IN THE SUPREME COURT OF NEW ZEALAND SC 92/2011

BETWEEN **ROBERT MICHAEL SYMONS**
First Appellant

GREGORY JOHN SYMONS
Second Appellant

ROBERT MICHAEL SYMONS AND ANNETTE SYMONS AS TRUSTEES OF THE ST ANTHONY TRUST
Third Appellant

GREGORY JOHN SYMONS, CLAIRE ANNE SYMONS AND LORRAINE JEAN SYMONS AS TRUSTEES OF THE DRAKENSBERG TRUST
Fourth Appellant

AND **WILTSHIRE INVESTMENTS LIMITED**
Respondent

Hearing: 17 April 2012

Court: Elias CJ
Tipping J
McGrath J
William Young J
Chambers J

Appearances: S P Bryers and M A Karam for the Appellants
D A Laurenson for the Respondent

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5 **CIVIL APPEAL**

MR BRYERS:

May it please the Court, I appear for the appellants, together with my learned friend Matthew Karam.

ELIAS CJ:

Thank you Mr Bryers, Mr Karam.

MR LAURENSON:

Your Honours, Laurenson for the respondent.

ELIAS CJ:

Thank you Mr Laurenson. Yes Mr Bryers.

MR BRYERS:

Yes, as your Honour pleases, the issue in this Court is a very narrow one. It arises essentially because of the refusal of the respondent to produce what the appellants say is a critical document, namely the settlement agreement, whereby they disposed of the shares that Opus and Fibroin had held in the Hats company and the sole issue, as identified by the Court, is whether some rejudgment should have been entered, despite non-production of that agreement.

Now it is common ground that the effect of the settlement agreement was to dispose of the only asset of the debtor Opus, that is, the shares I've referred to which were held in Hopscotch.

On the face of things, the shares had a value of $4.7 million dollars which was the balance that Hats had agreed to pay for those shares pursuant to an earlier settlement agreement in 2007.

The appellants have disposed that they were heavily reliant on the value of those shares being realised, in order to discharge their liability under their guarantees.

The respondent has never disputed that the amounts received by it under the agreement are relevant but the respondent has claimed, or appears to claim, that the only amount received was $1.4 million or less than one-third of the face value of the shares. The respondent has consistently refused, despite requests both before and after the proceedings were instituted, to produce the best evidence of what has been obtained for the shares, that is, the settlement agreement itself.

Of course what the appellants want to see is not just what Opus may have received pursuant to the settlement agreement but what, in fact, was the total package of benefits that was obtained for the shares when they were disposed of pursuant to the agreement.

CHAMBERS J:

There is no evidence though, is there, that Wiltshire Investments Limited was a party to the settlement agreement?

MR BRYERS:

Well I think there is a suggestion that there might have been, Sir.

CHAMBERS J:

Is there?

MR BRYERS:

Yes, and not only Wiltshire Investments but another Wiltshire company as well. Shall I take you to that?

CHAMBERS J:

Yes.

ELIAS CJ:

Yes, that would be helpful.

MR BRYERS:

Well perhaps I could just start, if I could ask you to look at volume 1 at page 93. This is an affidavit by Mr Leicester Gouwland who is a chartered accountant in Auckland, and who was a director of Wiltshire Investments Limited. At page 93 paragraph 10, he mentions in the final sentence of that that paragraph that, "Most of the funding of the litigation that had been undertaken," — that's the litigation between Opus and Hats — "had been met by Wiltshire Property Management Limited." So I just ask you to note that, that he says, "The funding of the litigation had been met by Wiltshire Property Management —

TIPPING J:

He doesn't say "had been met", he said, "would have been met"?

MR BRYERS:

I'm sorry?

TIPPING J:

Well —

MR BRYERS:

"In fact most of the funding of the litigation was met by Wiltshire Property Management Limited."

TIPPING J:

I must be reading something different Mr Bryers. I read, "would have been met".

ELIAS CJ:

In paragraph 10.

TIPPING J:

Oh, it's in 10, I'm sorry, I'm reading 12. I beg your pardon.

MR BRYERS:

No, 10, final sentence.

TIPPING J:

I beg your pardon.

MR BRYERS:

Then if I could take you to volume 2 at page 218. Now this is a bundle of documents under this tab 33, a bundle of documents that was produced by Mr Sills, the receiver of Opus. The documents that came into existence at the time that the settlement was achieved and the purpose of these documents was actually to get rid of Mr Gregory Symons as a director. He was, at that stage, the sole director of Opus Fintek Investments Limited. The purpose of these documents was to get rid of Mr Gregory Symons and have him replaced by Mr Alan Wiltshire as a director. So we have this collection of documents. Now —

ELIAS CJ:

Sorry, who did you say produced these, the receiver —

MR BRYERS:

Mr Sills —

ELIAS CJ:

Mr Sills, yes, okay.

MR BRYERS:

— the receiver and the third of the documents, at page 220, is a notice given by Mr Wiltshire after he's been appointed as a director, of his interests in the transaction which is about to be entered into, that is, the settlement agreement.

At paragraph 2, he discloses those interests involving him personally and the companies of which he was a director and shareholder, namely Wiltshire

Investments Limited and Wiltshire Property Management Limited. Now that's the only evidence I can find on this particular point but it suggests that Wiltshire Investments Limited and Wiltshire Property Management Limited both had something to gain from the settlement and here he is disclosing that potential interest.

CHAMBERS J:

Well I suppose Wiltshire Investments Limited was going to gain from it because it would enable Opus to pay it.

MR BRYERS:

Yes, that's quite so Sir, I accept that. Whether that's the only benefit Wiltshire Investments Limited was to get is what we don't know.

WILLIAM YOUNG J:

There's a sort of, some tactical problem, does the "that" in item 2 refer to the settlement or the proceedings? Presumably it's only the — it must be the settlement because Wiltshire Property Management wouldn't have been a party to the proceedings.

MR BRYERS:

No, it wasn't. I think if you look at tab 34, you'll see who the parties to the proceedings were and of course, neither of the Wiltshire companies were parties.

ELIAS CJ:

What — I'm sorry, I should have picked this up, what discovery was obtained in these proceedings? Was it —

MR BRYERS:

No, it's a summary judgment where no —

ELIAS CJ:

So it was no —

MR BRYERS:

— discovery has occurred —

ELIAS CJ:

— discovery, it was just what the parties put before the Court, was it?

MR BRYERS:

Correct, yes.

TIPPING J:

At the moment, it's just an assertion that all they got out of it was $1.4 million.

MR BRYERS:

Correct.

TIPPING J:

An assertion on oath but nevertheless an assertion.

MR BRYERS:

Well and even then it's a very carefully worded assertion that Opus, that's all Opus got out of it.

TIPPING J:

Quite.

ELIAS CJ:

And made late.

CHAMBERS J:

No, no, it's an assertion on oath by Mr Sills who is a barrister and the receiver and by Mr Wiltshire, that the total payments received by Wiltshire Investment from Opus were $1.4 million.

MR BRYERS:

Quite so.

TIPPING J:

Payment though.

WILLIAM YOUNG J:

But that's — this is in terms of the chain, so that the only money they got via Opus was —

MR BRYERS:

Correct. What we don't know, and what we want to know, is what was the total package of benefits that was obtained for the shares ostensibly worth $4.7 million.

CHAMBERS J:

By whom?

MR BRYERS:

It doesn't matter in my submission.

CHAMBERS J:

Yes it does, doesn't it, because if —

MR BRYERS:

Well I don't think it, no I —

CHAMBERS J:

— it's money received by Opus. Let's suppose for the sake of argument that Opus did receive or is entitled to another million dollars or a million dollars in kind, let's assume that, that doesn't affect Wiltshire's claim as assignee of the bank against these guarantors who under their guarantees are principal debtors, they still have to pay Wiltshire Investments. They may have a claim

in the receivership against the receiver and he may have to account to them but that's not something that affects Wiltshire Investment as assignee is it?

MR BRYERS:

Well my submission is that it is, Sir. And I am relying here on *Barclays Bank Plc v Kingston* [2006] EWCA 533 (QB), which we put in the other day in our memorandum, and which I see, in any event, is in the respondent's authorities at tab 9. I'm relying on paragraph 16 of that judgment, which is the section dealing with the duties of a security holder who realises securities. What is said here, is that the creditor is normally under no duty to the principal debtor or to any sureties to realise any securities. He cannot be compelled to realise a security at any particular time or at all, but if he does realise a security he must do so prudently, and with reasonable care so as to seek to obtain a proper price.

CHAMBERS J:

Well, who is the creditor that you say fits within this proposition of law in this case?

MR BRYERS:

Well at the particular time it was clearly Wiltshire. The bank has assigned all its rights to Wiltshire.

CHAMBERS J:

But it's not realising a security, it's simply suing on a debt.

WILLIAM YOUNG J:

No, but it was realising security through the receiver in the underlying litigation.

MR BRYERS:

It sued on the debt after it had realised the security.

TIPPING J:

It sued on the balance of the debt.

MR BRYERS:

The balance of the debt.

CHAMBERS J:

It didn't, the receiver was acting as agent for Opus when he did what he did and if he hasn't done that properly he will be liable as the receiver.

MR BRYERS:

I'm not arguing whether he did it properly, Sir, nor do I accept, with respect, that a receiver is merely the agent of the debtor company because he's also acting, obviously, on behalf of the debenture holder. I think that's well-established.

WILLIAM YOUNG J:

And particularly if the debenture holder is actually a party to the settlement agreement.

MR BRYERS:

Well quite so which, there's a suggestion in the documents —

WILLIAM YOUNG J:

Which it may have been.

MR BRYERS:

— it may have been.

TIPPING J:

Well the last sentence in paragraph 16 to which you are helpfully referring us Mr Bryers, would tend to — tends to sort of forecast what you, your client is concerned about.

MR BRYERS:

That's right. We want to know what the full value of the security that was obtained was because the debt should be reduced accordingly.

TIPPING J:

They say it was 1.4 million but they choose not to produce the document which —

MR BRYERS:

Well that's what I say Sir, but what they say is that Opus, as Justice Chambers has pointed out, has paid Wiltshire 1.4 million. They don't say that that's all they got for the shares.

CHAMBERS J:

Who's they?

MR BRYERS:

Wiltshire.

CHAMBERS J:

That Opus got?

MR BRYERS:

Wiltshire.

CHAMBERS J:

Oh, that Wiltshire got.

MR BRYERS:

It doesn't say that that's all Opus got for the shares.

