IN THE GRAND COURT OF THE CAYMAN ISLANDS
FINANCIAL SERVICES DIVISION

CAUSE NO FSD 159 of 2016 (IMJ)

BETWEEN

MIDTOWN ACQUISITIONS L.P

PLAINTIFF

AND

ESSAR GLOBAL FUND LIMITED

DEFENDANT

<u>IN CHAMBERS</u>

Appearances:	**Mr. M Crawford and Mr. P Smith of Maples and Calder for the Plaintiffs** **Mr. U Payne, Mr. P Murphy and Mr. J Zimmer of Ogier for the Defendant**
Before:	**The Hon. Justice Ingrid Mangatal**
Heard:	**10 January 2017**
Draft Judgment Circulated:	**26 April 2017**
Judgment Delivered:	**02 May 2017**

HEADNOTE

Summary judgment application - foreign judgment - Whether Final and Conclusive - Whether Defendant has real prospect of successfully arguing that the foreign judgment was obtained by fraud or in breach of natural justice.

<u>JUDGMENT</u>

The Parties

1. Barclays Bank Plc ("Barclays") is a public company incorporated in the United Kingdom.

2. Credit Suisse Loan Funding LLC ("Credit Suisse") is a limited liability corporation incorporated under the laws of the State of Delaware, USA.

3. Midtown Acquisitions L.P. ("Midtown") is a limited partnership organised under the laws of the State of New York, USA and an affiliate of Davidson Kempner Capital Management.

4. Special Situations Investing Group, Inc. ("Special Situations") is a company incorporated under the laws of the State of Delaware, USA and a subsidiary of The Goldman Sachs Group, Inc.

5. Barclays, Credit Suisse, Midtown and Special Situations are each Lenders as defined in paragraph 7 below, and are together referred to as "the New York Judgment Creditors".

6. The Defendant Essar Global Fund Limited ("EGFL") is a Cayman Islands exempted non-resident company which has its registered office at PO Box 1350, Clifton House, 75 Fort Street, Grand Cayman, Cayman Islands and carries on business as the holding company of the Essar Group. EGFL was incorporated on 20 September 2005.

The Claim as originally filed and pleaded

7. Under a Credit and Security Agreement dated 30 September 2014 (the "Credit Agreement") between Essar Steel Minnesota LLC (the "Borrower"), each guarantor party thereto, US Bank as agent ("Agent") and the lenders party thereto from time to time (the "Lenders"), the Lenders provided a first priority senior secured term loan facility to the Borrower (the "Term Loan"). The Credit Agreement is governed by New York law.

8. Under a Guaranty also dated 30 September 2014 entered into by EGFL in favour of the Agent for the benefit of the Lenders (the "Guaranty"), EGFL guaranteed to each Lender payment of the principal of, premium and interest on, the Term Loan and any other Obligations due under the Credit Agreement, up to the Maximum Guaranteed Obligations, plus interest and fees, costs and expenses. The Maximum Guaranteed Obligations is USD$200,000,000.00 plus interest at the rate of 13.5% per annum accruing through payment, plus fees, reasonable costs, and expenses incurred in collecting, enforcing and preserving rights under the Guaranty. The Guaranty is governed by New York law.

9. Section 8.2 of the Credit Agreement provides in material part, that in the case of any Event of Default, the Term Loan may be accelerated.

10. Section 2.1(c) of the Guaranty provides that, in the event of any declaration of acceleration of the Term Loan, the Term Loan (up to the Maximum Guaranteed Obligations) will forthwith become due and payable by the Defendant.

11. The Statement of Claim alleges that on 23 February 2016, as a result of numerous prior admitted Events of Default under the Credit Agreement, the Agent, as directed by the Lenders, by notice to the Borrower, declared the unpaid amount of the Term Loan, and all other amounts owed under the Credit Agreement, totalling US$412,132,810, to be immediately due and payable.

12. Pursuant to Section 2.1 of the Guaranty, EGFL became obligated immediately to pay the Agent on behalf of the Lenders the Maximum Guaranteed Obligations amount of US$200,000,000, plus interest at the rate of 13.5% per annum accruing through payment, plus fees, reasonable costs and expenses incurred in collecting, enforcing and preserving rights under the Guaranty.

13. On 18th March 2016 EGFL stipulated by way of affidavit, and confessed to judgment with respect the Guaranty ("Confession of Judgment").

14. The Confession of Judgment contained an admission of liability by the Defendant under the Guaranty in the amount of US$201,575,000; and that interest was to accrue at the rate of 13.5% per annum, and that the entry of judgment was authorized in favour of the lenders in any federal state court located in the Borough of Manhattan, City and State of New York or any other court of competent jurisdiction in the amount of US $201,575,000 together with certain other amounts.

15. On 24 August 2016 pursuant to the New York Civil Practice Law and Rules, the New York Judgment Creditors filed a request with the New York Court seeking the entry of judgment pursuant to the Confession of Judgment. The New York Judgment Creditors gave credit for US$40 million in payments that had been received from the Defendant.

16. On 25 August 2016 the New York Court entered judgment for the New York Judgment Creditors in the principal sum plus interest, costs and disbursements in the total sum of US$171,769,169.00 (the "New York Judgment").

