets held by Church Lane are the Sugarbay shares, not the property itself. Further, Church Lane does not

have standing as a result of being a Sugarbay shareholder: see *Abdelmamoud* v. *Egyptian Assn. in Great Britain* (1). In *Abdelmamoud*, the members of a charitable company, the Egyptian Association in Great Britain, were seeking to set aside a judgment which had been entered against that company. It was held that the judgment did not affect the members' interests or impose any liability on them and that they were not therefore "directly affected." Applying basic principles of company law, the court concluded that just as a company's members are shielded from corporate liability, they cannot usurp the role of the company's board of directors in deciding whether or not to defend proceedings. This decision that the Association's members did not have standing was upheld by the Court of Appeal in *Mohamed* v. *Abdelmamoud* (1). The claimants submit that the fact that Church Lane was a trustee shareholder makes no difference to this analysis.

37 As for Church Lane's concern about a possible shortfall, the claimants submit that this is nothing more than premature speculation. If this comes to pass, Church Lane is not bound by the default judgment and it can bring its challenge then. Further, the claimants submit that *Latif* (9) has no application in the present case and is distinguishable on a number of grounds, notably that in *Latif*, Lexi was already a party and therefore bound by the decision unlike the present case where the applicants are not yet added as parties to this claim and therefore free to argue that the loans were not valid. The claimants also urge caution regarding the 2018 claim which they described as a claim for a negative declaration as para. 1(a) of the prayer (a declaration that the moneys in question were paid by way of addition to the trust fund of the trust and thus settled by BB on the terms of the trust) only served to feed para. 1(b) of the prayer, which seeks a declaration that Church Lane is not liable to the claimants herein under the loans. This they argue might be considered to be an abusive attempt to prevent the existence or otherwise of the Sugarbay loan being litigated in the jurisdiction where it belongs and where its only asset is.

Conclusions

38 I reject Church Lane's claim to be directly affected by reference to the letters of demand made by the claimants against it as referred to above. Those letters of demand were made at a time when the claimants had not been provided with the DORAs which they had been requesting and, when these were provided, the claimants set their sights on the defendant. For the reasons advanced by the claimants, I also agree that Church Lane cannot claim that the property is its asset or that it is directly affected as a trustee/shareholder: see *Abdelmamoud* (1).

39 Whilst Church Lane is not the owner of the property, it may well be sued for a shortfall in due course. Whilst the question of whether there is a proper legal basis to make such a claim for any such shortfall could be

postponed, it is understandable that Church Lane as professional trustees wish to resolve this dispute position without further delay especially as this matter has already been hanging over its head for over two years, since September 2017 when it first received a letter of demand from HFW. Given the advanced stage of the 2018 claim, it is entirely understandable that Church Lane want this issue to be brought to a conclusion without further delay.

40 Further, I agree with Church Lane that its claim in the 2018 claim is inconsistent with the default judgment which confers standing on it following the principle established in *Latif* (9). Whilst the claimants have distinguished *Latif* on a number of grounds, I do not regard that those distinguishing features warrant a departure from the reasoning in that case. The court's assessment in applications of this sort must be pragmatic and this requires the court to give weight to Church Lane's desire for its position to be resolved expeditiously, clearly and consistently by the courts.

41 Further, I do not consider that the fact that the 2018 claim concerns a claim for a negative declaration militates against a finding that Church Lane has standing. Whilst claims for negative declarations should be approached with caution and particular attention should be paid to procedural complications and possible injustices arising from possible role reversal of the parties, subject to the exercise of appropriate circumspection, negative declarations can be granted when it is useful to do so. The court should approach its discretion to grant negative declarations pragmatically and should not be reluctant to do so where it would help to achieve the aims of justice: *per* Lord Woolf, M.R. in *Messier-Dowty Ltd.* v. *Sabena* (10) ([2000] 1 W.L.R. 2040, at para. 42).

