**COMMONWEALTH OF THE BAHAMAS** **2014/CLE/gen/00613**

**IN THE SUPREME COURT**

**COMMON LAW AND EQUITY DIVISION**

**BETWEEN:**

**THERAPY BEACH**

**PLAINTIFF**

**AND**

**BIMINI BAY RESORT MANAGEMENT LIMITED**

**1ST DEFENDANT**

**AND**

**RAV BAHAMAS LIMITED** **2ND DEFENDANT**

**AND**

**RWBB RESORTS MANAGEMENT LIMITED**

**(d.b.a. Resorts World Bimini)** **3RD DEFENDANT**

**AND**

**BB ENTERTAINMENT LIMITED** **4TH DEFENDANT**

**AND**

**BB INVESTMENTS HOLDINGS LIMITED**

**(d.b.a. Resorts World Bimini)**

**5th DEFENDANT**

**BEFORE: The Honourable Mr. Justice Ke**

**ith H. Thompson**

**APPEARANCES:** Ms. Krystal Rolle of Counsel for the Plaintiff,

Mrs. Tara Archer-Glasgow along with Ms. Theominique Nottage of Counsel for the 1st and 3rd Defendants;

Mr. Ferron Bethell along with Ms. Camille Cleare of Counsel of the 2nd Defendant

**Hearing Dates:** 07th March, 2019

27th January, 2020

28th January, 2010

## DECISION

[1] The First and Third Defendants along with the Second Defendant filed separate summonses on May 17th, 2019 and November 13th, 2019 respectively to strike the Statement of Claim of the Plaintiff. The Second Defendant seeks to strike on the basis that;

> **"the Plaintiff's claims are res judicata having been heard and determined by arbitration."**

[2] The First and Third Defendants are seeking to strike on the basis that the Plaintiff is precluded from pursuing this action against the First and Third Defendants by virtue of the principles of "res judicata and issue estoppel".

[3] All of the Defendants say that the claims set out in the fourth amended Writ of Summons have already been resolved in arbitration proceedings. The Plaintiff says that they have a right to litigate against the present defendants who although invited to arbitrate refused. The Plaintiff accepts that the First, Third and Second Defendants were not parties to any arbitration agreement.

**BACKGROUND:**

[4] This action was commenced on May 07th, 2014 by the Plaintiff initially against Rav Bahamas Limited, Bimini Bay Resorts Management Limited and Resort World Bimini Limited by way of the said Writ of Summons. The Writ was amended four times, thereby adding the present, First, Third and Second Defendants who were not parties to any agreement with the Plaintiff but rather with one or more of the Rav Parties.

[5] On or about 18th November 2016 the Plaintiff and the Rav Parties commenced arbitration proceedings which were ultimately determined by an Arbitration Award dated 21st August, 2017, which awarded the Plaintiff a total award of $9,670,000.00 inclusive of general damages for **CONSEQUENTIAL LOSS** and **EXEMPLARY DAMAGES** for the Plaintiff's claims against the Rav Parties.

[6] By way of a lease agreement dated the 31st December, 2011, the Plaintiff leased premises from Rav Bahamas Limited and Bimini Bay Resort Management Limited (The Rav Parties). Subsequently the Rav Parties entered into various separate agreements with the Defendants in the instant action.

[7] This action was filed May 7th, 2014 and was initially against the Rav Parties and Resorts World Bimini. After four amendments to the Writ of Summons, **RWBB RESORTS MANAGEMENT LIMITED (d.b.a. Resort World Bimini), BB ENTERTAINMENT LIMITED and BB INVESTMENTS HOLDINGS LIMITED** (d.b.a. Resorts World Bimini) were added as Defendants.

[8] The Plaintiff, with leave to further amend its third Writ of Summons and Statement of Claim sought to remove the Rav Parties from the action on the basis that its claims as against the Rav Parties had been settled by virtue of the Arbitration proceedings and the subsequent Award. The Plaintiff was granted leave to amend and filed its Fourth Amended Writ of Summons and Statement of Claim thereby claiming as against the 1st and 2nd Defendants **RWBB RESORTS MANAGEMENT LTD. and BB ENTERTAINMENT LIMITED** for;

**(i) trespass;**

**(ii) inducing and/or procuring breach of contract and**

**(iii) unlawful interference with economic interests.**

[8] In essence, the Plaintiff's position is that they are entitled to sue the 1st, 2nd and 3rd Defendants separately and apart from the Rav Parties. The Plaintiff seems to be saying that there was an exclusivity clause as between it and the Rav Parties contained in the Sakara Lease. This clause it says was varied. Counsel for the Plaintiff says that no issues were resolved as between the present parties and that the issues between the Plaintiff and the Rav Parties have been resolved. The Plaintiff relies heavily on the case **SPECIAL EFFECTS LTD. V. L'OREAL SA** and Another [2007] IPET 617.

**CASE OF THE PLAINTIFF:**

[9] The case for the Plaintiff is to be found in several affidavits. The first being the affidavit of **SHANTELLE MUNROE** filed November 24th, 2014, in particular paragraphs 7 – 14.

> **7. "By this application the Plaintiff is firstly seeking leave to amend its Writ of Summons to regularize the addition of, RWBB RESORTS MANAGEMENT LTD. *d.b.a. Resorts World Bimini*, (which appears to have been added without the leave of the Court) and to add the Intended Defendants BB ENTERTAINMENT LTD. d.b.a. RESORTS WORLD BIMINI and BB INVESTMENTS HOLDINGS LTD. d.b.a. RESORTS WORLD BIMINI.**
>
> **8. Secondly, the Plaintiff is seeking leave to amend its Statement of Claim endorsed on the Writ to make the specific claims and allegations as against the Third Defendant and the two (2) Intended Defendants as are shown on the Draft Third Amended Writ of Summons and Statement of Claim which is now produced and shown to me marked Exhibit "SMM-1". The proposed amendments are thereon shown in purple and underlined.**
>
> **9. The Third Defendant and the Intended Fourth and Fifth Defendants were not a party to the Lease Agreement which is the subject of the claim as between the Plaintiff and the First and Second Defendants.**
>
> **10. The Plaintiff also asserts that the Third Defendant and the Intended Fourth and Fifth Defendants are independently liable**

**to the Plaintiff for the entirety of the loss presently claimed as against the First and Second Defendants by virtue of their independent breaches and the resultant independent causes of action alleged as against them.**

**11. The proposed amendments include the specific claims and causes of action pleaded against the Third, Fourth and Fifth Defendants as well as the requisite factual and legal basis which must be pleaded in relation to such claims.**

**12. By way of example, one of the intended causes of action as against the Third Defendant and the Intended Fourth and Fifth Defendants is the tortious claim of Inducing or Procuring breach of Contract. In order to plead this claim the Plaintiff must first fully plead inter alia the existence, the nature and the breach of the contract which it is alleged the Intended Defendants induced and/or procured.**

**13. There is no issue of Arbitration as between the Plaintiff and the Third, Fourth and Fifth Defendants.**

**14. The Plaintiff intends to proceed with these intended claims as against the Third Defendant and the Intended Fourth and Fifth Defendants seeking the entirety of the loss which they have alleged to have suffered."**

[10] I take special note of paragraph 10 wherein the Plaintiff says:

**Par. 10. "The Plaintiff by its intended amended claims asserts ..... The Plaintiff also asserts that the Third and Intended Fourth and Fifth Defendants are independently liable to the Plaintiff FOR THE ENTIRETY OF THE LOSS**

**PRESENTLY CLAIMED as against the First and Second Defendants by virtue of their independent breaches and the resultant independent causes of action alleged against them."**

[11] The Plaintiff also asserts that the Third and Second Defendants are independently liable to the Plaintiff **FOR THE ENTIRETY OF THE LOSS PRESENTLY CLAIMED,** as against the First and Second Defendants by virtue of their independent breaches and the resultant independent causes of action alleged against them."

[12] In the Third affidavit of Cyd Ferguson paragraphs 7 – 10 are of special note.