17. EGFL was served with the New York Judgment on 31 August 2016.

18. It is pleaded that the New York Judgment became enforceable immediately in the State of New York. Further, that there was no appeal pending in the courts of the State of New York, the appeal period in respect of the New York Judgment having expired, and no stay of execution has been granted in favour of EGFL.

19. The Statement of Claim avers that the New York Judgment is final and conclusive for a liquidated sum and gives rise to a *res judicata* under New York Law in respect of the matters to which it relates.

20. By reason of the New York Judgment, the pleading continues, EGFL is indebted to the New York Judgment creditors in the amount of US$171,769,169 and accordingly the New York Judgment Creditors sought judgment in that amount.

21. Further, the New York Judgment Creditors also claimed interest pursuant to the Guaranty at the rate of 13.5% per annum from 25 August 2016 until the date of actual payment (whether before or after any judgment of the Grand Court). Alternatively, the New York Judgment Creditors claimed interest pursuant to section 34 of the Judicature Law (2013 Revision) at such rate and for such period as the Court thinks fit.

22. An Acknowledgement of Service was filed in the instant proceedings on behalf of EGFL on 17 October 2016.

Claim Amended - Sole Plaintiff now Midtown

23. On 15 November 2016, after the proceedings were filed in the name of Barclays, Credit Suisse, Midtown and Special Situations, Barclays, Credit Suisse and Special Situations assigned the benefit of the New York judgment to Midtown. Midtown's application to be sole plaintiff in order to reflect that position was granted by me without opposition on 10 January 2017, with costs to EGFL on the standard basis to be taxed if not agreed.

Summary Judgment Application

24. This is the Plaintiffs' application for summary judgment, dated 26 October 2016, to enforce the Judgment of the New York Supreme Court in the amount of US$171,769,169.00 dated 25 August 2016.

25. The Plaintiffs' summons dated 26 October 2016 seeks the following orders:

> "*1. Pursuant to GCR O.14, r.1, that summary judgment be entered in favour of the Plaintiffs in the amount of US $171,769,169.00 (the "**Principal Sum**").*
>
> *2. Directions for the determination of the Plaintiffs' claim for contractual or alternatively statutory interest on the Principal Sum.*
>
> *3. Such further or alternative relief as the Court thinks fit.*

> 4. *That the Plaintiffs' costs of and incidental to this Summons be paid by the Defendant to be taxed if not agreed.*"

26. The application is supported by the affidavits of Benjamin Finestone, who is a partner in the firm of Quinn, Emanuel Urquhart & Sullivan LLP ("Quinn Emanuel"), and is based in that firm's New York office. Quinn Emanuel have acted for, and continue to act for, the Lenders and their Agent in relation to EGFL's indebtedness.

27. In addition to other evidence, Mr. Finestone at paragraph 20 of his First affidavit opines that, as a matter of New York law, the Confession of Judgment is a document that entitles the person in whose favour it is made to obtain the entry of judgment in the Supreme Court of the State of New York, pursuant to the New York Civil Practice Law and Rules, §3218.

28. At paragraph 29, he also opined that :

> "29. *As a matter of New York law, where, as is the case in respect of the New York Judgment, a judgment has been obtained pursuant to New York Civil Practice Law and Rules …3218 and the appeal deadline has expired, that judgment is final and conclusive for a liquidated amount and gives rise to a res judicata under New York law in respect of the matters to which it relates.*"

<u>EGFL's position</u>

29. The application is contested by Mr. Payne, Counsel for EGFL, on the basis that EGFL has bona fide defences to the claim which, because of complex issues of New York law and fact, should not be disposed of summarily as part of the summary judgment procedure in the Cayman Islands. The Defendant states their position is as follows:-

> "(a) *the Confession Judgment [i.e. the New York Judgment] was obtained by "fraud, misrepresentation or other misconduct" as construed under New York law:*

(b) *enforcement of the Confession Judgment is contrary to public policy;*

(c) *the Confession Judgment was obtained in breach of the principles of natural justice;*

(d) *the Confession Judgment is not final and conclusive; and/or*

(e) *there is a triable issue involving foreign law."*

30. EGFL relies upon the affidavit of Sushil Baid, Vice President of an affiliate of EGFL, the affidavit of Stephen Meister, a lawyer, and partner in the law firm Meister Seelig & Fein LLP, New York Counsel for EGFL and the affidavit of Andrew Wright, a senior legal counsel for an affiliate of EGFL.

<u>Things have not stood still</u>

31. In his First Affidavit, sworn 11 November 2016, Mr. Baid referred the Court to his affirmation of the same date, i.e. 11 November 2016, which was filed in support of EGFL's motion in the Supreme Court of the State of New York to vacate the judgment entered by Confession entered by the Clerk of the New York County on 25 August 2016 ("5015 Motion"). This is the judgment that Midtown seeks to enforce here in the Cayman Islands.