42 In this case, the 2018 claim is now well under way and the claimants have not only filed a defence in which they deny the validity of the loans but they have also brought a counterclaim seeking the setting aside of the waiver letter. The claimants' application for a stay of that claim was only filed after they obtained the default judgment. In all the circumstances it is right for the validity of the loans to be adjudicated upon before enforcement proceedings are pursued in London and which will become redundant if the claimants fail in establishing that they are judgment creditors in the first place. I do not therefore consider that this is the sort of case where any abuse or injustice arises from the commencement of the 2018 claim. Indeed, given the unfortunate position which the defendant finds itself in and Church Lane's ability to advance a case (as well as Steadfast and LMC) this is one of those cases where the 2018 claim will further, rather than undermine, the aims of justice.

43 In her oral submissions Ms. Talbot Rice for the claimants alleged for the first time that Church Lane's appointment was defective as BB, the

protector under the trust, was not a party to the DORA dated January 31st, 2013 as required under cll. 1 and 13 of that DORA. Although Ms. Talbot Rice accepted that this matter had not been raised earlier, she submits that it could not be ignored as it went to the issue of standing. Given the last-minute manner in which this point was raised, Sir Peter for the applicants only had the chance to respond to this argument in his reply submissions. He submits that the apparent defect is not determinative of Church Lane's standing as trustee and that even if there has been a defect in the documentation, Church Lane would still be impressed with the duties of a constructive trustee having received the trust fund and carried out the duties of a trustee. For the purposes of this application, I agree with the applicants that even if there has been a defect in the documentation, that does not mean that Church Lane automatically falls away as an interested party as Church Lane may well be impressed with some form of trusteeship. As such, my decision that Church Lane has standing is not affected by the apparent defect in the DORA.

Issue 2: If the applicants have standing, should the court exercise its discretion in favour of the setting aside of the judgment?

Grounds on which the application to set aside is made

44 The first witness statement of Mr. Guest filed in support of the application states that the default judgment "was a pre-meditated and intended abuse of the process of the court" and sets out at para. 64 five items of alleged abuse in support of the application.

45 The applicants have also argued that the Gibraltar court issued the default judgment by mistake, since had it been aware of all the true and relevant facts, it would not have done so. Finally, although not specified in the application, Sir Peter submitted that whether or not the claimants' conduct amounted to an abuse of the process of the court, it justified the setting aside of the default judgment as the applicants have a real prospect of success in establishing that the loans are not genuine. The claimants oppose the application proceeding on this basis as they say that it is not spelt out in the application.

46 The rules dealing with setting aside default judgments are contained in CPR Part 13. CPR r.13.2 deals with irregular judgments, *i.e.* judgments which have been wrongly entered. An application under this rule must succeed if the conditions set out in CPR r.12 for the entry of a judgment in default are not satisfied. CPR r.13.3 deals with the setting aside of regular judgments and states as follows:

> "(1) In any other case, the court may set aside or vary a judgment entered under Part 12 if—

(a) the defendant has a real prospect of successfully defending the claim; or

(b) it appears to the court that there is some other good reason why—

(i) the judgment should be set aside or varied; or

(ii) the defendant should be allowed to defend the claim."

47 The use of the word "may" shows that the court has a discretion but must act in accordance with the overriding objective which includes avoiding injustice.

Mistake

48 The claimants submit that the default judgment was properly entered by the court as the defendant did not file an acknowledgement of service form within the prescribed time. The claimants further submit that the fact that the defendant was not in a position to file an acknowledgement of service form does not detract from the court's jurisdiction to enter default judgment which covers this type of situation. In my judgment the jurisdiction to enter default judgments is purely an administrative act which does not require the court's consideration of the factual background of a case. There was no mistake in the computation of time and the procedural requirements were met in the sense that the conditions in CPR r.12.3(1) and r.12.3(3) were satisfied. In those circumstances, the default judgment was regularly entered.