> **"7. Further, for the purpose of the Fourth Defendant's Application the Plaintiff relies on the fact that the Award in the Arbitration proceedings between itself and the First and Second Defendants related specifically to the restaurant and beach club known as the Sakara Beach Club and the loss and damage arising from the demolition of the Sakara Beach Club.**
>
> **8. The Plaintiff's intended claim against the Third, Fourth and Fifth Defendants does not pertain at all to the Sakara Beach Club. The Plaintiff's intended claim against the Third, Fourth and Fifth Defendants relates exclusively to the restaurant which was to be known as the Atlantic Seafood Restaurant, to the Atlantic Seafood Building and to the loss and damage arising from the Third, Fourth and Fifth Defendant's acquisition and operation thereof to the exclusion of the Plaintiff.**

9. **In the Arbitration between the Plaintiff and the First and Second Defendants issues pertaining to the Atlantic Seafood Restaurant and the Atlantic Seafood Building were determined as between the Plaintiff and the First and Second Defendants only.**

10. **There was no such determination as between the Plaintiff and the Third, Fourth and Fifth Defendants. As deposed to in my First and Second Affidavits the Third, Fourth and Fifth Defendants were not parties to the Arbitration."**

[13] In essence, the Plaintiff's position is that the Plaintiff's claim against the 1st, 2nd and 3rd Defendants does not pertain to the Sakara Beach Club but relates exclusively to the restaurant which was to be known as the Atlantic Seafood Restaurant, to the Atlantic Seafood Building and to the loss and damage arising from the First, Second and Third Defendants acquisition and operation of the same to the exclusion of the Plaintiff.

[14] The Plaintiff's further position is that the Arbitration between the Plaintiff and the Rav parties in relation to issues pertaining to the Atlantic Seafood Restaurant and the Atlantic Seafood Building were determined as between the Plaintiff and the Rav parties only. The Plaintiff says that there was no such determination as between the Plaintiff and the 1st, 2nd and 3rd Defendants as they were not parties to the Arbitration.

**POSITION OF THE 2ND DEFENDANT:**

[15] Counsel almost immediately referred to the 4th Amended Writ of Summons and Statement of Claim beginning with paragraph 33 which he read into the record.

**"The Atlantic Seafood Agreement"**

"33. **Consistent with the Exclusivity Provision, by further agreement (hereinafter referred to as "The Atlantic Seafood Agreement") between the Plaintiff and RAV, in part in writing and in part by conduct, RAV agreed that in addition to the Sakara Beach Club & Restaurant, RAV would construct and the Plaintiff would develop, promote, market and operate a beach restaurant on the Resort Property under the name and style of the Atlantis Seafood & Grill (hereinafter called "Atlantic Seafood Restaurant").**

[16] He then referred the court to paras 38 and 39; 19, 44 and 45:-

38. **"Further, Resorts World at all material times had actual knowledge that the Plaintiff had the right to possess the Atlantic Seafood Building for the duration of the term provided for in the Sakara Lease and for any renewed term as provided for therein.**

39. **Further or in the alternative, Resorts World at all material times had imputed and/or constructive knowledge of the Plaintiff's right to possess the Atlantic Seafood Building for the duration of the term provided for in the Sakara Lease and for any renewed term as provided for therein by reason of Mr. Rafael Reyes being a Director of both RAV and of the Second Defendant."**

19. **"By an Indenture of Lease dated the 31st day of December, A.D., 2011 (hereinafter referred to as "The Sakara Lease") RAV**

**demised unto the Plaintiff d.b.a. Sakara Beach Club a portion of the Resort Property (hereinafter referred to as "the Sakara Beach Club and Restaurant Premises") comprising approximately 5, 376 square feet as shown on the Plan attached thereto as Exhibit A for a term of three (3) years upon the terms and conditions provided for therein inclusive of a term for renewal of the Lease for a further three (3) years. The Plaintiff will rely on the terms and provisions of the Sakara Lease at the trial of this action for its full terms and effect."**

**44. "RAV's Breach of the Atlantic Seafood Agreement"**

**As of the 18th day of July, 2013, that being the date of the demolition of the Sakara Beach Club and Restaurant, RAV prohibited the Plaintiff from entering into possession of the Atlantic Seafood Building and its surrounding areas and thereby breached the Atlantic Seafood Agreement.**

**45. The Plaintiff was never allowed to develop, promote, manage and operate the Atlantic Seafood Restaurant pursuant to the terms of the Atlantic Seafood Agreement or at all."**

[17] Counsel further referred to the Arbitration Award itself, in particular, paragraphs 48,57,60,62,76,87,88,89,90,91,92,93 and 94.

**Para. 48. "At paragraphs 12 to 21 of the Statement of Claim the Claimant pleads that there was a Variation of the Lease Agreement (VLA) to include three additional beach venues. The Claimant has identified these additional**

**venues. The Claimant has identified these additional venues as Atlantic Seafood and Grill, Therapy Beach Club and Spa, and Hemmingways.**

**Para. 57.** **"Kelly Jones also was involved as part of Edwards' team. He admitted that he possessed no firsthand knowledge of the real conditions on the island and had never visited Bimini. However, based on information supplied to him by Edwards and his familiarity with another Caribbean destination (Tortola, Virgin Islands). Kelly Jones produced extensive restaurant models. Based on those models he projected annual sales for the restaurants: Atlantic Seafood $1,155,559. Therapy Beach Club $1,7011q64, and Hemmingways $ 564,410." .....**

**Para. 60.** **"The Claimant cites the construction of the Atlantic Seafood building as conduct by the Respondents, through Reyes, as demonstrative that there was a VLA. The building was described by Edwards as being 75% complete on 18th July 2013 when Sakara was demolished." .....**

**Para. 62.** **"Edwards' evidence was that construction of the Atlantic Seafood building was started in mid-2012. When he saw this he questioned Reyes about starting Phase 1 as Sakara was still incomplete. Reyes then assured him that Sakara, would be completed even though construction of Phase 2 had begun. There were subsequent email exchanges between Reyes and Edwards concerning Phase 2 and, concurrently Edwards' emails to Reyes requiring the lighting specifications for Sakara in order to purchase lighting fixtures in Florida. Edwards said that he ultimately agreed to this because he already had a**

**network of people involved in the project. Construction of the building continued until it was nearly complete then suddenly construction was halted, according to Edwards. He also stated that after receiving the Kelly Jones restaurant models he had several meetings with Reyes to discuss them. He ultimately received Reyes approval to proceed with the three restaurant design concept." .....**

**Para. 76. "Mrs. Rolle argues that Reyes has been so discredited during cross examination that his evidence should be disregarded on all points in issue. She cited the following authority in that regard for my consideration the case of Siswan Shelly-Morris, Plaintiff V Bus Atha Obiah, Defendant [2003] 1R 232 where the plaintiff was found to have engaged in deliberate falsehood and the consequent diminution of his credibility generally on all issues in dispute." .....**

**Para. 87. "However, Mr. Bethell has raised the determinative issue with regard to the purported VLA by reference to Therapy's corporate records." .....**

**Para. 88. Mr. Bethell produced records of Therapy, which were admitted into evidence. Those records show that Therapy was incorporated on 15th January 2012, with Garrick Edwards was removed as President and Director of the company on 21 March 2012 and Aniska V. Demille was appointed President and Director of Therapy. Therapy's corporate records further show that Edwards was again recorded as President of Therapy on 23rd March 2014. On 1st May 2017 Therapy was dissolved, but it was subsequently reinstated.**

**Para. 89.** **Mr. Bethell submits that based on those corporate records Therapy cannot rely on any actions taken by Edwards during the period 21st March 2012 to 28th March 2014 when he was not an officer of Therapy in support of its claim of a VLA.**

**Para. 90.** **When cross examined by Mr. Bethell on the period during which he was not an officer of the company Edwards' answers were evasive. Further, if his removal as President and/or Director of Therapy was indeed, as he claimed, due to a mistake of his attorney, it strains credibility that this "mistake" uncorrected for two years.**

**Para. 91.** **Mrs. Rolle did not addressed the issue of Mr. Edwards' removal as President of Therapy, and consequent lack of authority to act for the Claimant during her re-examination of Mr. Edwards, or at all. She however did term the cross-examination of Edwards on his Tax Returns and bank statements as "red herrings". No evidence was adduced to show that Edwards was, subsequent to his removal as an officer of Therapy appointed an agent of Therapy. Such designation would have clothed him with the requisite authority to act for Therapy.**

**Par. 92.** **Therapy Inc. is the Claimant in this Arbitration, not Garrick Edwards. It is trite law that a corporate entity acts through its officers and directors. Consequently I find that Therapy cannot rely on any discussions and/or verbal understandings which occurred prior to its incorporation. Further Garrick Edwards, as shown by email exchanges as late as 13th December 2011 appeared to be negotiating with Reyes as an affiliate of UCA, Miami.**

**Par. 93.** **Similarly Therapy cannot rely on any actions taken by Garrick Edwards personally when he was <u>not</u> an officer and/or director or agent of Therapy, in furtherance of its claim that there was a VLA, from 21st March 2012 to 28th March 2014.**

**Par. 94.** **I am not satisfied that Garrick Edwards was an officer of Therapy and authorized to act on its behalf from 21st March 2012 to 28th March 2014. Accordingly for these reasons Therapy's Claim that there was a variation of the Lease Agreement must fail. I so find".**

[18] Counsel's point is that in the Arbitration it was determined that there was no variation of a lease agreement. He referred to the matter as a collateral attack on the award. His position is that the issues have already been determined.

