



**Emerald Bay Worldwide Limited v  
Barclays Wealth Directors (Guernsey) Limited et al**  
Court of Appeal  
9th January, 2014

**JUDGMENT 02/2014**

- 1) **Appeal from a decision of the Royal Court concerning a finding of a breach of Directors' duties of care and statutory indemnity clause.**
- 2) **Application for leave to Appeal to the Privy Council. (see page 16)**

**Approved Text  
09.01.2014**

**IN THE COURT OF APPEAL  
OF GUERNSEY**

**CIVIL DIVISION APPEAL No. 463**

**12<sup>th</sup> December 2013**

**Before:**

**Sir John Nutting Bt., QC Presiding  
Mr James Walker McNeill QC  
Robert Logan Martin QC  
Judges of Appeal**

**Between:**

**EMERALD BAY WORLDWIDE LIMITED  
-V-  
BARCLAYS WEALTH DIRECTORS  
(GUERNSEY) LIMITED ET AL**

**Applicant**

**Respondent**

**Advocate G K Bell for the Appellant  
Advocate M G A Dunster for the Respondent**

**THIS IS THE JUDGMENT OF THE COURT**

**McNEILL JA:**

**Introduction**

1. On 11 June 2013 the Deputy Bailiff (McMahon) issued judgment in which he found against the plaintiffs. From that decision the plaintiffs now appeal and the respondents have lodged a Notice.
2. As the grounds of each of the Appeal and the respondents' Notice deal are quite specific points, the background circumstances can be set out quite shortly and the following narration is taken from the list of agreed facts settled between the parties before trial and from the judgment below.

## Background

3. The plaintiff, Emerald Bay Worldwide Limited ('Emerald') was incorporated on 6 February 2008 under and in accordance with the laws of the British Virgin Islands. Between April 2008 and October 2008 the defendants ('the respondents') were the only directors of Emerald. At all material times the entire issued share capital of each of the respondents was held by Barclays Wealth Trustees (Guernsey) Limited. Barclays Wealth Trustees (Guernsey) Limited was also trustee of a trust known as The Galaxy Trust which, through nominees, held the entire issued share capital in Emerald. The Galaxy Trust was constituted under and in terms of the laws of Guernsey.
4. On 3 October 2008 the shares in Emerald were transferred to nominee companies owned and controlled by Vistra Trust Company (Jersey) Limited, as trustee of a trust known as the Blue Bay Trust. The respondents were replaced as directors of Emerald by Vistra Services Limited. Vladimir Chernukhin and his wife, Lubov Golubeva, and their issue formed, at all material times, the beneficial class of the Galaxy Trust and of the Blue Bay Trust.
5. In about February 2000 certain other parties had entered into contracts for the construction and sale of a new Hawker 4000 aircraft. Emerald was, in effect, a single purpose vehicle used to purchase that aircraft through acquisition by it of an intermediate company. By a resolution of the respondents, as directors of Emerald, on 23 April 2008 Emerald became the purchaser of the aircraft, paying some US\$ 7.1 million. In December 2009 Emerald gave notice of termination on the grounds of late delivery but could recover only a deposit of US\$ 1 million plus interest. The benefit of the arrangements lay in the order having been placed many years earlier at an overall lower price than would have been available for a new order and the delivery date being earlier than would otherwise have been available. A disadvantage of this means of acquiring the aircraft meant that some of the money spent in buying the ownership interests became irrecoverable.

## The Proceedings

6. Emerald brought the present proceedings against the respondents contending that they were in breach of their duty of care and skill as directors under Section 122 of the BVI Business Companies Act 2004, as amended in 2005 (the '2004 Act') in causing it to enter into a contract on the terms which it did. Emerald contended that these breaches had caused a loss of US\$ 6.1 million (being the price less the recovered deposit).
7. The respondents denied liability and also contended that they were entitled to an indemnity from Emerald covering the respondents' liability to Emerald for their own negligence and breach of duty towards Emerald.
8. At the end of a detailed judgment the Deputy Bailiff summarised the outcome of the trial before him in the following terms:

"259. For the reasons given I have decided that, by reference to the civil standard of proof, the Plaintiff has succeeded in establishing that both Defendants breached their duties of care to [Emerald] and, although this issue is very finely balanced, that the breaches caused the Plaintiff to sustain the loss alleged of US\$ 6,004,100.94. However, I have also decided that [Emerald's] Articles of Association affords the Defendants, as former directors of [Emerald], an indemnity against the money judgment and their costs because these are within the wording in Sub-Regulation 14.1, indemnifying them against *"all expenses, including legal fees, and against all judgments ... in connection with legal ... proceedings"*. Therefore, the effect of the indemnity is to extinguish the judgment that would otherwise have been given in favour of the Plaintiff."

### Issues before this Court

9. The issues in the Appeal can be stated in this way. Was the Deputy Bailiff correct in finding that the respondents were able to rely on Sub-Regulation 14.1 in response to the claim made against them by Emerald? In particular, upon a proper interpretation of Section 132 of the 2004 Act, was such a provision as is set out in the Sub-Regulation void?
10. As regards their Notice, the respondents contend that the Royal Court erred in finding any breach of duty by the respondents that was causative of the loss claimed.

### The Statutory provisions

11. The 2004 Act provides, among other matters:

“120.(1) Subject to this section, a director of a company, in exercising his powers or performing his duties, shall act honestly and in good faith and in what the director believes to be in the best interests of the company.

- .....
122. A director of a company, when exercising powers or performing duties as a director, shall exercise the care, diligence, and skill that a reasonable director would exercise in the same circumstances taking into account, but without limitation,
    - (a) the nature of the company;
    - (b) the nature of the decision; and
    - (c) the position of the director and the nature of the responsibilities undertaken by him.

- .....
- 132.(1) Subject to subsection (2) and its memorandum or articles, a company may indemnify against all expenses, including legal fees, and against all judgements, fines and amounts paid in settlement and reasonably incurred in connection with legal, administrative or investigative proceedings any person who (a) is or was a party or is threatened to be made a party to any threatened, pending or completed proceedings, whether civil, criminal, administrative or investigative, by reason of the fact that the person is or was a director of the company; or (b) is or was, at the request of the company, serving as a director of, or in any other capacity is or was acting for, another body corporate or a partnership, joint venture, trust or other enterprise.

