
CANADA / JUDGMENT

Hi-Seas Marine Ltd. v. Boelman

2006 BCSC 488

COURT

Supreme Court of British Columbia

DECIDED

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2006 BCSC 488 Hi-Seas Marine Ltd. v. Boelman

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Hi-Seas Marine Ltd. v. Boelman,

2006 BCSC 488

Date: 20060327

Docket: S033659

Registry: Vancouver

Between:

Hi-Seas Marine Ltd.

Plaintiff

And

Willem Gerard Boelman

Defendant

Before: The Honourable Mr. Justice Davies

Reasons for Judgment

Counsel for the Plaintiff:

M.L. Smith

Counsel for the Defendant:

D.G. Cowper, Q.C.

S. Elliott

Dates and Place of Trial/Hearing:

January 31 to February 2, 2006

Vancouver, B.C.

INTRODUCTION

- [1] This judgment is concerned with the interplay between arbitration and court proceedings and the extent to which corporate liability may be extended to a sole director of a one person corporation.
- [2] In 1999 the plaintiff, Hi-Seas Marine Ltd. ("Hi-Seas"), obtained an arbitration award of \$325,466.98 (USD) and \$33,199.99 (CAN) (the "Arbitration Award") against a corporation, Trinav Shipping (Canada) Ltd. ("Trinav"), pursuant to an arbitration (the "Arbitration") arising out of an agreement dated September 26, 1997 (the "Vessel Management Agreement"), entered into between Hi-Seas and Trinav concerning a tugboat named the Pacific Challenge (the "Vessel").
- [3] In these proceedings Hi-Seas alleges that the defendant, Willem Gerard Boelman ("Boelman") was at all material times the alter ego of Trinav and seeks to establish that, on the basis of the doctrine of alter ego as well as by reason of equitable principles surrounding breaches of fiduciary duty, Boelman is also liable to pay the Arbitration Award to Hi-Seas.

ISSUES

- [4] The issues to be decided were originally framed by the parties in applications to dismiss Hi-Seas' claims brought by Boelman under Rules 19(24), 18 and 18A of the Rules of Court and a competing application brought by Hi-Seas for summary judgment against Boelman brought under the Rule 18A.
- [5] During the hearing of those competing applications, it became obvious to me that if Hi-Seas' claims of alter ego or claims related to breach of fiduciary duty against Boelman are arguable at law, the manner in which the evidence was adduced by both parties under Rule 18A would make it both inappropriate and unfair to the parties to determine Boelman's potential liability under the Rule 18A summary trial process.
- [6] The following issues must, however, still be decided:
 - (1) Does Hi-Seas' failure to make Boelman a party to the Arbitration preclude it from now bringing this action against him?
 - (2) What use, if any, can be made of the transcript of the Arbitration proceedings and of the Arbitration Award itself in this proceeding concerning the potential liability of Boelman to Hi-Seas?

- (3) Should some or all of Hi-Seas' allegations against Boelman be dismissed under Rule 18(6) because there is no merit to all or some of those claims?

BACKGROUND

- [7] On May 27, 1997, Trimex Shipping Ltd. ("Trimex"), a Barbados company of which Boelman was one of three directors and shareholders, entered into a Charterparty Agreement (the "Charterparty") with Hi-Seas, a Belize company, for the use of the Vessel in Mexico for an intended period of fifteen months scheduled to commence in late June 1997.
- [8] Well prior to Trimex entering into the Charterparty with Hi-Seas, Boelman had incorporated Trinav, a British Columbia company, to carry on business as a shipbroker and shipping agent. Unlike the situation with Trimex, Boelman was the sole shareholder and director of Trinav and it maintained different banking arrangements than Trimex and also had separate legal counsel.
- [9] The Vessel was not delivered on time by Hi-Seas to Trimex as had been agreed in the Charterparty. Trimex was then required to make more costly alternative arrangements to satisfy its charter obligations in Mexico.
- [10] It also became obvious to both Hi-Seas and Trimex that the Vessel was in less sound mechanical condition than had been anticipated. Further, Hi-Seas lacked the financial wherewithal to remedy the Vessel's many mechanical problems, extricate it from its previous hire in Korea, pay its captain and crew, and deliver it to Mexico.
- [11] Faced with those problems and needing the Vessel to fulfil its own obligations in Mexico, Trimex advanced funds to Hi-Seas and also paid funds directly to third parties on behalf of Hi-Seas to pay its outstanding debts related to the Vessel, including crew costs, transportation costs, and costs to have the Vessel repaired.
- [12] Although the total amount advanced by Trimex to or on behalf of Hi-Seas is somewhat disputed, on August 6, 1997, Hi-Seas executed a Collateral Marine Mortgage (the "Mortgage") over the Vessel to secure repayment of its indebtedness to Trimex in an amount not exceeding \$175,000.
- [13] Clause 1.3 of the Mortgage provided for a right of set-off by which Trimex was entitled to deduct \$1,000 per day from the payments otherwise due to Hi-Seas under the Charterparty for each day that the amounts owed to it by Hi-Seas were outstanding.
- [14] On August 9, 1997, the Vessel was finally delivered to Mexico and completed one voyage. However, on its second voyage in late August the Vessel's engine caught fire. The Vessel then had to be towed to harbour for repair and since Hi-Seas was again financially unable to rectify the situation, Trimex was required to pay for the necessary towing and repairs.

- [15] The face amount of the Mortgage was eventually increased to \$200,000. However, given the amount of prior secured debt registered against the title to the Vessel, Trimex was, in effect, a wholly unsecured creditor for all of its advances to or on behalf of Hi-Seas.
- [16] Trimex and those to whom it chartered the Vessel eventually became very concerned about potential liability to third parties for the work Trimex and the charterers were undertaking by effectively managing the Vessel because of Hi-Seas' non-performance under the Charterparty. Trimex wanted to ensure that decisions that had to be made concerning the Vessel and the Charterparty were agreed to in writing by Hi-Seas and could be made in a timely manner. Trimex also wanted assurances assuming that any monies owing to Hi-Seas from Trimex pursuant to the Charterparty were first used to pay off-set debts owed to it by Hi-Seas since that was the only realistic source of repayment of those substantial debts to Trimex.
- [17] Accordingly, on September 26, 1997, Hi-Seas (as the "Owner" of the Vessel) and Trinav (as the "Manager" of the Vessel) entered into the Vessel Management Agreement. Prior to its execution, Trinav and Hi-Seas each obtained independent legal advice.

[18] In its recitals the Vessel Management Agreement provides:

A. The Owner [Hi-Seas] is currently unable, due to financial difficulties, to continue to properly man and perform the maintenance and repairs to the tug named "PACIFIC CHALLENGE", details of which are set out in Appendix "A" to this Agreement (the "Vessel") and which is the subject of the charterparty (the "Charterparty") between the Owner and Trimex Shipping Ltd. of Bridgetown, Barbados ("Trimex"), so as to render the Vessel fit for the purposes intended under the Charterparty;

B. As a result of the circumstances stated in Recital A to this Agreement, Trimex has been prevented by the Owner from fulfilling Trimex's contractual obligations to third parties;

C. The Manager [Trinav] is, subject to the terms and conditions contained in this Agreement, willing to manage the Vessel on behalf of the Owner; and

D. The Owner is willing, at its own risk and for the duration of the Charterparty, to permit the Manager to exclusively manage the Vessel without any interference from or further consultation with the Owner.

- [19] The Vessel Management Agreement also delineates the following substantive provisions concerning the obligations of Hi-Seas and limitations on the obligations and responsibilities of Trinav that are of significance to the issues to be decided in this case:

2.0 The Owner's Obligations

2.1 The Owner hereby acknowledges and agrees that:

- a. The Owner does not have the financial capacity and the trade contacts necessary to properly man, maintain and repair the Vessel to the degree required to enable her to perform in accordance with the terms of the Charterparty;
- b. As of the date of this Agreement, the Owner owes unpaid back wages (the "Unpaid Wages") to the following crew members who are employed by the Owner:
 - i. Captain Rod Georgison;
 - ii. Captain Arthur Reeves; and
 - iii. Chief Engineer Nikolai Timoshkin.
- c. The Owner, alone, shall, at all times, remain responsible for the Unpaid Wages; and
- d. Manager shall not, under any circumstances and at any time, be responsible for paying any Unpaid Wages from Hire Funds or otherwise.

2.2 The Owner hereby agrees that:

- a. Where the Manager hires any crew members to man the Vessel (the "Crew Members"), the Crew Members shall, at all times and under all circumstances, be and remain the employees of the Owner and shall, at no times and under no circumstances, be or be deemed to be the employees of the Manager.
- b. The Owner, alone, shall, at all times, remain responsible for:
 - i. Any and all debts, liabilities, obligations and unpaid crew wages incurred by the Owner, whether prior to or after the effective date of this Agreement; and
 - ii. Any and all Management Expenses (including, but not limited to, any unpaid Crew Member wages) incurred by the Manager pursuant to this Agreement, where the Manager is unable to pay for any Management Expenses due to insufficient Hire Funds having been provided to the Manager under this Agreement to cover all Management Expenses.

2.3 The Owner hereby authorizes the Manager to manage the Vessel as the Manager, in its absolute discretion, sees fit (the "Management Services").

2.4 The Owner hereby agrees not to interfere, in any way and under any circumstances at any time during the term of the Charterparty, with the management of the Vessel by the Manager.

2.5 The Owner hereby agrees that the Manager shall not be required to consult with the Owner or provide any reports or notifications to the Owner with regard to the Management Services unless the Manager, in its absolute discretion, chooses to do so.

2.6 Without restricting the generality of the definition given to the words "Management Services" under Section 2.3 of this Agreement, Management Services may include, but may not be limited to, the following:

- a. Crewing obtained on behalf of the Owner;
- b. Arranging for the supply of necessary stores, fresh water and lubricating oil;
- c. Arranging for maintenance of the Vessel on behalf of the Owner;
- d. Arranging for repairs to the Vessel on behalf of the Owner; and
- e. Arranging for the provision and installation of replacement parts for the Vessel on behalf of the Owner.

2.7 Where the Manager provides crewing to the Vessel on behalf of the Owner, the Owner hereby agrees that, notwithstanding any legal requirements to the contrary, the Manager:

- a. May, on behalf of the Owner, hire crew members of any nationality;
- b. Shall not be restricted to hiring, on behalf of the Owner, only Canadians or persons holding Canadian landed immigrant status to serve as crew on the Vessel;
- c. Shall not be liable for any fines, penalties or the loss of the Vessel's Canadian Flag or other privilege which may occur as a result of the Manager's failure to hire, on behalf of the Owner, only Canadians or persons holding Canadian landed immigrant status to serve as crew on the Vessel.