[19] Counsel referred to s. 80 of the Arbitration Act ("the Act") which provides;

> **"Unless otherwise agreed by the parties an award made by the tribunal pursuant to an arbitration agreement IS FINAL and BINDING both on the parties AND ON ANY PERSONS CLAIMING THROUGH OR UNDER THEM."**

[20] **WITNESS STATEMENT OF KELLY JONES** (paragraph 37) and **WITNESS STATEMENT OF ERIC OCASIO** (paragraph 27).

**<u>WITNESS STATEMENT OF KELLEY JONES</u>**

**"I, KELLEY JONES, of Las Vegas in the state of Nevada one of the United States of America make oath and say as follows:**

1. I make this Witness Statement on behalf of the Claimant in this Arbitration. I do so based on facts and matters within my own knowledge save where otherwise expressly stated.

**My experience in the Food & Beverage & Hospitality Industry. My Ventures, Endeavors and Employment History & Pursuits.**

2. I have been involved in the Food and Beverage and Hospitality Industry in varying capacities for a period of almost 30 years.

3. I am the principal of Kelley Jones Hospitality. Kelley Jones Hospitality currently has officer in New York City and in Las Vegas.

4. My diverse employment history, ventures, endeavors and affiliations are set out below.

5. Between 1998 and 2003 I served as the Director of Development and Operations for China Grill Management (CGM), New York. In this capacity, I led the development and opening teams on numerous restaurant and club concepts including China Grill, rumjungle, Red Square, Asia de Cuba, Spoon, Tuscan Steak and Blue Door in cities across the globe including New York,; London; Mexico City; San Francisco; Las Vegas; Los Angeles; Miami and Chicago. CGM was the F & B and Restaurant operator at all of Ian Schrager's Hotels prior to it becoming Morgan's Hotel Group.

6. Between 2003 and 2005 I served as the Vice President of Restaurant Operations for the Kimpton Hotels & Restaurant Group. Kimpton is a collection of stylish, independent lifestyle hotels coupled with fine chef-driven restaurants. In this role, I oversaw the day-to-day operations of 39 multi-unit concept fine

**dining restaurants in locations including San Francisco; New York; Washington; Seattle; Portland, Oregon; Salt Lake City; Devner; New Orleans; Aspen, Colorado; San Diego; Vancouver; British Columbia; Miami and Boston. Additionally, I coordinated restaurant marketing and public relations efforts, as well as oversaw restaurant development for new projects.**

7. **Between 2005 and 2007 I served as the Vice President of Restaurant Operations for Starr Restaurant Organization (SRO) is a multi-concept fine dining Restaurant Company with 16 restaurants operating in Philadelphia; New York and Atlantic City, New Jersey. I oversaw the day-to-day operations of a diverse portfolio of food-focused restaurant concepts including some of the industries' most recognized brands. Among them are Buddakan, Striped Bass, Morimoto (with the original Iron Chef), and Continental, Alma de Cuba, Barclay Prime, Pool Pod, El Vez and numerous others. Additionally, I was responsible for new restaurant development, marketing, public relations and special events sales.**

8. **Between 2007 and 2008 I served as the President of the Light Group. The Light Group is one of the nation's leading nightlife, restaurant and lifestyle development organizations. It is based in Las Vegas. The Light Group's diverse portfolio of concepts includes cutting-edge nightclubs, restaurants and ultra-lounges.**

9. **Additionally, I have worked in the Caribbean in the Food & Beverage and Hospitality Industry. As such I have also garnered a wealth of knowledge and experience about the Caribbean markets and industry.**

10. **Between 1990 and 1991 I served as the General Manager/Executive Chef at Pussers Landing situated in St. John, U.S. Virgin Island.**

11. **Between 1991 and 1998 I served as the Corporate Director of Food and Beverage for Pussers, Ltd situated in Tortola, British Virgin Islands ("BVI").**

12. **In addition to the employment history set out above, my ventures include the Mayfair Hotel in Los Angeles, California and the The Dapper Doughnut and Proof Tavern in Las Vegas, Nevada.**

13. **I was also retained by ITV Studios to create "Hell's Kitchen the Restaurant" which ITV plans to roll out internationally. I was also retained by The Related Group in Miami, Florida as the asset manager for their F & B operations at Hyde Beach Kitchen & Cocktails.**

14. **Additionally, I instructed the culture and leadership training for all managers and team members for the Madison Square Garden Company at their various venues including LA Forum, Chicago Theater, Beacon Theater, MSG and Radio City Music Hall.**

15. **I train teams at Newark Airport for OTG Management and Tom Bradley International Terminal at LAX for Westfield.**

16. **I launched Gaku Ramen, loosely translated in Japanese to "educated noodle", in Burlington Vermont with a planned expansion into college towns across the North East.**

17. **I previously opened Hops & Harvest with James Beard's award winning partner Bradley Ogden, an American farm to table comfort food concept.**

18. I also partnered with Top Chef Angelo Sosa on Poppy Den, an Asian gastro-pup and retained Sosa as his culinary consultant at The Malibu Inn on Malibu Beach, California.

19. I partnered with Iron Chef Geoffrey Zakarian at Tudor House and HIGHBAR on Miami's South Beach and opened Todd English Pub as managing partner in Las Vegas.

20. I created Suite & Tender at the Se Hotel in San Diego and Eden on Miami's South Beach, both with Michelin 2 Star Chef Christopher Lee.

21. I have been on the opening executive teams of some of the country's leading hotel brands including The Monaco Washington DC, Hudson New York, Clift San Francisco, Argonaut San Francisco and Mandalay Bay Resort & Casino Las Vegas.

22. I have managed the operating teams of eight of the top 100 highest grossing restaurants in the country and I have led the opening teams of five of the top 100 highest grossing restaurants in the United States.

23. I held senior executive level positions with three of the top 75 multi-concept restaurant operators in the country (#'s 3,7 and 15) as ranked by Restaurant & Institutions Magazine.

24. As a result of my vast knowledge and experience in the hospitality industry. I am often approached to share my views and insight at conferences around the country including the National Restaurant Association Show, Bar & Nightclub Show, Hospitality Design Boutique Expo. RD&E Conference, G2E Summit, the inaugural Independent Lodging Congress, Temple University School of Hospitality and Tourism and UNLV.

25. I have been interviewed and quoted in industry magazines such as Nations Restaurant News, Restaurant & Institutions, Market Watch, Cheers, Restaurant Business, Food and Beverage Underground, Food Arts, Hospitality Design Tasting Panel and Wine Enthusiast.

26. I am the founding member of the Epicurean Charitable Foundation in Las Vegas and I continue to serve on the board and previously on the executive committee as Vice President and Chairman.

27. I also served on the board of the Nevada Blind Children's; Foundation as secretary.

**My Retention by the Claimant and the Services 1 Provided for the Claimant**

28. In or about mid 2011 I was contacted by Mr. Garrick Edwards relative to a project the Claimant was doing in Bimini, Bahamas.