(2) Subsection (1) does not apply to a person referred to in that subsection unless the person acted honestly and in good faith and in what he believed to be in the best interests of the company and, in the case of criminal proceedings, the person had no reasonable cause to believe that his conduct was unlawful.

(2A) For the purposes of subsection (2), a director acts in the best interests of the company if he acts in the best interests of (a) the company’s holding company; or (b) a shareholder or shareholders of the company; in either case, in the circumstances specified in section 120(2), (3) or (4), as the case may be.

.....  
.....  
(5) A company shall not indemnify a person in breach of subsection (2) and any indemnity given in breach of that section is void and of no effect.”

## **The Indemnity**

12. Regulation 14 of the Articles of Association provides:

"14.1 Subject to the limitations hereinafter provided the Company shall indemnify against all expenses, including legal fees, and against all judgments, fines and amounts paid in settlement and reasonably incurred in connection with legal, administrative or investigative proceedings any person who:

(a) is or was a party or is threatened to be made a party to any threatened, pending or completed proceedings, whether civil, criminal, administrative or investigative, by reason of the fact that the person is or was a director of the Company; or

(b) is or was, at the request of the Company, serving as a director of, or in any other capacity is or was acting for, another company or partnership, joint venture, trust or other enterprise.

14.2 The indemnity in Sub-Regulation 14.1 only applies if the person acted honestly and in good faith with a view to the best interests of the Company and, in the case of criminal proceedings, the person had no reasonable cause to believe that their conduct was unlawful.

14.3 The decision of the directors as to whether the person acted honestly and in good faith and with a view to the best interests of the Company and as to whether the person had no reasonable cause to believe that his conduct was unlawful is, in the absence of fraud, sufficient for the purposes of the Articles, unless a question of law is involved.

14.4 The termination of any proceedings by any judgment, order, settlement, conviction or the entering of a nolle prosequi does not, by itself, create a presumption that the person did not act honestly and in good faith and with a view to the best interests of the Company or that the person had reasonable cause to believe that his conduct was unlawful.

14.5 The Company may purchase and maintain insurance in relation to any person who is or was a director, officer or liquidator of the Company, or who at the request of the Company is or was serving as a director, officer or liquidator of or in any other capacity is or was acting for, another company or a partnership, joint venture, trust or other enterprise, against any liability asserted against the person in that capacity, whether or not the Company has or would have had the power to indemnify the person against the liability as provided in the Articles."

## **The Appeal**

13. As the proper construction of the indemnity and the proper interpretation of the 2004 Act were matters of the law of the British Virgin Islands ("BVI"), each party relied upon expert evidence, adduced through leading English counsel also qualified in respect of the laws of the British Virgin Islands, Mr Jones QC and Mr Levy QC. Mr Jones and Mr Levy produced reports and a joint report and each was led in evidence. They agreed that it was relevant to look at the 2004 Act and were agreed in identifying certain associated statutory provisions. They were agreed that there was no BVI authority dealing with the issue as to whether an indemnification provision, such as that relied on here, was struck at by the 2004 law. The principles of statutory interpretation and underlying duties of directors were not in dispute and, for the most part, the evidence of each consisted of an analysis of the Sub-Regulation and of the statute in accordance with what each considered to be the proper application of the relevant canons of construction.

## The Appeal: Reasoning Below

14. In proceeding to deal with the indemnity question (at paragraphs 210 and following), the Deputy Bailiff quoted Regulation 14 and Section 132 and noted (paragraph 210) that Emerald accepted that no allegations had been made or were being made that the respondents acted otherwise than honestly and in good faith. The Deputy Bailiff also noted that, from a comparison of the wording of the Regulation and the Section, it is apparent that the Regulation had been crafted to reflect the statutory provision (paragraph 215). The Deputy Bailiff then set out a detailed rehearsal of his understanding of the evidence of the two experts set out in the various reports of their oral evidence (paragraphs 216 – 240). Whilst he concluded this rehearsal by indicating, under reference to section 20(2) of the Evidence in Civil Proceedings (Guernsey and Alderney) Law 2009 that he preferred the evidence tendered by Mr. Levy QC for the present respondents (paragraph 241), he then went on to set out his own analysis and reasoning (paragraphs 242 – 256). In my opinion it was proper for him to do so, and will also be proper for this appellate court to do so. Section 20(2) does not require the Court slavishly to adhere to the evidence of one or other of the expert witnesses, rather it requires the court to carry out its usual function of appraising the evidence before it. The experts had identified the applicable foreign law and, in this case, the applicable statutes. They had identified an authority setting out principles, in that legal system, applicable to questions on statutory interpretation. They were agreed that there was no authority in that legal system dealing with the statutory interpretation required to be considered in this matter, or anything of arguably close relevance. In such circumstances it is for the courts of this jurisdiction, applying the foreign law and the canons of interpretation which are applicable to that foreign law, to identify the proper interpretation of the statute. The situation is quite different from those where evidence is adduced from individuals expert in disciplines in which the court has no expertise. The proper approach of the courts in situations such as these was considered by the House of Lords in *De Beéche v South America* [1935] AC 148 where an issue was as to the effect of Chilean legislation on a contractual obligation and where evidence had been given by two experts. Viscount Sankey, LC, (at 158-159) stated that, once the witnesses called to prove any foreign law have identified passages in the code of their country as containing the law applicable to the case, the local Court is at liberty to look at those passages and to consider what is their proper meaning: the court is bound to construe the relevant provisions and to determine their meaning and effect.
15. The Deputy Bailiff then proceeded to identify the approach which a BVI Court would take to the question of statutory interpretation and indicated that he was persuaded that the approach would be "to concentrate first and foremost on the plain meaning of the words in the extant legislation, namely the 2004 Act." (paragraph 242). The Deputy Bailiff then indicated that he was relying on the principles of statutory interpretation drawn from *Bebo Investment Limited v The Financial Secretary*, (17 January 2008), a first instance BVI decision in the High Court of Justice of the Eastern Caribbean Supreme Court. He concluded this short indication of the appropriate principles by quoting from the decision in that case and stating: "The court would, therefore, take as its starting point the need to divine the legislative intention from "*the primary meaning of the word or phrase with such modifications to that meaning as may be necessary to make it concordant with the statutory context*"."
16. There may be a slight tension between the first and last sentences of paragraph 242 in that the first gives an impression that "the plain meaning of the words in the extant legislation" may provide the answer without looking further; whereas the quotation from *Bebo Investment Limited* suggests that a primary meaning of a word or phrase in a statute may require modification to make it concordant with the statutory context. It is therefore necessary to look to the remainder of the judgment to identify the extent to which clarification of this can be found.
17. The starting point is an earlier section of the judgment where the Deputy Bailiff dealt with principles of statutory interpretation under BVI law (paragraphs 119 – 126).