2.8 The Owner hereby agrees to provide, prior to the execution of this Agreement, the Manager with:

- a. A written authorization and instruction, from the Owner to Trimex, authorizing and instructing Trimex to pay out to the Manager any due and owing hire (net of any deductions made in accordance with the terms of the Charterparty and the mortgage agreement between the Owner and Trimex) under the Charterparty (the "Hire Funds");
- b. All documents (including, but not limited to, licences, permits and certificates), plans, manuals, class survey reports and certificates, and insurance policies pertaining to the Vessel.

2.9 The Owner hereby acknowledges and agrees that the Manager shall not, at any time and under any circumstances and notwithstanding any other provision of this Agreement, be responsible or liable for demanding payment of or collecting the Hire Funds from Trimex.

2.10 The Owner hereby authorizes the Manager, in its absolute discretion, to use the Hire Funds, on behalf of the Owner, to pay for expenses incurred by the Manager on behalf of the Owner as a result of or in connection with the provision of Management Services (the "Management Expenses").

2.11 Where, at any time during the term of this Agreement, the Hire Funds are insufficient to pay for all Management Expenses incurred by the Manager:

- a. The Owner hereby undertakes and agrees to reimburse any outstanding amount to the Manager, upon first request; and
- b. The Manager shall be entitled, where the Manager, in its absolute discretion, chooses not to make any or some requests for payment under Section 2.11(a) of this Agreement or has not received payment despite the making of such request, to pay itself, from any future Hire Funds paid out to the Manager, for any unreimbursed Management Expenses incurred by the Manager but not yet reimbursed to the Manager by the Owner.

[20] In addition, the Vessel Management Agreement provides a limitation of liability and an indemnity by Hi-Seas in the following terms:

4.1 The Owner hereby agrees that, notwithstanding any other provision contained in this Agreement, the Manager, its directors, officers, employees, contractors, subcontractors and agents shall be under no liability whatsoever to the Owner, whether in tort, negligence, contract or otherwise, for any loss, damage, delay or expense of whatsoever nature, whether direct or indirect (including but not limited to loss of profit arising out of or in connection with detention of or delay to the Vessel) and howsoever arising in the course of the performance of the Management Services.

4.2 Notwithstanding any other provision contained in this Agreement, the Owner hereby undertakes to keep the Manager, its directors, officers, employees, contractors, subcontractors and agents indemnified and to hold them harmless from and against all actions, proceedings, suits, claims (including, but not limited to, any claims for Unpaid Wages), demands, liabilities, damages, arbitration awards, costs (including, but not limited to, legal costs and disbursements on a full indemnity basis), expenses, penalties and fines arising out of or in connection with, directly or indirectly and whether in tort, negligence, contract or otherwise, the performance of this Agreement which may, at any time, be brought or claimed against them or incurred or suffered by them or assessed against them, directly or indirectly.

[21] Further disputes arose between Trinav and Hi-Seas concerning the use and management of the Vessel when Trinav returned the Vessel into service under the Vessel Management Agreement and the Charterparty under the control of a Mexican captain.

[22] Captain Rodney Georgison ("Georgison"), one of the principals of Hi-Seas (who had previously at times been the captain of the Vessel) went to Mexico to attempt to re-take possession of it. However, Trinav hid the Vessel from Georgison notwithstanding that Georgison had obtained a Mexican court order for its possession.

[23] Eventually, however, Georgison's order was overturned by the Mexican court and Trinav continued in possession and control of the Vessel until returning it to Hi-Seas in July 1998.

The Arbitration process

- [24] Clause 7.1 of the Vessel Management Agreement provides that "This Agreement shall be governed by and construed in accordance with the laws of the Province of British Columbia."
- [25] Clause 7.3 provides that disputes "arising out of or connected with" the Vessel Management Agreement are to be "referred to and finally resolved by arbitration in Vancouver, B.C., Canada under the Rules of the Vancouver Maritime Arbitration Association".
- [26] In April 1998, Hi-Seas commenced Arbitration proceedings against Trinav while the Vessel continued to work in Mexico. It did so until July 1998 when Trinav re-delivered it to Georgison in Mexico.
- [27] The Vessel was then eventually moved to Canada where it was arrested by a creditor/mortgagee. It still remains under that arrest.
- [28] When Trinav re-delivered the Vessel to Hi-Seas, Hi-Seas converted its claim advanced against Trinav in the Arbitration to claims for damages for conversion or detainment, an accounting of all monies received by Trinav, damages for breaches of the Vessel Management Agreement, and punitive damages.
- [29] In response, Trinav sought a declaration that the Vessel Management Agreement was valid and enforceable and that its terms prohibited Hi-Seas from the recovery of any damages. Trinav also counterclaimed for the balance of the payments it allegedly made to Trimex on behalf of Hi-Seas.
- [30] Hi-Seas' "Answer and Reply to [Trinav's] Counterclaim" in the Arbitration gave rise to procedural and substantive challenges before the arbitrators appointed pursuant to the Vessel Management Agreement (the "Arbitration Panel"). In order to put those challenges and their impact upon this present litigation against Boelman in perspective, it is necessary to set forth that pleading in its totality. It stated:
1. The first 64 paragraphs of the Respondent's [Trinav's] Reply are an improper characterization of the background to the Vessel Management Agreement and unless specifically admitted, the Claimant [Hi-Seas] denies each and every allegation contained therein. The argument of evidence is inappropriate to pleadings and demonstrates a clear attempt to deflect attention from the true issue in this arbitration which is the responsibility of the Respondent, Trinav, and its principal Willem Boelman to pay over all hire monies due and owing to the Claimant.
 2. The Respondent Trinav, represented by Willem Boelman, was the agent for the Claimant in respect of the management of the vessel and receipt of monies for the hire of that vessel. By failing to account for or pay any monies owing to the Claimant, the Respondent is in breach of fiduciary obligations to the Claimant.

3. Under Clause 2.8 of the Vessel Management Agreement the Respondent received a written authorization from the Claimant for all hire funds for the vessel to be paid directly from Trimex Shipping Ltd. to the Respondent.
4. Willem Boelman received the benefit of more than \$500,000 (US) for the hire of the vessel and has refused to pay over any monies to the Claimant or provide an accounting.
5. The Claimant was at the mercy of and vulnerable to the exercise of discretion by the Respondent to whom the Claimant had trusted its vessel for management. Under the law of British Columbia Willem Boelman and the Respondent owed duties of loyalty, good faith and honesty to the Claimant to protect the interests of the Claimant.
6. The Respondent Trinav and Willem Boelman were in a conflict of interest by virtue of the Respondent acting as agent for charterers and owners at the same time as well as Willem Boelman having a financial interest in the charterer Trimex Shipping Ltd.
7. In paragraphs 63 to 92 of the Respondent's Reply and Counterclaim, the Respondent relies upon various clauses of the Vessel Management Agreement dated September 26, 1997 to avoid any and all responsibility to perform any service for, act in the best interest of or be accountable to the Claimant. In particular the Respondent in paragraphs 65, 69, 72 and 73 maintains that under Clause 4.0 of the Vessel Management Agreement it is not legally accountable for any failure of performance under the Vessel Management Agreement. Under paragraphs 68 and 70 of the Reply, the Respondent relies upon contractual provisions granting absolute discretion to manage the vessel (Clause 2.3) and absolute discretion to use the hire funds (Clause 2.10) to avoid any legal obligation to act in good faith and in the best interests of the Claimant. In paragraph 71, the Respondent seeks to rely upon Clause 2.5 of the Vessel Management Agreement to avoid the Respondent's legal and equitable obligation to account for monies owing to the Claimant.
8. The laws of British Columbia prohibit unjust enrichment and impose a constructive trust on monies or benefits received by a fiduciary. Fiduciaries cannot by contract exempt themselves for liability for fraud, bad faith and wilful default. In any event, the Respondent is precluded from relying upon the contractual terms pleaded in the Reply and Counterclaim for a number of reasons in law including:
 - (a) to interpret the terms of the Vessel Management Agreement as maintained by the Respondent would mean that the Respondent owed no legal duties to the Claimant whatsoever under the Vessel Management Agreement and thus the Vessel Management Agreement fails for lack of any consideration flowing from the Respondent to the Claimant as necessary to form a valid contract;
 - (b) the Vessel Management Agreement was entered into under duress and undue influence and the terms relied upon by the Respondent are unconscionable and unenforceable at common law and under the Trade Practice Act of British Columbia, R.S.B.C. Ch. 457, s. 4;

- (c) the Vessel Management Agreement does not, by its terms or otherwise, override the fiduciary and trust duty of the Respondent in acting as agent for the Claimant in the management of the vessel and dealing with hire payments.
9. In paragraph 73 of the Reply, the Respondent states that they alone were entitled to terminate the contract and that the Claimant's only remedy is in damages. The Respondent then says that under Clause 4 of the Vessel Management Agreement they are exempt from a claim for damages. The Respondent however is not thereby relieved of its fiduciary duties and is liable for breach of fiduciary duty, equitable fraud, bad faith and wilful default.
10. Willem Boelman and thus the Respondent are liable for his conflict of interest, unjust, enrichment, breach of fiduciary duty and equitable fraud. The Respondent is accountable not only for hire funds which were received but also for hire payments which should have been received. The unconscientious conduct of Willem Boelman makes the Respondent liable to account, and by his cavalier conduct, liable to pay punitive damages.
11. Equitable principles hold the Respondent to account for the enrichment of Willem Boelman. Failure of the Respondent to collect, account for and pay over all vessel hire due and owing enriched Willem Boelman as principal of Trimex Shipping Ltd. and the Respondent is liable for such enrichment up to the time the vessel was returned to the Claimant.
12. The Claimant seeks an order for equitable compensation in an amount approximating \$350,000 (US) for unpaid hire, the exact amount of which cannot be ascertained because of the continuing refusal of the Respondent to provide any accounting. In addition the Claimant seeks punitive damages as well as costs including arbitration fees, expenses and legal fees.

[Emphasis added]

- [31] In response, Trinav filed an Answer to Hi-Seas' Answer to Trinav's Reply and Counterclaim in the Arbitration. It is again necessary to repeat the whole of that pleading. It stated:
1. The Respondent [Trinav] denies each and every allegation of fact contained in the Claimant's [Hi-Seas'] Answer.
2. The Claimant's Answer does not constitute a Reply to the Respondent's Response to the Claimant's Points of Claim nor is it an Answer to the Respondent's Counterclaim. Instead, it is a new set of allegations and claims for damages which are advanced out of time and inappropriately. They are out of time because they should have been advanced, if at all, within the time frame set out in the VMMA Rules. They are inappropriate because first, many of the new allegations are made against Mr. Willem Boelman personally and Mr. Boelman is not nor could he be a party to the arbitration since he is not a party to the Management Agreement which is the subject of the Arbitration and second, because the new allegations concern issues which are outside the scope of the Management Agreement which is the basis for the arbitration. Many of the new allegations and claims are matters which arise out of the Charterparty between Hi-Seas and Trimex, and are not pertinent to or

arbitrable under this reference.