Abuse of process

Legal principles

49 The applicants rely on the following well-known introductory passage from the speech of Lord Diplock in *Hunter* v. *Chief Constable* (7) ([1981] 3 All E.R. 729):

"My Lords,

This is a case about abuse of the process of the High Court. It concerns the inherent power which any court of justice must possess to prevent misuse of its procedure in a way which, although not inconsistent with the literal application of its procedural rules, would nevertheless be manifestly unfair to a party to litigation before it, or would otherwise bring the administration of justice into disrepute among right-thinking people. The circumstances in which abuse of process can arise are very varied; those which give rise to the instant appeal must surely be unique. It would, in my view be most unwise if this House were to use this occasion to say anything that might be taken as limiting to fixed categories the kinds of circumstances in

which the court has a duty (I disavow the word discretion) to exercise . . ."

50 More specifically, the applicants rely on the doctrine of *Henderson* v. *Henderson* (6) abuse of process which was summarized as follows by Lord Bingham in *Johnson* v. *Gore Wood & Co.* (8) ([2002] 2 A.C. 1):

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

> funds has been caused by the party against whom it is sought to claim. While the result may often be the same, it is in my view preferable to ask whether in all the circumstances a party's conduct is an abuse than to ask whether the conduct is an abuse and then, if it is, to ask whether the abuse is excused or justified by special circumstances. Properly applied, and whatever the legitimacy of its descent, the rule has in my view a valuable part to play in protecting the interests of justice."

51 The House of Lords in *Johnson* adopted "a broad merits-based" approach to the issue of *Henderson* abuse of process. In that case, the court refused to strike out the claimant's personal claim against the defendant solicitors where he had already brought a claim against them arising out of the same circumstances on behalf of his company. On the facts of that case, Mr. Johnson did not have sufficient funds to bring the second, more complex claim at the same time as the company's claim and there was a risk that the company would become insolvent if the litigation was delayed by the introduction of the second claim. In *Dexter* v. *Vlieland-Boddy* (4), Clarke, L.J. (as he then was) summarized the principles to be derived from *Johnson* where a claimant chooses not to bring a single set of proceedings against all the potential defendants as follows ([2003] EWCA Civ 14, at para. 49):

> "The principles to be derived from the authorities, of which by far the most important is *Johnson v Gore Wood & Co* [2002] 2 AC 1, can be summarised as follows:
>
> i) Where A has brought an action against B, a later action against B or C may be struck out where the second action is an abuse of process.
>
> ii) A later action against B is much more likely to be held to be an abuse of process than a later action against C.
>
> iii) The burden of establishing abuse of process is on B or C or as the case may be.
>
> iv) It is wrong to hold that because a matter could have been raised in earlier proceedings it should have been, so as to render the raising of it in later proceedings necessarily abusive.
>
> v) The question in every case is whether, applying a broad merits based approach, A's conduct is in all the circumstances an abuse of process.
>
> vi) The court will rarely find that the later action is an abuse of process unless the later action involves unjust harassment or oppression of B or C."

52 In *Aldi Stores Ltd.* v. *WSP Group plc* (3), one of the main reasons why an abuse complaint was rejected by the court in a case where a claim against consultants was only pursued when claimants could not recover all their losses against their contractor was because the claimants had always been open about their intention of possibly bringing proceedings against the consultants and had good forensic and commercial reasons not to bring the two claims together. Again, the court assessed a number of factors and applied a broad merits-based judgment in reaching its conclusion.

Submissions

53 The applicants rely on five heads of alleged abuse as follows. They allege that the claimants obtained the restoration of the defendant to the Register of Companies on two bases which were untrue, namely that BB was a creditor of the defendant and that they intended to place the defendant in liquidation. The claimants maintain that BB was a creditor of the defendant and rely on the fact that they pointed out to the court in their evidence that Church Lane contested the validity of the claimants' standing as a creditor. The claimants have further explained that they changed their minds about a possible liquidation and have simply chosen to enforce their claim by different means.