18. Somewhat surprisingly, given that the decision in *Bebo Investment Limited* was an authority – perhaps the leading authority – from the foreign law summarising the principles of statutory interpretation in use in BVI, it had not been referred to by either expert in any of the reports or any of the skeletons. As noted by the Deputy Bailiff in paragraph 119, whilst it was common ground between the two experts that the judgment of Hariprashad-Charles J in *Bebo Investment Limited* summarised the principles of statutory interpretation in use in the BVI, the case had been produced during the hearing in response to a question posed by the Deputy Bailiff about the applicability or otherwise of the decision in *Pepper v Hart* as a matter of BVI law.
19. At paragraphs 120 – 126, the Deputy Bailiff gave a careful rehearsal and analysis of the decision in *Bebo Investment Limited*. For present purposes, it is necessary only to refer to two passages.
20. In paragraph 121 the Deputy Bailiff identified a quotation from the judgment of Sir Vincent Floissac C.J. in *Charles Savarin v John Williams* (1995) 51 WIR 75, at 78-79. The passage reads (emphasis added):

*"In order to resolve the fundamental issue of this appeal, I start with the basic principle that the interpretation of every word or phrase of a statutory provision is derived from the legislative intention in regard to the meaning which that word or phrase should bear. That legislative intention is an inference drawn from the primary meaning of the word or phrase with such modifications to that meaning as may be necessary to make it concordant with the statutory context. In this regard, the statutory context comprises every other word or phrase used in the statute, all implications therefrom and all relevant surrounding circumstances which may properly be regarded as indications of legislative intention."*

21. After other quotations the Deputy Bailiff continued, at paragraph 122, with a further passage from paragraph 30 of the judgment of Hariprashad-Charles J where she said:

*"Another general principle of statutory interpretation is that every clause within a statute or Act must be construed in the context of and with reference to the other clauses or sections of that statute. One section or sections should not be interpreted without reference to the other sections. In **case of Lincoln College** [(1595) 3 Co. Rep 58b, at page 59b], it was held that in interpreting an Act of Parliament one must "make construction on all the parts together and not of one part only by itself"."*

22. The Deputy Bailiff then added "Accordingly, when I come to look at specific provisions in the 2004 Act, I need to remind myself not to view them in isolation." It seems to me that those views should resolve any tension in paragraph 242 and it would follow, therefore, that the words "the plain meaning of the words" in the first sentence mean "the primary meaning of the word or phrase with such modifications to that meaning as may be necessary to make it concordant with statutory context".
23. Unfortunately the immediately ensuing paragraph in the judgment below suggests that the Royal Court considered that the primary rule of statutory interpretation was to look at the words of the statutory provision and give them their ordinary meaning without, as part of the same exercise, considering the whole statutory context in order to identify any necessary modifications. The Deputy Bailiff said this:

*"In the manner suggested in the evidence of Mr. Levy QC, when I consider the words of Section 132 of the 2004 Act, approaching it as I understand a BVI court would, there is nothing on the face of that provision creating any limitation on the availability of an indemnity to a director, or former director, in respect of a claim by the company against him or her. Accordingly, at that very simple level of looking at the words and giving*

them their ordinary meaning, which is still recognised as the cardinal rule of statutory interpretation, Regulation 14 of EBWL's Articles of Association is not inconsistent with the extent of indemnity lawfully available to be given to persons, including directors of the company itself, even in an action brought by the company. In many respects, that opinion, and construction, provides a complete answer to the question."

24. However, at the start of paragraph 246, the clear words of the Deputy Bailiff refute any such inference. The Deputy Bailiff stated "I am further satisfied that a BVI court would, as it is required to do, have regard to the terms of Section 132 in the context of the 2004 Act as a whole – a single provision must not be construed in isolation."
25. In paragraph 246, the Deputy Bailiff then proceeded to consider what, as he understood it, was the strongest point made by Mr. Jones QC on interpretation of the 2004 Act. The Deputy Bailiff commences by noting an opinion given by Mr. Jones that it was significant that Section 122 of the 2004 Act did not commence with any words of qualification such as "*subject to the memorandum or articles of a company*". I regret that it is not clear to me from the remainder of the paragraph what the Deputy Bailiff understood the ensuing reasoning of Mr. Jones to be and how to deal with it. If one refers back to the Deputy Bailiff's rehearsal of Mr Jones' position at paragraph 225 of the judgment, the line of argument can be seen to be, put short, that, there being no such qualification in s. 122, the legislature intended a replication of s. 54(2) of the International Business Companies Act 1984 which was the predecessor BVI legislation to the 2004 Act. The Deputy Bailiff continued by noting that Section 122 imposed a duty of care on all directors which could not be modified. But he went on "That duty is, in any event, dependent on other factors, such as the nature of the company or the nature of the particular decision and is, on the basis of its relationship with Section 132, capable of being dealt with by way of an indemnity, such an indemnity being afforded through the company's memorandum or articles or by some other permissible means. Accordingly, I am of the opinion that a BVI court would not consider that the construction argument put forward by Mr. Jones QC, based on considering Sections 122 and 132 in the light of the wording of other provisions in the 2004 Act, would assist [Emerald]."
26. It certainly appears that the Deputy Bailiff had in mind to approach the issue of interpretation by reference to the whole statutory context, that he sought to consider an argument put to him regarding the impact of s. 122, that he was not of the opinion that s.122 had a material impact, and that the unmodifiable duty in s.122 could be covered by an indemnity. Whilst the Deputy Bailiff continued with ancillary analyses, it is convenient, as regards this consideration of the appeal, to pause at this point and consider the competing submissions on appeal.