CHAMBERS J:

But what does it matter what Opus got for the shares. What matters in this case, isn't it, is what Wiltshire got?

MR BRYERS:

No I don't accept that based on this final sentence that the — in paragraph 16. The liability to the creditor is to be reduced by the full value of the security realised. Now I suppose we could take an extreme case, Sir, and the deal was that Opus was only going to pay Wiltshire $1 and the rest of the money was going to go somewhere else.

CHAMBERS J:

That who was going to pay who?

MR BRYERS:

Opus.

CHAMBERS J:

Was going to pay?

MR BRYERS:

Wiltshire $1 and the rest of it was going to go somewhere else, other Wiltshire companies whatever.

WILLIAM YOUNG J:

Say to the Wiltshire Property Management Company.

MR BRYERS:

Quite so. Surely Wiltshire couldn't come along and say, well, we're going to sue for the whole debt less $1. How would that be complying with good faith duties or the duty to give full value for the —

CHAMBERS J:

Well the answer may be, and I'm only testing propositions here, but the answer may be that of course in those circumstances your people would have a claim against the receiver, potentially, who had failed, whose job it was to take reasonable care but they wouldn't have a claim, would they, against

Wiltshire because all we're concerned about is, well, how much did Wiltshire get as assignee.

MR BRYERS:

I don't see the appellant's case, Sir, at least at this stage, as involving a claim against anybody. What it involves is requiring the creditor to prove the quantum of the claim and what we're saying is that unless and until the creditor establishes what value it got for the security it realised it is not entitled to summary judgment.

TIPPING J:

It must be common ground that they are bound to give credit for the value of the security realised one would have thought. The question —

MR BRYERS:

That's certainly what that case says and I can't see why that wouldn't be the case.

TIPPING J:

The question crucially is, for summary judgment purposes, does one rely on a statement which is sent to represent the effect of a document but the document is not produced.

MR BRYERS:

Well obviously it's our case that you can't do that.

TIPPING J:

Yes, quite, I'm just teasing the issue in my own mind.

MR BRYERS:

And as I say, I see it essential that the document be produced in order to satisfy that particular aspect of the claim, to demonstrate just exactly what value has been obtained for the security.

TIPPING J:

Well one would have thought ordinarily it would be produced unless there is some very cogent reason for it not being produced, in which case the Court might have to go on lesser evidence.

MR BRYERS:

Yes, I agree with that, with respect Sir, and of course it's our case that no cogent reason whatsoever has been put forward. The only two reasons that have ever been advanced were that the document was confidential but that has really been abandoned because while it may have a clause, confidentiality clause in it —

ELIAS CJ:

Is that an assertion too?

MR BRYERS:

Yes.

CHAMBERS J:

Although that’s not the ground on which the Court of Appeal relied is it?

MR BRYERS:

No.

CHAMBERS J:

Their ground was —

MR BRYERS:

Relevance.

CHAMBERS J:

— that it was irrelevant.

MR BRYERS:

Correct. So that means of course the Court accepting the party's version of what is or is not relevant, in my submission, that's just not good enough.

ELIAS CJ:

Because really the key issue in the Court of Appeal judgment was the single sentence saying we're satisfied of this question of fact on the basis of what was said in the affidavit.

MR BRYERS:

Yes.

TIPPING J:

I have great difficulty —

McGRATH J:

There is of course no other evidence on that, Mr Bryers, but your point I think is that because this is summary judgment you're entitled to disclosure because the document will be relevant given the possibility of value perhaps being obtained in some other way.

MR BRYERS:

Correct.

TIPPING J:

I would have thought it was very hard to say it was irrelevant. It surely must be at least potentially relevant and the real question is, against that background, whether an assertion on oath is enough to displace, if you like, the ordinary normal rule, at least as far as I'm concerned, that you produce a document rather than paraphrase its effect.

MR BRYERS:

Well I agree, with respect Sir, and the repercussions, of course, of allowing a case to proceed in this sort of way are enormous. I mean, it would mean that

anybody applying for summary judgment could come along and say well, I'm not going to produce the document but I'm telling you this is what is in it and the Court has to accept it.

CHAMBERS J:

Well Mr Bryers, I accept Justice Tipping's proposition to you and if the document is relevant then clearly, well it would seem, that the best evidence rule says that you must produce the document and you'd be on very strong ground. But can we just test why you say it is relevant because, it seems to me at the moment and it seemed to the Court of Appeal and I stress I'm just testing propositions, that what is crucial is what Wiltshire says it received.

WILLIAM YOUNG J:

Well, isn't this the point of difference? Justice Chambers is putting to you that it's — Wiltshire is only concerned with what it receives. You say that Wiltshire has to prove that it — either Wiltshire has to prove that it took proper steps to realise value, given that it did execute on the security, or alternatively the possibility that it didn't provide, or may provide, a defence —

MR BRYERS:

Correct.

WILLIAM YOUNG J:

— and either way it's relevant.

MR BRYERS:

Yes.

WILLIAM YOUNG J:

It's not, the inquiry is not simply money laid out by the ASB and less money received by Wiltshire.

MR BRYERS:

No. I suppose the starting point on relevance is the document is clearly relevant at least to the extent that Wiltshire received money under it, but we're saying —

CHAMBERS J:

Well, that's where you have —

MR BRYERS:

That's where the Court of Appeal got to.

CHAMBERS J:

— slipped over a proposition there. The case could have been — this is the proposition that I think the Court of Appeal would put against you and which Mr Laurenson would put against you. The case could have been advanced without saying anything about the agreement but simply that Wiltshire did receive from the receiver of Opus $1.4 million, however that was acquired, without saying a thing about the settlement agreement.

MR BRYERS:

Well I don't, with respect, accept that Sir because of — and I again rely on the *Barclays Bank* case and the very clear statements of what it is that the creditor has to do once the creditor decides to realise securities and which is what happened here. And, of course, the appellants were to some extent involved in that but it's quite clear that once the creditor seeks to realise securities that various duties arise. It must be done prudently, with reasonable care, so as to seek a proper price. It's a duty that's owed both to the principal debtor and the guarantor. The guarantor's liability can be affected in two respects, the judgment says. First, obviously, if he pays before realisation he's entitled to an assignment of the security. Not relevant here. But secondly, his liability, like that of the principal debtor, falls to be extinguished or reduced by the amount realised by this creditor when he realises the security assuming it to be sufficient.

CHAMBERS J:

Now the *Cuckmere* principle, which Mr Justice Stanley Burnton is referring to there, has been codified in New Zealand in the Receiverships Act, hasn't it? Under the —

MR BRYERS:

Yes.

CHAMBERS J:

— relevant section which I haven't looked at, does the obligation fall on the receiver or on the debenture holder or both?

MR BRYERS:

Well, I haven't got it with me Sir but I think under the Act it falls on the receiver.

CHAMBERS J:

Exclusively on the receiver, I think.

MR BRYERS:

I think that may be correct.

CHAMBERS J:

So how does that help you because that would be a claim one might have against Mr Sills, potentially against Opus but not against anyone else on the principle that you're quoting.

MR BRYERS:

Well, I again revert to what I said before Sir, that I don't, we're not here alleging that we have a claim against anybody. We're here alleging that in order to obtain summary judgment, the creditor must prove the amount of its claim, and where it has realised securities, whether through a receiver or otherwise, it must demonstrate what value was received for the security.

CHAMBERS J:

Well, how does that proposition stand that the creditor must show all these things when the guarantee documents entered into with the bank specifically said that the guarantor was not entitled to question the figures that the creditor, in that case the bank, put forward, matters referred to in the memo, the minute that the Court put out?

MR BRYERS:

Yes well that, of course, raises a whole lot of new issues, as the minute itself sets out and I'm prepared to delve into that if necessary but our position is that the certificate here is irrelevant because it's never been pleaded or relied upon or argued.

CHAMBERS J:

But even if that is so, the proposition I'm putting is that doesn't that indicate that this was the very sort of dispute which the guarantors and ASB at least agreed could not arise? You weren't entitled to question the amount which the creditor said was owing.

MR BRYERS:

Prima facie that's correct. However, as the minute signals, there are exceptions to that rule, and I would have thought that acting in bad faith, for example, by diverting some of the funds from the realisation of the security to places other than the bank, would be a breach of that good faith entitling —

WILLIAM YOUNG J:

Well, a certificate from a bank is one thing. A certificate from a private individual is another, I guess.

MR BRYERS:

Well, that's another point. I mean, there's a decent argument that in fact that clause is non-assignable. We can talk about that if necessary, but there is authority in this country —

TIPPING J:

I would have thought there were arguments of public policy involved here too.

MR BRYERS:

That's right and there's clear authority in the English Courts that these sorts of certificates are tolerated because they're coming from a bank but looked on a good deal less favourably if it's a non-banking person involved and, of course, here for the appellants to be required to accept a certificate from a former business partner with whom they've fallen out is really stretching it to the limit.

CHAMBERS J

Yes, well I accept all those arguments. I'm merely testing the proposition that you made that the starting point is that the creditor has to prove all these things whereas at the prima facie, the default position, I'm suggesting to you, under the guarantee, was that at least if the bank was the creditor it didn't have to prove anything other than the assertion as to what the amount owing was.

MR BRYERS:

Yes, that's so and I suppose one relies on the bank acting in good faith and not doing what we're suspicious of here, diverting funds elsewhere.

TIPPING J:

The jurisprudence in this area, of course, substantially predates modern technology and that sort of thing and what I'm forecasting if we have to get into this is I have an anxiety about the whole concept of a conclusive certificate clause. Let us hope and maybe a vain hope, we don't need to go into it.

MR BRYERS:

Well, that's certainly our position Sir.

TIPPING J:

Well, you may or may not find yourself vindicated Mr Bryers, so I think you're going to have to, frankly, you're going to have to address this, at least from my point of view because there are issues here of major commercial significance, that unless we can ignore them and pretend it hadn't happened because there wasn't clause in here, we're going to have to deal with it, aren't we because Mr —

MR BRYERS:

Well I was hoping —

TIPPING J:

– Laurenson is bound to get up and say oh well, you know, we've effectively given a certificate, it's assignable, end of story. Now whether it's better for you to wait until you see what he says about it, I don't know, that's over for your forensic skills.

MR BRYERS:

Well that's what I was proposing to do but I also signal Sir that if the Court does intend to get involved in this matter, I would be seeking an adjournment to consider it properly because —

TIPPING J:

Well I can understand that —

MR BRYERS:

— it only came up five working days ago and we've done a fair bit of work, I'm not satisfied we're totally on top of it.