54 Further, the applicants allege that it was an abuse for the English enforcement proceedings to have been commenced without notice to the applicants whilst the claimants rely on the fact that they followed the correct procedure in that regard. The applicants also submit that the claimants' request for a stay of the 2018 claim pending the determination of the English enforcement proceedings is abusive. In response, the claimants say that the mere request for a stay (which they say has merit) cannot possibly amount to an abuse.

55 The ground of abuse on which the applicants placed most reliance was the allegation that the claimants acted abusively when they obtained judgment in default against a company without directors and which it knew would not defend itself, to the prejudice of the applicants and the beneficiaries of the trust, without making them in any way aware of these proceedings, and despite knowing the basis on which they sought judgment was impugned, disputed and before the court for adjudication in the 2018 claim (to which both the claimants and the defendant were already parties). The claimants on the other hand submit that the jurisdiction to enter judgment in default exists precisely to cover the situation where a defendant will not, or cannot, defend the claim. Further, they say that the applicants are neither interested nor prejudiced by the default judgment. Indeed, they say that a successful enforcement of the default judgment puts Church Lane in the position that it wants to be, namely, not being liable to the claimants for the loans. A final and related complaint by the

applicants is the contention that the claimants are seeking to recover the loans in the English enforcement proceedings against the trust's property, despite knowing that they are alleged shams and thus frustrating and circumventing the determination of that question by the Supreme Court of Gibraltar (the court of competent jurisdiction) in the 2018 claim. In response, the claimants say that there is no abuse because the entity which is liable on the loans does not seek to avoid its liability for them and any arguments in relation to the Sugarbay loan are entirely separate and can be litigated over in the English enforcement proceedings.

Conclusions

56 I do not consider that the claimants' application to restore the defendant amounted to an abuse of process. The challenge on the loans was adverted to in the application and the fact that the claimants changed their minds about proceeding with a Part 7 claim rather than with a liquidation is not significant. I also reject the allegation that it was abusive for the claimants to apply for the interim third party debt order and interim charging orders against Sugarbay and its property without notice to the applicants. The claimants followed the correct procedure under CPR r.72.3.2 and the applicants still have the chance to oppose the final making of the interim orders which they are in fact doing. Further, I do not consider that there is any merit in the allegation that the claimants' application for a stay of the 2018 claim is abusive. The applicants can oppose this application in due course and the mere fact that such an application has been filed does not advance the applicants' complaint.

57 As already stated, the defendant was added as a party to the 2018 claim before this claim was commenced. The claimants did not signal any intention (if such an intention existed at that time) to sue Mainstay separately when it was added as a party to the 2018 claim and they went on to file a defence and counterclaim in that action seeking the setting aside of the waiver letter on the grounds that it is invalid. That is one of the issues surrounding the validity of the loans and must surely be directed principally at the defendant to whom the waiver letter is addressed. As such, whilst this claim is not brought against the applicants and they are not therefore being sued twice in respect of the same matter (although Church Lane may be in due course), the defendant is facing two sets of proceedings in respect of materially the same issue, namely its liability under the loans.

58 I have already found that the 2018 claim was not commenced abusively. The same, however, cannot be said about the circumstances in which this claim was commenced. The claimants were aware that shortly after the defendant was added to the 2018 claim on November 29th, 2018, the defendant's sole director resigned. It was also aware that it was likely that the defendant, once restored, would not have any substantial assets

with which to pay the sum claimed. In these circumstances, a judgment without an adjudication on the merits appeared highly likely. They also knew that Church Lane, the defendant's successor trustees (as well as Steadfast and LMC) were challenging the validity of the loans in the 2018 claim which were governed by Gibraltar law and that an adjudication on that issue was underway. The effect of this claim was therefore to stymie the 2018 claim which is confirmed by the fact that the claimants are now seeking to stay that claim.