### **The Appeal: contentions**

27. For the appellants, Advocate Bell submitted that, whilst the Royal Court had accepted that the duty of care in Section 122 of the 2004 Act could not be modified so as to be cut down or removed, it had failed to carry that consideration through as part of its analysis. Whilst the Deputy Bailiff's subsequent analysis dealt with ancillary matters, certain of the issues there and the authorities were equally apposite in respect of the principal question of proper interpretation of the 2004 Act. The authorities referred to in that subsequent analysis showed that where a company has agreed to identify a director against his liability to the company, the company simply has no cause of action and it followed that the indemnification did not merely modify the duty but removed it. It had indeed been common ground between the experts that the duty under Section 122 could not be excluded or varied and reference was made, in particular, to the cross-examination of Mr. Levy QC, on day 2, where he had agreed that there could be no release from the duty.
28. For the respondents, Advocate Dunster relied upon the Deputy Bailiff's analysis. The Deputy Bailiff had been correct to conclude that neither Section 132 nor Article 14 were an exclusion of the duties which a director owed; rather, they were framed as an unqualified indemnity

giving rise to a defence of circuity of action. By reference to Section 132(5) it could be seen that the BVI legislature had chosen to restrict the power to grant an indemnity. It could have chosen, but did not, to put further words on restriction about actions by the company. Upon a proper analysis, Section 122 identified duties which could not be excluded. The company therefore had a right that those duties would be observed and it was correct, as a matter of general principle, that a right must have a remedy. However, it was open to parties to the relationship which gives rise to the right to contract for variation of the rights or the remedies which normally flow. There was a two stage test. Did the obligation continue to exist? Even if it did because it could not be excluded, it was not defeated as an obligation simply because arrangements between the parties had the effect that the company could not recover damages for breach.

## Discussion

29. As regards the function of this court, the situation is similar to that in *De Beéche v South America* above and this court is bound to construe the relevant provisions and to determine their meaning and effect.
30. In the present case it is a matter of agreement between the parties that the wording of Sub-Regulation 14.1 is sufficiently wide to provide indemnification of a director by the company even in respect of a judgment obtained by the company against that director in respect of negligent performance of her or his duties as director.
31. That provision being found in the articles of association of a company incorporated under and in terms of the laws of the British Virgin Islands, it is also a matter of agreement that the provisions of the 2004 Act are of potential importance in identifying whether or not such a provision is struck at by that Act.
32. The parties are also agreed that, for the purposes of interpretation of a BVI statute, the principal rules are those set out in the judgment of Hariprashad-Charles J in *Bebo Investment Limited v The Financial Secretary* (17 January 2008) and, in particular, the passage from the judgment of Sir Vincent Floissac C.J. in *Charles Saverin v John Williams*, as set out in paragraph 22 of the judgment in *Bebo Investment Limited*. The court must therefore approach the task of interpretation, in the first place, by considering the primary meaning of the word or phrase in issue, but with that primary meaning construed in the context of and with reference to other relevant clauses or sections of the statute.
33. These matters having been identified, it is now a matter for this court to consider the proper interpretation of the relevant provisions.
34. Section 132 of the 2004 Act is enacted in Division 4 of Part VI of the 2004 Act. Part VI deals with directors. Part VI, Division 3, deals with the duties of directors and conflicts. Section 120, which cannot be modified by the memorandum or articles, requires a director to act honestly and in good faith. Section 122 which, again, cannot be modified by the memorandum or articles, requires a director, when exercising powers or performing duties as such, to exercise the care, diligence and skill of a reasonable director in the particular circumstances. Mr. Levy QC confirmed in evidence (at 12:29:34 on day 2) that the 2004 Act did not permit a clause in the memorandum or articles or director's employment contract which released a director from her or his obligation under Section 120 or 122.
35. On its plain wording, the terms of Section 132 would appear to permit an indemnity by a company to its directors subject only to being in respect of an honest breach of duty to exercise due care, diligence and skill. The granting of such an indemnity would appear, at first sight, to amount to a release from the obligations under Section 122, in the sense of relieving the director of the consequences of her or his acts or omissions. The obligation to act in a particular

way would remain, but in little more than nominal form. There would be no remedy for a breach which had occasioned loss and, therefore, little compunction to adhere to the obligation.

36. Two modern cases, both referred to in the decision below, appear to give authoritative guidance on this issue. The most recent is the decision of the Supreme Court in *Farstad Supply AS v Enviroco Limited* [2010] UKSC 18; 2010 SC (UKSC) 87, a charter-party case on appeal from the Inner House of the Court of Session in Scotland. The principal judgment was given by Lord Clarke of Stone-cum-Ebony JSC.

37. A critical clause in the charter-party was Clause 33.5 which provided:

"Subject to Clause 33.1, the Owner shall defend, indemnify and hold harmless the Charterer, its Affiliates and Customers from and against any and all claims, demands, liabilities, proceedings and causes of action resulting from loss or damage in relation to the Vessel, (including total loss) or property of the Owner, including personal property of the Owner's Personnel or of anyone for whom the Owner may be responsible on the Vessel, irrespective of the cause of loss or damage, including where such loss or damage is caused by, or contributed to, by the negligence of the Charterer, its Affiliates or Customers."

38. Lord Clarke, at paragraph 24, turned to the question as to whether Clause 33.5 excluded the Charterer's liability to the owner in respect of damage to the vessel caused by the Charterer's negligence. In his opinion it plainly did. His Lordship said "As appears below, the word "indemnify" is capable of having a wide meaning but, even assuming that by itself it might (depending upon the context) have a narrow meaning, it does not stand alone in the clause. The owner must "defend ... and hold harmless" the charterer, not only against liabilities and causes of action, but also against "all claims, demands" and "proceedings". The natural meaning of that expression is that, since the owner must hold ASCO harmless from a claim by the owner in respect of damage to the vessel caused by ASCO's negligence, ASCO cannot be liable to the owner in respect of such damage."