29. Mr. Edwards firstly explained the venue to me, specifically that it was a bench venue and secondly he described the concept he was developing. The concept described to me by Mr. Edwards was four (4) locations on the beach comprising beach clubs and restaurants.

30. I recall explaining to Mr. Edwards at the very beginning that I did have significant Caribbean experiences. I told him that I worked and resided in Tortola BVI for many years during which time I worked exclusively in the Food & Beverage and Hospitality Industry.

31. I also told him that I had a significant amount of experience with the planning and the opening of restaurants and businesses of the nature he was developing.

32. Mr. Edwards and I first considered the Sakara Beach Club. Mr. Edwards spent a significant amount of time explaining the Sakara Beach Club concept to me and he advised me that he needed Financial Projections to present to his business partners.

33. I confirmed to him that my role and involvement with the opening teams for various restaurants and hotels over the course of my career also involved me preparing such projections for the purpose of analyzing the financial feasibility of the intended project. I told him that I would be able to prepare the Financial Projections for Sakara.

34. After spending a significant amount of time with Mr. Edwards, discussing and considering the relevant supporting information I prepared Financial Projections for Sakara date October, 2011 and presented them to Mr. Edwards. A copy of the Sakara projections which I prepared are contained in the Claimant's Bundle of Documents. I have also attached a copy of the Sakara Projections to this Witness Statement for ease of reference labeled "KJ-1".

35. My Projections for Sakara demonstrated a net profit margin of $1.5 Million annually.

36. The Sakara Financial Projection was based to a large extent on the plans Mr. Edwards had for driving business and "traffic" to the Beach Club. He discussed these plans and marketing strategies with me and I agreed that these plans supported the financial projection that I made for Sakara.

37. On Mr. Edward's request and based on his description of the concepts he wanted for the additional three (3) locations, I prepared Concept Models for the three (3) other locations,

**specifically, Atlantic Seafood & Grill, Hemmingway's Restaurant and Therapy Beach Club. Copies of the Concept Models for Atlantic Seafood & Grill, Hemmingway's Restaurant and Therapy Beach, which I prepared, are contained in the Claimant's Bundle of Documents. I have also attached copies of the Concept Models for Atlantic Seafood, Hemmingway's Restaurant and Therapy Beach to this Witness Statement for ease of reference labeled "KJ-2", "KJ-3" and KJ-4".**

38. **Mr. Edwards explained to me that he needed these Concept Models to present to his business partners as well as to other participants and potential investors.**

39. **I prepared these Concept Models and presented them to Mr. Edwards in or about February, 2012.**

40. **Mr. Edwards also asked me to prepare Financial Projections for Atlantic Seafood & Grill, Hemmingway's Restaurant and Therapy Beach Club. I did so in close consultation with Mr. Edwards utilizing the supporting information which I obtained from him.**

41. **I prepared the Financial Projections for Atlantic Seafood & Grill, Hemmingway's Restaurant and Therapy Beach in February, 2012. Copies of the Financial Projections for Atlantic Seafood & Grill, Hemmingway's Restaurant are Therapy Beach Club are contained in the Claimant's Bundle of Documents. I have also attached copies of these Financial Projections tot his Witness Statement for ease of reference labeled "KJ-5", KJ-6" and "KJ-7".**

42. **My Projections for Atlantic Seafood & Grill demonstrated a net profit margin of $1,155,590.00 annually.**

43. **My Projections for Hemmingway's Restaurant demonstrated a net profit margin of $564,410.00 annually.**

44. **My Projections for Therapy Beach Club demonstrated a net profit margin of $1,701,164.00 annually.**

45. **The contents of this Witness Statement are correct and true to the best of my knowledge, information and belief.**

**SWORN AT Las Vegas,**

**Nevada this 12th day of**

**June A.D., 2017.**

**Signature"**

**WITNESS STATEMENT OF ERIC OCASIO:**

**I, ERIC OCASIO, of Miami in the state of Florida one of the United States of America make oath and say as follows;**

1. **I am a Financial Professional**

2. **I make this Witness Statement for the purpose of the Arbitration between the Claimant and the Respondents. Within this Witness Statement I provide details on my educational background and employment history. I explain the nature of my engagement by the Claimant and I attach to this Witness Statement my Expert Report relative to my engagement.**

3. I make this Witness Statement based on facts and matters within my own knowledge save where otherwise expressly stated.

**Statement of Independence:**

4. I hereby confirm that I have never provided services, financial or otherwise, for Therapy Beach Club Incorporated, Garrick Edwards, any other Officer or Director of Therapy Beach Incorporated or any entity associated with or affiliated with Therapy Beach Club Incorporated (hereinafter together referred to as "Therapy").

5. I also hereby confirm that I have no direct or indirect financial interest in Therapy and no interest in the final outcome of the Arbitration.

**My Educational Background:**

6. My Educational Background spans a period of nine (9) years with my main focus being the Study of Finance.

7. Between 1990 and 1994 I attended the Hill School situated in Pennsylvania. In 1994 I graduated from the Hill School with a General Education Degree with my specific field of study being Finance.

8. Between 1999 and 2002 I attended the University of Miami situated in Miami Florida. I graduated from the University of Miami in 2002 with a Bachelors of Business Administration (BBA) Degree with my specific field of study being Finance.

9. Between 2006 and 2008 I again attended the University of Miami and in 2008 I graduated with a Master's Degree in Business

**Administration with my specific field of Study being International Business and Strategic Management.**

**My Employment History:**

10. **I have a 15 year employment background in Finance working specifically in various Retail and Consumer enterprises which I describe below.**

11. **Between January 2003 and March, 2007 I worked at Perfumania as a Financial Analyst. My primary duties were to maintain, prepare and analyze the Company's corporate office, its four (4) regional offices, its 27 Districts, its 290 retail Stores as well as its online stores. The Company had a $300 Million Budget and I prepared Profit & Loss Reports, Performance Reports and Department Reports. I also prepared other Analysis Reports such as Store Compensation, marketing, Supplies, Shrinkage, Damages, Returns, Testers and Cap Ex Schedules. I did Strategic Planning & Ad Hoc Analysis, New Store & Lease Renewals, Pre-Forma Projections, Business Valuations, Excel, JDA, AS400 & Cognos Financial Software (Adfautum). I worked closely with the CFO, Director of Corporate Operations and Senior Management to find ways to improve profitability within the retail stores, the wholesale division and Perfumania.com.**

12. **Between 2007 and February, 2008 I worked as the Senior Financial Analyst for Bacardi USA Inc. My duties as Senior Financial Analyst at Bacardi involved the preparation of accurate and relevant financial analysis and reports for the brand teams, Senior Management and Bacardi Limited. This analysis and reports played a key role in interpreting financial results and relating them to the actual marketing activity.**

13. **Between 2008 and 2012 I worked as the Business Analyst and Financial Manager for Bimbo Bakeries USA. My duties included preparing and managing the monthly flash, Brand profit & loss & close process, analyzing and reconciling month-end financial statements, managing the preparation and discussion of monthly VP of Sales overheads and KOPI's conference call, preparing the monthly Leadership Financial presentation, managing the Annual & LE Planning process, Special Strategic Planning Projects. (i.e., Real Estate, Route Restructure, & Overdue Payment Schedules), preparing, compiling and distributing the internal financial management reports, identifying risks and opportunities based on financial data and trends, preparing and analyzing Weekly Volume Analysis and Managing Promotional Trade Analysis & Display Activation Report.**

14. **Between March 2012 and March 2013 I worked as the Financial Manager for PepsiCo (Pepsi Beverage Company). Pepsi Beverages Company (PBC) is PepsiCo's beverage manufacturing, sales and distribution operating unit in the United States, Canada and Mexico, PBC handles approximately 75 percent of PepsiCo's North America beverage volume. Its diverse portfolio includes some of the world's most widely recognized beverage brands, including Pepsi, Mountain Dew, Sierra Mist, Aquafina, Gatorade, SoBe, Lipton, and Amp Energy. In many markets, PBC also manufactures and/or distributes non-Pepsi brands, including Dr. Pepper, Crush, ROCKSTAR, and Muscle Milk.**

15. **As Finance Manager my primary responsibilities were to prepare and manage the Annual Operation Plan ($4 Billion) and the Quarterly Business Plan and Monthly & Weekly Forecasts.**