WILLIAM YOUNG J:

Well is there any indication that the point is relied on by the respondent?

MR BRYERS:

We've received no indication of that.

TIPPING J:

Well, let's find out.

ELIAS CJ:

Let's wait.

TIPPING J:

Let's find out.

ELIAS CJ:

You want to find out now?

TIPPING J:

I think it would be helpful to find out now.

ELIAS CJ:

All right. Mr Laurenson, can you help us?

MR LAURENSON:

Your Honours, the position of the respondent was initially based on the submissions as to how the 2009 agreement was relevant. Given that it appears what is being alleged is that it is irrelevant — sorry, it's relevant because it is being claimed that there's been a breach of an equitable duty on the part of the creditor in realising the security and that that gives rise to an equitable set-off against the claim owed under the guarantee and that it's therefore – it would be accepted that that type of claim isn't precluded by one of these exclusive evidence rules – sorry, evidence is not your Honour, it's —

ELIAS CJ:

Isn't. So you're not relying on the clause?

MR LAURENSON:

Well, well, I wasn't, your Honour but the way the argument is developing in terms of what relevance is being placed on the 2009 agreement, I think I'm going to have to reserve my position on that and if —

WILLIAM YOUNG J:

Well that's not really satisfactory. I mean, the point was noted five days ago, if you were going to rely on it, you could have given notice. Mr Bryers wouldn't have had to come down with Mr Karam from Auckland and an adjournment could have been granted.

MR LAURENSON:

Well, well —

WILLIAM YOUNG J:

Now you don't really want to do this on the wing.

MR LAURENSON:

No, well I accept that if what is being relied upon to question the amount owed under the guarantee is this ability to rely on a breach of an equitable duty, then the exclusive evidence clause doesn't prevent that.

CHAMBERS J:

Well, with respect —

TIPPING J:

I think there's a point against you before you get to that point and it's the very simple one, a simple conception, that you haven't properly proved quantum without producing the document. I think that's — Mr Bryers, correct me if I'm wrong but that seems to be the essence of the first argument at least.

ELIAS CJ:

Well that's really the way that Mr Bryers is putting it, he's not — he's saying that you're the summary judgment claimant and you have to prove quantum.

CHAMBERS J:

I really think, Mr Laurenson, that what the Chief Justice has put to you is a very simple proposition. You know what Mr Bryers' argument is. The Court raised a possible, another possible matter which we didn't know how relevant it was, we invited the parties to think about it. You've had five days to make up your mind. It's no point coming along now and saying you reserve your position. You've either got to say yes, I do rely on the conclusive evidence point as another factor to my argument, or I don't rely on it. It's as simple as that. If you don't rely on it then we've got no problem, we go ahead. If you do rely on it we may have to consider what the implications of that are but there's no point just saying you want to reserve your position.

MR LAURENSON:

Put like that your Honour, my instructions were not to rely on it.

CHAMBERS J:

Right, thank you.

ELIAS CJ:

All right, thank you.

MR BRYERS:

Now, I've somewhat lost the train of the argument. I think I had been asked to explain why the settlement agreement was relevant —

WILLIAM YOUNG J:

Well, can I just put — it's not just a matter of proving the claim, the essence of summary judgment is to prove that there's no defence —

MR BRYERS:

Yes.

WILLIAM YOUNG J:

— and one of those things —— and tied up with that, one of the things that would be tied up with that, would be proving that reasonable steps were taken to realise the security —

MR BRYERS:

Yes.

WILLIAM YOUNG J:

— and in particular, that reasonable — that there wasn't, as it were, a diversion of what would normally be the realisation of the security.

MR BRYERS:

Yes, I agree with all that —

WILLIAM YOUNG J:

So it's not just a matter of form —

ELIAS CJ:

Yes, I'm sorry, I was very sloppy and said yes —

TIPPING J:

Well no, I started — my brother Young has put it exactly right.

ELIAS CJ:

Yes, yes.

TIPPING J:

The plaintiff has to exclude, on a reasonable basis, there being any defence.

MR BRYERS:

And the settlement agreement being at the heart of the case, in my submission, you have to produce it to eliminate potential defences relating to

the realisation of the security. In fact I see that — I was going to say something like that in my notes.

There's also, one of the duties we've identified that a creditor has, is to disclose all material facts and documents bearing on the amount of the appellants' liabilities under their guarantees, particularly in response to specific requests for disclosure. And here there was a specific request for disclosure by Mr Gregory Symons at the time the settlement was being negotiated. That's to be found at volume 2, tab 28, page 212.

WILLIAM YOUNG J:
Sorry, what page Mr Bryers?

MR BRYERS:
Page 212, tab 28. Now this is an email that Mr Symons sent to the receiver Mr Sills, following a request by Mr Sills which is under the previous tab, requesting him to sign off on the settlement and in his penultimate paragraph, or perhaps I — he starts off by saying that he thinks it would be imprudent for a director to simply sign off because a shareholder requests it. That's in the first paragraph, and then in the penultimate paragraph, he asks for a copy of the proposed settlement agreement and any legal advice on the merits of the settlement which would help in considering the request.

That wasn't done, the settlement agreement was never sent to him, either in draft or in final form. In fact, the receiver's next step was to have him removed as a director and replaced by Mr Wiltshire and of course, since the proceeding itself has got underway, the appellants have been consistently clambering for the document to be produced and that's been resisted by the respondent —

TIPPING J:
You earlier indicated there were two grounds on which the document was declined to be produced. One was this confidentiality which has fallen away. Just remind us, would you, what was the second one?

MR BRYERS:

Relevance.

TIPPING J:

Relevance, right.

MR BRYERS:

It was said that the document was only relevant to the extent that money was received by Wiltshire by Opus and, I suppose, that a summary from the respondent as to what that part of the agreement provided was put forward as being adequate for the purposes of summary judgment. Of course —

McGRATH J:

It's really saying, from your perspective Mr Bryers, that steps to realise the security weren't relevant, what was relevant is how much came in?

MR BRYERS:

Yes, that's right, the —

CHAMBERS J:

Came in to whom?

MR BRYERS:

To Wiltshire.

CHAMBERS J:

So what we're invest —

MR BRYERS:

From — no, no, came into Wiltshire from Opus, getting this right. So that for example —

CHAMBERS J:

Well can you just, in a very quick list, just give us the page references perhaps, or the documents you rely on for the supposition that Opus has given more value to Wiltshire than the $1.4 million which Mr Sills and Mr Wiltshire have referred to in their affidavits.

MR BRYERS:

There's no such evidence and that's not the point of the agreement, with respect, the point of the argument is whether Wiltshire or other Wiltshire companies received other benefits under the agreement over and above what may have been received through Opus.

WILLIAM YOUNG J:

And you'd say it's the onus of proof is on the plaintiff —

MR BRYERS:

Yes.

WILLIAM YOUNG J:

— to eliminate defences —

MR BRYERS:

Eliminate that possibility.

WILLIAM YOUNG J:

— to a reasonable standard.

CHAMBERS J:

Let's suppose for the sake of argument that Hats paid $1 million to Mr Wiltshire personally —

MR BRYERS:

Yes.

CHAMBERS J:

— which has not been disclosed, let's assume that.

MR BRYERS:

Yes.

CHAMBERS J:

How does that assist the guarantors with respect to the claim that's being made by Wiltshire Investments as assignee?

MR BRYERS:

In two ways I would suggest. Firstly, because they are entitled to have deduced from their debt the full value of the security as realised which in the case that you've just cited, so it would be 1.4 plus one million. In other words it doesn't matter who got the benefit —

CHAMBERS J:

But hold on, what was the nature of the claim that Opus had against Hats?

MR BRYERS:

Opus had entered into a settlement agreement in 2007 with Hats whereby Hats had agreed, Opus had agreed to transfer all its shares to Hats in this company called Hopscotch. And under that agreement the first payment had been made by Hats, but there were two further payments still to be made having a total value of $4.7 million, so on the face of things the shares had a value of $4.7 million. Now on the evidence we've got so far those shares have been disposed of under the second settlement, the 2009 settlement for only 1.4.

CHAMBERS J:

Right, right, so Opus' claim against Hats was based on a failure by Hats to pay a debt that was owing to it —

MR BRYERS:

Yes.

CHAMBERS J:

— an unsecured debt.

MR BRYERS:

I don't —

CHAMBERS J:

Well it may not matter one way or the other.

MR BRYERS:

Well, no, it was secured in the sense, it was secured in the sense that they held the shares until they were paid.

CHAMBERS J:

Well that may be but how that's got — whether the receiver has made a good deal in that respect, vis-a-vis Hats, has got nothing to do with – I can't, what I'm having trouble with is seeing how that affects either the bank originally or Wiltshire Investment as assignee. Whether he's done a good or a bad deal there.

MR BRYERS:

It's not a question of whether he did a good or a bad deal, with respect, so it's a question of how much money did they get for those shares.

WILLIAM YOUNG J:

You say that if the receiver diverted $1 million direct to Wiltshire this could only have been done on the instructions of Wiltshire and did not represent an appropriate realisation of the security.

MR BRYERS:

Well, that's one but I don't need to prove that.

WILLIAM YOUNG J:

No.

MR BRYERS:

At the moment they disposed of those shares for, as we've talked about, for 2.4 million we're entitled to a credit for 2.4 million.

WILLIAM YOUNG J:

And of course what we're having to do is speculate about something which could be very easily resolved by producing a document.

MR BRYERS:

Of course, and the fact that it hasn't been produced is curious to say the least.

WILLIAM YOUNG J:

Well it's a sort of bootstraps argument which, to my way of thinking, is quite a powerful one. Why go through all this hassle come — unless it's an agreement you don't want to produce.

MR BRYERS:

Correct.

ELIAS CJ:

Because it’s immaterial, because there is no other reason not to.

MR BRYERS:

There’s something in it that they don't want us to see.

TIPPING J:

Well that’s a reasonable inference, well when I say — you say that’s a reasonable inference to be drawn from the circumstances and that if that is so then they haven't excluded defences.

MR BRYERS:

Correct.

CHAMBERS J:

So your proposition is that if a million dollars did go to Mr Wiltshire personally, Wiltshire Investments would have to give credit for that.

MR BRYERS:

Yes.

CHAMBERS J:

And just tell me why it is that Wiltshire Investments has to give credit for that money which it didn't receive?

MR BRYERS:

Pursuant to its duty to take care when it realises a security.

CHAMBERS J:

But it didn't have that duty. Under the agreement, and I think it's clause 8.2 of the security deed, but the receiver is simply the agent of Opus and it alone is responsible for the acts and defaults of misconduct of the receiver, you've agreed to that.