39. His Lordship went on to note that the words "indemnify" and "hold harmless" have the same meaning and then continued, at paragraph 27:

"The word "indemnify" can sometimes mean indemnify a third party. As ever, all will depend upon the context. Here the context is plain. The expression "defend, indemnify and hold harmless" is used in both senses and is wide enough to include the exclusion of liability for loss incurred by the owner or charterer as the case may be. This is plain from Clause 33.11(a), which, as appears in the Appendix, provides that the "Owner" shall defend, indemnify and hold harmless Charterer from any consequential or indirect losses ... They thus show that in this charter party the expression "defend, indemnify and hold harmless" is wide enough both to provide a defence for one party to claims made by the other party and to provide an indemnity in respect of the claims of third parties."

40. At paragraph 29 his Lordship concluded by holding the effect of Clause 33.5 to be, among other matters, to exclude the charterer's liability in respect of damage to the vessel caused by its own negligence. Having considered both English doctrine of circuitry of action and the principle emanating from the Scots brocard *frustra petis quod mox es restiturus*, his Lordship stated at paragraph 33:

"That principle would apply here if, contrary to the view expressed above, cl 33.5 was no more than a narrow indemnity clause. Even if ASCO was in principle liable to the owner, it would be entitled to be immediately indemnified by the owner, which would be bound to repay the amount of the liability. In these circumstances it would, as Lord Dunedin put it, be useless to give judgment for the owner against ASCO. Accordingly, if ASCO had been sued by the owner, no such judgment would have been given for damages against it.

It follows that for these reasons, which are the same as those given by Lord Mance, cl 33.5 protects ASCO against the possibility of a judgment being given against it, whether it is construed as an exceptions clause or as a narrow indemnity clause.”

41. Lord Hope of Craighead DPSC agreed with Lord Clarke that the effect of Clause 33.5 of the charter party was to exclude any liability of ASCO to the owner in negligence (paragraph 44). That being so, in Lord Hope's view, Enviroco's claim for a contribution from ASCO had to be held to be irrelevant. Lord Rodger of Earlsferry JSC was in complete agreement with the judgments of Lord Clarke and Lord Mance JSC.
42. Lord Mance, at paragraph 57, expressed the following view: "In the case of Clause 33.11, Farstad's agreement is to "defend, indemnify and hold harmless Charterer from any consequential or indirect losses that the Vessel Owner may suffer as a result of the performance of the Charter". Farstad was the vessel's owner and this sub-clause indicates that the phrase "defend, indemnify and hold harmless" is used in a sense wide enough to embrace agreement to exclude the other contracting party from responsibility." (emphasis added).
43. These views emphasise not only that such clauses are wide enough to cover indemnity against liability to the party granting the indemnity but, also, that the effect of such clauses is, whether construed as exclusion clauses or more narrowly as indemnities, to exclude the other contracting party from responsibility.
44. The case of *Viscount of the Royal Court of Jersey v Barry Shelton and Another* [1986] 1 WLR 985 was a decision of the Privy Council on appeal from the Court of Appeal in Jersey. The issues included consideration of an article in the articles of association of a company incorporated in Jersey which provided, among other matters, for the indemnification of every director against losses incurred in the conduct of the company's business. The Court of Appeal of Jersey held that, even if the matters complained of were *ultra vires* the company, the directors were protected by the article in the admitted absence of dishonesty. The Privy Council advised that the appeal should be dismissed.
45. The advice of the Board was delivered by Lord Brightman.
46. Clause 46 of the Articles of Association of the company provided, among other matters: "(1) Every director, officer or servant of the company shall be indemnified out of its funds against all costs, charges, expenses, losses and liabilities incurred by him (a) in the conduct of the company's business, or (b) in the discharge of his duties;"
47. Lord Brightman expressed the views of the Board in the following words (991 – 992):

"This result, as a matter of construction, is what one would expect. It is not contested that an article of this sort will exonerate a director against liability for a loss caused to the company by the negligent act of the director. This was decided by Neville J. in *In Re Brazilian Rubber Plantations and Estates Limited* [1911] 1 Ch. 425, which was followed by Romer J. at first instance in *In Re City Equitable Fire Insurance Co Limited* [1925] Ch 407. ... The plain purpose of Article 46 was to give blanket exoneration to a director for any mistake that he has made which is not tainted by dishonesty."
48. His Lordship continued:

"Their Lordships turned to the second question, of whether it is legally possible to have an effective provision in the articles of a company which exonerates a director from liability for participation in an act which is *ultra vires* the company. The argument for the plaintiff is as follows. It is not competent for the articles of association of a company to modify or exclude the duty of the directors to apply the assets of the company exclusively towards the furtherance of the objects prescribed by the memorandum of

association. The articles of association cannot widen the objects clause. The memorandum is paramount. . . . . The articles cannot modify or exclude that duty so as to enable the assets of the company to be applied for other purposes. If a company is precluded by the articles from recovering from its directors a loss caused by an ultra vires application of its assets, the articles would in the result enable the company's assets to be applied for ultra vires purposes.

Their Lordships did not accept this approach. An article which exonerates a director from personal liability for a loss incurred by the company by reason of an ultra vires act in which the director has participated, does not have the indirect effect of validating the act which caused the loss. The act remains ultra vires notwithstanding the company is precluded from suing the director. The clause does not ratify the ultra vires act, but only restricts the persons who can be sued for the loss which the ultra vires act has caused."