32. Reference was made by Mr. Payne to the decision of the Chief Justice in ***Tasarruf Mevduati Signorta Fonu v Merrill Lynch Bank and Trust Company & Others*** [2009 CILR Note 15] (unreported – 9 June 2009) ***("TMSF")*** where it was held that in relation to applications for summary judgment involving expert evidence of foreign law:

> "*...expert evidence as to what is the law of a foreign country constitutes a matter of fact for the determination of this Court and dispute over such matters can only properly be resolved after full enquiry, not merely on the basis on untested affidavit evidence."*

33. However, it is to be noted that in ***TMSF*** the learned Chief Justice held that on the evidence before him there was no triable issue of foreign law since the joint opinion of

experts was that the Turkish judgment in question was regarded as final and conclusive in the Court in which it was given.

The 5015 Motion

34. The Defendant filed the 5015 Motion on 11 November 2016. The basis of the 5015 Motion is that the confession affirmation filed by the Plaintiffs in support of obtaining the Confession Judgment falsely represented to the New York Court that entry of the Confession Judgment is not conditioned in any way upon any fault. Furthermore, the confession affirmation made no reference to the Term Sheet (as defined below) that the Defendant had complied with and would have estopped the Plaintiffs from obtaining the Confession Judgment.

35. The Plaintiffs are seeking to resist the 5015 Motion on the basis that:

    (i) the Plaintiffs were entitled to file the Confession of Judgment regardless of whether or not the Defendant had defaulted under the Term Sheet; and

    (ii) the Defendant had defaulted in any event.

36. The Defendant says it is clear from the Defendant and Plaintiffs' Memoranda of Law that there are issues of law and fact that the New York Court will have to resolve in order to determine the 5015 Motion. Importantly, the New York Court will have to determine whether the Confession Judgment has been obtained on the basis of fraud, misrepresentation or misconduct.

The 317/3218 Motion

37. New York Rule 317 provides that, where a judgment has been entered against a person, that person may be entitled to defend an action in circumstances where:

    (a) the service of the summons was made in a manner other than personal delivery;

    (b) the defendant did not receive actual notice of the process in time to defend;

(c) the defendant has a meritorious defence, and

(d) a motion is made within one year of knowledge of the entry of default.

38. New York Rule 3218 allows a judgment entered in violation of the terms of a confession of judgment to be vacated. The Defendant contends that the Confession Judgment was entered in breach of the Term Sheet and should be vacated.

39. At paragraphs 3-26 of Mr. Baid's Affirmation, he makes assertions as follows:

> *"3. As set forth herein, and in the accompanying papers, the Judgment should be vacated based upon the fraud, misrepresentation and/or other misconduct of...Midtown..., which filed the application for the entry of the Judgment.*
>
> ***<u>The Term Sheet</u>***
>
> *4. On March 18, 2016, EGFL, U.S. Bank National Association (the "Agent"), as agent for certain "Lenders", and certain " Affiliate Creditors", among others, entered into a **binding** term sheet ("the "Term Sheet") describing the material terms of a settlement arrangement with regard to certain disputes arising between the parties pursuant to a guaranty and equity contribution agreement..*
>
> *5. The Term Sheet provides that certain parts thereof are "immediately binding and effective" and that other parts are subject to: (a) the finalization of certain documentation and (b) EGFL's payment of the first installment of the "Settlement Amount" of $10 million by March 24, 2016...It is undisputed that this $10 million payment was delivered and accepted, as discussed below.*
>
> *6. Pursuant to section 4 of the Term Sheet, the settlement amount is $415 million plus interest (the "Settlement Amount"), payable by EGFL in installments (the "Payment Plan") due by March 31, 2017. However, if EGFL paid $360 million plus interest (the "Early Settlement Payment") under the Payment Plan by September 30, 2016, then "the Settlement Amount" shall be deemed to be paid in full.*
>
> *7. Furthermore, pursuant to section 4, upon Lenders' receipt of either the Settlement Amount or the Early Settlement Payment (subject to an exception not relevant hereto), then "all Lenders' claims against EGFL ...will be ...cancelled in full and the Confessions of Judgment provided by EGFL pursuant to section 3...**shall be null and void...**"* (Emphasis added).

8. *Stated differently, if EGFL paid either (a) $360 million plus interest by September 30, 2016, or (b) $415 million plus interest by March 30, 2017, then the Confessions of Judgment would be null and void.*
9. *The Confessions of Judgment are attached as exhibits B and C to the Term Sheet, and include the Confession of Judgment upon which the Judgment herein was improperly entered, as detailed below.*