59 In response, the claimants say that a challenge can be brought in the English proceedings and that, in any event, the default judgment puts Church Lane in the position it wants, namely that it relieves it of liability and that it should therefore be commending the claimants' actions. As I have already said above, there will be little or no scope for any effective challenge in the English proceedings to the validity of the loans which is a question of Gibraltar law and which is already before the Gibraltar courts. Further, the suggestion that Church Lane will achieve what it wants as a result of the claimants' actions is, with respect, only accurate in the most abstract sense. Church Lane is a professional and licensed trustee and the latest successor in the chain of trusteeship. It has rejected the claim in detail in pre-action correspondence where it has also stated that in April 2014 it appointed the entire trust fund of the trust (comprising the shares and shareholder loans of Sugarbay) to a beneficiary of the trust. Such a step is likely to have been taken based on Church Lane's understanding that there is no outstanding liability under the loans and this has the potential of unravelling if the claimants are correct about the status of the loans. There is also the question of a possible shortfall. Church Lane's position is not therefore as simple as the claimants are suggesting and it is understandable that Church Lane wishes to have the issue properly determined. In order to do so, Church Lane has had to bring this application together with Sugarbay and will need to resist the claimants' application for a stay of the 2018 claim. Sugarbay is also resisting the English enforcement proceedings. This multiplicity of actions with numerous parties in different jurisdictions with the risk of inconsistent judgments is precisely what *Henderson* v. *Henderson* (6) abuse of process is designed to prevent. Whilst there will be cases where bringing a claim and obtaining a default judgment against a company with no assets and no directors is not objectionable, this is not such a case and my broad merits-based assessment given the facts of this case is that the claimants' conduct was abusive.

60 Whilst the merits which are primarily to be considered are those of the abuse itself, it would be at odds with the flexible approach laid down by Lord Bingham in *Johnson* (8) to exclude all consideration of the underlying merits of the case which, in the event, were relied on by the

applicants to show that there was substance to their underlying case on the merits.

61 The applicants contend that the loans are shams and that moneys settled into a trust cannot be re-categorized as loans years after the event and contend that it is highly improbable that BB would have made unsecured, interest free undocumented loans for over £4.7m. in 2002 and insisted on documenting it five years later. Further, they say that even if this were possible, it would constitute a very serious breach of trust by the trustee. They rely on contemporaneous documents in relation to the first loan which they say suggests that apart from the initial contribution of £500,000, there would be additional contributions of capital to conclude the purchase of the property and that this was likely to come from the Itchen Trust or BB's personal account. They say that it would be unlikely that the trustee would have accepted a loan repayable on seven days' notice from BB or that this would not have been included in a 2007 trustee minute recording the alleged loan of £4,739,115. The applicants refer to the fact that the Mainstay loan deed incorrectly refers in its recital to the defendant as the borrower when it should have been Steadfast which is not a party to the deed. The applicants therefore submit that the sums which are the subject of the second loan are further contributions to the trust.

62 The applicants rely on Steadfast's case in the 2018 claim where they say that they did not borrow any money from BB and on the witness statement of Brendan Murphy who has been a director of Steadfast since August 19th, 1998 and which was filed in the English enforcement proceedings. Mr. Murphy although not personally involved at the relevant time refers to the contemporaneous documents outlined above and refers to advice received by Steadfast from counsel to the effect that the presumption of advancement applies to money paid by BB into a trust for the benefit of his daughter and family. He also makes the point to the fact that the trust instrument does not include the power to borrow without any form of security. Further, he observes that it would be highly unusual for a settlor of a family trust when paying additional funds into a trust after it had been established with an initial sum, to do so by way of loan rather than gift. He also questions how Steadfast could have accepted a loan on terms that enabled BB to call for its repayment within 60 days since the trustees would not have liquid funds to repay the loan and suggests that the fact that there is no indemnity from the defendant to Steadfast is consistent with there being no liability to repay the loan.