49. Such views, as we understand it, would be persuasive in the British Virgin Islands, just as they are in this jurisdiction. It is to be observed at the outset that Lord Brightman, in stating that "an article of this sort will exonerate" did not take the view that proper characterisation of the clause in question necessarily turned on particular use of language. In the advice of the Board, the proper characterisation of the act remained, but the conventional provision restricted the persons who could be sued for the loss which that act had caused. In that decision there was no reference to any statutory provision in the Jersey Companies Laws restricting the relief from personal liability (such as s. 54(2) of the 1984 BVI statute), and we understand that none was enacted at the relevant time.
50. At first sight it might seem that an interpretation of Section 132 which does not take into account the import of Section 122 is an interpretation which fails to adhere to the cardinal principle of the interpretation of statutes as set out in the test agreed between the parties. The provisions of Section 122 were, clearly, seen of as very considerable importance by the legislature in that they could not be elided in the memorandum and articles.
51. In my opinion, however, the argument that the provision of s. 122 is of such importance that it must impose a limitation on s. 132 encounters a serious obstacle in the wording of s. 132, from which, among others, the legislative intention is to be divined. The obstacle is found in subsections (2) and (5). Section 122 is not the only provision of significant importance in part VI: the provisions of section 120 again cannot be departed from. Yet the legislature, by specifying in s. 132(2) that subsection (1) was not to apply to a person referred to unless the person acted honestly and in good faith and in what he believed to be in the best interests of the company, clearly took the view that, without a provision such as subsection (2), the provisions of subsection (1) were wide enough to permit indemnity form actions in breach of the obligations of s. 120. The subsequent modification which brought in subsection (5) might on one view be considered an unnecessary addition, but it may have emphasised the view that dishonest conduct, contrary to s. 120, might otherwise be subject to an indemnity. In my view it is the proper characterisation of subsection (2) which answers the issue between the parties. It is a limitation on the otherwise broad provision of s. 132. The legislature having applied its mind to an appropriate limitation and specified one by reference to a particular duty (namely the duty under s. 120), the statute is not open to an interpretation that a wider limitation should be read into the provision by implication. The result is that although the duty in s. 122 is not modified or excluded by the articles of association, the result is exoneration from liability in certain circumstances, such as loss incurred by the director's company. That is not to say that the duty is to all intents and purposes elided by the conventional agreement. The prospect of disqualification proceedings would retain a compulsitor to act in accordance with the duty. Any act in flagrant disregard of s. 122 would also bring into consideration the fiduciary duties of s. 120, breach of which would preclude indemnity.
52. In my opinion the ancillary matters dealt with by the Deputy Bailiff, namely a consideration of the terms of previous BVI legislation and the terms of similar legislation in other jurisdictions,

are not matters to be considered under the normal canons of construction. The earlier legislation was set out in different terms and there is no suggestion of consideration of it by courts. As regards other jurisdictions, there is no suggestion of a jurisdiction enjoying a particularly close relationship with the BVI where a legislative provision has been the subject of judicial interpretation and therefore of assistance.

### **Respondents' Notice**

53. The respondents contended that the Royal Court had erred in finding any breach of duty by the respondents which was causative of the loss claimed. In presenting this case, therefore, they did not seek to overturn the Deputy Bailiff's detailed analysis of the facts or his conclusions that the respondents had indeed been negligent and in breach of their duties of care and skill in a number of respects. The issue which they took was limited to whether any negligence was causative of the loss claimed.
54. The duties of the directors were those set out in Sections 120 and 122 of the 2004 Act which permitted a director, in exercising his powers and duties honestly and in good faith, to act in what he believed to be in the best interests of the company. It was common ground, in the circumstances of the present case, that the directors could have regard to the interests of Barclays Wealth Trustees (Guernsey) Limited, as trustee of Galaxy Trust, where considering what was in the best interests of Emerald, and that the interests of Emerald equated to those of Mr. Chernukhin and his family as beneficiaries of the Galaxy Trust.
55. The case against the respondents comprised allegations of being in breach of their duty by entering into the contract in respect that the contract was said not to be in the best interests of Emerald because the majority of the price paid would be wasted and lost in the event of a termination.
56. Most of the findings of breach of duty at the Board meeting of Emerald on 23 April 2008 did not go to causation of loss. The high water mark was reached with those in respect of the guiding minds of the first and second respondents, respectively, each of whom was found not to have taken enough care to ascertain whether the contract was in the best interests of Emerald or BWTG: see paragraphs 201 and 205 of the judgment below.
57. The Deputy Bailiff had correctly identified that the question to be considered was whether the respondents' breaches of duty had caused the loss (paragraph 206); but he did not answer it. The Deputy Bailiff appeared to have overlooked that the burden of proving causation fell upon Emerald. He had not found that Emerald had proved that the lack of precautions at the Board meeting of 23 April 2008, characterised by the Deputy Bailiff as breaches of duty, had caused Emerald to enter into the purchase agreement caused the appellants' loss. The Deputy Bailiff had appreciated that what he had to decide was whether the respondents' omissions, if correct, would have led to Emerald not being committed to the agreement; but it was not for the respondents to prove that the arrangement would have gone ahead anyway.
58. For Emerald it was contended that the respondents' criticism of the judgment were unfair. The overall approach to the assessment of factual evidence was careful and considered and the Deputy Bailiff was clearly aware of the material aspects of the issues which he was considering.
59. The Deputy Bailiff had been aware that Emerald's case was that it was exposed to the risk of the seller breaching the contract, almost with impunity, because all that would require to be returned would be the deposit plus interest (see paragraph 131 of the judgment).
60. An important assessment of the evidence was given by the Deputy Bailiff at paragraph 148 where he said:

"... The whole tenor of the material I have seen is that Barclays Wealth personnel were concentrating on creating a structure for holding the proposed aircraft that was consistent with how their organisation was prepared to hold assets in a legitimate and tax-efficient fashion. There has been no evidence suggesting that any of them gave more than a cursory thought to whether the transaction should or should not be agreed; it was going to happen unless and until someone else indicated to them they should not proceed. The extent to which their understanding of their role is consistent with the positions they had as directors of [Emerald] is another matter. This is tantamount to an admission that they did not feel there was any need to exercise any independent judgment in respect of the affairs of [Emerald]."

## Discussion

61. It is trite that this court will only interfere with findings of fact by the Royal Court either because they have no possible basis from the evidence adduced before the Royal Court or where the apparent finding is manifestly perverse: *Stone v Hickman* 2007-08 GLR Note 23. A finding on causation is a finding of fact: cf *City Inn v Shepherd Construction* 2011 SC 127, at paragraph 42.

62. Here, the Deputy Bailiff has set out his appraisal of the evidence in detail and with care over some fifty paragraphs. His general conclusions are found at paragraphs 201 to 205. In that section he deals with breach of duty. At paragraph 202 he said:

"... The position of the humans associated with the Defendants has throughout been that the detailed terms of acquiring a Hawker 4000 aircraft to be held within The Galaxy Trust structure were matters presented to them rather than something on which their advice was sought. The problem is that there is no identifiable document or exchange in which that was spelt out explicitly. ... As shown by the response from Barclays Wealth about the extent of their instructions in their letter of 8 June 2009, they did not have a role in evaluating or advising upon the commercial terms of the deal. However, as directors of [Emerald], in my view, the Defendants need to be able to point to something on which they can formally rely under Section 123 of the 2004 Act or something more concrete than an assumption to satisfy Section 122(b) of the Act before they can distance themselves from exercising the type of independent judgment that directors should display."