EGFL's Compliance with the Payment Plan Prior to the Entry of Judgment

10. *Section 4 of the Term Sheet specifies the following Payment Plan for the Early Settlement Payment: (a) $10 million by March 24, 2016;(b) $10 million by March 31, 2016;(c) $10 million by April 30, 2016; (d) $10 million by May 31, 2016;(e) $10 million by June 30, 2016;(f) $33.3 million by August 31, 2016; and (g) the balance of the Early Settlement Payment by September 30, 2016...*
11. *Pursuant to section 4, the Payment Plan for the Settlement Amount is: (a) $10 million by March 24, 2016; (b) $10 million by March 31, 2016; (c) $10 million by April 30, 2016; (d) $10 million by May 31, 2016; (e) $10 million by June 30, 2016; (f) $33.3 million by August 31, 2016; (g) $33.3 million by October 31, 2016; (h) $33.3 million by December 31, 2016; and (i) the balance of the Settlement Amount by March 31, 2017.*
12. *On March 24, 2016, EGFL paid $10 million to the Agent. Bank documentation reflecting this payment is attached hereto as Exhibit B. Midtown Acquisitions does not dispute that such payment was made, as reflected by a schedule of payments submitted by its Counsel to the Court.*
13. *On March 31, 2016, EGFL paid $10 million to the Agent. Bank documentation reflecting this payment is attached hereto as Exhibit C. Midtown Acquisitions does not dispute that such payment was made, as reflected by a schedule of payments submitted by its counsel to the Court.*
14. *On May 3, 2016, EGFL paid $10 million to the Agent. Bank documentation reflecting this payment is attached hereto as Exhibit D. Midtown Acquisitions does not dispute that such payment was made, as reflected by a schedule of payments submitted by its counsel to the Court.*
15. *On June 6, 2016, EGFL paid $5 million to the Agent. Bank documentation reflecting this payment is attached hereto as Exhibit E. Midtown Acquisitions does not dispute that such payment was made,*

as reflected by a schedule of payments submitted by its counsel to the Court.

16. *On June 23, 2016, EGFL paid $5 million into the Agent's escrow account, which was thereafter released to the Agent on or about July 15, 2016. Bank documentation reflecting this payment is attached hereto as Exhibit F.*
17. *On or around July 21, 2016, $5 million was paid by a third party to the Agent at the arrangement of EGFL, such arrangement being expressly agreed to by Midtown Acquisitions, and therefore the receipt of such proceeds was consistent with the Payment Plan. This payment is reflected on pages 9-10 of the email chain, between the representatives of the third party and the Lenders, attached hereto as Exhibit G. It does not appear that Midtown Acquisitions disputes that this payment was made, as its schedule reflects a $5 million payment made in July 2016.*
18. *On or around August 18, 2016, a further $5 million was paid to the Agent by the same third party in the same manner as described in the preceding paragraph. This payment is reflected on pages 1-2 of Exhibit G. The aforementioned payments equal $50 million in the aggregate.*
19. *Although an "Event of Default" is defined in section 12 to include the "[f]ailure to pay the Settlement Amount pursuant to the Payment Plan", ... there is no "time is of the essence" clause, and thus the fact that certain of the aforementioned installment payments were delivered later than set forth in the Payment Plan is not an incurable Event of Default. Similarly, neither section 12 nor section 13 (entitled "Consequences of Default") refer to any acceleration of the entire Settlement Amount based upon an Event of default. It is also clear that Midtown Acquisitions and EGFL were in regular contact with regarding* [sic] *to the payments and that Midtown Acquisitions was agreeable to the various proposals/discussions to move certain payment dates out.*

Midtown Acquisitions Improperly Filed a Confession of Judgment

20. *On August 23, 2016, Midtown Acquisitions, without notifying EGFL, e-filed a Confession of Judgment by EGFL, in the amount of $201, 575,000, with this Court. A true and correct copy of the filed Confession of Judgment is attached hereto as Exhibit H.*
21. *On August 24, 2016, Midtown Acquisitions' counsel, again without notifying EGFL, e-filed an Affirmation in Support of Entry of Judgment (the "Affirmation"). The Affirmation conceded that EGFL*

made $40 million in payments. A true and correct copy of the Affirmation, with its Schedule calculating the judgment amount sought, is attached hereto as exhibit 1.

22. *Paragraph 6 of the Affirmation states: "The Confession of Judgment is not conditioned in any way upon any default".... In truth, the Confession of Judgment provides that EGFL "is entering into this Confession... contemporaneously with that certain term sheet (the "Term Sheet") and that "pursuant to the Term Sheet [,]EGFL has agreed to enter into this Confession..." As noted above, pursuant to the Term Sheet, if the Settlement Amount is paid, then the Confession of Judgment is null and void.*
23. *The Affirmation does not allege that EGFL defaulted under the Term Sheet. Moreover, at the time that the Confession of Judgment was filed on August 23, 2016, EGFL had paid (or arranged payment of) an aggregate of $50 million to the Agent, which was the total amount due as of that date pursuant to the Payment Plan. Thus, EGFL was not in default under the Term Sheet when the Confession of Judgment was filed. As noted above, Section 4 of the Term Sheet provides the Payment Plan, and it is absurd to suggest that EGFL would enter into a binding Term Sheet, and could perform under the Payment Plan, but nevertheless Midtown Acquisitions had the right to file the Confession of Judgment at any time regardless of whether there was a default under the Payment Pan or not.*
24. *Even if an Event of default occurred, neither section 13 of the Term Sheet (entitled "Consequences of Default") nor any other provision thereof authorizes the filing of any Confession of Judgment.*
25. *Moreover, if an Event of default occurred, the Term Sheet does not authorize the acceleration of the Payment Plan. There is nothing in the Term Sheet, such as an acceleration clause, authorizing the filing of the Confession of Judgment (for hundreds of millions of dollars) based upon the failure to pay an installment in a fraction of that amount. At most, had there been a default at the time the Confession of Judgment was filed - and there wasn't one - without an acceleration clause Midtown Acquisition would have been entitled to the amount of the defaulted installment payment.*
26. *The Affirmation admits that it was filed based upon an alleged default under the Guaranty that* ***pre-dates*** *the Term Sheet: "The Confession of Judgment was provided to U.S. Bank and the Lenders on March 18, 2016, after the default had already occurred. In February 2016, EGFL defaulted under the Guaranty....". It was improper to file the*

Confession of Judgment based on a default under the guaranty that predated the Term Sheet after the parties had entered into, and EGFL had performed, under the Term Sheet, which settled and compromised the pre-existing default under the guaranty."