3. Accordingly, the Respondent says that the receipt of this submission should be rejected by the Arbitrators as being out of time and inappropriate and that the Claimant should be required to pay the solicitor and own client costs of the Respondent as a result of the filing of this document.
4. In the alternative, the Respondent says that the relationship between the Claimant and the Respondent is set out in the Management Agreement negotiated freely between the parties and that any allegation of breach of duty must be considered in relation to the obligations and responsibilities agreed to and assumed under the terms of that contract and the Respondent denies that it is in breach of any duties, contractual or otherwise, as alleged by the Claimant or at all.
5. In the further alternative, the Respondent says that the Claimant's allegations are an attempt to circumvent an arbitration process arising out of the Charterparty between Hi-Seas and the Claimant knows full well that Trimex, pursuant to the terms of that Charterparty, was entitled before paying hire to deduct payments properly made for the care and maintenance of the vessel and says that the Claimant's allegations for payment of vast sums of unpaid hire are not only untenable in fact and in law, but are claims which ought to be made pursuant to the arbitration provisions of the Charterparty and not pursuant to the Management Agreement which is the subject of this arbitration.
6. In further response to the whole of the Claimant's Answer, the Respondent says that the scurrilous, vexatious and unsubstantiated allegations of the Claimant should be dismissed with solicitor and own client costs throughout, including full costs of arbitration expense and legal fees.

[Emphasis added]

- [32] In addition to filing that Answer, Trinav brought a pre-hearing application before the Arbitration Panel seeking to strike out the pleadings contained in Hi-Seas' Answer to Trinav's Reply and Counterclaim in the Arbitration. That application was dismissed.
- [33] Unfortunately there is no transcript of any arguments advanced by the parties on that application or any record of any reasons given by the Arbitration Panel for dismissing Trinav's application. However, following the dismissal, then counsel for Trinav wrote to counsel for Hi-Seas on December 23, 1998, stating:

Further to the hearing before the Arbitration Panel on December 1, 1998, in which the Arbitration Panel refused to dismiss the allegations of equitable fraud, unjust enrichment, wilful default, bad faith, breach of fiduciary duty and claims against Trimex Shipping Ltd. and Willem Boelman contained in the Claimant's Answer to Respondent's Reply and Counterclaim and thereby decided to exercise jurisdiction over these issues, we advise that we intend [to] apply to Court pursuant to s. 16 of the International Commercial Arbitration Act for an Order that the Arbitration Panel has no jurisdiction to deal with the matters raised in the Claimant's Answer to

Respondent's Reply and Counterclaim, specifically those issues relating to equitable fraud, unjust enrichment, wilful default, bad faith, breach of fiduciary duty and claims against Trimex Shipping Ltd. and Willem Boelman.

Please advise by return whether your client will consent to the withdrawal from consideration by the Arbitration Panel of the allegations specified above and contained in the Claimant's Answer to Respondent's Reply and Counterclaim.

[Emphasis added]

[34] Hi-Seas did not agree to withdraw its allegations.

[35] Although Trinav's then counsel did file a petition in this Court seeking a review of the Arbitration Panel's dismissal of Trinav's application to strike Hi-Seas' pleadings, that petition was never heard.

[36] Due to the lack of availability of his counsel, Boelman was not represented when the Arbitration commenced on February 15, 1999. He did not, however, make any adjournment application.

[37] Boelman has sworn in these proceedings that he provided an accounting concerning the management of the Vessel and has also sworn that notwithstanding his objection to being cross-examined related to Trimex or himself, he was required to respond with his objections being noted by the Arbitration Panel.

[38] After five days of evidence as well as written and oral submissions, the Arbitration Panel delivered its award in writing.

The Arbitration Award

[39] The Arbitration Award stated:

We, Peter Brown, Daryl Raibl and Brian W. Wasson having been duly appointed as the arbitration panel or tribunal to hear the controversy existing between Hi-Seas Marine Ltd. and Trinav Shipping (Canada) Ltd., all having heard all of the allegations and proofs of the disputants and after due deliberation do hereby determine and award as follows. In doing so we would have the record state that the Tribunal was unanimous in its findings.

Counsel for the claimant argued ably and forcefully that the terms of the Vessel Management Agreement create a fiduciary relationship between Hi-Seas as principal and Trinav as its contractually appointed agent that demanded the utmost good faith and fair dealing on the part of Trinav. He supported his position with authorities which traced the evolution of the doctrines of fiduciary duty and restitution up to its contemporary applications. Without being specific on his reasons the representative of the Respondent stated that this was not a relationship where a fiduciary duty arose, and if it did, Trinav was freed of that duty under the wording of the Agreement itself.

Based on the authorities cited by the Claimant's counsel, the Tribunal accepts the position that an agent has fundamental duties to his principal arising from the agency relationship. Probably the most important of these duties, in the context of this dispute is a duty at law and in equity for the agent to account to his principal for the disposition of any money the agent acquires on behalf of his principal, or has been suggested, should have acquired.

In this respect, the Respondent has misunderstood the Yasuda decision (*Yasuda Fire and Marine Insurance Co. of Europe v. Orion Marine Insurance Underwriting Agency Ltd.*, [1995] 3 All E.R. 211). At p. 221 the Court clearly states the principle that the agent has a duty to account to the principal irrespective of the existence of a contract, the agency relationship being sufficient to impose such a duty. The decision makes it clear that the records of the agent's activities belong to the principal who can not be denied access. The parallel here to the Yasuda case is Trinav's refusal to permit Hi-Seas access to its performance under the Vessel Management Agreement. Indeed, in addition to endorsing the duty to account on the part of the agent, the Yasuda case confirms the agent's duty of disclosure to the principal.

In the evidence presented to the Tribunal by both the Claimant and the Respondent there are numerous examples where this duty of disclosure was not followed, ignored or actively resisted. Trimex apparently considered itself under no obligation under the charterparty and the Collateral Marine Agreement to account to Hi-Seas for the charter hire or the setoff of funds advanced on behalf of Hi-Seas. As counsel for the Claimant pointed out, it is questionable whether a larger number of the advances to or for Hi-Seas should have been secured by the mortgage account thus attracting interest initially at 10% per annum followed by 12% per annum. It is interesting to postulate the extent of the duty of Trinav to audit the accounting of the mortgage debt on behalf of its principal. Perhaps this is pushing Trinav's fiduciary duties too far for the period prior to the Vessel Management Agreement but once Trinav represented Hi-Seas in the administration of the charter party it should have been vigilant that only the expenses described in the Collateral Marine Agreement were added to the outstanding balance of the mortgage. The Tribunal recognizes that there are advances made by Trimex that are currently outstanding for which Trinav has a claim but these advances do not without concurrence by Hi-Seas carry the interest obligation under the Collateral Marine Agreement.

There is another basic duty that an agent owes to his principal. Where the agent assumes the management and control of property on behalf of his principal, he must deal with the property as would a prudent owner; secure, repair and employ the property as a prudent owner.

One can sympathize with the frustration experienced by Trimex in its effort to have available an operating vessel to meet its barge towing obligations. Trimex suffered the delays, the ineptitude, the need to finance the vessel to keep it in service. These are however obligations Trimex assumed voluntarily. It attempted to secure its position with a mortgage and the [sic] replaced the owner with someone more cooperative to its objectives. These efficiencies led to legal obligations on the part of Trinav as described above, obligations which were totally ignored. The Tribunal now has to assess the measure of Trinav's liability for failing to meet its obligations.

The Tribunal finds that the Vessel Management Agreement was valid to create an agency relationship between Hi-Seas and Trinav and that the Agreement subsisted until its termination by notice from Trinav dated July 7, 1998. Hi-Seas had consulted counsel as to its terms and effectiveness and in spite of the onerous terms it contained had entered into the relationship it proposed. Having said that the Tribunal has determined that in many respects the general legal principles referred to above override its terms and must be applied in assessing Trinav's conduct in the performance of the Agreement as a shield against a lack of performance of its duties as the agent of Hi-Seas. The Tribunal finds Hi-Seas [sic] in substantial breach of these duties and has determined that Trinav should be held accountable for the shortfalls of its performance as an agent.

[Emphasis added]

[40] The Arbitration Award was broken down as follows:

- (1) \$185,337 (USD) based upon the amount that should have been paid by Trimex to Hi-Seas under the Charterparty for its use of the Vessel for 303 days (\$560,550) less the amounts agreed upon by Hi-Seas as being appropriately deductible from that gross amount;
- (2) \$37,844.42 (USD) and \$23,108 (CAD) as "Past Damages";
- (3) \$15,486 (USD) for theft; and
- (4) \$86,498 (USD) for "unrepaired damage" to the Vessel.

[41] Trinav was also ordered to pay the "full costs for arbitration" calculated to be \$18,941.11 (CAD).

[42] In a supplemental award, the Arbitration Panel ordered that Trinav pay Hi-Seas' legal costs of the Arbitration on a solicitor/client basis in the amount of \$65,303.26 (CAD).

Hi-Seas' claims against Boelman in this action

[43] The Arbitration Award and the supplemental award against Trinav remain unpaid.

[44] On January 30, 2004, Hi-Seas filed its statement of claim in this action against Boelman in which it made the following substantive allegations against him:

11. The agency, trust and fiduciary relationship created between Trinav and Hi-Seas under the Vessel Management Agreement required the utmost objectivity and good faith on the part of Trinav, including a duty not to compromise the interests of its principal, Hi-Seas.
12. In breach of fiduciary and trust obligations to Hi-Seas, Trinav did not protect the interests of Hi-Seas and did not manage the Vessel and hire funds to the benefit of Hi-Seas. Both Trinav and Trimex were directly controlled by the Defendant Boelman.
13. In breach of fiduciary and trust obligations Trinav denied the Plaintiff access to the Vessel and permitted the Vessel to deteriorate and suffer significant losses and damage.

14. In violation of fiduciary and trust obligations Trinav failed to account to Hi-Seas for monies received for the benefit of Hi-Seas.
15. On the 22nd day of March 1999 an arbitral tribunal appointed under the arbitration clause of Vessel Management Agreement made an award against Trinav in the amount of \$325,465.82 US and \$33,199.79 CDN for breach of fiduciary duty, failure to account for the disposition of money acquired on behalf of Hi-Seas and failure as agent to deal with property under its management and control in a prudent manner. In addition, the arbitral tribunal ordered that Trinav pay \$65,303.26 CDN for solicitor and own client costs.
16. The Defendant Boelman knowingly assisted Trinav in breach of trust and fiduciary duties, knowingly received monies obtained in breaches of trust and fiduciary duties, dishonestly induced a fiduciary to breach a trust and received trust property and dealt with that property in a manner that he knew to be inconsistent with the trust.

DISCUSSION

[45] I intend to proceed by first addressing Boelman's submissions that this action should be dismissed by application of the principles *res judicata* and abuse of process arising from the conduct of the Arbitration. I will then consider issues related to the use (if any) to which the transcript of the Arbitration and the Arbitration Award itself may now be put in these proceedings. Finally, I will rule on whether Boelman has established that Hi-Seas' claims against him must be dismissed under Rule 18 as disclosing no triable issue.