63. The Deputy Bailiff dealt with the issue of causation at paragraphs 206 – 209. As the respondents accept, the Deputy Bailiff asked himself the correct question. At paragraph 206 he stated:

"Having decided that there was a breach of director's duty on the part of both Defendants, the next question is whether those breaches caused the loss claimed by the plaintiff. This aspect of the case was not argued in as much detail as the other issues to be determined. My reasons for finding that causation has also been established are, therefore, similarly abbreviated."

64. The Deputy Bailiff then set out the competing arguments as follows:

"207. On the one hand, I can understand the argument pursued on behalf of the Defendants that, if the omissions and other failings had not occurred, the directors of [Emerald] would still have proceeded to resolve to execute the [agreement] and that the alleged losses sustained by [Emerald] did not arise from the decisions to enter into the [agreement], but rather from the decision to terminate the [aircraft purchase agreement]. Had the revised delivery date confirmed by [the manufacturer] been incorporated into a formal amendment of the [aircraft purchase agreement], the aircraft would have been accepted or [the

purchasing entity] would have been in a worse position. It was only because the scheduled date for delivery in the terms then in place had slipped so far back without agreement to modify what was in the [aircraft purchasing agreement] on the part of the Buyer that the option to terminate and recoup the deposits of \$1 million plus interest was available to [the purchasing entity]. In other words, the deal for acquiring the [aircraft] as represented by the [agreement] was the deal that was going to be concluded come what may and even if the directors of [Emerald] had not fallen short of the standard of care required and had checked everything as they should have, the decision to execute the [agreement] on the terms contained therein would still have been taken.

208. On the other hand, events that occurred after the purchase of the membership interests in [the purchasing entity] can, as argued on behalf of [Emerald], be regarded as flowing from that flawed decision. By executing the [agreement] and acquiring [the purchasing entity], [Emerald] took the benefit, and the burdens, of the [aircraft purchasing agreement]. The decisions taken by [the purchasing entity], quite possibly with the concurrence of the new directors of [Emerald], in relation to not agreeing a revised later scheduled delivery date and then exercising the option to terminate the [aircraft purchasing agreement], were a form of mitigation. If one compares the choices made in respect of the failure by [the seller] to deliver the aircraft in accordance with the agreed schedule with the position had a direct order been placed, or some other means of purchasing a Hawker 4000 aircraft been taken, the choice would still have been whether to accept the slippage that was arising because of the problems experienced by [the seller] or to exercise the option to terminate the purchase agreement. The difference, however, is that the deposit monies repayable by [the seller] would have represented all, or nearly all, of the outlay of [Emerald] rather than approximately US\$ 6.1 million having been paid out without any prospect of those monies being returned."
65. Having set out those two competing arguments, the Deputy Bailiff indicated, in paragraph 209, that, on balance, he preferred the argument that it was the decision for Emerald to enter into the agreement that left it in the position where subsequent choices would result in what amounted to the purchase price for the membership interests in the purchasing entity being lost forever. Accordingly, as a matter of causation the Deputy Bailiff identified that juristic act as the immediate cause and not, for example, the decision to terminate the purchase.
66. Where a claim being pursued is one in respect of breach of duty by omission, the plaintiff must prove that compliance would have prevented the damage. If it would have happened anyway, the plaintiff has failed to prove his or her case: see, for example, *Bishopsgate Investment Management Limited v Maxwell* [1993] BCC 120, 139, per Hoffman LJ (as he then was). In certain cases, of course, the plaintiff may be assisted by presumptions, but none are said to arise here.
67. Assuming, as I consider it proper to do, that the Deputy Bailiff was proceeding upon the basis that it was for Emerald to prove that compliance with the duty would have prevented the loss, I confess that I do not find in the opening of paragraph 209 a proper answer to the question set. It may well be that it was the decision of Emerald to enter into the agreement that left it in the position of potential loss; but the question was whether the breaches caused the loss. In the present case, that question required consideration of a logically prior question as to whether fulfilment of the duties would have resulted, necessarily, in the agreement in question not being entered into by Emerald. The reasoning on causation is silent on this matter; and it may be that the argument before the Deputy Bailiff was silent on it as well. However, there is a passage in the earlier section on breach of duty which provides a fairly clear indication as to how, on the Deputy Bailiff's analysis, the question should have been answered.

68. At paragraph 203 the Deputy Bailiff said:

"Up until the execution of the [agreement], the monies paid into escrow with the IATS were returnable; there was no absolute commitment to proceed and the position of BWTG on behalf of The Galaxy Trust was salvageable. Moreover, the impression I formed of Mr. Chernukhin is that he takes an interest in the bigger picture, for example, his wish to have use of a Hawker 4000 aircraft; and occasionally the minutiae of something, the prime example being pilot training, but did not trouble himself with the details on what might be regarded as an in between level, leaving those to be sorted out in the best way possible by those he paid well for making it their business to handle those matters on his behalf. This should have been apparent to Barclays Wealth from their dealings with him. Accordingly, against that background, it became even more important to undertake some proper inquiries of their own into Mr. Dryden specifically relating to the transaction that he was pushing through to them. Many of these problems were capable of resolution in a simple way. A series of direct questions could have been put to Mr. Dryden himself or to Mr. Chernukhin himself. The answers given would have provided the comfort that Barclays Wealth should have sought or would have raised issued requiring further thought."

69. That is a careful, logical and thoughtful appraisal of an essential element of the case involving, as it does, consideration of the practical ways open to the defendants and present respondents in dealing with the issues which face them. However, it also comes very close to refuting any suggestion that entry into the agreement was self-evidently not in the interests of Emerald. It recognises the important position of Mr. Chernukhin himself for this single purpose vehicle company and, it seems to me, the circumstances which arise in respect of many such bespoke contracts which lie at the interface of commercial interests and private interests, where there may be particular reasons in the mind of the ultimate decision maker which render the taking of an otherwise significant risk a decision which it is appropriate to take.