40. At paragraphs 17-24 (inclusive) of his affidavit, Mr. Meister discusses the 5015 Motion filed in New York, and responds to Mr. Finestone's analysis of the Law as follows:

*"**Motion to Vacate the Judgment***

17. NY CPLR 5015 (a) permits a party to file a motion seeking relief from a judgment upon certain enumerated grounds, including fraud, misrepresentation or other misconduct of a party. A copy of the rule is exhibited at pages 3 to 4 of the Bundle.

18. On behalf of EGFL, my office filed a motion with the New York Court seeking an order vacating the Judgment on the grounds that the improper filing of the Confession of Judgment contrary to the provisions of the Term Sheet and the Affirmation's misrepresentations (both affirmative and by omission) concerning Midtown Acquisition's ability to seek the entry of judgment constitutes fraud, misrepresentation and/or misconduct (the "New York Motion"). A copy of the New York Motion is exhibited at pages 5 to 6 of the Bundle.

19. The fraud, misrepresentation and/or misconduct of Midtown Acquisitions in connection with the Judgment is detailed in the New York Motion. In brief, in the Affirmation, Midtown Acquisitions misrepresented to the New York Court that a default justifying the filing of the Confession of Judgment existed when, in truth, EGFL had performed under the Term Sheet (a document that Midtown Acquisitions was obligated, but failed to bring to the New York Court's attention) and such performance prohibited the filing of the Confession. A copy of a memorandum of Law filed by EGFL in support of the New York Motion is attached at pages 7 to 12 of the Bundle. I have read the Memorandum of law and believe that the contents accurately summarises the factual and legal position as regards the New York Motion.

20. If Midtown Acquisitions elects to reply to the New York Motion any such opposition is due in early January 2017, after which EGFL will have an opportunity to submit a reply. The New York Motion, opposition thereto, and reply are scheduled to be "fully submitted" to the New York Court on January 18 2017(see page 5 of the Bundle). Thereafter, the New York Court will decide whether to hear oral *argument on the New York Motion. A decision from the New York Court can be expected in the first half of 2017.*

21. *If the New York Motion is granted, the Judgment will be vacated (and thus a nullity and unenforceable). See Oppenheimer v Westcott, 47 N.Y.2d 595, 393 N.E.2d 982, 419 N.Y.S.2d 908(1979). A copy of this judgment is exhibited at pages 13 to 18 of the Bundle. If the New York Motion is denied, EGFL will have the right to appeal that denial to New York's intermediate appellate court, the Appellate Division, First Department. If the Appellate Division reverses a denial of the New York Motion, the Judgment will be vacated.*

Response to affidavit of Benjamin Finestone

22. *I have read the affidavit of Benjamin Finestone dated 26 October 2016 and take issue with the following statements in that affidavit:*
    i) *Paragraph 22 - Mr. Finestone states: "Any appeal against the judgment after the expiration of the 30 day period must be dismissed and absent an appeal within that time period, the judgment becomes final and conclusive as a matter of New York Law."*
    ii) *Paragraph 29 - Mr. Finestone states: "As a matter of law, where, as is the case in respect of the New York Judgment, a judgment has been obtained pursuant to New York Civil Practice Law and Rules ... 3218 and the appeal deadline has expired, that judgment is final and conclusive for a liquidated amount and gives rise to a res judicata under New York law in respect of the matters to which it relates."*

23. *These statements are inaccurate and incomplete in that they fail to mention that a New York Judgment - even if it is not timely appealed - is susceptible to vacatur under CPLR 5015 when one of the enumerated grounds for vacatur exists. The New York Court of Appeals, which is New York's highest court, held in the case of Nash v Port Authority of N.Y. & N.Y., 22 N.Y.3d220 (2013):*

    " Here, we agree with Nash that her judgment had, in fact, become final when the Port Authority failed to appeal within the requisite time period. But the discussion does not end there. Although a court determination from which an appeal has not been taken should 'remain inviolate', that rule applies 'absent the sort of circumstances mentioned in CPLR 5015... Section 5015 applies not only to judgments that are still in the appellate process... but also to those in which appellate review has been exhausted... Notably, section 5015 does not distinguish between final and non-final judgments, or those that have or have not exhausted the appeals process. Therefore,

Nash's contentions that Supreme Court [i.e. the trial-level court] was precluded from entertaining the motion or lacked jurisdiction to vacate the judgment are without merit."

A copy of the judgment is exhibited at pages 19 to 25 of the Bundle.

24. Stated in brief, the expiration of the time to appeal a judgment does not divest a court of the authority to vacate a judgment based upon one of the grounds enumerated in NY CPLR5015 in circumstances where the Court vacates a judgment pursuant to NY CPLR 5015 that judgment will be a nullity and unenforceable."