**I served as the key Finance contact on the Grocery Customer Sales team for DSD (Direct Store Delivery) beverage portfolio. I partnered with Sales to develop accurate customer sales, margin and trade forecasts. I analyzed the weekly sales and trade variances and provided insight for weekly forecast updates.**

**I provided financial expertise and recommendations to drive effective sales and promotional event decisions. I provided the sales team with adequate decision making capability to manage trade calendars, investment decisions and overall customer performance. I provided reporting and analysis to Sales Management for the purpose of tracking business results and identifying potential risks and opportunities. I conducted "pre" & "post" promotional event analysis. I performed ad-hoc analyses that lead to problem solving and business improving recommendations. I analyzed potential trade investment opportunities and provided guidance and financial perspectives to the Sales team.**

16. **Between April 2013 and March 2014 I worked as the Senior Manager of Financial Operations, Planning and Analysis for Genting (USA) Limited, Resorts World Bimini, Bimini SuperFast Ltd. I elaborate further on my employment and duties for Genting/Resorts World Bimini in greater detail below.**

17. **From January 2015 to the present I serve as the Chief Executive Officer (CEO) of FEO Management Group/Haitian Children's Initiative.**

**<u>My Employment with Genting (USA) Limited – Reports World Bimini:</u>**

18. **At Genting (USA) Limited I worked as the Manager of Financial Operations, Planning Budgeting and Analysis.**

19. I developed, prepared and maintained the Phase One (1) $300 Million development budget. This budget included Board Proposals & Business Plans, I worked in conjunction with the Attorneys to set up the eight (8) companies which made up the Miami and the Bahamas Market. I set up the commercial bank accounts for all eight (8) companies and I designed the matrix controls.

20. I was the Project Manager for the Reservation and Onboard Tracking (Seaware, Fidelio, CyberSource, Servebase & Micros), I implemented the Merchant Services, Sales Planning & Pricing Structure and I developed an exclusive cross branding Discover Card promotion.

21. I was responsible for the development of Daily, Weekly, Monthly and Quarterly Key Performance Indicators (KPI) and I prepared and managed the Operation Plan for all Genting USA entities in Miami and the Bahamas.

22. I provided pricing and promotional analysis and I was responsible for all financial operations abroad Resorts World Fast Ferry and at the Resort.

23.; I was responsible for all budgeting, planning and reconciliation. I prepared the Revenue Analysis and I set up the Point of Sale (POS) infrastructure. I acted as the Finance Director, second only to the Senior Vice President of Finance.

24. I operated from Genting's corporate office in Miami. I travelled to Bimini when the Casino was approximately 90% completed. In Bimini I set up the POS infrastructure for the various revenue outlets at the Resort.

25. By virtue of my capacity at Genting (USA) limited and at Resorts World Bimini I am personally aware of the earnings and earning

**capabilities of the various revenue centers at the Resort including the Food & Beverage Revenue Centers. This is particularly so because I was the one who did the financial projections for Genting (USA) Limited and for the Resorts World Bimini as it entered into this endeavor.**

**26. Genting (USA) Limited/Resorts World Bimini launched in Bimini in July, 2013. I remained on staff until March, 2014.**

**<u>My Report on the Profit Loss sustained by Therapy Beach Club Incorporated Inc. Relative to the Sakara Beach Club and the Atlantic Seafood & Grill Restaurant.</u>**

**27. I have prepared for the Claimant a Report which sets our inter alia the results of my careful analysis and investigation as well as my ultimate opinions and projections on the financial loss sustained by the Claimant relative to the Sakara Beach Club and the Atlantic Seafood & Grill Restaurant.**

**28. I have attached my Report on this Witness Statement as Exhibit "EC-1".**

**29. The contents of this Witness Statement are correct and true to the best of my knowledge, information and belief.**

**SWORN AT Nassau**
**Bahamas this 8th day of**
**June, A.D., 2017.**
**Signature"**

[22] Counsel's position was that, he referred to these various paragraphs of the two witness statements to show that the claims herein are duplicated having been dealt with already at arbitration.

[23] A comparison was made between s. 80 of the Act and s. 16 of the United Kingdom's Act 1950, it being the same. In this regard counsel referred the court to the case of **FIDELITAS SHIPPING CO. LTD. V. V/O EXPORTCHLEB [1966] 1 Q.B. 630** where LORD DENNING stated the relevant principle as being;

> **"The law as I understand it, is this; if one party brings an action against another for a particular cause and judgment is given upon it, there is a STRICT RULE OF LAW (my emphasis) that he cannot bring another action against the same party for the same cause. Transit in rem judicatuor; see KING V. HOARE (1844) 13 M & W 494 504. But within one cause of action there may be general issues raised which are necessary for the determination of the whole case. The rule then is that, once an issue has been raised and distinctly determined between the parties, then as a general rule neither party can be allowed to fight that issue all over again. The same issue cannot be raised by either of them again in the same or subsequent proceedings except in special circumstances, see BADAR BEE V HABIB MERICAN NOORDIN [1909] AC 615, 623 per Lord McAcnaghten."**

[24] He further stated;

> **"Issue estoppel APPLIES TO ARBITRATION as it does to litigation. The parties having chosen the tribunal to determine the disputes between them as to their legal rights and duties ARE BOUND by the determination by that tribunal if any issue which is relevant to the decision of any dispute referred to that tribunal. An arbitrator today**

**has power to make an interim award determining particular issues separately from other issues in the arbitration."**

[25] The Court was then referred to paragraphs 101 and 102 from **SPENCER BOWER, TURNER and HANDLEY, "THE DOCTRINE OF RES JUDICATA 1996**.

**The determinations must be fundamental, not collateral**

**"201. Even when the court has expressly determined the same issue in the earlier proceeding an issue estoppel will not necessarily result. Only determinations which are necessary to the decision, and fundamental to it, will found an issue estoppel. Other determinations, however positive, cannot. The authority for this may be traced to Lord Holt in *Blackham's Case* but the judgment of King Bruce VC in *Barrs v Jackson* is frequently cited.**

**How to distinguish the fundamental from the collateral:**

**"202. "The difficulty in the actual application of these conceptions," continued Dixon J, is to distinguish the matters fundamental or cardinal to the prior decision or judgment, or necessarily involved in it as its legal justification or foundation, from matters which, even though actually raised and decided as being in the circumstances of the case the determining considerations, yet are not in point of law the essential foundation or groundwork of the judgment". In order to make this distinction one has to inquire whether the determination was so fundamental to the decision that the latter cannot stand without it. Even where this condition is met, it is suggested by**

**Dixon J that there is another test to pass, viz. whether the determination is the "immediate foundation" of the decision or merely "a proposition collateral or subsidiary only, i.e. no more than part of the reasoning supporting the conclusion". A mere step in the reasoning is insufficient. What is required is a determination fundamental to the decision.**

**One test which has been suggested is: was it possible to appeal against the determination? This will not decide the question in all cases; but is often a useful test. There are many determinations which cannot effectively be challenged on appeal. If there can be no effective appeal against a particular determination it is not fundamental to the judgment. But this is not the only test; the inquiry must always be – is the determination such that without it the judgment cannot stand?"**

[26] The point counsel was making was that the instant action is an abuse and the Plaintiff ought to have appealed.