70. Whilst Advocate Bell cautioned against unthinking acceptance that the directors could rely upon Mr Chernukhin rather than the Galaxy trust and its trustees, in my view the singular circumstances here were such as to entitle the Deputy Bailiff to recognise Mr Chernukhin as the relevant decision maker, or at least interlocutor, for the purposes of fulfilment of the directors' duties. Further, at paragraph 168 the Deputy Bailiff had found that Mr Chernukhin, or perhaps his wife, was keen in the autumn of 2007 to secure an early delivery of this brand new model of aircraft. At paragraph 179 he had also found it inconceivable that the broad terms of what was being done remained unknown to Mr Chernukhin at that time. And at paragraph 200 he found that whilst the arrangements necessarily meant that some of the money that would be expended would, upon completion of the acquisition of ownership interests, become unrecoverable, that circumstance was part of the required balancing of competing advantages and disadvantages in reaching a conclusion on the proposed transaction. Whilst the Deputy Bailiff had found that refundability of 'deposits' was something over which Mr Chernukhin was concerned, he also found that those concerns had not been communicated to the directors: see paragraph 175.

71. If, as I take it to be the view of the Deputy Bailiff in paragraph 203, one could not exclude the possibility that the exercise of proper diligence on the part of the respondents might result in the provision of "the comfort that Barclays Wealth should have sought" this would suggest that, on the balance of probabilities, the case on causation was not made out and the Deputy Bailiff's determination in paragraph 209 was not supported by his findings in paragraph 203. The passages to which I have referred in the preceding paragraph indicate, to my mind, that there is nothing in the remainder of the Deputy Bailiff's findings to suggest that he considered that the potential loss of deposits would necessarily have been a bar to the arrangements proceeding.

## Conclusion

72. For all these reasons I would refuse the Appeal. Had it been necessary, however, I would also have granted the Respondents' notice.

**FURTHER PROCEEDINGS**  
**Approved Text**  
**09.01.2014**

**IN THE COURT OF APPEAL  
OF GUERNSEY**

**CIVIL DIVISION APPEAL No. 463**

**16<sup>th</sup> December 2013**

**Before:** **Sir John Nutting Bt., QC Presiding**  
**Mr James Walker McNeill QC**  
**Robert Logan Martin QC**  
**Judges of Appeal**

**Between:** **EMERALD BAY WORLDWIDE LIMITED** **Applicant**  
**-V-**  
**BARCLAYS WEALTH DIRECTORS**  
**(GUERNSEY) LIMITED ET AL** **Respondent**

**Advocate G K Bell for the Appellant**  
**Advocate M G A Dunster for the Respondent**

**THIS IS THE JUDGMENT OF THE COURT**

**McNEILL JA:**

1. Following the issuing of our Judgment on the substantive appeal in this matter, when we refused the Appeal but indicated that we would have granted the Respondent's Notice, an application for leave to appeal to the Privy Council was made on behalf of the appellant.
2. Advocate Bell directed us to s. 16 of the Court of Appeal (Guernsey) Law 1961 which provides among other matters that no appeal shall lie from a decision of this Court in civil matters to the Privy Council except where the value of the matter in dispute is equal to, or exceeds, £500 sterling; a threshold more than adequately passed in the circumstances of this case, as it is, invariably, in appeals to this court with a monetary value.
3. That provision was considered by this court in Pirito v Curth 2005-06 GLR 34 where Southwell JA, delivering the judgment of the court, referred to the apparent disjunction between it and rule 2 in Schedule II to the Judicial Committee (General Appellate Jurisdiction Rules, which requires leave of the Court appealed from or special leave granted by Her Majesty in Council. He noted the apparent clarification in the Notes on Procedure in Commonwealth Appeals dated October 1983 to the effect that, whilst there an appeal might be described as "as of right" (or

similar words)”, leave was still required in order for court below to be satisfied that any special category of appeal was involved and that there could be appropriate security for costs. In the view of this court expressed by Southwell JA, the only power of this court to refuse leave when the threshold had been met was in cases of abuse of process (paragraph 34).

4. We are conscious, however, that since the expression of those views in Pirito v Curth the House of Lords and the Supreme Court has more than once emphasised that the not dissimilar privilege enjoyed by Scottish litigants should not be abused.
5. In Wilson v Jaymarke Estates Ltd 2007 SC (HL) 135 (paragraphs 17 and 20), Lord Hope of Craighead (himself at one time Lord President of the Court of Session in Scotland) observed:

‘It is contrary to the public interest that the time of the House should be taken up with appeals which do not raise an arguable question of general public importance, as this is liable to cause delay in the disposal of appeals which merit its attention.

.....

But [limitations] must be carefully and jealously respected if it is to continue to be in the public interest, given the amount of appellate business that now comes before the House from all parts of the United Kingdom.’

6. These observations have been repeated by the Supreme Court in Uprichard v Scottish Ministers 2013 SC (UKSC) 219. In our opinion they are observations which this court ought to bear in mind in applications for leave to appeal to the Privy Council. The appellate business of the Privy Council is, for present purposes, to be closely equated to that of the Supreme Court. The Scottish provisions, whilst of different origin are to the same effect as those of the 1961 Law. This court, in Pirito has already identified a restriction by reference to perceived abuse of the exercise of the right.
7. In the opinion of this court, the present litigation and the potential appeal does not raise arguable questions of general public importance of such a magnitude that the decision as to whether an appeal should be permitted should lie with this court as opposed to Her Majesty in Council.
8. The potential appeal would raise two questions. The first would be whether a conventional provision (the articles of association) is permitted by a statutory provision. There is no dispute but that the conventional provision is otherwise valid and enforceable. Neither the present BVI statutory provision nor its predecessor has been the subject of judicial or academic comment. The second question would be as to a pure matter of fact, namely, whether the claimed loss had been proved to have been caused by such individual acts or omissions in breach of duty as had been found by the court of first instance. Neither question, therefore, appears to this court to raise issues of any general public importance.
9. It therefore follows that, whilst it is open to the Appellant to persuade the Privy Council to grant special leave, for this court to grant leave might cause delay in the disposal of appeals which merit the attention of the Privy Council and, in that respect, potentially cause an abuse of what, otherwise, is the right to appeal. In our view of this case it is proper that the decision as to leave should be taken by an appeal panel of Her Majesty in Council to determine whether the case does raise matters of such importance that the issues ought to be considered in Council.