41. In his Fourth Affidavit, sworn on 4 January 2017, at paragraphs 2 and 3, Mr. Finestone states as follows:

> *"2. ....no payments were received in respect of the payment plan described in paragraph 4 of the Term Sheet... in respect of US$10 million due on or before 30 June 2016 (despite the credit improperly taken by the Defendant for the Skyways payments; US$33.3 million on or before 31 August 2016; or US$33.3. Million on or before 31 October 2016.*
>
> *3. I am informed by Avram Friedman, a Manager of Midtown Acquisitions GP LLC, the general partner of the Third Plaintiff, and believe, that the defendant has also not made any payments in respect of the US$33.3 million due on or before 31 December 2016."*

42. Andrew Wright is the Senior Legal Counsel of Essar Capital (UK) Limited, a wholly-owned subsidiary of EGFL. Essar (UK) Limited is the UK-based services vehicle through which investment advisory services are provided to Essar Capital Limited, which in turn provides the same to EGFL. Mr. Wright swore his first affidavit on 9 January 2017. This affidavit was allowed to stand, notwithstanding its late filing, as Mr. Crawford, who appeared for Midtown, indicated that he had no objection.

43. In this affidavit, Mr. Wright denies the accuracy of paragraph 2 of Mr. Finestone's affidavit, referred to above. At paragraph 7, he states as follows:

> *"7. In short, at the time when the Plaintiffs filed the Affidavit of Confession, EGFL had in fact procured the making of all required cash payments to the Plaintiffs such that EGFL was current with all payments then due under the Payment Plan. This consisted of the five*

payments of US$10 million each which were originally stated to be due on 24 March 2016, 31 March 2016, 30 April 2016, 31 May 2016 and 30 June 2016 (as such payment dates were subsequently varied by agreement between the parties). The aggregate amounts of these payments totaled US$50 million; as of 18 August 2016, the Plaintiffs had received (through the transactions referred to herein) an amount of US$50 million."

44. The Plaintiffs' answer to this is as follows:-

1. The New York Judgment remains final and conclusive and is prima facie entitled to recognition and enforcement absent a substantive defence:
2. The only substantive defence raised by the Defendant's evidence is fraud.
3. The fraud defence has been concocted at the 11th hour via the filing of the Motions (namely 5015 Motion and the New Motion referred to in Finestone 2). The Motions are a collateral attack on the New York Judgment and do not affect its status as a final and binding judgment entitled to be enforced in this jurisdiction.
4. There is no substance to the fraud allegation:
   - (i) Although this court is not asked to rule on the dispute concerning the Term Sheet (about which the New York Court is presently seized), it can see for itself that there is no substance to it;
   - (ii) The Motions concern the allegation that the Term Sheet and Confession of Judgment read together did not permit the entry of the New York Judgment at the time it was entered. Correctly understood, this is a simple contract dispute, not an allegation of fraud. There is no direct allegation of 'fraud' in any of the evidence.
   - (iii) The reason why there is no direct allegation of fraud is because there is no evidence whatsoever of "*conscious and deliberate dishonesty*" by the Plaintiff in having the

New York Judgment entered, which is the standard required.

45. During the hearing in January 2017, I was informed by Counsel for EGFL that it's Motions to vacate the New York judgment might be heard on 8 February 2017. I therefore asked that both Counsel update me as to the state of the New York proceedings. By letter dated 14 February 2017, Ogier wrote on behalf of EGFL, indicating that the contents of their letter had been agreed with Maples. The letter essentially informed that the Motions were not heard on 8 February 2017, and that the US Attorneys would coordinate, with a view to having the Motions heard on 29 March 2017.

46. Since that letter, I have also received a number of other updates from Counsel, some of which I expected, and some of which I did not. I have, in addition to being updated as to the status of the New York proceedings, received information and copies of judgments of the English Commercial Court, and the Dubai International Financial Centre Court, where there were apparently applications simultaneously being made for recognition and enforcement of the New York Judgment, of which I had hitherto not been directly informed. It is convenient to list the correspondence and their respective contents as follows:

a. Letter dated 17 March 2017 from Maples, indicating that on the same date, Mr. Justice Teare, sitting in the Queen's Bench Division of the Commercial Court of England and Wales, granted Midtown's application for summary judgment on its application to recognize the New York Judgment in England and Wales. A copy of the judgment was enclosed. Justice Teare had also granted a stay of the execution of the summary judgment order upon certain terms and conditions.
b. After a number of emails objecting in principle to the way in which Maples had put the judgment of Teare J before this Court, Ogier by letter dated 12 April 2017, informed of two things:

i. *"In the New York Proceedings, a hearing took place on 29 March 2017. At that hearing Justice Chan reserved judgment on the Defendant's motions to vacate the New York Confession Judgment and granted the Defendant's motion that, until such time as Justice Chan's judgment is delivered, there should be a stay of enforcement by way of discovery (the "New York Stay").*

ii. *"Consequently, in the UK Proceedings Mr. Justice Baker today directed that execution of the UK Summary Judgment Order remains stayed until the New York Stay expires (i.e. until Justice Chan renders her decision)."* A copy of Justice Baker's order was enclosed.

c. By letter dated 13 April 2017, Maples and Calder enclosed *"For the sake of completeness,... a decision of Sir Richard Field sitting in the Dubai International Financial Centre Courts, recognizing the New York judgment."* In his judgment, Justice Field (who it seems, only had before him the judgment of Justice Teare, and not the later order of Justice Baker), took an approach towards the question of stay of execution that differed with that taken by Justice Teare.