MR BRYERS:

Yes, but I am saying that the creditor nevertheless had an equitable duty to act in good faith, and if it was party to an agreement whereby funds were diverted to some other person, such as Mr Wiltshire personally, it can't take advantage of that fact. It has to give credit for that amount of money when it sues the guarantors.

WILLIAM YOUNG J:

But at this point even if all else fails the credit contracts would come in because this would be extremely oppressive behaviour to divert an asset away from —

MR BRYERS:

I must admit I hadn't thought of that, yes.

WILLIAM YOUNG J:

— the debtor's account.

MR BRYERS:

Yes well I will gratefully adopt that argument Sir.

WILLIAM YOUNG J:

But I mean it's, if the deal were as dirty as is proposed, that a million dollars is diverted to Mr Wiltshire then it would be extraordinary if that somehow or other wouldn't be to the benefit of your clients.

MR BRYERS:

I would have thought so Sir.

TIPPING J:

Well is it possible to put it this way that whatever value Hats gave was for the shares and however one gets there, at least for summary judgment purposes, you should be entitled to see what the full value that Hats gave.

MR BRYERS:

That's exactly the argument Sir.

TIPPING J:

And if you look at it like that what value was given then who precisely received it —

MR BRYERS:

It doesn't matter.

TIPPING J:

— some of these issues may just evaporate and I'm saying for summary judgment purposes.

MR BRYERS:

That's right.

TIPPING J:

Down the line it may have some technical relevance as to who did what to who, so to speak, but at the moment Hats gives the value and you are entitled to see what value Hats gave.

MR BRYERS:

That's exactly the argument Sir and, as you say, further down the line when we actually, if we do get to this stage and we find out what is in that settlement agreement then of course all the sorts of possibilities that are being explored would have to be addressed but at this stage it's academic. The first step is they must produce a settlement agreement.

TIPPING J:

Well we should be able to — if they were to have done so it shouldn't be terribly difficult to work out on the face of the agreement, what value Hats gave for the shares never mind to whom.

MR BRYERS:

Exactly.

TIPPING J:

Unless there is some collateral transaction but we're not talking about that. Maybe there's reference in the document to another transaction.

MR BRYERS:

Well there could be, I don't know.

TIPPING J:

We just don't know.

MR BRYERS:

The possibilities are endless really. There may have been, I mean I've thought perhaps there may have been some ongoing investment by Mr Wiltshire or one of his companies in the Hopscotch operation provided for in the agreement, I don't know.

TIPPING J:

But the whole point of summary judgment is that it is sufficiently clear that you can bypass discovery and derogatories and all other preliminary skirmishing.

MR BRYERS:

Yes, and that’s obviously a right which has to be respected by full disclosure of all relevant material, in my submission, and that wasn't done here.

TIPPING J:

Well I signal that unless there is some cogent reason a document that is at least prima facie relevant or potentially relevant, I would have unease at entering summary judgment without seeing it.

MR BRYERS:

Yes. Yes it's —

TIPPING J:

And Mr Laurenson may be able to remove the unease.

MR BRYERS:

Yes.

WILLIAM YOUNG J:

I'm in the camp of Justice Tipping as you will appreciate.

TIPPING J:

But, we shall see.

ELIAS CJ:

Is there more that you really need to develop of your argument at this stage, given that we've read your written submissions?

MR BRYERS:

Well, there's no doubt that the essential points have now been conveyed. I was going to make a few comments about the written submissions put in for the respondent, but I don't know that …

ELIAS CJ:

Well, well, do so if it's — he might as well be alerted.

MR BRYERS:

All right. Well, there's an argument put in to the effect that although — this is in paragraph 35 of the respondent's written submissions. Yes, an argument's put in about the guarantor's right to information and there's the case of *Ross v Bank of New South Wales* (1928) 28 SR (NSW) 539, which is referred to it and which is in the bundle of authorities. I suppose I make two points. One is that we're not here seeking information so much as requiring the plaintiff in a summary judgment context to prove its claim.

Secondly, the case that's relied upon is really a completely different kind of case. It was a situation where a customer of a bank, I'm sorry, a guarantor of a customer of a bank had sought from the bank particulars of the customer's account, and the ruling was — and this is before any enforcement issues arose — the ruling was that the guarantor is not as a matter of course entitled to details of the customer's account with the bank because that would be a breach of the bank's duty of confidence to its customer.

ELIAS CJ:

So it was before enforcement, did you say?

MR BRYERS:

Quite so. It was just while the guarantee was running.

ELIAS CJ:

Yes.

MR BRYERS:

And then in the other case that's mentioned, in paragraph 36, of *A D & J A Wright Pty Ltd v Custom Credit Corporation Ltd* (1992) 108 FLR 45, it's also quite a different situation. There the guarantor had made an application to the Court for an account under the relevant Court rules and the account sought was an order that the creditor disclose documents relating to the indebtedness of the principal debtor. And really on somewhat technical grounds, the Court decided that the defendants didn't come within the ambit of an action for account. And nor was the Court satisfied the applicant was entitled to have accounts taken under the relevant rules, so again it's pre-enforcement. It's not a situation where enforcement has occurred. It's a question of compliance with particular rules relating to the taking of accounts between two parties.

There are, in any event, as mentioned briefly in our submissions, other authorities, in Canada I think in particular, which do suggest that there is an ongoing duty of disclosure in particular circumstances during the life of a guarantee.

CHAMBERS J:

What about clause 15.2 in these guarantees? You'll see it on page 20 of volume 2. "We have no duty or responsibility to provide you with any information concerning the financial statements, financial condition, or any other matter concerning the customer."

MR BRYERS:

Yes Sir, well that would be consistent with the authorities that I've just been referring to. There is reference to clause 3.2(e) of the guarantee, which is on

page 18, which talks about whether the guarantor can be discharged or its obligations affected by anything which but for this clause might have discharged or affected the obligations, and the particular reference is —

CHAMBERS J:

Sorry, which one are you looking at?

MR BRYERS:

3.2, on page 18.

CHAMBERS J:

And which one?

MR BRYERS:

3.2.

CHAMBERS J:

Yes, which paragraph?

MR BRYERS:

Well, I've read the opening words and then —

CHAMBERS J:

Sorry.

MR BRYERS:

Now we go to (e), which is the one particularly relied upon, "So that you're not to be discharged nor are your obligations to be affected by anything which but for this clause would or might have discharged you or affected your obligations including the enforcement of or failure to enforce this deed or any other security, interest, guarantee, indemnity or other agreement." And under, at the bottom of that clause, the last sentence, "There's no liability in respect of these matters even if your rights may be prejudiced as a result." Now as I read that clause, it's a defence to claims by the guarantor against the creditor

for acts which the creditor might carry out, including acts done during the enforcement phase, and my submission is that that is not what the appellant's argument is. The appellant is not arguing that the creditor is liable for anything. The appellants are arguing that in order to prove its claim in a summary judgment context the creditor is obliged to comply with the normal rules of proof and bring forward documents relating to the quantum of its claim. There's then an argument about the —

ELIAS CJ:

I'm sorry, you did start to say that there were other Canadian cases. Did you finish what you were saying about those?

MR BRYERS:

I wasn't intending to rely on them, Ma'am. They —

ELIAS CJ:

What were they — to what effect?

MR BRYERS:

Well, they're to the effect that there is an ongoing duty of disclosure during the life of a guarantee.

ELIAS CJ:

I see.

CHAMBERS J:

Well, and it was in that context that I had referred you to clause 15.2 because it seemed to me that that clause was contrary to that —

MR BRYERS:

Yes.

CHAMBERS J:

— general Canadian authority.

MR BRYERS:

I agree, Sir.

WILLIAM YOUNG J:

But in a sense the point you're making is that it's all irrelevant. It was the obligation of the plaintiff to show there was no arguable defence.

MR BRYERS:

Correct. Once you get into the enforcement phase, then the normal rules of proof arise and the creditor's got to prove the amount of its claim, et cetera, and it's got to eliminate defences, as we talked about before.

WILLIAM YOUNG J:

And in the Court of Appeal it was that they put the onus on the defendant to show an arguable defence.

MR BRYERS:

Yes, they seemed to, but without, in my submission — or too readily accepting of the standard of proof that the creditor had put forward, that is simply a statement by the creditor as to what was in the agreement.

WILLIAM YOUNG J:

Well, it's not even a complete statement though.

MR BRYERS:

No, it's not. It's a very carefully worded restricted statement as to what money Opus had received and paid to Wiltshire.

TIPPING J:

And materially, perhaps, it doesn't focus on what value Hats gave.

MR BRYERS:

Exactly.

McGRATH J:

For the shares.

CHAMBERS J:

Well, that's really come down to the issue, isn't it, in this case, if given that — did Hats pay more than —

MR BRYERS:

1.4.

CHAMBERS J:

— the 1.4 million and —

TIPPING J:

I would say not just pay but —

MR BRYERS:

Provide benefits.

CHAMBERS J:

Provide value for more than —

TIPPING J:

— provide consideration.

CHAMBERS J:

Yes, provide consideration for more and have you raised —

WILLIAM YOUNG J:

No —

CHAMBERS J:

I know the onus —

WILLIAM YOUNG J:

— to be excluded —

CHAMBERS J:

I know the onus is on the plaintiff but there are also plenty of cases which say plaintiffs do not have to prove against mere speculation, so but have you raised sufficient doubt so that the plaintiffs were under an obligation to eliminate that possibility, in the summary judgment context?

MR BRYERS:

Well my submission is that the creditor was obliged to produce that document, regardless of anything that the appellants brought up —

ELIAS CJ:

It's the non-disclosure you rely on?

MR BRYERS:

Yes.

CHAMBERS J:

Having put them on notice repeatedly, that's your point?

MR BRYERS:

We wanted to see that document and what they'd got for the shares because the appellants were so reliant on getting as much value —

TIPPING J:

Well it was their only source —

McGRATH J:

It's the difference in value over the two year period, isn't it, between the two agreements in effect?

MR BRYERS:

That's right. On the face of it, at the moment, $4.7 million worth of shares have been disposed of for $1.4 million. It's a huge loss and there's no doubt there's reasons why Wiltshire was prepared to take some sort of drop in value to settle litigation but it's a massive one, particularly when there are clauses in the 2007 agreement which said it was a full and final settlement. So I don't know how Hats were going to get over that.

TIPPING J:

Well unless Hats were in financial trouble you'd think well, there's no basis for discounting it at all.