[27] In furtherance of his position, counsel made reference to paragraph 13 of his supplemental submissions, wherein he cites the case of **MICHAEL WILSON & PARTNERS LTD. V. THOMAS IAN SINCLAIR ET AL [2017] EWCA Civ 3**, in which the Court of Appeal addressed the issue of abuse of process with regard to prior arbitral awards. In this case **LORD JUSTICE SIMON**, relied heavily on the reasoning of **JUSTICE REYES in PARKOU SHIPPING PTE LTD. V JINHUI SHIPPING AND TRANSPORTATION LTD. [2010] HCAJ 184/2009** where he stated;

**"In that case, there had been a London arbitration to determine whether Parkou had entered into an agreement to charter a vessel**

**from Galsworthy Ltd. Galsworthy contended that they had and Parkou contended that they had not. In an arbitration award made in August 2010 the tribunal concluded that there had been a prima facie binding fixture which had been ratified by Parkou, and that no relevant misrepresentations had been made for which Galsworthy was responsible. Prior to the date of this award, in August 2009, Parkou had begun proceedings in Hong Kong alleging against the defendant that they had made misrepresentations which had induced the contract, if such had been concluded.**

**56. Reyes J held that the Hong Kong claim raised the same misrepresentation issues that had been decided by the arbitrators, albeit in an arbitration between different parties to those sued in the Hong Kong action, and struck out Parkou's claim. The Judge identified what he described as the second aspect of the Court's jurisdiction to strike out collateral attacks on adverse final decisions as an abuse of process: namely, where the doctrine of *res judicata* did not strictly apply.**

**58. Reyes J considered the judgment of the Court of Appeal in the Sun Life case on which Parkou had relied, and concluded that it did not assist Parkou's argument in answer to the strike out application. First, as already noted, it was not an abuse of process case (see the Parkou judgment at S.152). Secondly, and pertinently, an analysis of what was said in the Sun Life case did not support the proposition that the abuse of process jurisdiction was not available where the court was faced with an attempt to re-litigate issues decided in an arbitration (see the Parkou judgment S. 155-157). Thirdly, where the doctrine of res judicata did not strictly apply and the parties to the subsequent proceedings were not the same parties or their privies in the earlier**

**proceedings, the Court was bound to engage in a fact sensitive enquiry to see whether there is manifest unfairness or conduct which brings 'justice into disrepute', (see the Parkou judgment S.93-95). Reyes J concluded;**

> **171. I do not read Mance LJ as having in mind (or extending his remarks to) the situation here, where in effect Parkou is seeking by litigation in Court to re-open matters decided in an Arbitration to which the Defendants were privies. In contrast to Lincoln's argument in Sun Life, the Defendants here advance a more modest application. This is not a case of two arbitrations ...**
>
> **172. In the present circumstances, regardless of the availability of joinder or consolidation in arbitration proceedings, the Court must undoubtedly have jurisdiction in the interests of justice to prevent its own process from being abused.**
>
> **173. Where arbitration is concerned, of course the Court must exercise caution given the differences between arbitration and ordinary litigation identified by Mance LJ. But caution does not mean that the Court should not strike out in an appropriate situation. In light of the similarity of issues and of the alter ego relationship between the Defendants and Galsworthy, it seems to me that the proper and efficient administration of justice imposed a duty (Lord Diplock's expression) to refuse to allow the Hong Kong action to proceed.**

**59. After further consideration of the facts of the case with which he was concerned, Reyes J added:**

**184. Closely read, I do not think that Sun Life supports Parkou's case. The abuse of process jurisdiction may be invoked in appropriate cases even where arbitration is involved.**

**In the present case Teare J adopted a similar approach to the question whether the abuse of process doctrine could apply where the previous decision was that of an arbitral tribunal.**

**50. In answering this question it is necessary to bear in mind that the question is whether the process of this court is being abused by a claim being brought before it. The nature of the court or tribunal which has given the decision said to be under collateral attack will or may be important in deciding whether the proceedings in this court are an abuse of its process. For example, where the decision under collateral attack is the decision of a jury in a criminal trial, there may be particularly cogent reasons for saying that the collateral attack is an abuse of the process of this court; see Arthur JS Hall v. Simons [2002] 1 AC 615 at p. 702 per Lord Hoffmann. But there is high authority for saying that it is unwise to limit to fixed categories the circumstances in which it is the court's duty to prevent its processes from being abused; see Hunter v Chief Constable [1982]. I have therefore concluded that there can be no rule that the court can have no such duty merely because the tribunal whose decision is under attack is an arbitral tribunal.**

**54. I accept that these are relevant considerations to bear in mind when deciding whether, on the facts of any particular case, there has been an abuse of the process of this court. It seems**

**to me that they will often cause this court to conclude that it is not an abuse for A to make allegations against B which are contrary to the findings in an arbitration between A and C to which B was not party. However, in the light of the clear guidance from the House of Lords to which I have referred I am unable to accept that the doctrine of abuse of process cannot apply merely because the decision under collateral attack is that of an arbitral tribunal."**

**20. "It is apparent that abuse of process may be relied upon by a non-party to the earlier litigation said to give rise to the abuse. This is illustrated by the case of Taylor Walton (a firm) v David Eric Laing [2007] EWCA Civ 1146. That case concerned a negligence claim brought by Mr. Laing against his solicitors. The claim made depended on Mr. Laing proving that the agreements, about the drafting of which complaint was made, were in the terms alleged by Mr. Laing. That issue had been decided against Mr. Laing in proceedings between him and the other party to the agreement. That decision had not been appealed and the Court of Appeal held that it was an abuse of process to seek to re-litigate that decision in the further proceedings brought."**

**23. It is also apparent that abuse of process may be relied upon where the earlier decision was that of an arbitral tribunal rather than a court and that arbitration involved a different party.**

**24. In the circumstances of that case Teare J decided that it would be an abuse of process to allow a collateral**

**attack on the decision of the arbitral tribunal to be made, even though the court proceedings were brought against a non-party to the arbitration."**

**POSITION OF THE 1ST AND 3RD DEFENDANTS:**

[28] Counsel's further position is that the claims for trespass etc. were already decided by arbitration. This falls under issue estoppel. Counsel referred the court to paragraph 23 of her skeleton arguments. Further as it relates to Res judicata, counsel says that issue estoppel and res judicata apply to this action. This is so she says because the Court of Appeal confirmed the damages awarded, the arbitrator having concluded that there was no variation based on the position of Garrick Edwards at the time.

[29] Counsel says it would be unfair and prejudicial to the 1st and 3rd Defendants and an abuse of process to allow the action to be maintained.

[30] The 1st and 3rd Defendants advised the Court that they fully adopted the arguments of the 2nd Defendant in support of their own case.

[31] The 1st and 3rd Defendants application is pursuant to Order 18 rule 19 (1, (a), (b) and/or (d) of the Rules of the Supreme Court 1978 and/or under the inherent jurisdiction of the Court that the Plaintiff's Fourth Amended Writ of Summons and Statement of Claim filed on 4th September, A.D., 2019 be struck out as being frivolous or vexatious and/or an abuse of process of the Court and that the action be dismissed on the grounds that:

**"The First and Third Defendants would be prejudiced by the Fourth Amended Writ of Summons and Statement of Claim as the claims which were not previously advanced or raised in the Action but regardless have been determined as between the Plaintiff and the RAV Parties, and/or which otherwise in law would be deemed to have been waived; and**

**By virtue of the alleged factual and causative matrix which underpinned each of the Plaintiff's claims in the Fourth Amended Writ of Summons and Statement of Claim, the Plaintiff's damages have been satisfied in respect of all of its justiciable claims (as all of the various damages claims intended to be advanced against the First and Third Defendants are in form and/or substance duplicative of those determined in form and/or substance against the Parties)."**

[32] The 1st and 3rd Defendants say that it is of importance that the Arbitrator in making the award, determined that;

**"While it was possible that there was a variation of the Lease, the negotiations that took place between Mr. Edwards and Mr. Reyes occurred before the incorporation of Therapy Beach and while Mr. Edwards did not have the authority to conduct any negotiations on behalf of Therapy Beach by virtue of which there was a binding variation of the Lease. As such the Lease was not varied." (See paragraphs 87 – 94 of the Arbitration Award).**

**"87. However, Mr. Bethell has raised the determinative issue with regard to the purported VLA by reference to Therapy's corporate records.**

**88. Mr. Bethell produced records of Therapy, which were admitted into evidence. Those records show that Therapy was incorporated on 15th January 2012, with Garrick Edwards as President. Subsequently, according the Therapy's corporate records Garrick Edwards was removed as President and Director of the company on 21 March 2012 and Aniska V Demille was appointed President and Director of Therapy. Therapy's corporate records further show that Edwards was again recorded as President of Therapy on 23rd March 2014. On 1st May 2017 Therapy was dissolved, but it was subsequently reinstated.**

**89. Mr. Bethell submits that based on those corporate records Therapy cannot rely on any actions taken by Edwards during the period 21st March 2012 to 28th March 2014 when he was not an officer of Therapy in support of its claim of a VLA.**

**90. When cross examined by Mr. Bethell on the period during which he was not an officer of the company Edwards' answers were evasive. Further, if his removal as President and/or Director of Therapy was indeed, as he claimed, due to a mistake of his attorney, it strains credibility that this "mistake" remained uncorrected for two years.**

**91. Mrs. Rolle did not address the issue of Mr. Edwards' removal as President of Therapy, and consequent lack of authority to act for the Claimant during her re-**

examination of Mr. Edwards, or at all. She however did term the cross examination of Edwards on his Tax Returns and bank statement as "red herrings". No evidence was adduced to show that Edwards was, subsequent to his removal as an officer of Therapy appointed an agent of Therapy. Such designation would have clothed him with the requisite authority to act for Therapy.