47. At paragraph 83 - 85 of his judgment, in addition to summarising the judgment of Justice Teare, Justice Field explained his decision to grant summary judgment and to refuse a stay of execution as follows:

"83. In a judgment dated 17 March 2017, Mr. Justice Teare, sitting in the London Commercial Court, awarded Midtown summary judgment on its claim to enforce the New York Judgment in England and Wales but granted a stay of enforcement pending the determination of EGFL's motion for a stay of execution pending the determination of EGFL's .....5015, 3218 and 317 NY CPRL motions. Teare J said that he understood that the stay motion would be heard at the end of March 2017 and in his view it would be odd and arguably inconsistent with the doctrine of comity to

permit execution of Midtown's English summary judgment were the NY Supreme Court to grant a stay of execution.

84. *I take a different view on the question of a stay of execution. Unlike the London Commercial Court, this Court now knows that the NY Supreme Court did not grant a stay of execution from the bench on 29 March 2017 and also that it is not known when judgment on EGFL's motions will be handed down. It may not be for a number of months. In the meantime, EGFL is liable under the NY Judgment for the sum of USD171,769,169 and has ceased to make any further payment under the payment plan. In these circumstances justice does not, in my view, call for a stay of execution. Instead, Midtown should be free right away to execute on the immediate judgment I propose to award to it. If the NY Judgment is eventually vacated by the NY Supreme Court, EGFL can apply to Midtown for reimbursement of any sums obtained by execution and it was not suggested by Mr. Ghaffar that Midtown would be unable to meet any legally sound claim that it should repay those sums.*

Conclusion

85. *For the reasons given above, Midtown are awarded immediate judgment on their claim to enforce the NY Judgment and there will be no stay of execution."*

<u>Enforcement of a Foreign Judgment</u>

48. I accept Mr. Crawford's submission that a foreign money judgment is enforceable in the Cayman Islands if it is:

a. Made by a court of competent jurisdiction;

b. For a debt or definite sum of money (not in respect of taxes, fines or other penalty);

c. Final and conclusive, and

d. Not impeachable on the basis of fraud or contrary to public policy or natural justice.

Fraud

49. To establish fraud in relation to a foreign judgment, the requirements are that there has to be a "*conscious and deliberate dishonesty*" in relation to the relevant evidence given, or action taken, statement made or matter concealed, which is relevant to the judgment now sought to be impugned. What has to be established is actual dishonesty or recklessness. Mere negligence or inadvertence is not enough.

50. Reference was made by Mr. Crawford to ***Fletcher v Royal Automobile Club Ltd*** (2000) 1 BCLC 331 at 349 (RB/10) cited by the Bermuda Supreme Court (upheld on appeal) in ***Masri v Consolidated Contractors*** (2009) Bda L.R. 12 at [67] (RB/11) in setting out the principles applicable to establishing a prima facie case for setting aside registration of a foreign judgment on the grounds of fraud.

51. The relevant evidence, action, statement or concealment (performed with conscious and deliberate dishonesty) must be "*material*". Material means that the evidence is such that it demonstrates that the previous relevant evidence, action, statement or concealment was an operative cause of the court's decision to give judgment in the way it did. Put another way, it must be shown that the evidence would have entirely changed the way in which the first court approached and came to its decision. Thus, the relevant conscious and deliberate dishonesty must be causative of the impugned judgment being obtained in the terms it was.

52. I accept Counsel's submission that the question of materiality of the fresh evidence is to be assessed by reference to its impact on what decision might be made if the claim were to be re-tried on honest evidence.

The Test for Summary Judgment

53. I have accepted that the test for summary judgment under Order 14 of the GCR in the Cayman Islands is the same as adopted in England under the CPR. Reference was made by Mr. Crawford to my judgment in ***Montpelier Pension Trustees Limited v Crown***

Acquisitions Worldwide Limited, unreported Grand Court 8 November 2016 at [41] – [42]. Counsel submits that the general principles are as follows:

"...

1. *The Court must consider whether the defendant has a 'realistic' as opposed to a 'fanciful' prospect of success. A claim is 'fanciful' if it is entirely without substance.*
2. *A 'realistic' prospect of success is one that carries some degree of conviction and not one that is merely arguable, and*
3. *The Court is not obliged to take everything that a party says in its evidence at face value and without analysis. In some cases it may be clear that there is no real substance in factual assertions which are made, particularly if they are contradicted by contemporaneous documents. Contemporary activity or lack of activity may similarly cast doubt on the substance of factual assertions."*

54. Reference was made by EGFL to the Supreme Court Practice 1999, Rule 14/4/9. The extracts therefrom that I have found useful are as follows:

"14/4/9 Leave to defend-unconditional leave...