MR BRYERS:

Mmm.

CHAMBERS J:

Is there any evidence about Hats' financial position?

MR BRYERS:

Not really Sir, not in the evidence. It's common knowledge that Hopscotch is — the man who owns Hats is a very wealthy individual who ran the Chrisco Hampers operation. I think that's mentioned in the evidence somewhere.

There's two other points that are mentioned in the respondent's submissions. One relates to the Fibroin aspect which is — we haven't been given leave to appeal on it, this is the smaller debt, over and above the Opus debt. And we sought leave to appeal on that because if everything went perfectly for the appellants there is at least the possibility of them being fully discharged from both debts, either because enough value was obtained from the Hats shares to pay off both debts, or if there were breaches of bad faith which might persuade a Court to discharge the guarantors completely.

TIPPING J:

Well of course you can't responsibly plead fraud or bad faith without some basic foundation for it, but at the moment you're being denied any possibility of responsibly alleging.

MR BRYERS:

That's exactly right Sir.

TIPPING J:

I'm not encouraging it or anything, I'm just thinking aloud, Mr Bryers.

MR BRYERS:

That is precisely the position Sir. We don't know what the basic facts are, so we don't know exactly what defences or claims we may have.

ELIAS CJ:

Sorry, you said there were two matters you wanted to raise?

MR BRYERS:

Well the first one was the possibility that enough money was obtained from the Hats settlement to pay off the entire guaranteed debt.

ELIAS CJ:

Yes.

MR BRYERS:

I think something over three million would be required for that. The other possibility was that if there — if it can be shown that the creditor has acted in bad faith, then a Court might be persuaded to decline the creditor any relief at all. Now there's a final argument put in for the respondent that even if, if all else failed, it should be entitled to some rejudgment on liability in any event. In other words, the respondent is saying well, this is really an argument about quantum and even if we haven't satisfied the proof requirements for the quantum of our claim we ought to get judgment on liability.

My submission is that until the settlement agreement is produced and its legal effect analysed, it's not possible to say with any certainty whether the appellants have any liability at all under their guarantees, for the reasons I've just mentioned. It could be that there was enough money obtained because they had shares to pay off the debt entirely, or there may be indications of bad faith which would release them entirely.

Those are my submissions, thank you.

ELIAS CJ:

Thank you Mr Bryers. Yes Mr Laurenson.

MR LAURENSON:

Your Honours, the first thing that the respondent would take issue with in respect of what has been submitted this morning, is this reliance on paragraph 16 of the *Barclays Bank* case, to the effect that if a security is realised then, for instance in our case, if there's been a settlement and the settlement was say for 2.4 million but Hats has only paid 1.4 of it, then *Barclays Bank* at paragraph 16 is authority for the fact that nevertheless the guarantors are entitled to credit for that balance.

If I could just explain why I say that and what *Barclays Bank* is actually dealing with. *Barclays Bank* was a case where the argument proceeded on the basis that, in that case, the creditor who had appointed an administrator to sell an asset had interfered with the exercise of those powers to such an extent that the administrator was taken to be actually the agent of the creditor and then it relied on the authority which seems to be clear that if a creditor does decide to realise an asset of a debtor company, then that creditor has that duty to do so prudently and to get the best possible price.

Now, the first point I'd make and just what — if I could take your Honours please to paragraph 16. What they're referring to there is the situation, this last paragraph, it says, "But if he," sorry, the last sentence, "But if he does realise the security he must do so prudently with reasonable care so as to

seek to obtain a proper price. The duty to take reasonable care — the duty, since the liability of the creditor should have been reduced by the full value of the security."

Now what they're saying there is that if the creditor does have that duty, upon taking himself to realise the security and he breaches it, then notwithstanding that in breach of the duty they only negotiated say 1.4 million, if they had not breached it they would have got 2.4 and therefore they should be subject to the difference. It's not — they should be credited for the difference. It's not saying for instance, in a case like this, where the agreement between Hats and Opus say, is that 2.4 million should be paid but only in fact 1.4 million is paid, that then that one million should still be taken off what is owed by the guarantors.

WILLIAM YOUNG J:

Well Mr Laurenson, in a sense you're dealing with a specific point. Let us assume that the value provided by Hats exceeded 1.4 million, some of it to Opus, some of it to parties associated with Mr Wiltshire. Can you seriously argue that there wouldn't be a possible defence as to the surplus that was diverted away from Opus?

MR LAURENSON:

If it could be shown that the creditor WIL —

WILLIAM YOUNG J:

No but just — I mean, obviously those questions are a bit awkward because they perhaps contain assumptions of fact but let us say Hats provided benefits totalling $2.4 million, 1.4 to Opus, $1 million to interests associated with Mr Wiltshire and all of this for an asset that belonged to Opus. Could you seriously suggest that there wasn't an issue as to whether the appellants were entitled, one way or another, to a credit, a set-off, an allowance for the diverted $1 million?

MR LAURENSON:

Well they would only be entitled to it if WIL as the creditor should be held responsible for it because —

WILLIAM YOUNG J:

Well, a diversion of some of the benefit to parties associated with Mr Wiltshire could only have happened at the direction and with the assent of Mr Wiltshire and his companies presumably giving the receiver an indemnity. So how, I mean, just taking a realistic view of it, could you really suggest that there wouldn't be an issue about the million dollars?

MR LAURENSON:

Well, what I would say your Honour, is that if that had happened, yes but all of this is —

WILLIAM YOUNG J:

Have you proved it didn't happen?

MR LAURENSON:

No but I would refer to some of the principles that His Honour Justice —

WILLIAM YOUNG J:

No but just — have you set out to prove that there wasn't a diversion of value?

MR LAURENSON:

No.

ELIAS CJ:

Have you excluded it?

MR LAURENSON:

No we haven’t excluded it your Honour because what we would say is it simply wasn't on the table, that sort of defence.

WILLIAM YOUNG J:

But wasn't it for you to exclude it because you are the only people who could deal with it? The guarantors, the other guarantors, had no ability to get at the point unless you put all the cards on the table and what troubles me is the fact that you wouldn't put the cards on the table suggests that there is something in the guarantors' concerns.

MR LAURENSON:

Well, taking your Honour's point that we wouldn't put the cards on the table, what I would like to do is take your Honours through the process leading up to how it was that the agreement was requested, because if you look at the issues that were put on the table by the defendants leading up to the summary judgment proceeding, all they were taking issue with was first of all, how much was paid, how much was paid to Opus and that was confidential, so we don't know and they were taking issue with the amount of the deal —

CHAMBERS J:

Well just pause there though, so you accept that they did put in issue how much Hats had paid?

MR LAURENSON:

Yes well I can take your Honour to the —

CHAMBERS J:

Well that's really the point, I think that Justice William Young is putting to you. To some extent I would have to say I see paragraph 16 of *Barclays Bank* as a complete red herring in Mr Bryers' argument. The essential proposition that is against you is that we don't know because you failed to disclose the settlement agreement, exactly what Opus paid and to whom.

TIPPING J:

What Hats paid.

CHAMBERS J:

What Hats paid and to whom. That's the essential proposition put against you and that that should be teased out at trial and as Justice William Young has shown you, suppose $1 million had been paid by Hats to another Wiltshire company, it is at least arguable that somehow or another Wiltshire Investments would have to give credit for that to the guarantors and that seems an eminently feasible proposition. So it's as simple as that. Paragraph 16, I think, is a complete red herring with respect.

MR LAURENSON:

Well I agree your Honour.

CHAMBERS J:

But the proposition against you is they did alert you to the fact that they were suspicious about how much Hats had paid and you haven't removed that suspicion by producing the agreement which easily could have been done.

MR LAURENSON:

Could I take your Honour to the paragraph where this is raised? It's at Mr Symons', Gregory Symons' affidavit, volume 1, page 89, paragraph 23. Now at paragraph 22, what is being complained about is the fact that they haven't provided breakdowns of the balances demanded under both the loans but then at paragraph 23, they say, referring back to paragraph 22, "Frustrated fairly by the fact that the settlement is confidential and accordingly it is not possible to assess what Opus has received in payments or is due to receive, including distribution to WIL".

So there isn't any sort of suggestion being made that there's been any underhandedness in terms of funds being diverted away from Opus or the creditor, it's simply being said that we don't know how much has been paid or how much is due to be paid. Now in terms of how much was paid, that was addressed in Mr Wiltshire's next affidavit where he attached the schedules.

TIPPING J:

What about the last sentence in that. You're being quite exact in your reading of this that one has to take the general flavour of it, "The outstanding monies due, if fully paid would see no action required". They are really trying to find out what's going on. I agree it's perhaps not drafted with the precision that one might expect but —

CHAMBERS J:

They are suspicious —

TIPPING J:

They are certainly suspicious.

CHAMBERS J:

— as to how a large sum of money that was to be paid by Hats has become a small amount of money. Now has any explanation been giving by Mr Sills or Mr Wiltshire as to why so much less was accepted?

MR LAURENSON:

Well yes, first of all Mr Sills gives an indication of what he did in terms of assessing the merits of Opus' case against Hats and the merits of Hats' counterclaim against Opus, and took into the account the fact that there wasn't going to be any funding for the Opus claim because Wiltshire Investments were saying they weren't going — so if I could take your Honour to the Sills' affidavit of the receiver —

ELIAS CJ:

But really, at the end of the day, the Court of Appeal had to elicit further information before it could be satisfied and then it was satisfied based and that's an issue for us, but what you are taking us to is the chain of how — the Court of Appeal said that the attitude of Wiltshire to proving its loss was quite cavalier, very sloppy.

MR LAURENSON:

Mmm, yes.

ELIAS CJ:

And they let you fix it up in the Court of Appeal. So why is taking us through this chain of how matters came up — how do you get behind the fact that unless you put in that further assertion and we have a question whether that was sufficient, the Court of Appeal would have overturned the decision for summary judgment.

MR LAURENSON:

The main concern I submit your Honour, that the Court of Appeal had is that there was a gap of approximately two months between Mr Wiltshire's affidavits, his second one putting in the schedules.

ELIAS CJ:

Yes.

MR LAURENSON:

Giving evidence to the effect that 1.4 million had been received.

ELIAS CJ:

But that was incredibly sloppy. There were payments to come and they are not disclosed. In fact even some of the payments that have been made I think were not disclosed.

TIPPING J:

Didn't get off on a very strong footing.

ELIAS CJ:

No.