Issue #1: Does Hi-Seas' failure to make Boelman a party to the Arbitration preclude it from now bringing this action against him?

[46] Boelman submits that, by operation of the principle of *res judicata*, Hi-Seas' conduct as claimant in the Arbitration bars it from now maintaining this action against him. Alternatively, he submits that this proceeding constitutes an abuse of process as an attempt to now use the results of the Arbitration as the foundation of an award based upon alleged personal liability for corporate acts that it ought to have pursued against Boelman in the Arbitration.

[47] The two arguments are very much related and require consideration of not only whether the Arbitration Panel had any jurisdiction to make an award against Boelman as a non-party to the Vessel Management Agreement, but also whether the actions of both parties in relation to the pleadings filed in the Arbitration, and the conduct of the Arbitration itself, now preclude these proceedings against Boelman.

[48] Briefly stated, the argument advanced by Boelman concerning these related abuse of process issues is that:

- (1) by reason of the decision of our Court of Appeal in *Pan Liberty Navigation Co. Ltd. v. World Link (H.K.) Resources Ltd.*, (2005), 39 B.C.L.R. (4th) 370, 2005 BCCA 206, 253 D.L.R. (4th) 461 [Pan Liberty] (which Mr. Cowper characterizes as an alter ego case like the one now advanced against Boelman), Hi-Seas was obligated to make Boelman a party to the Arbitration by reason of the claims advanced against him arising out of the Vessel Management Agreement; and
 - (2) notwithstanding that Hi-Seas did not specifically apply to join Boelman as a party to the Arbitration by advancing claims against him personally in that proceeding, its conduct in the Arbitration severely prejudiced him in the conduct of this litigation, especially given its present position that the findings of the Arbitration Panel and Boelman's testimony before it are determinative of his personal liability in this proceeding.
- [49] In response Mr. Smith, on behalf of Hi-Seas, submits that:
- (1) based upon the Court of Appeal's decision in *Javor v. Francoeur* (2004), 25 B.C.L.R. (4th) 114, 2004 BCCA 134, Boelman could not have been joined as a party in the Arbitration because he was not a signatory to the Vessel Management Agreement so that the claims against him had to be reserved to judicial determination; and
 - (2) Boelman is, in any event, estopped from asserting the position now advanced by reason of the positions taken by him in the Arbitration on the same issue.
- [50] I have decided that the conduct of the parties in the Arbitration process and the conduct of the Arbitration itself were such that it would be unfair to bar the present proceedings by reason of the Arbitration. That decision makes it unnecessary to further explore the very interesting questions arising from the two potentially contradictory decisions of our Court of Appeal in *Pan Liberty* and in *Javor v. Francoeur*.
- [51] In reaching those conclusions, I rely upon the following circumstances:
- (1) It is apparent that neither the parties nor the Arbitration Panel turned their minds to whether the Arbitration was brought pursuant to the provisions of the British Columbia International Commercial Arbitration Act, R.S.B.C. 1996, c. 233 [ICAA], due to the dispute being one between a foreign corporation and a British Columbia corporation relating to matters arising largely in Mexico; or, pursuant to the Canadian Commercial Arbitration Act, R.S.C. 1985 (2nd Supp.), c. 17 [Arbitration Code], due to the subject matter of the dispute being "in relation to maritime or admiralty matters" and thus within federal rather than provincial jurisdiction.
 - (2) While the provisions of the two enactments are similar, they differ in some respects concerning jurisdiction over non-parties to an agreement to arbitrate. Under s. 2(1) of the ICAA a "party" is defined as meaning "a party to an arbitration agreement and includes a person claiming through or under a party". There is no such expansive definition under the Arbitration Code.

- (3) A close reading of Hi-Seas' Answer to Trinav's Reply and Counterclaim in the Arbitration leads to the conclusion that while the subject matter of the claims now advanced by Hi-Seas against Boelman in these proceedings was addressed in the Arbitration pleadings, there was no specific claim for relief against Boelman in any personal capacity arising from the allegations made.
- (4) While represented by legal counsel, (who is not counsel in this litigation), Boelman formally asserted, both before the Arbitration Panel and in the Petition filed in this Court, that the Arbitration Panel had no personal jurisdiction over him. Boelman is now estopped from advancing his present argument to the opposite effect.

Issue #2: What use, if any, can be made of the transcript of the Arbitration proceedings and of the Arbitration Award itself in this proceeding concerning the potential liability of Boelman to Hi-Seas?

- [52] In support of its application for judgment by way of a summary trial under Rule 18A, Hi-Seas filed the Arbitration Award as an exhibit to the affidavit of Georgison. In addition, he referred to and exhibited portions of the transcript of Boelman's cross-examination before the Arbitration Panel.
- [53] In that affidavit, Georgison also purported to summarize findings of the Arbitration Panel, or alternatively, provide his own analysis of and conclusions as to its findings. For example, he stated that:
9. All of the acts found by the Tribunal on the part of Trinav giving rise to the Arbitration Award and Supplemental Award were the acts of Mr. Boelman.
 10. The Arbitration Award arose out of misconduct by Trinav and Mr. Boelman in the performance of duties as agent for Hi-Seas in the management of the ship "Pacific Challenge" owned by Hi-Seas.
 11. Hi-Seas was required by Mr. Boelman to enter into an agency relationship with Trinav. This requirement was made by Mr. Boelman in his capacity as the principal of Trimex Shipping Ltd. ("Trimex") with whom Hi-Seas had earlier entered into a Time Charterparty (the "Charterparty") for the Vessel dated May 27, 1997.
 12. Mr. Boelman was at all times the sole principal, owner and the alter-ego of Trimex. Attached is an excerpt of the transcript of the proceedings before the Tribunal dated February 19, 1999 in which Mr. Boelman stated that Trimex was wholly owned by Dargas Shipping which in turn was owned 100% by himself. Mr. Boelman further stated that he was the Director and Manager handling the affairs of Trimex and had "full authority to represent Trimex in terms of its expenses and its corporate actions".
 13. All business dealings between Hi-Seas and Trimex were with Mr. Boelman. There were no other shareholders, officers or persons other than Mr. Boelman involved in any way in the affairs of Trimex.

14. All of the acts found by the Tribunal on the part of Trimex giving rise to the Award and Supplemental Award were the acts of Mr. Boelman.
20. Further to the Vessel Management Agreement, Mr. Boelman agreed that Trinav would act as agent for Hi-Seas in respect of the Charterparty with Trimex.
21. The Vessel Management Agreement provided for Hire Funds to be paid by Trimex to Trinav for the benefit of Hi-Seas. Hi-Seas did not receive the benefit of Hire Funds owing to Hi-Seas because Mr. Boelman wrongfully claimed that all Hire Funds were offset by debts to Trimex.
22. Notwithstanding the obligation of Mr. Boelman and Trinav to manage the Vessel on behalf of Hi-Seas, Mr. Boelman, who was also the alter-ego of Trimex, testified in the arbitration proceedings that the function of Trinav was to look after the interests of Trimex, not Hi-Seas.
23. As found by the Tribunal, the Vessel Management Agreement prepared by Mr. Boelman in favour of Trinav was a reflection of the corporate will of Trimex and was drafted by Mr. Boelman to permit Trinav to treat the Vessel as its own for the duration of the time that Trimex required the Vessel for its purposes.
24. Mr. Boelman frustrated all attempts by Hi-Seas to have physical access to the Vessel even after Hi-Seas gave notice of termination of the Vessel Management Agreement. Mr. Boelman withheld any information concerning the Vessel's condition and refused to give any accounting in respect of Hire Funds. Mr. Boelman testified at pages 247 and 249 of the Transcript that no hire payments were transferred by him from Trimex to Trinav for the charter of the Vessel despite a written direction from Hi-Seas to Trimex to make all payments to Trinav. Mr. Boelman further testified at page 248 of the Transcript that he and Trinav did not recognize any fiduciary duty to Hi-Seas and in all cases preferred the interests of Trimex over Hi-Seas.
27. Hi-Seas suffered further losses resulting from the wrongful conduct of Mr. Boelman as alter ego of Trinav including costs of the arbitration in the amount of CAN \$18,841.11 and legal costs as set out in the Award and Supplemental Award totalling CAN \$65,303.26.
28. Mr. Boelman was personally responsible for the breach of fiduciary duty of Trinav in failing to account for Hire Funds to Hi-Seas and for failure to properly care for the Vessel under his care.
- [54] Counsel for Hi-Seas took the position that the affidavit evidence it adduced establishes Boelman's personal liability to Hi-Seas for breach of fiduciary duty, inducing breach of fiduciary duty and equitable fraud in his dealings with Trinav and Hi-Seas.
- [55] Counsel for Boelman submitted that Georgison's affidavit is largely inadmissible as opinion evidence or argument. He also submitted that any use of the Arbitration Award as "evidence" in these proceedings is objectionable on the basis that it is irrelevant to the issues now before the Court and is also inadmissible as a private document.

[56] Except to the extent that he relies upon the private nature of the Arbitration, I am largely in agreement with Mr. Cowper's submissions concerning the use that can be made of the Arbitration Award and the transcripts of the Arbitration proceedings in these proceedings.

[57] Concerning Hi-Seas' use of the Arbitration Award:

- (1) I agree that it is irrelevant to the issues now before the Court because Boelman was not a party to the Arbitration and Hi-Seas has submitted that it was never intended that he be a party;
- (2) although the Arbitration Award would be properly admissible in enforcement proceedings against Trinav or in an application to stay a court proceeding on the basis of res judicata (as it was by Boelman in this case), it is not admissible against Boelman as proof of the facts found by the Arbitration Panel or the legal conclusions drawn by it from those facts because Boelman was not a party to the Arbitration; and
- (3) Hi-Seas' submission that the Arbitration Award is admissible against Boelman in these proceedings as proof of the facts found by the Arbitration Panel or the legal conclusions drawn by it is entirely inconsistent with Hi-Seas' submissions that these proceedings are not barred by res judicata. Hi-Seas cannot "have it both ways".

[58] Concerning Hi-Seas' attempted use of the transcripts of Boelman's cross-examination before the Arbitration Panel as a basis for the determination of his personal liability in this matter, I am satisfied that the transcripts cannot be used as sought by Hi-Seas in a summary trial under Rule 18A for the following non-exhaustive reasons:

- (1) Witnesses may not offer legal opinions and argument in the guise of sworn testimony. Such testimony is not only inadmissible as evidence but abusive of the summary trial process. In my opinion, the vast majority of Georgison's affidavit is an affront to the rules of evidence and largely inadmissible. To the extent that it contains admissible evidence, it can be afforded little weight due to his making and drawing of bald assertions and conclusions.
- (2) Hi-Seas' purported use of the transcripts of the cross-examination of Boelman in the Arbitration proceedings as evidence that is binding upon Boelman in these proceedings under Rule 18A conflates issues concerning: the use of Examination for Discovery testimony of parties at trial; the admissibility of "admissions by a party against interest"; and the possible use of evidence of "prior inconsistent statements made under oath".
- (3) Rule 40(4) of the Rules of Court makes specific provision for the use of the transcripts of other proceedings at trial. It provides:

- (4) Where a witness is dead, or is unable to attend and testify because of age, infirmity, sickness or imprisonment or is out of the jurisdiction or his or her attendance cannot be secured by subpoena, the court may permit a transcript of any evidence of that witness taken in any proceeding, hearing or inquiry at which the evidence was taken under oath, whether or not involving the same parties to be put in as evidence, but reasonable notice shall be given of the intention to give that evidence.