*The summary jurisdiction conferred by this Order must be used with great care. A defendant ought not to be shut out from defending unless it is very clear indeed that he has no case in the action under discussion." (See **Sheppards & Co v Wilkinson** (1869) 6 T.L.R.13.). See also per Lord Lindley in **Codd v Delap** (1905) 92 L.T.810: <u>"Unless it is obvious that the allegation of fraud (impeaching the foreign judgment sued on) is frivolous or practically moonshine, Order XIV ought not to be applied."</u>*

...

*Where there is "a fair probability of a defence" unconditional leave to defend ought to be given (**Ward v Plumbley** (1890) 6.T.L.R.198)……*

And in an action on a foreign judgment, where the defendant sets up the defence that the judgment was obtained by fraud, he is entitled to defend, *although the fraud alleged is such as necessitates a re-trial of the case in England (**Vadala v Lawes** (1890)25 Q.B.D. 310) and where it is alleged that the foreign judgment has been obtained by fraud or in proceedings which offended against English views of substantive justice, leave to defend should be given whether the fraud goes directly to the cause of action or is collateral fraud (**Jet Holdings Inc. v Patel**) [1988] 3 W.L.R. 295, C.A.)"*

55. Reference was also made by Mr. Payne to <u>Dicey, Morris & Collins, The Conflict of Laws,</u> 15th Edition, Rules 42 and 50. I found the passage at 14-023 helpful in considering whether the New York Judgment is final and conclusive. This paragraph reads as follows:

> *"14-023 No foreign judgment will be recognized or enforced in England at common law unless it is "final and conclusive". The expression is repetitive but, having been rendered familiar by many judicial statements, is reproduced in the 1933 Act. The test of finality is the treatment of the judgment by the foreign tribunal as a res judicata. "In order to establish that [a final and conclusive] judgment has been pronounced, it must be shown that in the court by which it was pronounced, it conclusively, finally, and forever established the existence of the debt of which it is sought to be made conclusive evidence in this country, so as to make it res judicata between the parties": it follows that the possibility of an appeal to a higher court does not alter the finality of the judgment. <u>A foreign judgment that is liable to be abrogated or varied by the court which pronounced it is not a final judgment. But a default judgment may, in this sense, be final and conclusive, even though it is liable to be set aside in the very court which rendered it.</u> Otherwise, the clearer the claimant's case, the more useless his judgment would be. <u>The test has been stated as whether the default judgment was "entirely floating as a determination, enforceable only as expressly provided and in the course of that enforcement</u>*

subject to revision", in which case it will not be final, or "given the effect of finality unless subsequently altered, in which case it will be final." (My emphasis)

DISCUSSION AND ANALYSIS

56. In my view, there is no real triable issue about foreign law involved in this case. Matters have continued to unfold and it is obvious that EGFL has proceeded with applications by Motion to vacate the New York Judgment. Justice Chan has reserved her decision on those Motions.

57. It seems clear to me, that the New York Judgment, whilst in some ways analogous to a judgment on admissions, it is more analogous to a default judgment, because the parties disagree as to whether the conditions for the entry of the Confession of Judgment had arisen. It seems to me that this Judgment falls into the category referred to in Dicey, where the New York Judgment has the effect of finality, unless subsequently altered. This means it is therefore a final and conclusive judgment.

58. In my judgment, EGFL does have a real prospect of succeeding on a defence that the Confession Judgment was obtained by "*fraud, misrepresentation or other misconduct*" as construed under New York law, enforcement of the Confession Judgment would be contrary to public policy or that the Confession Judgment was obtained in breach of the principles of natural justice. I do not wish to go into this in great detail, but some of my reasons for so holding are that, although the Affirmation in support of the Confession Judgment referred to certain terms of a Term Sheet, the Term Sheet was not attached or disclosed to the New York Court. Also, EGFL assert that the affirmation is based on a default under the guaranty that predated the Term Sheet after the parties had entered into, and EGFL had performed, under the Term Sheet, and which settled and compromised the pre-existing default under the guaranty.

59. Further EGFL claim that both the Confession of Judgment and the Affirmation in Support of the Entry of Judgment were filed without any advance or other notification to it.

60. EGFL has admitted that it has not made the other payments due after the New York Judgment was entered and that is of some concern to this Court. However, a lot has been going on in this case and this Court cannot speculate as to whether and how the entry of the New York Judgment may have affected EGFL's ability to finance the payments and debt reduction; my main concern is with whether there is a defence to the claim before me, carrying a degree of conviction.

61. As I understand it, a stay has now been granted by the New York Court. In those circumstances, even if I am wrong in finding that Midtown is not entitled to summary judgment, justice would in my view plainly require a stay of execution pending the determination of the New York motions, or until the New York stay expires. Although no express application was made by EGFL for such relief, Mr. Payne invited me to use my inherent jurisdiction to grant a stay in the event that I came to the view that Midtown were entitled to summary judgment.

62. However, as I have said, in my judgment the Defendant has satisfied me that there are issues to be tried. The application for Summary Judgment is therefore refused, with costs to EGFL to be taxed if not agreed on a standard basis.

63. I appreciate that I have the misfortune to have disagreed with two distinguished Judges of two very experienced Courts, but I have to make the decision based on my own understanding of the law and facts as presented to me at this time and as the events have unfolded, and make a decision that deals with this case justly.

THE HON. JUSTICE MANGATAL
JUDGE OF THE GRAND COURT