MR LAURENSON:

No and I accept that entirely your Honour. There were problems with the way that the claim had been pleaded matching up with what had been — but when it came to the actual evidence that was put in for summary judgment, the affidavit where the Court of Appeal sought to fix up that gap showed that the evidence was all correct. Mr Wiltshire said that 1.4 million had been obtained at the date of his affidavit in May, prior to the July summary judgment application. The Court of Appeal wanted evidence as to whether or not anything else had come in, in that two month period and Mr Wiltshire confirmed that nothing had. So that the amounts claimed at summary judgment, based on his affidavit, have not changed so —

ELIAS CJ:

No, I understand that.

MR LAURENSON:

Yes.

ELIAS CJ:

I'm just wondering really why we're going through — anyway, perhaps you should take us to the material but I would have thought it was, it all comes down to the final assertion that is made in that last affidavit and whether that's adequate.

TIPPING J:

Could we see, could I be reminded and forgive me if I'm a little behind, the exact terms in which that assertion was made?

MR LAURENSON:

Of?

TIPPING J:

The one that the Chief Justice has just referred.

ELIAS CJ:

But in the Court of Appeal the affidavit.

TIPPING J:

The affidavit, yes.

MR LAURENSON:

The affidavit response to the minute yes, your Honour, that is at page 110 of volume 1.

TIPPING J:

Thank you.

MR LAURENSON:

Now the question asked by the Court of Appeal is referred to at paragraph 1. Actually I should refer your Honour to the — because it is important what answer was given. It is important what the question asked by the Court was and I think it is accurately set out at 1.1 of Mr Wiltshire's affidavit but just so I'm in no danger of misleading your Honours I will take you to the minute of the Court which is at page 18 of volume 1.

TIPPING J:

So it's all focused on monies received by Opus for other consideration provided to Opus. It's not focused on value given by Hats and this may be because this is the way the Court of Appeal asked it but quite frankly I would have thought, with great respect, that that was the key point.

ELIAS CJ:

That was the gap.

TIPPING J:

And that if one's closing off —

CHAMBERS J:

Well I suppose —

TIPPING J:

— defences you would simply —

CHAMBERS J:

It may be, did Mr Symons ever assert that he suspected money had gone to other Wiltshire interests?

WILLIAM YOUNG J:

Up at 115 but it's in the response to this affidavit.

MR LAURENSON:

Yes, yes, your Honour, that's what I was going to say is as far as I'm aware, I mean I wasn't involved at summary judgment so I don't know exactly what was argued there but as far as I am aware certainly at the Court of Appeal, the thrust of the agreement was first of all this gap and, secondly, the fact that the agreement was worth so much less than the 2007 agreement that there was a real likelihood that the receivers breached the duty and therefore the guarantors should be given some credit for that.

WILLIAM YOUNG J:

But to be fair at 115, perhaps belatedly, the nail is hit on the head, isn't it?

MR LAURENSON:

Yes, your Honour.

WILLIAM YOUNG J:

And there's no response to that.

MR LAURENSON:

To be fair though, your Honour, what —

WILLIAM YOUNG J:

I know, I understand the sequence of events.

MR LAURENSON:

Yes, the Court of Appeal has granted a real indulgence to WIL —

WILLIAM YOUNG J:

To who?

MR LAURENSON:

To WIL, to my client.

WILLIAM YOUNG J:

Yes.

MR LAURENSON:

I accept that. There was a two month gap which wasn't closed and they asked a very direct question. They clearly weren't concerned to the extent that they required to see the terms of the agreement before they were prepared to —

WILLIAM YOUNG J:

But isn't that because they thought there was an onus on the defendant to point to an arguable defence?

MR LAURENSON:

Well I was just going to the —

WILLIAM YOUNG J:

It would be hardly likely that Justice Lang would have fallen into that error because as an Associate Judge he must have dealt with hundreds of summary judgments.

MR LAURENSON:

Well perhaps just see what he says actually.

ELIAS CJ:

So the reasoning is not enormously convincing though, as everyone does overlook things.

MR LAURENSON:

At page 8 is the —

ELIAS CJ:

Page 8?

MR LAURENSON:

Sorry, I'm just — page 8 is the judgment I think. Now —

ELIAS CJ:

Well isn't the key passage, doesn't it all really come down to paragraph 36, what the Court of Appeal made of it and they said, “The information in the latest affidavit satisfies us that all of the sums that Opus received and paid to Wiltshire were taken into account,” and so it doesn't close the gap that we're discussing.

MR LAURENSON:

No it doesn't your Honour and that reflects, I submit, the way in which it was argued.

ELIAS CJ:

Even though it had been raised by that time in the counter affidavit?

MR LAURENSON:

Yes, yes it had.

CHAMBERS J:

Well I suppose the question is though, looking at page 115, paragraph 5, was that the first time that the Symons raised the possibility of a side deal or had that been raised previously?

MR LAURENSON:

Well all I can say your Honour is, as far as I am aware but, as I say, I wasn't involved at summary judgment and I —

CHAMBERS J:

Well you do know what's in the affidavits.

MR LAURENSON:

In the affidavits I don't think there is anything else that has raised that sort of issue as far as I'm aware but I apologise if I'm wrong and that I'm sure it will be pointed out, but I — my understanding is that's the first time that it's been suggested to some sort of side deal, that the trust before this has always been on the fact that we don't know how much has actually gone, whether or not anything more has gone from Opus to WIL —

CHAMBERS J:

From Opus to —

MR LAURENSON:

— and there's this real difficulty with the very small sum that was negotiated, the fact that it is 1.4 million as opposed to the 4.7 that was still outstanding and the fact that that really does raise the issue of whether or not there has been a breach of the receiver in his duties.

CHAMBERS J:

In the litigation between Opus and Hats, did Hats have a counterclaim —

ELIAS CJ:

Yes.

CHAMBERS J:

— or a defects based on misrepresentation or something?

MR LAURENSON:

Yes, yes your Honour. If I could take — and there were some very serious allegations being made against the Symons as directors of Hopscotch and that is really, well, I would submit or what WIL would submit is putting it all in context and —

ELIAS CJ:

But that may be the whole answer. That may be why there is so little realised but why should we speculate about that? What we're discussing is whether they should, whether your client should have eliminated the question that still hangs there. Was any other value obtained from Hats?

WILLIAM YOUNG J:

And just looking at that, I think it must have been raised in the High Court because look at page 37 of volume 1, paragraphs 42, 43, 44. Two aspects of that, the last sentence of 43 I think is wrong and the first sentence of, first two sentences or basically all of 44 is wrong.

ELIAS CJ:

Yes.

WILLIAM YOUNG J:

Because 44 proceeds on the basis that there was an onus of proof on the defendants.

MR LAURENSON:

Well I suppose what is being said is that the Judge was satisfied that computation of the claim had been proven and that if you're going to suggest that there is something else wrong with it, for instance, breach of receivers' duties and things like that then —

WILLIAM YOUNG J:

Produce some evidence but they can't because they can't get discovery and you won't hand over, your clients won't hand over the document.

MR LAURENSON:

But your Honour, in terms of breach of receivers' duties and things what would the —

WILLIAM YOUNG J:

No diversion of — the easiest thing to talk about is diversion of proceeds —

MR LAURENSON:

Yes.

WILLIAM YOUNG J:

— of, a diversion of the settlement.

MR LAURENSON:

Yes, yes and I accept but —

CHAMBERS J:

Well my concern is that diversion was not raised as an issue until that affidavit in reply in the Court of Appeal.

MR LAURENSON:

And that's what I'm submitting, your Honour, is that when that was raised you look at the circumstances. As I say, WIL, my client, has already been granted an indulgence in terms of being able to put that additional information in. I would reject any suggestion that WIL has been reluctant to put the agreement in, in circumstances where it is considered to be relevant. Now —

WILLIAM YOUNG J:

But you could have put in it from the moment, you could have put it in, (a) in response to the last affidavit from Mr Symons, and (b) if not before once you got, once leave for appeal was granted.

MR LAURENSON:

But —

WILLIAM YOUNG J:

You could have said it's a bit unfair because this point has come up on us by degrees, it wasn't firmly raised in the High Court, perhaps touched on, see these things, it's mentioned for the first time in a reply affidavit, it's a bit unfair that we should be, as it were, criticised in this way but look, here's the agreement, there's nothing in it?

MR LAURENSON:

Well I suppose that that would have been an option your Honours —

ELIAS CJ:

I would like to query whether it's entirely fair to say that this is something that arrived late in circumstances where the Court of Appeal say that the plaintiff had been sloppy about quantum and so quantum, quite understandably, was the first question, have you demonstrated your loss? Eventually, in a fairly specific response to the question of quantification, it is said well, this is all that Opus received from Hats, so it's when everything is riding on that that of course the defendant is entitled to say well, hang on, that isn't the full story. So one can understand the sequence built off the fact that there was insufficient evidence to support your claim on the quantum basis first. So it's only when you've nailed that and done it by reference only to what Opus has received that the defendants say well, what other value was obtained?

TIPPING J:

This was their first opportunity to go on oath after your client had been given, what I personally regard as a very considerable indulgence —

MR LAURENSON:

Yes and I accept that.

TIPPING J:

— I wouldn't have dreamt of entering summary judgment frankly, on this material.

MR LAURENSON:

But your Honour, if you look at the wording of what the Court of Appeal is asking and given that it is an indulgence, I would submit that that affidavit answers the question. It goes further than just talking about how much money, it talks about consideration because that is what the Court —

TIPPING J:

No, it fundamentally misunderstands the difference between value received by one party and value given by the debtor party and, albeit late in the day, comparatively this was surely the Symons' camp first opportunity, once your client had been given this indulgence, to say anything on oath.

ELIAS CJ:

And there is the additional circumstance which, perhaps it's a little peripheral, about why the Wiltshire companies are apparently involved in this settlement.

MR LAURENSON:

Well I can't — yes.

ELIAS CJ:

You see, we just don't know.

MR LAURENSON:

No.

ELIAS CJ:

Anyway, perhaps if it's convenient, we'll take the adjournment now and resume in 15 minutes, thank you.

COURT ADJOURNS: 11.33 AM

COURT RESUMES: 11.51 AM

MR LAURENSON:

If it please your Honours, I've over the break looked through the rest of my submissions and I think I appreciate very much what the issue is that your Honours are concerned with and I don't really think that there's, unless your Honours have more questions on that issue, that there is much more that I can say on it. Unless your Honours wanted me to go through my other submissions but they don't really make a lot of difference in light of the real concern that your Honours have about the side deal issue because they don't really address that, other than—

CHAMBERS J:

Well do you submit that the Symons had raised side deal in some form or other prior to the reply affidavit in the Court of Appeal or not?