None of those pre-conditions to the use of Boelman's testimony in the Arbitration exist in this case.

- (4) Rule 40(27) of the Rules of Court sets forth with particularity the extent to which the evidence of a party to a proceeding may be used at trial. Under Rule 18A subsections (a) and (d) of Rule 40(27) are specifically made applicable to summary trial proceedings.
- (5) Those limitations on the permitted uses of Examination for Discovery evidence include the right (under Rule 40(27)(d)) to have the evidence that is tendered by an adverse party reviewed by the Court in the context of the whole of the discovery testimony of a witness.
- (6) In my view, such limitations underline the inappropriateness and unfairness of the approach adopted by Hi-Seas in this case. That is especially so in circumstances where Boelman was examined as a witness in a proceeding in which Hi-Seas specifically disavowed any intention of seeking to establish before the Arbitration Panel any finding of personal liability for his actions as a director or officer of Trinav.
- (7) While out of court admissions against interest made by a party are generally admissible as an exception to the hearsay rule (because the party has the opportunity to respond at trial when confronted by the alleged admission), the admissibility of such alleged admissions requires not only the opportunity to address the circumstances of their making but also the inclusion of explanations.
- (8) While a prior alleged admission against interest may well be used to cross-examine a party who subsequently seeks to resile from such a voluntary statement, fairness dictates that the whole of the statement be put to the witness and even in those circumstances a prior statement will generally be admissible only to test credibility.

[59] I am accordingly satisfied that while Boelman's testimony before the Arbitration Panel would likely be admissible during cross-examination of him at a trial, the use of excerpts from the transcripts of his testimony at the Arbitration may not be used in the manner they were intended for use by Hi-Seas in these summary trial proceedings under Rule 18A.

[60] As I have previously noted, however, my conclusions concerning Hi-Seas' inability to use the Arbitration transcripts in these summary trial proceedings in the ways sought does not rely on Mr. Cowper's submissions that the use of the transcripts is precluded by the private nature of the Arbitration.

- [61] In summary, the confidentiality argument advanced by Mr. Cowper on behalf of Boelman was that:
- (1) English jurisprudence has accepted the concept of confidentiality in commercial arbitrations. See: *Ali Shipping Corporation v. Shipyard Torgir*, [1998] 2 All E.R. 136 (C.A.) [Ali Shipping];
 - (2) in *Adesa Corporation v. Bob Dickenson Auction Services Ltd.* (2004), 73 O.R. (3d) 787, 247 D.L.R. (4th) 730 (Sup. Ct. J.), on a preliminary motion for production of documents, Cameron J. stated that there is an expectation of privacy in arbitration proceedings that should be fostered to maintain the integrity of the arbitration process; and
 - (3) although there is no direct authority in British Columbia that has considered whether there is an inherent duty of confidentiality attaching to documents or evidence disclosed or obtained through commercial arbitration, the implied duty of confidentiality that exists in British Columbia concerning the use of documents or information obtained through the discovery process supports such a conclusion.
- [62] In response, Mr. Smith relied upon the decision of the High Court of Australia in *Esso Australia Resources Ltd. et al. v. Plowman (Minister for Energy for Resources) et al.* (1995), 128 A.L.R. 391, 183 C.L.R. 10 (H.C.A.) [Esso Australia], in which Mason C.J. (for the majority) determined that confidentiality is not an essential attribute of a private arbitration that imposes an obligation on each party not to disclose the proceedings or documents and information provided in and for the purposes of the arbitration.
- [63] It is noteworthy that in *Esso Australia*, Mason C.J. specifically declined to follow *Dolling-Baker v. Merrett*, [1990] 1 W.L.R. 1205 (C.A.) [Dolling-Baker] and *Hassneh Insurance Co. of Israel v. Mew*, [1993] 2 Lloyd's Rep 243 (Q.B.) [Hassneh Insurance] which had held that confidentiality was an essential attribute of private arbitrations that imposed an obligation on the parties not to disclose the proceedings, documents or information provided in and for the purposes of arbitration. He also determined that the decided cases in the United States were inconsistent with the English jurisprudence on the issue.
- [64] However, following the High Court of Australia's decision in *Esso Australia*, the English Court of Appeal again visited the question of whether there was an implied obligation of confidentiality incident to private arbitration contracts. In *Ali Shipping*, upon which Boelman relies, the English Court of Appeal considered and refused to follow *Esso Australia*. In so doing, Potter L.J. reaffirmed and followed the Court of Appeal's earlier reasoning in *Dolling-Baker* stating (at 146):

In *Dolling-Baker v. Merrett* [1991] 2 All ER 890 at 899, [1990] 1 W.L.R. 1205 at 1213, shortly before the passage which I have already quoted, Parker LJ referred to "the essentially private nature of an arbitration" which he coupled with the implied obligation of a party who obtains documents on discovery not to use them for any purpose other than the dispute in which they were obtained, in order to arrive at his decision in that case. Thus, the principle which he propounded did not

depend upon any inherent confidentiality in the material protected (which he expressly rejected), although the implied obligation arising was broadly similar in effect. So far as the juridical nature of that implied term is concerned, while I note that in *Hassneh Insurance Co. v. Mew* [1993] 2 Lloyd's Rep 243 at 246 Colman J remarked that the "implication of the term must be based on custom or business efficacy" I consider that the implied term ought properly to be regarded as attaching as a matter of law. It seems to me that, in holding as a matter of principle that the obligation of confidentiality (whatever its precise limits) arises as an essential corollary of the privacy of arbitration proceedings, the court is propounding a term which arises "as the nature of the contract itself implicitly requires".

[65] Potter L.J. then went on to consider specific exceptions to that broad rule of implied confidentiality as well as Colman J.'s decision in *Hassneh Insurance* and further stated (at 147):

As to those exceptions, it seems to me that, on the basis of present decisions, English law has recognised the following exceptions to the broad rule of confidentiality: (i) consent, ie where disclosure is made with the express or implied consent of the party who originally produced the material; (ii) order of the court, an obvious example of which is an order for disclosure of documents generated by an arbitration for the purposes of a later court action; (iii) leave of the court. It is the practical scope of this exception, ie the grounds on which such leave will be granted, which gives rise to difficulty. However, on the analogy of the implied obligation of secrecy between banker and customer, leave will be given in respect of (iv) disclosure when, and to the extent to which, it is reasonably necessary for the protection of the legitimate interests of an arbitrating party. In this context, that means reasonably necessary for the establishment or protection of an arbitrating party's legal rights vis-à-vis a third party in order to found a cause of action against that third party or to defend a claim (or counterclaim) brought by the third party (see the *Hassneh* case). In that connection, I make two particular observations. Although to date this exception has been held applicable only to disclosure of an award, it is clear (and indeed the parties do not dispute) that the principle covers also pleadings, written submissions, and the proofs of witnesses as well as transcripts and notes of the evidence given in the arbitration (see *Dolling-Baker's* case). Second, I do not think it is helpful or desirable to seek to confine the exception more narrowly than one of "reasonable necessity". While I would indorse the observations of Colman J in the *Insurance Co* case [1995] 1 Lloyd's Rep 272 at 275 that it is not enough that an award or reasons might have a commercially persuasive impact on the third party to whom they are disclosed, nor that their disclosure would be "merely helpful, as distinct from necessary, for the protection of such rights", I would not detach the word "reasonably" from the word "necessary", as the passage just quoted appears to do. When the concept of "reasonable necessity" comes into play in relation to the enforcement or protection of a party's legal rights, it seems to me to require a degree of flexibility in the court's approach. For instance, in reaching its decision, the court should not require the parties seeking disclosure to prove necessity regardless of difficulty or expense. It should approach the matter in the round, taking account of the nature and purpose of the proceedings for which the material is required, the powers and procedures of the tribunal in which the proceedings are being conducted, the issues to which the evidence or

information sought is directed and the practicality and expense of obtaining such evidence or information elsewhere.

[Emphasis added]

[66] While it may eventually be necessary for the courts of this province to comprehensively address the contradictory positions taken by the English Court of Appeal in *Ali Shipping* and the Australian High Court in *Esso Australia*, it is not necessary that I do so in this case.

[67] I reach that conclusion because:

- (1) I have already determined that, for reasons unrelated to the present confidentiality arguments, the Arbitration Award and the transcript of the Arbitration are not admissible as evidence against Boelman on Hi-Seas' Rule 18A summary trial application.
- (2) As a consequence of those rulings, the impugned "evidence" of the Arbitration Award and the Arbitration transcripts is now only of concern in relation to Boelman's application to summarily dismiss Hi-Seas' claims against him under Rule 18(6).
- (3) It is in my view both reasonable and necessary (in the sense used by the English Court of Appeal in *Ali Shipping*) to consider both the Arbitration Award and the portions of the transcript of the Arbitration relied upon by Hi-Seas to fully explore the issues that are raised by Boelman's Rule 18(6) summary dismissal application because:
 - (a) the cost of adducing the impugned evidence in summary dismissal proceedings brought by Boelman would be excessive;
 - (b) the efficiency of the summary dismissal proceeding would be severely compromised; and
 - (c) most importantly, the transcript evidence relied upon by Hi-Seas puts its case alleging personal liability of Boelman on the highest possible evidentiary plane, a factor which is, in my view, essential to the assessment of the legal and factual issues raised by Boelman in his application for summary dismissal under Rule 18.
- (4) In those very narrow circumstances, it is not necessary for me to adopt the broad approach against confidentiality taken by the Australian High Court in *Esso Australia*.

[68] I will accordingly consider both the Arbitration Award and the transcript of the Arbitration in my determination of Boelman's Rule 18(6) summary dismissal application. I will not, however, consider Georgison's inadmissible summarizing of the finding of the Arbitration Panel or his analysis of and conclusions as to its findings, some of which I have set forth in ¶ 53.

Issue #3: Should some or all of Hi-Seas' allegations against Boelman be dismissed under Rule 18(6) because there is no merit to all or some of the claims?

[69] The test to be applied under Rule 18(6) is stringent and the burden upon Boelman is an onerous one. He must establish that the claims advanced by Hi-Seas present no bona fide triable issue and are therefore bound to fail: *Serup v. School District No. 57* (1989), 54 B.C.L.R. (2d) 258, 57 D.L.R. (4th) 261 (C.A.). Contested issues of fact cannot be weighed and inferences from the facts must be viewed in the manner most favourable to Hi-Seas: *Carnahan v. Coates* (1990), 47 B.C.L.R. (2d) 127, 71 D.L.R. (4th) 464 (S.C.).