92. Therapy Inc. is the Claimant in this Arbitration, not Garrick Edwards. It is trite law that a corporate entity acts through its officers and directors. Consequently I find that Therapy cannot rely on any discussions and/or verbal understandings which occurred prior to its incorporation. Further Garrick Edwards, as shown by email exchanges as late as 13th December 2011 appeared to be negotiating with Reyes as an affiliate of UCA, Miami.

93. Similarly Therapy cannot rely on any actions taken by Garrick Edwards personally when he was not an officer and/or director or agent of Therapy, in furtherance of its claim that there was a VLA, from 21st March 2012 to 28th March, 2014.

94. I am not satisfied that Garrick Edwards was an officer of Therapy and authorized to act on its behalf from 21st March, 2012 to 28th March, 2014. Accordingly for these reasons Therapy's Claim that there was a variation of the Lease Agreement must fail. I so find.

[33] Counsel puts forward very succinctly the position of RWBB and BB Investments 1st and 3rd Defendants in paragraphs 12 – 15 of their skeleton arguments in support of the striking out application.

**The Position of RWBB and BB Investments**

> **12. "In reliance on the above timeline of events, and the determination of the Arbitration Proceedings in particular, Therapy Beach contends that the issues in dispute between itself and the RAV Parties, and all of the resulting claims by Therapy Beach against the RAV Parties have been resolved.**
>
> **13. Based on the matters set out in the Statement of Claim, the RWBB and BB Investments will contend that the aforesaid Statement of Claim is frivolous, vexatious, and an abuse of the Court's process, on the grounds that Therapy Beach is precluded from pursuing the same by virtue of the principles of *res judicata* and issue estoppel.**
>
> **14. Further, and/or alternatively, the RWBB and BB Investments will contend that they would be prejudiced by the Statement of Claim in that the claims were not previously advanced or raised in the Action but regardless have been determined as between the Therapy Beach and the RAV Parties, and/or which otherwise in law would be deemed to have been waived. Such determination and/or waiver ought properly to inure legally to RQBB and BB Investments benefit (arising from, inter alia, RWBB and BB Investments alleged relationship as agents to the RAV Parties for all material purposes, or otherwise in their own right).**
>
> **15. It will also be contended that by virtue of the alleged factual and causative matrix which underpinned each of Therapy Beach's**

**claims, its damages have been satisfied in respect of all of its justiciable claims (as all of the various damages claims intended to be advanced against the RWBB and BB Investments are in form and/or substance duplicative of those determined in form and/or substance against the RAV Parties). As such, the Plaintiff is not entitled to recover any further sums above and beyond those recovered by way of the Arbitration Award."**

**CASE FOR THE 2ND DEFENDANT**:

[34] The 2nd Defendant filed a summons on 17th May, 2019 seeking an Order pursuant to Order 18 r. 19 of the Rules of the Supreme Court ("RSC") and under the inherent jurisdiction of the court that the instant action be struck out as being frivolous and vexatious and an abuse of process and "res judicata". As per the 2nd Defendant, the Plaintiff's claim alleges loss of opportunity and/or the chance to open and operate the Atlantic Seafood Restaurant and to pursue its related and promotional business activities from the Atlantic Seafood Building. However, the Defendant contends that the Plaintiff's claims are frivolous, an abuse of process and res judicata based on the legal fact that an arbitration tribunal determined relevant issues between the Plaintiff and previous parties to these proceedings namely RAV BAHAMAS LIMITED and BIMINI BAY RESORT MANAGEMENT LIMITED. In this regard the arbitration tribunal decided as a part of the ratio decidendi, that the Plaintiff's claim that there was a variation of the lease entitled it to the use and/or possession of the Atlantic Seafood Building failed.

[35] It is the further argument of the 2nd Defendant that as the decision of arbitration was not appealed or otherwise challenged it is final and binding on the Plaintiff. For this proposition, the 2nd Defendant relies on Section 80 (1) of the Arbitration Act which provides;

**"Unless otherwise agreed by the parties, an award made by the tribunal pursuant to an arbitration agreement is final and binding BOTH ON THE PARTIES AND PEOPLE CLAIMING THROUGH OR UNDER THEM. ("my emphasis").**

[36] The 2nd Defendant is fully aware that it nor the 1st and 3rd Defendants were parties to the arbitration but they all contend that the Plaintiff is estopped from proceeding with the instant action and to be allowed to do so would be an abuse of process.

**THE LAW**:

[37] Arbitration is defined in Blacks Law Dictionary – Eight Edition as:-

**"A method of dispute resolution involving one or more neutral third parties who are usually agreed to by the disputing parties AND WHOSE DECISION IS BINDING."**

[38] In this jurisdiction it is Section 80 (1) of the Arbitration Act which speaks to this. (See paragraph 19 above.)

[39] The latter part of the section is in fact a reference to "PRIVIES" or "PRIVITY".

[40] PRIVIES is defined by Merriam Webster as;

> **"persons having by operation of special doctrines of law a mutual interest in or successive relationship to the same estate or right in the same property (as where one takes property from another by escheat) and succeeding to property with its attendant benefits and burdens.":**

[41] PRIVITY is defined by Blacks Law Dictionary, Eight Edition as;

> **"The connection or relationship between two parties, each having a legally recognized interest in the same subject matter (such as a transaction, proceeding, or piece of property); mutuality of interest."**

[42] The critical and crucial aspect of this action in my opinion turns on whether the lease between the previous parties (i.e.) Therapy Beach (the Plaintiff) and the Rav parties was in fact and in law a lease that existed and was varied. It is perhaps prudent at this juncture to visit the Fourth amended Writ of Summons which the 1st, 2nd and 3rd Defendants are seeking to strike out pursuant to Order 18 rule 19 (1) which provides;

> **"A" ORDER 18 RULE 19 (1)**
>
> The Court may at any stage of the proceedings order to be struck out or amended any pleadings or the indorsement of any Writ in the action, or anything in any pleading or in the indorsement, on the ground that –

(a) it discloses no reasonable cause of action or defence, as the case may be, or

(b) it is scandalous, frivolous or vexations; or

(c) it may prejudice embarrass or delay the fair trial of the action; or

(d) it is otherwise an abuse of the process of the court;

(e) it is otherwise an abuse of the process of the court;

And may order the action to be stayed or dismissed or judgment be entered accordingly, as the case may be.