MR LAURENSON:

I haven't found anything in evidence to that effect your Honour. So I would submit there's no evidential basis of it. So I can't submit that it wasn't raised at the hearing of the summary judgment application and to the best of my recollection it wasn't raised during the Court of Appeal hearing but I can't state that for sure but in terms of the evidence, what I found is that it's that reply affidavit.

CHAMBERS J:

Was side deal argued in the Court of Appeal?

MR LAURENSON:

To my recollection, no, and I submit that that's reflected in the nature of the question in the minute of the Court of Appeal. All they were really concerned about was this gap and the issue of whether or not anything further had come in from Opus — sorry, from Hats since 31st of March which was the last date that the last tranche on that schedule —

ELIAS CJ:

There wasn't further argument after those affidavits came in, was there?

MR LAURENSON:

No your Honour.

ELIAS CJ:

Where it might have been raised, yes.

MR LAURENSON:

No your Honour. I'd submit that if, certainly if it was an issue that was of concern to the Court of Appeal, the question would have been different and it wouldn't have been so directly focused on whether or not anything else had come in, anything else had been paid.

CHAMBERS J:

Do you happen to have, I'm not saying we want to see them, but do you happen to have the submissions of the parties in the two lower Courts?

MR LAURENSON:

I have the — I think I have the submissions of the appellants in the Court of Appeal with me but —

TIPPING J:

Could I just raise with you, in paragraph 35 of the Court of Appeal's judgment, in tab 3 in volume 1, they narrate that Mr Gregory Symons filed an affidavit in response in which he expresses concern that the full terms of settlement have

not yet been disclosed. They say, “The information in Mr Wiltshire’s latest affidavit satisfies us, however...” But that doesn’t actually traverse, albeit belated, let’s assume it’s belated, that this is the first time it’s been raised, it doesn’t actually address the point that he raised, what he calls I think, “it’s in addition” he said, wasn't it, in his paragraph 5, was it?

CHAMBERS J:
It’s para 5 I think.

TIPPING J:
It doesn’t actually address that point at all.

MR LAURENSON:
No.

TIPPING J:
It makes you wonder whether they’ve noticed it.

CHAMBERS J:
That’s why I wonder, one possible explanation for that is because the Court of Appeal didn't regard paragraph 5 of that reply affidavit as being an issue before them.

ELIAS CJ:
Well or that they didn't regard it as being relevant.

TIPPING J:
I think it may be more a relevance issue because that seemed to have been their main theme. If that was sung, then it would subsume the point but if the relevance proposition is unsung then, albeit belated, it was something that required attention, if only to say, “We have considered this and we don't think it gets them anywhere because, because”. This case, I must confess, with all due respect, is not a happy one.

MR LAURENSON:

Yes, I —

ELIAS CJ:

Now Justice Chambers asked you about the submissions. For my own part, I would have thought that the issue was more the question of whether the Court of Appeal was right in thinking that this topic was not relevant because the view it was taking that there was, well and what it says about onus but Justice Chambers, do you want to see whether these things were flagged?

CHAMBERS J:

Well I'm very much in your hands. Personally, I would be quite interested to see —

ELIAS CJ:

I do very much dislike seeing submissions in the lower Courts but if you think it's relevant we'll have them in. We should ask counsel to provide them.

TIPPING J:

It can't have been addressed, I would have thought with respect, in the light of the Court of Appeal's judgment.

ELIAS CJ:

No.

TIPPING J:

But I would like to think it can't have been addressed.

ELIAS CJ:

Yes.

TIPPING J:

And it's understandable that it's not addressed in submissions if it only came up in paragraph 5 of that reply affidavit because that would seem to me to be the likely scenario, just one's knowledge of how things work forensically.

ELIAS CJ:

Perhaps we can clear it up by simply asking Mr Bryers and you to confirm Mr Laurenson, that it wasn't addressed in submissions in the lower Courts. I'm sorry, Mr Karam. You may not be able to give us that assurance without checking the position yourselves but that might be a speedier way of dealing with the point.

MR LAURENSON:

Yes your Honour, I suspect a problem might be that even if we can confirm something from the written submissions that if someone said that it was brought up orally I certainly couldn't say that it hadn't been but I don't recall it.

ELIAS CJ:

Yes, all right.

MR LAURENSON:

So I wouldn't —

ELIAS CJ:

That also, of course, applies to the written submissions if we get them in. I would think we can infer that it wasn't argued, simply from the way the Court of Appeal deals with it and unless Mr Bryers wants to put something else to us, perhaps that's the way we should proceed.

WILLIAM YOUNG J:

Well look at para 31 of the Court of Appeal judgment. I mean it may be, I mean, I don't know what that is a reference to but it may be a reference to a point that is reasonably close to the one that's now being advanced.

CHAMBERS J:

I am no longer sitting on this fence Chief Justice. For myself, I would like to see the written submissions in the Court of Appeal.

ELIAS CJ:

All right, perhaps counsel can arrange, we should see both lots. You have only got the appellants', is that right?

MR LAURENSON:

I could check your Honour, right now I don't want to take up your time.

ELIAS CJ:

Yes, they can come in after. You don't want them now, do you?

CHAMBERS J:

No.

ELIAS CJ:

They can come in after the hearing.

MR LAURENSON:

So I suppose in summary then your Honours, the rest of my submissions can address why the 2009 settlement agreement isn't relevant to other things that have been raised, both from a legal and factual point of view but I can't take the point about the side deal any further than I have already taken and so, on that basis, I don't propose going through any of my other submissions, unless your Honours want me to.

ELIAS CJ:

No, thank you.

MR LAURENSON:

Other than in relation to Fibroin and that's a very short point. That's at — leave wasn't granted but as has been pointed out, the ability to apply orally today has been granted. The submissions for the respondent are at 51 through to 55 of my submissions and it's a short point to the effect that what would be relied upon is Fibroin's 7.3% interest in Opus, getting something more, if more came out of the Hats agreement to the extent that there was something left over and therefore Fibroin could take advantage of that as a shareholder. And the point is made that given that the total amount, the maximum you would think that could be got out of the litigation from Opus' point of view is 4.7 million and that in order for there to be any money available for a shareholder of Opus, there would have to be not only the 1.4 but also the 2.5 million that's referred to, of other creditors that would have to be paid off.

That would mean there would have to be some sort of a finding based on the 2009 settlement agreement that but for funds going elsewhere or breaches of the receiver's duty there would have been a settlement or a payment from Hats of 3.8 million, as opposed to the 1.4, and I simply say that on the evidence it's almost inconceivable that the effect of the agreement could have that effect.

CHAMBERS J:

But Mr Laurenson, if you lose on the Opus one, on the basis that nobody can be sure of what the position is without seeing the settlement agreement, doesn't Fibroin just automatically have to go to trial as well because we just don't — it will be on the basis that there's just incomplete information generally as to what's happened?

MR LAURENSON:

Well that's—

CHAMBERS J:

It may be unlikely as you say but who knows?

MR LAURENSON:

Well I can't take it any further than I've put it your Honour. That would have to be a —

TIPPING J:

It could well exceed 3.8. When I say that, speculatively.

CHAMBERS J:

Yes, yes, who knows?

TIPPING J:

Who knows?

MR LAURENSON:

And the only other thing I would say and I hesitate to suggest it given the indulgences that have already been granted is that if the only query and issue that your Honours have with this is whether or not there is something, some sort of really dodgy dealing, some sort of side deal underneath the 2009 settlement agreement as to whether or not you would be prepared to call for that, to see it before the judgment was written.

ELIAS CJ:

Well would we not — are you indicating to us that you would be — that you are prepared to put this material before the Court because if so why would we not simply allow the appeal and remit it for rehearing, that is, the summary judgment application in the High Court?

MR LAURENSON:

That was going to be my other suggestion, your Honour, because I could understand why you might not be prepared to do that but that would be the other option rather than simply dismissing the summary judgment and putting all the parties to the necessity of a full proceeding if there is a simple answer to it.

CHAMBERS J:

Well that would be your fault. That would be your fault though wouldn't it?

MR LAURENSON:

Yes, yes your Honour, ultimately it would be my — yes.

TIPPING J:

Well your client's fault.

MR LAURENSON:

Yes, yes.

CHAMBERS J:

Well I meant that.

MR LAURENSON:

But in the interests of justice I would say your Honour, if there is, and I'm not giving evidence from the Bar.

ELIAS CJ:

Well we couldn't do that in any event. We really couldn't even consider doing that unless we had an indication from you that the settlement will be disclosed.

MR LAURENSON:

I have got instructions your Honour, to the effect from the parties to it, that they are definitely prepared to disclose it on a confidential basis, that is to counsel, solicitors and the Court, on the basis that that's not unusual if something is confidential that it doesn't necessarily have to be provided to —

TIPPING J:

I thought it was no longer said to be confidential.

MR LAURENSON:

No that's not the case your Honour. I would submit the issue of confidentiality is one, that's really the reason why it simply hasn't been put in, but the main reason has been that it's not relevant. It's not relevant to the computation of the amount and it's not relevant to any defences. Now obviously this Court might reject that.

ELIAS CJ:

Well the issue is whether really it was sufficient for you to simply say that and deprive the Court of the opportunity, the Court at first instance, of making that call. It's a bit late in the day really to start negotiating this.

MR LAURENSON:

Your Honour the —

TIPPING J:

Your clients have made their bed and they should lie in it, in my view.

MR LAURENSON:

Yes, well that's —

TIPPING J:

What happens next is over to them. If we allow the appeal, set aside the summary judgment, do what you like.

ELIAS CJ:

Make fresh application.

MR LAURENSON:

Well the only thing is if there could be an appeal allowed but on the basis it could only go back to the Court if the document is presented to the Court.

CHAMBERS J:

Well you need to make, it's no use just floating ideas with respect Mr Laurenson, you need to — if you're making an application you make it in precise terms.

MR LAURENSON:

An application in what sense your Honour? You mean to —

CHAMBERS J:

Well you're floating possibilities that we might do this or might do that, with respect your only right at the moment is to present submissions.

MR LAURENSON:

Of course, your Honour.

CHAMBERS J:

If you wish to do something further, you need to formulate that in terms of an application to the Court which Mr Bryers would then have an opportunity to —

MR LAURENSON:

What I was doing, I thought your Honour, was making a submission on what a likely order, a possible order of the Court could be if it were to grant the appeal, which would be that it could be remitted to the High Court for the purposes of the summary judgment application on the basis that the 2009 settlement agreement would have to be put forward in evidence and then the parties would be free to submit one way or the other as to whether or not it should be granted.