[70] Paragraphs 11 to 15 of its statement of claim (quoted in ¶ 44 of these reasons), as well as the arguments advanced by counsel on this application, make it obvious that all of Hi-Seas' allegations of personal liability against Boelman arise from the Arbitration Panel's determination that High Seas suffered damages due to Trinav's breaches of fiduciary obligations owed as a result of an agency relationship concerning the management of the Vessel. From that determination, and the evidence before the Arbitration Panel concerning Boelman's role in directing the affairs and actions of Trinav, Hi-Seas alleges that Boelman is also liable for those breaches of fiduciary duty.

[71] Paragraph 16 of the statement of claim delineates the alleged legal basis for that personal liability. As noted above, it pleads:

The Defendant Boelman knowingly assisted Trinav in breach of trust and fiduciary duties, knowingly received monies obtained in breaches of trust and fiduciary duties, dishonestly induced a fiduciary to breach a trust and received trust property and dealt with that property in a manner that he knew to be inconsistent with the trust.

[72] In argument, counsel for Hi-Seas characterized that pleading as encompassing allegations of:

- (1) participation by Boelman as an alter ego of Trinav in breaches of fiduciary duties owed by Trinav to Hi-Seas arising from its agency role concerning the Vessel and the Charterparty so that the "corporate veil" should be pierced to avoid injustice;
- (2) commission by Boelman of equitable fraud by knowingly participating in breaches by Trinav of fiduciary duties it owed to Hi-Seas; and
- (3) Boelman inducing, participating in, and assisting, breaches of fiduciary duties and breaches of trust by Trinav in failing to account to Hi-Seas for monies owed to it by Trimex under the Charterparty.

[73] I will now summarize the arguments advanced by Hi-Seas and by Boelman in support of their respective positions on this Rule 18(6) application.

Hi-Seas' submissions

[74] Concerning its allegations that Boelman breached fiduciary duties owed to Hi-Seas as an "alter ego" of Trinav so that the "corporate veil" should be pierced to avoid injustice, Hi-Seas submitted that:

- (1) fiduciary relationships are no longer confined to the classic trustee-beneficiary relationship. An agency relationship gives rise to fiduciary duties and the underlying requirement of any agency or fiduciary relationship remains that of complete trust and utmost loyalty: *Hodgkinson v. Sims et al.*, [1994] 3 S.C.R. 377, 97 B.C.L.R. (2d) 1.
 - (2) by assuming management of the Vessel, Trinav entered into an agency and fiduciary relationship with Hi-Seas by which, in the submissions of its counsel, "Hi-Seas was at the mercy of Trinav in respect of the management of the Vessel and the collection of Hire payments [from Trimex under the Charterparty]";
 - (3) Trinav, through its "operating mind" Boelman, was obliged to act in the best interests of Hi-Seas and could receive no collateral benefits;
 - (4) Boelman, as the operating mind of Trinav, breached his obligations to Hi-Seas by not collecting payment of monies owing by Trimex and also by failing to pay over all monies, and further, as the alter ego of Trimex, benefited from the non-payment of monies due to Hi-Seas;
 - (5) as the alter ego of Trinav, any benefit accruing to Boelman "in any capacity" would be a deemed benefit to Trinav so that it would be unjust to allow Boelman to reap such benefit when he directed the breaches of fiduciary duty by Trinav. In those circumstances the corporate veil should be pierced: *Clarkson v. Zhelka*, [1967] 2 O.R. 565, 64 D.L.R. (2d) 457 (H.C.) [Clarkson]; *Paine Edmonds v. Fornighton*, [1995] B.C.J. No. 911 (Prov. Ct.) [Paine Edmonds];
 - (6) Boelman let his personal interests interfere with his agency and fiduciary obligations to Hi-Seas by not fully disclosing that Trimex had not paid monies owing under the Charterparty which denied Hi-Seas the right to terminate the Charterparty and re-take possession of the Vessel;
 - (7) as an agent and fiduciary, Trinav's failure to maintain proper accounts must lead to the most unfavourable version of events being presumed against both it and Boelman: *Yasuda Fire Insurance v. Orion Marine Insurance*, [1995] 3 All E.R. 211 (Q.B.); and
 - (8) by reason of his direction of the affairs of Trinav, Boelman is also liable to Hi-Seas for Trinav's failure to maintain proper accounts so that Boelman is personally obligated to pay the award made by the Arbitration Panel against Trinav.
- [75] Concerning its allegations that Boelman committed equitable fraud by knowingly participating in Trinav's breaches of fiduciary duties owed to it, Hi-Seas submitted that:
- (1) Boelman's breaches of fiduciary duties owed to Hi-Seas as Trinav's alter ego also amount to equitable fraud which vitiates any contractual terms which might otherwise limit Trinav's or Boelman's liability to Hi-Seas. In making that argument it relies upon *Hart v. O' Connor*, [1914-15] All E.R. 45, [1985] A.C. 1000 (H.L.) and *Nocton v. Lord Ashburton*, [1914] A.C. 932 (H.L.);

- (2) the decision in *Island Realty Investments Ltd. v. Douglas* (1985), 19 E.T.R. 56, [1985] B.C.J. No. 1118 (S.C.) [Island Realty Investments] (in which Stewart J. held a corporate director liable as a trustee de son tort for participation in a breach of trust even where there was no direct participation in the breach by her), has determined that to establish equitable fraud all that is required is knowledge of or participation in a breach of fiduciary duty; and
- (3) unfair dealing in matters of contract may amount to equitable fraud. In making that argument Hi-Seas relies upon the following statement from the decision of Binnie J. in *Performance Industries Ltd. v. Sylvan Lake Golf and Tennis Club Ltd.*, [2002] 1 S.C.R. 678, 2002 SCC 19, 209 D.L.R. (4th) 318 [Performance Industries] at ¶ 39:

What amounts to "fraud or equivalent of fraud" is, of course, a crucial question. In *First City Capital Ltd. v. British Columbia Corp.* (1989), 43 B.L.R. 29 (B.C.S.C.), McLachlin C.J.S.C. (as she then was) observed that "in this context 'fraud or the equivalent of fraud' refers not to the tort of deceit or strict fraud in the legal sense, but rather to the broader category of equitable fraud or constructive fraud. Fraud in this wider sense refers to transactions falling short of deceit but where the Court is of the opinion that it is unconscientious for a person to avail himself of the advantage obtained" (p. 37). Fraud in the "wider sense" of a ground for equitable relief "is so infinite in its varieties that the Courts have not attempted to define it", but "all kinds of unfair dealing and unconscionable conduct in matters of contract come within its ken": *McMaster University v. Wilchar Construction Ltd.* (1971), 22 D.L.R. (3d) 9 (Ont. H.C.), at p. 19. See also *Montreal Trust Co. v. Maley* (1992), 99 D.L.R. (4th) 257 (Sask. C.A.), per Wakeling J.A.; *Alampi v. Swartz* (1964), 43 D.L.R. (2d) 11 (Ont. C.A.); *Stepps Investments Ltd. v. Security Capital Corp.* (1976), 73 D.L.R. (3d) 351 (Ont. H.C.), per Grange J. (as he then was), at pp. 362-63; and *Waddams*, *supra*, at para. 342.

[76] Concerning its submissions that Boelman is personally liable to Hi-Seas for having induced, participated in, and assisted breaches of fiduciary duties or breaches of trust by Trinav in failing to account for monies owing to it by Trimex under the Charterparty, Hi-Seas submitted that:

- (1) the Arbitration Panel determined that Trinav was Hi-Seas' agent and breached its fiduciary duties as an agent in failing to: fully disclose all financial dealings concerning the Vessel; properly care for and deal with the Vessel as if it were its own property; and failing to properly account for monies due from Trimex to Hi-Seas under the Charterparty;
- (2) those breaches of fiduciary duties constitute breaches of trust by Trinav;
- (3) alternatively, the decisions of our Court of Appeal in *Monarch Entertainment Corporation v. Strother* (2005), 38 B.C.L.R. (4th) 159, 2005 BCCA 35, 28 C.C.L.T. (3d) 159 [Strother] and *Alers-Hankey v. Solomon* (2002), 166 B.C.A.C. 237, 2002 BCCA 227 [Alers-Hankey] establish that the legal principles applicable to participation in a breach of trust are equally applicable to a breach of fiduciary duty;

- (4) even if Boelman was a stranger to the agency, fiduciary and trust relationship between Trinav and Hi-Seas (as opposed to being liable to account to Hi-Seas as an alter ego or by reason of equitable fraud), the decisions of the Supreme Court of Canada in *Air Canada v. M & L Travel Ltd.*, [1993] 3 S.C.R. 787, 108 D.L.R. (4th) 592 [M & L Travel] and *Citadel General Insurance Co. v. Lloyd's Bank Canada*, [1997] 3 S.C.R. 805, 152 D.L.R. (4th) 411 [Citadel Insurance] and of the Ontario Court of Appeal in *Commercial Union Life Assurance Company of Canada v. John Ingle Insurance Group Inc. et al.* (2002), 61 O.R. (3d) 296, 217 D.L.R. (4th) 178 (C.A.) [John Ingle Insurance] establish that he is still liable as the director of Trinav to fully account to Hi-Seas for losses suffered by it as a consequence of Trinav's breaches of fiduciary duty and breaches of trust;
- (5) such liability arises from either having himself participated in or having knowingly assisted Trinav in its breaches of trust and fiduciary duty from which he personally benefited in the same way that the directors of M & L Travel were liable to Air Canada in *M & L Travel* for failing to properly account for monies collected through the sales of Air Canada tickets. That is so, because, as stated by Iacobucci J. (at 827):

It is clear that the appellant [a director of M & L Travel] participated or assisted in the breach of trust. As was the case in *Horsman Bros.*, *supra*, the appellant dealt with the funds in question: in particular, he stopped payment on all cheques, and then opened a trust account and attempted to withdraw the stop payment orders and to transfer the funds into the new trust account in order to pay the respondent. The breach of trust was directly caused by the conduct of the defendant directors. As Griffiths J.A. observed, at p. 204: "[t]he movement of these directors, acting solely in their own interest to stop payment on cheques, not only prevented payment on cheques issued to Air Canada, but precipitated the seizure by the bank of the only funds available in the unprotected general account." In such circumstances, the directors are personally liable for the breach of trust as constructive trustees provided that the requisite knowledge on the part of the directors is proved.

With respect to the knowledge requirement, this will not generally be a difficult hurdle to overcome in cases involving directors of closely held corporations. Such directors, if active, usually have knowledge of all of the actions of the corporate trustee.