63 The applicants also rely on draft accounts to support their case. The first draft of the defendant's written annual financial statements for the trust since 2002 showed the funds received from BB as settled funds. A document dated May 9th, 2006 which bears the electronic title "Warren Trust Queries & Notes and Points" contains the following manuscript note: "James Jacobsen to confirm whether the amounts received by the

trust after the initial contribution of £500,000 are to be accounted for as settled funds or a loan." Subsequent accounts were drawn up on March 26th, 2007 which reflected the loans having been made since the inception of the trust and accounts for the years ending December 31st, 2002, 2003, 2004 and 2005 (except the initial £500,000). The applicants also rely on the waiver letter and the defendant's directors' declaration when striking off the defendant in a letter to the Registrar of Companies dated September 11th, 2012 that it "is no longer carrying on business or trading and has no debts, liabilities or charges."

64 The claimants on the other hand submit that the fact that the loan deed was signed years after the alleged loan was not significant and was not dissimilar to the position with the Sugarbay loan which is not disputed and which was also documented some years after the completion funds were provided. Further, references to anticipated further settlements into the trust could not be given much weight as they reflect nothing more than an intention which, in the claimants' submission, did not materialize. Indeed, the claimants regard it as significant that the practice which had been followed for the initial settlement of £500,000 into the trust was not followed in relation to the further amounts paid. Further, they rely on the fact that BB's instructions in relation to the first loan were not copied to Steadfast and that the funds were remitted directly to Curtis & Co. rather than to the credit of the trust. The claimants further point out that there was no trustee minute recording any settlement of the completion funds. The claimants therefore submit that the inference to be drawn is that the payment was not a contribution of funds to the trust.

65 As to the inaccurate reference in the Mainstay loan deed to the defendant and not Steadfast, the claimants say that this merely represents a practical way of recording the fact that the defendant took the burden of the loan when it became the trustee of the trust. They also submit that the evidence of Mr. Murphy should carry little or no weight as he was not a director of Steadfast at the material time and therefore had no direct knowledge about what happened in 2002. In response to the applicants' reliance on these accounting notes, the claimants point out that following Steadfast's replacement as the trustee of the trust, investigations were undertaken so as to complete the accounts and which necessarily included investigating BB's payment of the completion funds. The conclusion of that investigation (which the claimants say would not have been necessary if the position had been clear) was that the completion funds had been provided by way of a loan. Finally, the claimants allege that the waiver letter is ineffective under English law and that, if anything, it serves to support the fact that the completion funds were advanced by way of loans. As regards the declaration in support of the defendant's winding up, the claimants say that this is incorrect and that this error does not extinguish the defendant's liability under the loan.

66 In my judgment, the applicants' case on the underlying merits is not a fanciful one and as can be seen from the rival submissions of the parties. The payments in question were made at a time when the defendant had not yet been appointed as the trustee of the trust and there are genuine disputes on a number of factual and legal issues such as the basis on which the moneys in question were advanced, a determination as to whether the presumption of advancement will apply to those payments and the legal status of the waiver letter.

Conclusion

67 In my judgment the claimants have acted abusively and this amounts to a good reason under CPR r.13.1(1)(b) to set aside the default judgment.

68 The claimants submit that the application is made solely under CPR r.13.3(1)(b) and not on the grounds that the applicants have real prospects of success in defending the claim (CPR r.13.3(1)(a)). They therefore submit that the court should not concern itself with the strengths or weaknesses of the arguments as to whether the moneys in question were loans or settled funds. Sir Peter at the oral hearing submitted that the applicants relied, in the alternative, on CPR r.13.3(1)(a) in support of their application. I have already concluded that the default judgment should be set aside under CPR r.13.3(1)(b). In any event, for the reasons given above I also find that the applicants' case is not fanciful and does have a real prospect of success and that the default judgment should also be set aside under CPR r.13.3(1)(a).

69 The applicants also seek the striking out of this claim to allow the 2018 claim to proceed or alternatively for the claims to be consolidated. I shall hear the parties further as to the orders sought following this judgment including submissions on case management.

Ruling accordingly.