CHAMBERS J:

Well is there any precedent for that sort of course? I know of none. A summary judgment, you either get it right the first time or you go to trial. There's not second bites of the cherry normally.

TIPPING J:

It would be a third bite of the cherry actually.

CHAMBERS J:

It would be a third bite, yes.

MR LAURENSON:

Well that's the only suggestion I can make your Honour and I can't give you any authority in support of that being done before other than just the powers to remit to a Court.

TIPPING J:

I think we tactically probably could.

ELIAS CJ:

I think we could because I think if we were of the view that the matter had proceeded on the wrong basis, for example, the proper outcome might be to remit but I'm not sure that this can be fitted into that sort of procedural error point when you've elected not to put this material before the Court. If the Court came to the view that summary judgment ought not to have been entered on the evidence available that would be end of story really, I think, but we may think a bit more about it and we'll hear what Mr Bryers has to say in response.

MR LAURENSON:

Thank you your Honours, unless there is anything else, that's all I have to say.

ELIAS CJ:

Thank you Mr Laurenson. Is there any matter of reply there, Mr Bryers?

MR BRYERS:

Just a couple of matters Ma'am. The last one, I'm not aware — I'd like to consult the High Court Rules but I'm not aware of a party having a right to apply a second time for a summary judgment.

ELIAS CJ:

Well you might not need a right to — I'm not sure why you could not myself.

WILLIAM YOUNG J:

Well we could say, I mean if the process has miscarried —

ELIAS CJ:

Yes.

WILLIAM YOUNG J:

— and to some extent it has because this point has emerged only by degrees I think and that is subject to, it's something else you may comment on, it would be possible to say well, it has miscarried, there's really only one issue left for summary judgment purposes and that's the agreement and its impact, although that may be — I mean, these things sometimes open up other lines of enquiry and so on.

MR BRYERS:

Exactly. I can see the whole nature of the case potentially changing once the agreement is disclosed. Certainly the appellant's position is it should be — if the appeal is allowed, it should be remitted back to the Court to go to trial and, particularly from the appellant's point of view, to enable proper discovery to take place.

The only other points I wanted to make were, first there is still, in my respectful submission, no valid reason provided by the respondent as to why it hasn't produced the settlement agreement. Confidentiality is not relied on. Relevance is raised but, in my submission, won't stand up to scrutiny. The argument seemed to be that there was only an obligation to produce the document if the defendants had raised some point about it that required it to be produced. But, of course, it's the appellant's position that the onus is not on the defendant to do such things or to speculate. It is entitled to say to the plaintiff in a summary judgment context, "You produce the material that's necessary to prove your case and you prove that the way in which you've

dealt with the shares in Hopscotch, in your dealings with Hats, that you did it in a way which complies with the duties you have to act in good faith and so forth." So in my submission it is a red herring to go exploring the affidavits, and the submissions for that matter, in the lower Courts to see whether or not the issue was actually raised.

CHAMBERS J:

Why do you say that?

MR BRYERS:

Well, for the reason I endeavoured to articulate Sir, that I don't see that there's an onus on a defendant in a summary judgment application to raise speculative defences. Indeed, the authorities are quite clear that that's not what the defendant should do. I see this Sir, as a situation where the appellant is saying, "You, the plaintiff, produce all the relevant documentation and facts to prove your case and you haven't done it."

ELIAS CJ:

Yes, it's not an affirmative defence which the Court is entitled to reject if speculative if adverted to by the defendant. This is a core element of the plaintiff's case.

MR BRYERS:

Yes, so that I think that any attempt to put an onus on a defendant, on this defendant, to have raised the issues specifically in the lower Courts isn't the right approach at all.

CHAMBERS J:

Well, Mr Bryers, why isn't this a simple case of a creditor saying, "You promised to pay the indebtedness of Opus. We have received — the debt was assigned to us. We have received this amount of money." End of story, unless something is raised to indicate that there's something wrong with that.

MR BRYERS:

Well, there is something that's been raised that could be wrong with it, and that is that the creditor has realised the debtor's securities, the debtor's assets, and that brings into play, in the scenario you have painted, what value has been obtained by the creditor when it realised those securities, and that's the aspect of the case —

CHAMBERS J:

Well, the creditor didn't itself realise any securities. That is the point you constantly overlook. The receiver did as agent of Opus.

MR BRYERS:

Yes, but there's —

WILLIAM YOUNG J:

Well, maybe if Wiltshire was a party to the agreement —

MR BRYERS:

That's right.

CHAMBERS J:

Now that is a different point and I fully — I accept Justice William Young's point on that but that I would — all I'm putting to you is that, to get into that sort of thing, that there was effectively a side deal, wouldn't that be something which you would at least have an evidential burden on you?

MR BRYERS:

No but how could you Sir, when you haven't got the evidence, I mean, it's just not, it's quite unjust. Suppose there was fraud in this case, that Wiltshire in fact got 5.7 million and paid it to Mr Wiltshire personally and the settlement document was kept totally confidential so the defendant couldn't get access to it, how is the defendant to raise this?

CHAMBERS J:

Well I suppose that comes back to my fundamental concern is the extent to which even that idea was floated in affidavits or submissions in the Court below —

MR BRYERS:

Well what —

CHAMBERS J:

— that is the idea of some form of side deal.

MR BRYERS:

What was floated was that the defendant wanted to see the settlement agreement and what had been included in it before they would be, were prepared to accept the amount that was being claimed against them and that at least is clear from the material we've seen. Now I've been told by my learned junior who argued the case in the Court of Appeal that the issue was in fact raised by at least one of the Judges and there was a discussion about it. I can't comment, I wasn't there but it isn't reflected very well, if at all.

WILLIAM YOUNG J:

Maybe in paragraph 31.

MR BRYERS:

Paragraph 31?

WILLIAM YOUNG J:

Paragraph 31 of the Court of Appeal judgment I think.

MR BRYERS:

Yes I —

CHAMBERS J:

Although that’s all about whether —

MR BRYERS:

Wiltshire.

CHAMBERS J:

— what Wiltshire Investments had received.

MR BRYERS:

Well, of course, Wiltshire could have received monies in more than, by more than one method, it could have received a direct payment, it could have, as well as the payments through Opus, I don't know. Wiltshire, of course, I think it's also germane that Wiltshire is —

CHAMBERS J:

But haven't we closed off what Wiltshire Investments received by those later affidavits?

WILLIAM YOUNG J:

Only via Opus, only money received by Wiltshire from Opus.

MR BRYERS:

Correct.

CHAMBERS J:

Yes but that's because the Court of Appeal asked the question in that form because that was the only proposition put to them presumably.

MR BRYERS:

Well I can't, I don't know. I'm told that the side deal issue was in fact discussed but, so I —

TIPPING J:

Was there any evidence given to explain why the Wiltshire parties were parties to the settlement deed?

MR BRYERS:

No there isn't and —

TIPPING J:

Because if I'd been trying this at first instance that would have been something that would have alerted me to a concern at the very least that there was something a little unusual.

MR BRYERS:

Well there's no doubt that Mr Wiltshire was involved. There is evidence that he was involved in the negotiations which led to the settlement. He was appointed, and you may recall in lieu of Mr Gregory Symons, for the purpose of signing off the settlement so Mr Wiltshire, personally and probably through at least two of his companies according to that declaration of interest, was directly involved in the settlement. It seems to me that is a point which could well overtake the argument, for example, that only the receiver could be liable because there is plenty of authority to the effect that where a creditor becomes involved in the administration of the receivership then the creditor can become liable, but I still prefer to place the appellants' case on the basis of a failure to prove relevant facts than on the basis of a potential claim against either the creditor or the receiver. I think that was, those are the points I wanted to make.

ELIAS CJ:

All right.

MR BRYERS:

Excuse me, Ma'am, my learned junior is whispering.

ELIAS CJ:

Yes, yes, of course.

MR BRYERS:

My learned junior wants to know Ma'am, whether you wanted to hear from him about what happened in the Court of Appeal?

ELIAS CJ:

You're concerned about what happened in the Court of Appeal, do you want to —

McGRATH J:

Well we have heard from Mr Laurenson on the —

CHAMBERS J:

Yes, yes, I think it would be good just to hear from Mr Karam.

ELIAS CJ:

All right. Mr Karam, thank you.

MR KARAM:

Yes, thank you your Honours. I was just concerned to address this issue because my learned friend Mr Laurenson had said that the matter hadn't been raised at all. We'll be filing the submissions in the Court of Appeal as requested by your Honour but —

ELIAS CJ:

Would it be possible for us, by the way, to have those this afternoon, thank you?

MR KARAM:

I'm not sure if I have them on me.

CHAMBERS J:

Well we could presumably get them from the Court of Appeal anyway.

ELIAS CJ:

All right.

CHAMBERS J:

Yes, we can get them.

ELIAS CJ:

All right, we'll get them, thank you. We'll come back to you if we have trouble.

MR KARAM:

And I'm certainly loathe to be giving evidence from the Bar in this Court —

ELIAS CJ:

Well we don't want evidence but you can tell us just what was in issue.

MR KARAM:

Well my distinct — yes, thank you your Honour — my distinct recollection is that — and I think it was Justice Heath, who directly put to my learned friend, well what if there was a side deal and there was quite extensive discussion on that issue in that Court and I don't unfortunately have my notes with me from the hearing from that day but they'll be back in my chambers and I certainly think I have a recollection of writing that down because, from my perspective, in that hearing it was a critical issue and that was certainly the primary issue that was being put forward on behalf of the appellants at that hearing.

So I just considered that it was proper to bring that to your Honours' attention and I can certainly dig those —

CHAMBERS J:

Well how could it have been the primary issue if it's not reflected in your written submissions?

MR KARAM:

Well to an extent your Honour, it is in my submission reflected —

ELIAS CJ:

Well we'll read those submissions I think Mr Karam, that's probably as far as it can go and Mr Bryers has already told us that there was some exchange. I don't understand Mr Laurenson to be taking issue with that, there may well have been but it does sound as if this point was not to the forefront of the argument but we'll judge that from the written submissions perhaps.

MR KARAM:

Thank you your Honours, I'm happy to leave it there, thank you.

ELIAS CJ:

Thank you Mr Karam. All right, well thank you counsel, we'll get these written submissions for Justice Chambers and thank you for your arguments today. We'll reserve our decision on the matter.

COURT ADJOURNS: 12.22 PM