- (6) the evidence of Boelman at the Arbitration establishes that as the sole director and shareholder of Trinav, he was its controlling mind and thus the requirement of proving his knowledge of and direction of Trinav's breaches of fiduciary duty and breaches of trust is easily overcome.
- [77] Concerning any submissions by Boelman that a finding of personal liability against him is precluded by clauses 4.1 and 4.2 of the Vessel Management Agreement (which are set out in full in ¶ 20 of this judgment), Hi-Seas relies upon the proposition that such clauses are repugnant to the concept of a deliberate breach of trust or breach of fiduciary duty and thus unenforceable. In making that submission he refers to a discussion of limitation clauses in trustee relationships by the decision of the English Court of Appeal in *Armitage v. Nurse*,

[1998] Ch.D. 241 (C.A.) [Armitage].

- [78] Finally, concerning the legal test for the dismissal of its claims against Boelman under Rule 18(6), Hi-Seas submits that I should follow the observations of the Supreme Court of Canada in *Hunt v. Carey Canada Inc.*, [1990] 2 S.C.R. 959, 49 B.C.L.R. (2d) 273 [Hunt] by allowing this matter to proceed to trial. In *Hunt*, concerning an application to strike a statement of claim under Rule 19(24), Wilson J. stated (at 990-991) that:

The fact that a pleading reveals "an arguable, difficult or important point of law" cannot justify striking out part of the statement of claim. Indeed, I would go so far as to suggest that where a statement of claim reveals a difficult and important point of law, it may well be critical that the action be allowed to proceed. Only in this way can we be sure that the common law in general, and the law of torts in particular, will continue to evolve to meet the legal challenges that arise in our modern industrial society.

- [79] Counsel for Hi-Seas also relied upon the fact that the Arbitration Panel held Trinav liable for breach of agency and breaches of fiduciary duty as compelling proof that the pleadings and evidence in this case give rise to bona fide triable issues that are not bound to fail.

Boelman's submissions

- [80] The primary argument advanced by Mr. Cowper on behalf of Boelman is that even if Trinav is liable to Hi-Seas for breaches of fiduciary duty or breaches of trust as determined by the Arbitration (which Boelman does not accept), Hi-Seas' attempts to impose personal liability upon Boelman for the actions of Trinav by way of the various legal arguments advanced are all bound to fail, even when analyzed in light of the facts most favourable to Hi-Seas.
- [81] Boelman further submits that this action is bound to fail by reason of the terms of the Vessel Management Agreement which was entered into by both Hi-Seas and Trinav with the benefit of independent legal advice in very specific uncontested circumstances including: the numerous acknowledged defaults by Hi-Seas under the Charterparty; the costs suffered by Trimex as a result of those defaults; the exposure of Trimex to potential liability to third parties arising from those defaults; and the steps taken by Trimex to ameliorate the effect of those defaults.
- [82] Concerning Hi-Seas' allegations founded upon propositions of alter ego, equitable fraud, and other arguments that would require the Court to "pierce the corporate veil" for Hi-Seas to be successful in establishing that he is personally liable for the acts of Trinav, Boelman submits that such claims are bound to fail by reason of the application of the principles enunciated by the Court of Appeal in *B.G. Preeco 1 (Pac. Const.) Ltd. v. Bon Street Hold. Ltd.* (1989), 37 B.C.L.R (2d) 258, 60 D.L.R. (4th) 30 (C.A.) [B.G. Preeco], as considered and applied by Brenner C.J.S.C. in *Re Down* (2000), 80 B.C.L.R. (3d) 28, 2000 BCSC 1148.

[83] In the trial decision in *B.G. Preeco*, which is reported at [1988] B.C.J. No. 1641 (S.C.), Paris J. considered arguments very similar to those now advanced by *Hi-Seas* against *Boelman*. The case involved claims against two corporate defendants and two individual defendants (the directors of the corporate defendants) for damages suffered as a consequence of the failure of a real estate transaction. Damages were awarded by Paris J. against one corporation and the individual defendants based upon fraudulent misrepresentation. However, in considering the plaintiff's arguments concerning the individual defendant's use of the corporate defendants as a "device or sham", Paris J. stated (at 8):

Plaintiff's counsel also made a submission expressed in rather general and sweeping terms that the 57 company was a mere "device and sham" and the court should "pierce the corporate veil" to hold the individual defendants liable on the agreement. However, the 57 company was a properly incorporated legal entity whose principles intended to operate through it for specific purposes which I have described. It had no significant assets - it was a "shell" company - but of course that per se does not mean it did not have the power to contract to purchase real estate. Indeed, I was told that that was not uncommon in the real estate industry. Furthermore, the fact that the principals of the company may have intended even at the time of undertaking the obligation on behalf of the company to take advantage of the limited liability of the company if it suited their purposes does not per se make the company a sham, i.e. does not expose its principals to liability for the company's obligations.

[Emphasis added]

[84] On appeal, after considering that passage, the Court of Appeal extensively reviewed the circumstances in which it may be appropriate to "fix liability on the principals" of corporations. In so doing, Seaton J.A. rejected the proposition that the corporate veil should be lifted where it would be "unfair" to do otherwise since such an approach could not co-exist with the doctrine laid down in *Salomon v. Salomon & Co. Ltd.*, [1895-99] All E.R. 33, [1897] A.C. 22 (H.L.).

[85] Seaton J.A. then went on to consider specific instances in which it may be appropriate to pierce the corporate veil, on the ground of "fraud or improper conduct" and observed, at 268:

The cases in which the corporate veil is pierced on the ground of "fraud or improper conduct" deal with instances where a corporation is used to effect a purpose or commit an act which the shareholder could not effect or commit.

[86] In *Re Down*, Brenner C.J.S.C. considered the effect of the decision in *B.G. Preeco* on a claim that *Down* was personally liable for the debts of companies controlled by him. He stated (at ¶ 111 to 116):

[111] The leading authority in B.C. is *B.G. Preeco 1 (Pac. Coast) Ltd. v. Bon Street Hold. Ltd.* (1989), 37 B.C.L.R. (2d) 258 (B.C.C.A.). In that case the Court of Appeal considered and rejected the proposition that "company law does not protect principals of a company who acted

fraudulently or dishonestly, and that in such cases the corporate veil should be lifted ...". While the Court accepted that the principals of the company fraudulently caused the plaintiff to believe that one defendant company had assets which in fact were held by another defendant company, it refused to lift the corporate veils of the defendant companies.

[112] The Court held that the proper legal remedy was to respect the legal autonomy of the corporate entities and to find liability in fraud against only the particular individuals and the particular company which had actually committed fraud.

[113] Therefore, under the rule in B.G. Preeco, to the extent that the petitioners can show fraud or other dishonest conduct on the part of Down and/or the companies, such conduct would not lift the corporate veils and allow claims in debt of the companies Down used to be extended to Down personally. The claims against Down would be limited to claims against him for fraud he personally might have committed.

[114] Even if fraud were a basis for lifting the corporate veil, there are no allegations that any fraud was perpetrated by Down or his companies against the supplier companies. The contention is that they are trade creditors that have gone unpaid by the Down enterprise; there is no evidence that they have any claims in fraud against the enterprise.

[115] The petitioners also argue that the Down companies were mere "puppets" or "facades" because the debtors showed no regard for their independence. However, this argument was also advanced and rejected in B.G. Preeco. There, despite evidence of the principal's significant disrespect for corporate structure and enterprise (p. 261), the Court refused to pierce the corporate veil on the basis of arguments based on "device" (p. 268), "agent" or "puppet" (p. 267), or "group enterprise theory" (p. 268).

[116] The Court limited the applicability of the piercing of the corporate veil to instances where a corporation is used to effect a purpose or commit an act which the shareholder himself could not effect or commit (p. 268).

[Emphasis added]

[87] Boelman submits that since Hi-Seas does not allege actual fraud but rather "equitable fraud" and "improper conduct" by way of breach of trust, breach of fiduciary duty or inducing breach of trust or fiduciary duty arising from the actions of Trinav, it must establish that Boelman used Trinav to effect a purpose that he could not effect or commit. He submits that Hi-Seas cannot overcome that bar to any finding of personal liability in this case.

[88] Boelman further relies upon the undisputed facts that: it was a regular part of Boelman's business practice to operate through corporations; Trinav was incorporated before it entered into the Vessel Management Agreement with Hi-Seas; the Vessel was required for a common enterprise between Boelman and other shareholders of Trimex, the corporate structure involving Trinav and Trimex was put in place to obtain the benefits of limited liability and tax benefits and to comply with Mexican cabotage rules; and, most importantly,

that corporate structure was made clear to Hi-Seas principals as well as to its lawyers who provided advice to Hi-Seas concerning the Vessel Management Agreement.

- [89] Boelman submits that in all of those circumstances, and given that the statement of claim does not allege actual fraud by him, and given further that all of his actions that Hi-Seas alleges were improper, wrongful, equitably fraudulent, or tortuous were undertaken by him solely as a director of Trinav and under the terms of the Vessel Management Agreement, any personal liability for those acts is precluded by application of the rule in B.G. Preeco.
- [90] Boelman also submits that the decision of the Provincial Court in Paine Edmonds (which did not consider B.G. Preeco), and of the Ontario High Court in Clarkson which it followed, overstate the circumstances in which the corporate veil may be lifted and are inconsistent with B.G. Preeco which is binding upon me.
- [91] Concerning Hi-Seas' allegations that Boelman is liable to it for inducing, participating in, and assisting breaches of fiduciary duties and breaches of trust by Trinav in failing to account to Hi-Seas for monies owing to it by Trimex under the Charterparty, Mr. Cowper submits that:
- (1) the rule in B.G. Preeco denies recovery for these alleged wrongs since any actions taken or effected by Boelman were taken solely in his roles as a director and shareholder of Trinav;
 - (2) although it may be arguable that Trinav became in some respects an agent of Hi-Seas under the Vessel Management Agreement, its obligations in any such capacity were limited by its terms;
 - (3) concerning those limitations and the determination by the Arbitration Panel that as an agent Trinav breached its duties by failing to: fully disclose all financial dealings concerning the Vessel; and properly care for and deal with the Vessel as if it were its own property; and properly account for monies due from Trimex to Hi-Seas under the Charterparty, Boelman relies on Clause 2.0 of the Vessel Management Agreement and specifically upon clauses 2.9; 2.10 and 2.11 which (as noted in ¶ 19 of these reasons) provided:

2.9 The Owner hereby acknowledges and agrees that the Manager shall not, at any time and under any circumstances and notwithstanding any other provision of this Agreement, be responsible or liable for demanding payment of or collecting the Hire Funds from Trimex.

2.10 The Owner hereby authorizes the Manager, in its absolute discretion, to use the Hire Funds, on behalf of the Owner, to pay for expenses incurred by the Manager on behalf of the Owner as a result of or in connection with the provision of Management Services (the "Management Expenses").

2.11 Where, at any time during the term of this Agreement, the Hire Funds are insufficient to pay for all Management Expenses incurred by the Manager:

- a. The Owner hereby undertakes and agrees to reimburse any outstanding amount to the Manager, upon first request; and
- b. The Manager shall be entitled, where the Manager, in its absolute discretion, chooses not to make any or some requests for payment under Section 2.11(a) of this Agreement or has not received payment despite the making of such request, to pay itself, from any future Hire Funds paid out to the Manager, for any unreimbursed Management Expenses incurred by the Manager but not yet reimbursed to the Manager by the Owner.

[Emphasis added]

- (4) to the extent that the Arbitration Panel focused upon Trinav's failure to collect or remit funds under the Charterparty or properly account to Hi-Seas, Mr. Cowper submits that its reasoning is flawed and should not be followed because the characterization of Trinav's "agency" obligations under the Vessel Management Agreement not only ignores terms that were negotiated with the assistance of legal counsel between two separate legal entities, but also fails to consider whether the accounting information provided by Trinav at the Arbitration in defence of its claims and in support of its counterclaim could constitute an appropriate accounting by analyzing the information provided after acknowledging the receipt of the information;
 - (5) although the recent decisions of the Court of Appeal in *Alers- Hankey* and *Strother* do analogize from legal principles that impose liability upon strangers to a trust for express breaches of trust as also being potentially applicable to a breach of fiduciary duty, both cases were decided on partnership principles and in fact situations which bear no resemblance to the commercial arrangements between Hi-Seas and Trinav under the Vessel Management Agreement;
 - (6) M & L Travel, Citadel Insurance and John Ingle Insurance upon which Hi-Seas relies upon in support of its argument that even if Boelman was a stranger to the agency, fiduciary and trust relationship between Trinav and Hi-Seas (as opposed to being liable to account to Hi-Seas as an alter ego or by reason of equitable fraud), all dealt with circumstances where corporate directors knowingly and dishonestly participated as strangers in breaches of trust involving funds that were clearly established as trust funds that were held by way of constructive trust and in respect of which their corporations had no legitimate interest; and
 - (7) in this case not only was no constructive trust fund established, Trinav had an acknowledged corporate interest in the funds payable by Trimex to Hi-Seas as well as the contractual right to apply such funds to debts owed by Hi-Seas to either or both of Trimex or Trinav by way of set-off.
- [92] In addition to those submissions, Boelman relies upon clause 4.1 of the Vessel Management Agreement by which Hi-Seas specifically agreed that he, as a director and officer of Trinav, would be under:

no liability whatsoever to the Owner, whether in tort, negligence, contract or otherwise, for any loss, damage, delay or expense of whatsoever nature, whether direct or indirect (including but not limited to loss of profit arising out of or in connection with detention of or delay to the Vessel) and howsoever arising in the course of the performance of the Management Services.

[Emphasis added]

[93] Boelman also submits that the decision of the English Court of Appeal in *Armitage* concerning exemption clauses upon which Hi-Seas relies is of no assistance or application in this case because the discussion of the unenforceability of clauses limiting the liability of trustees in that case was concerned with the duties of trustees, not with the potential liability of officers or directors of corporate trustees.

DECISION

[94] Counsel for Hi-Seas has acknowledged that for it to be successful on any of its claims against Boelman in this litigation, I must accept the following analysis:

- (1) the Vessel Management Agreement created an agency relationship between Trinav and Hi-Seas because Trinav took total control of Hi-Seas property including most importantly, the right to collect monies owing to it from Trimex under the Charterparty;
- (2) that agency relationship gave rise to trust and fiduciary obligations on the part of Trinav in addition to the obligations imposed under the Vessel Management Agreement;
- (3) those fiduciary obligations could not be limited by the Vessel Management Agreement;
- (4) because Boelman knew of the agency and trust relationship between Hi-Seas and Trinav, he was obligated to ensure that Trinav adhered to its terms by not breaching any fiduciary duties owed to Hi-Seas, and, most importantly, was precluded from obtaining any direct or indirect personal benefit as a consequence of any breach of trust or fiduciary duty by Trinav; and
- (5) any clauses limiting Boelman's personal liability to Hi-Seas for participation in any breach of trust or breach of fiduciary duty are unenforceable because his actions were caused by his wilful and thus dishonest acts in directing breaches of trust by Trinav and receiving benefits from those breaches.

[95] I have concluded that that analysis is both legally and factually incapable of establishing personal liability of Boelman to Hi-Seas as pleaded.

[96] I am accordingly satisfied that the claims advanced by Hi-Seas present no bona fide triable issues and are therefore bound to fail. My reasons for those conclusions follow.

[97] I agree that it is arguable that the relationship between Hi-Seas and Trinav has some attributes that could give rise to the application of agency principles in determining disputes between the parties. It does not, however, follow that the terms of the Vessel Management

Agreement that define the obligations of the parties can be wholly overridden by application of equitable agency principles. To that extent, I disagree with the Arbitration Panel's conclusions which not only elevate general equitable agency principles over contractually negotiated terms, but also do not consider whether those terms inform the scope of any trust obligations that might arise under a contract that was entered into without undue influence no matter how one-sided its terms might appear.

- [98] My disagreement with the analysis undertaken by the Arbitration Panel is not, however, fundamental to my decision in this matter. That is so because the Arbitration Panel specifically did not address any liability that might attach to Boelman for Trinav's breaches of any agency duties that might be owed to Hi-Seas.
- [99] In my view, the fundamental basis upon which Hi-Seas' various claims against Boelman must fail is the flawed analysis that if the relationship between Hi-Seas and Trinav is founded upon agency principles (and particularly fiduciary duties to inform and account as determined by the Arbitration Panel), the consequent obligations also create personal liability for an officer or director of a corporate agent who directs the affairs of the trustee. To that extent, Hi-Seas' analysis and submissions entirely disregard the rule in B.G. Preeco as applied in *Re Down*.
- [100] Hi-Seas has not pleaded actual fraud and has also not pleaded that any of the actions taken by Boelman of which it now complains were taken to effect a purpose or commit an act which he as an officer, director or shareholder could not effect or commit. It has also adduced no evidence that could in any way support a finding that such was the case or that could establish actual fraud.
- [101] I am also of the view that the totality of the evidence adduced on this application, including Boelman's testimony before the Arbitration Panel, cannot support a finding that Boelman's actions as a director of Hi-Seas amounted to equitable fraud. I reach that conclusion because:
- (1) the argument advanced by Hi-Seas is that Boelman breached fiduciary duties owed to Hi-Seas as Trinav's alter ego. It submits that such breaches also amount to equitable fraud which vitiates any contractual terms which might otherwise limit Trinav's or Boelman's liability to Hi-Seas;
 - (2) I have already determined that any actions undertaken by Boelman in directing the affairs of Trinav were taken solely in his role as an officer, director, or shareholder. In those circumstances B.G. Preeco precludes a determination that his actions amounted to an actionable breach of fiduciary duty;

- (3) Stewart J.'s decision in *Island Realty Investments* was concerned with imputation of knowledge to a director of a company that had participated in a breach of trust resulting in a determination that the director could not escape liability as a constructive trustee. Unlike the case of *Trinav* under the *Vessel Management Agreement*, the company in *Island Realty Investments* had no contractual right to discharge the investment mortgage that was the subject of its breach of trust; and
- (4) while *Performance Industries* does support the proposition that unfair dealing in matters of contract may amount to equitable fraud, neither that decision, nor any other authority to which I was referred, dealt with circumstances such as these where the conduct complained of was sanctioned by the underlying contract, or, more importantly for the purposes of this case, attributed personal liability to a director or officer of a corporation who directed such acts.
- [102] Concerning *Hi-Seas'* submissions related to cases such as *M & L Travel*, *Citadel Insurance* and *John Ingle Insurance* which it relies upon in support of its argument that *Boelman* is liable to it as a stranger to the agency, fiduciary and trust relationship between *Trinav* and *Hi-Seas*, I agree with Mr. Cowper's analysis. Those cases all dealt with circumstances where corporate directors knowingly and dishonestly participated as strangers in breaches of trust involving funds that were clearly established as trust funds held by way of constructive trust in which their corporations had no legitimate interest. Those cases do not assist *Hi-Seas* in this case because no constructive trust fund was ever established. Further, *Trinav* had an acknowledged corporate interest in the funds payable by *Trimex* to *Hi-Seas* as well as the contractual right to apply such funds to debts owed by *Hi-Seas* to either or both of *Trimex* or *Trinav* by way of set-off.
- [103] I also agree with Mr. Cowper's submission that while the recent decisions of the Court of Appeal in *Alers-Hankey* and *Strother* do support the proposition that a stranger to a breach of fiduciary duty may be potentially liable to the party to whom that fiduciary obligation is owed, both cases were decided on true partnership principles which bear no resemblance to the arrangements between *Hi-Seas* and *Trinav* under the *Vessel Management Agreement*. I would also add that those cases were not required to consider the issues that arise under the rule in *B. G. Preeco*.
- [104] In addition to all of the foregoing, I am satisfied that *Boelman* is entitled to rely on both clauses 4.1 and 4.2 of the *Vessel Management Agreement* to preclude liability for all of the claims advanced against him by *Hi-Seas*.
- [105] To my knowledge there is no authority that is binding upon me that supports the proposition that clauses 4.1 and 4.2 of the *Vessel Management Agreement* are not enforceable against *Hi-Seas* in the circumstances of a freely negotiated contract entered into with the benefit of independent legal advice.

- [106] The decision of the English Court of Appeal in *Armitage* upon which *Hi-Seas* relies was concerned with the enforceability of clauses limiting the liability of trustees for wilful or dishonest breaches of trust by a trustee. There was also no discussion of the enforceability of clauses limiting the potential liability of the officers and directors of corporations for the actions of a corporation.
- [107] In dismissing the plaintiff's claims I have also determined that while the test for the dismissal of claims under Rule 19(24) considered by the Supreme Court of Canada in *Hunt*, is similar to that under Rule 18(6), the former is primarily concerned with determining whether the pleadings as considered, or with possible necessary amendments, reveal an arguable cause of action. Rule 18(6) is concerned with whether the plaintiff is able to adduce evidence which is capable of raising a bona fide triable issue as to whether a cause of action as pleaded has the potential for success.
- [108] In this case the plaintiff's pleadings are closed and the evidence adduced on this application (which evidence the plaintiff itself submitted was sufficient to establish liability against *Boelman* under Rule 18A), has been considered by me in the best light possible for the plaintiff and found wanting. In those circumstances the concerns addressed under Rule 19(24) in *Hunt* do not arise.
- [109] In reaching that conclusion, I have considered *Hi-Seas'* submission that the fact that the Arbitration Panel held *Trinav* liable for breach of agency and breaches of fiduciary duty is compelling proof that the pleadings and evidence in this case give rise to bona fide triable issues that are not bound to fail. That submission is of no assistance to the plaintiff because the Arbitration Panel did not consider any of the issues concerning *Boelman's* potential personal liability for the actions of *Trinav* that are the subject of *Hi-Seas'* claims in this litigation.

CONCLUSION

- [110] All of the plaintiff's claims against the defendant are dismissed.

"B.M. Davies, J."

The Honourable Mr. Justice B.M. Davies

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