[43] The Fourth Amended Writ of Summons, in particular the Fourth Amended Statement of Claim paras 19 – 21, 33, 34, 38, 39, 40, 41;

**19. "By an Indenture of Lease dated the 31st day of December, A.D., 2011 (hereinafter referred to as "The Sakara Lease") RAV demised unto the Plaintiff d.b.a. Sakara Beach Club a portion of the Resort Property (hereinafter referred to as "the Sakara Beach Club and Restaurant Premises") comprising approximately 5, 376 square feet as shown on the Plan attached thereto as Exhibit A for a term of three (3) years upon the terms and conditions provided for therein inclusive of a term for renewal of the Lease for a further three (3) years. The Plaintiff will rely on the terms and provisions of the Sakara Lease at the trial of this action for its full terms and effect.**

**20. The Sakara Lease was executed by Mr. Raphael Reyes for and on behalf of RAV.**

21. **The Plaintiff, pursuant to the terms of the Sakara Lease operated the Sakara each Cub and Restaurant from 31st December, 2011 until 18th July, 2013."**

**"33. Consistent with the Exclusivity Provision, by further agreement (hereinafter referred to as "The Atlantic Seafood Agreement") between the Plaintiff and RAV, in part in writing and in part by conduct, RAV agreed that in addition to the Sakara Beach Club & Restaurant, RAV would construct and the Plaintiff would develop, promote, market and operate a beach restaurant on the Resort Property under the name and style of the Atlantis Seafood & Grill (hereinafter called "Atlantic Seafood Restaurant").**

**34. At all times material to the negotiation, formalization and performance of the terms of the Atlantic Seafood Agreement the Plaintiff acted through its duly appointed agent Mr. Garrick Edwards.**

**38. Further, Resorts World at all material times had actual knowledge that the Plaintiff had the right to possess the Atlantic Seafood Building for the duration of the term provided for in the Sakara Lease and for any renewed term as provided for therein.**

**39. Further or in the alternative, Resorts World at all material times had imputed and/or constructive knowledge of the Plaintiff's right to possess the Atlantic Seafood Building for the duration of the term provided for in the Sakara Lease and for any renewed term as provided for therein by reason of Mr. Rafael Reyes being a Director of both RAV and of the Second Defendant.**

**40. Further, Resorts World at all material terms had actual knowledge of the fact that the Plaintiff had the right to manage, promote and operate the Atlantic Seafood Restaurant.**

**41. Further or in the alternative, Resorts World at all material times had imputed and/or constructive knowledge of the Plaintiff's right to manage, promote and operate the Atlantic Seafood Restaurant by reason of Mr. Rafael Reyes being a Director of both RAV and of the Second Defendant."**

[44] The crux of the applications of the 1st, 2nd and 3rd Defendants is Res judicata and abuse of process.

[45] The 1st and 3rd Defendants adopted the arguments of the 2nd Defendant while adding their own legal arguments.

[46] It is trite law that a PRIVY is one who claims title or right under through or on behalf of a party bound by a decision. A privy has also been held to include persons or entities with an interest, legal or beneficial in the previous litigation or its subject matter. In the arbitration hearing the parties were different but the subject matter was the same. However, in the instant action, the Plaintiff is the same and the Defendants are privies of the previous Defendants. In this regard I quote "LORD SUMPTION in the case of VIRGIN ATLANTIC AIRWAYS LIMITED (Respondent) v. ZODIAC SEATS UK LIMITED" (Appellant) where he states at paragraphs 17 - 26

**"Res judicata: general principles:**

17. **Res Judicata is a portmanteau term which is used to describe a number of different legal principles with different juridical origins. As with other such expressions, the label tends to distract attention from the contents of the bottle. The first principle is that once a cause of action has been held to exist or not to exist, the outcome may not be challenged by either party in subsequent proceedings. Secondly, there is the principle, which is not easily described as a species of estoppel, that where the claimant succeeded in the first action and does not challenge the outcome, he may not bring a second action on the same cause of action, for example to recover further damages: see *Conquer v Boot* [1928] 2 KB 336. Third, there is the doctrine of merger, which treats a cause of action as extinguished once judgment has been given upon it, and the claimant's sole right as being a right upon the judgment. Although this produces the same effect as the English judgment, which is regarded as "of a higher nature" and therefore as superseding the underlying cause of action: see *King v Hoare* (1844) *13 M & W 494, 504 (Parke B).* At common law, it did not apply to foreign judgments, although every other principle of res judicata does. However, a corresponding rule has applied by statute to foreign judgments since 1982: see Civil Jurisdiction and Judgments Act 1982, section 34. Fourth, there is the principle that even where the cause of action is not the same in the later action as it was in the earlier one, some issue which is necessarily common to both was decided on the earlier occasion and is binding on the parties: Duchess of Kingston's Case )1776) 20 St Tr 355. "Issue estoppel" was the expression devised to describe this principle by Higgins J in *Hoysted v Federal Commissioner of Taxation (1921) 29 CLR 537, 561* and adopted by Diplock LJ in *Thoday v Thoday* [1964] P 181, 197-198. Fifth, there is the principle first**

formulated by Wigram V-C in *Henderson v Henderson (1843) 3* Hare 100, 115, which precludes a party from raising in subsequent proceedings matters which were not, but could and should have been raised in the earlier ones. Finally, there is the more general procedural rule against abusive proceedings, which may be regarded as the policy underlying all of the above principles with the possible exception of the doctrine of merger.

18. It is only in relatively recent times that the courts have endeavored to impose ~~to impose~~ some coherent scheme some ~~coherent scheme~~ on these disparate areas of law. The starting point is the statement of principle of Wigram V-C in Henderson v Henderson (1843) 3 Hare 100, 115. This was an action by the former business partner of a deceased for an account of sums due to him by the estate. There had previously been similar proceedings between the same parties in Newfoundland in which an account had been ordered and taken, and judgment given for sums found due to the estate. The personal representative and the next of kin applied for an injunction to restrain the proceedings, raising what would now be called cause of action estoppel. The issue was whether the partner could reopen the matter in England by proving transactions not before the Newfoundland court when it took its own account. The Vice-Chancellor said:

> "In trying this question I believe I state the rule of the Court correctly when I say that, where a given matter becomes the subject of litigation in, and of adjudication by, a Court of competent jurisdiction, the Court requires the parties to that litigation to bring forward their whole

**case, and will not (except under special circumstances) permit the same parties to open the same subject of litigation in respect of matter which might have been brought forward as part of the subject in contest, but which was not brought forward only because they have, from negligence, inadvertence, or even accident, omitted part of their case. The plea of res judicata applies, except in special cases, not only to points upon which the Court was actually required by the parties to form an opinion and pronounce a judgment, but to every point which properly belonged to the subject of litigation, and which the parties, exercising reasonable diligence, might have brought forward at the time... Now, undoubtedly the whole of the case made by this bill might have been adjudicated upon in the suit in Newfoundland, for it was of the very substance of the case there, and prima facie, therefore, the whole is settled. The question then is whether the special circumstances appearing upon the face of this bill are sufficient to take the case out of the operation of the general rule."**

19. **Wigram V-C's statement of the law is now justly celebrated. The principle which he articulated is probably the commonest form of res judicata to come before the English courts. For many years, however, it was rarely invoked. The modern law on the subject really begins with the adoption of Wigram V-C's statement of principle by the Privy Council in *Yat Tung Investment Co Ltd v Dao Heng Bank Ltd* [1975] AC 581. *Yat Tung* was an appeal from Hong Kong, in which the appellant sought to unsuccessfully avoid the exercise by a mortgagee of**

**a power of sale in two successive actions, contending on the first occasion that the sale was a sham and that there was no real sale, and on the second that the sale was fraudulent. Lord Kilbrandon, giving the advice of the Board, distinguished at 589-590 between res judicata and abuse of process.**

> **"The second question depends on the application of a doctrine of estoppel, namely res judicata. Their Lordships agree with the view expressed by McMullin J that the true doctrine in its narrower sense cannot be discerned in the present series of actions, since there has not been, in the decision in no. 969, any formal repudiation of the pleas raised by the appellant in no. 534. Nor was Choi Kee, a party to no. 534, a party to no. 969. But there is a wider sense in which the doctrine may be appealed to, so that it becomes an abuse of process to raise in subsequent proceedings matters which could and therefore should have been litigated in earlier proceedings."**

**Lord Kilbrandon referred to the statement of Wigram VC- in *Henderson v Henderson* as the authority for the "wider sense" of res judicata, classifying it as part of the law relating to abuse of process.**

20. **The implications of the principle stated in *Henderson v Henderson* were more fully examined by the House of Lords in Arnold v National Westminster Bank plc [1991] 2 AC 93. The question at issue in that case was whether in operating a rent review clause under a lease, the tenants were bound by the**

**construction given to the very same clause by Walton J in earlier litigation between the same parties over the previous rent review. The Court of Appeal had subsequently, in other cases, cast doubt on Walton J's construction, and the House approached the matter on the footing that the law (or perhaps, strictly speaking, the perception of the law) had changed since the earlier litigation. Lord Keith of Kinkel began his analysis by restating the classic distinction between cause of action estoppel and issue estoppel:**

> **"Cause of action estoppel arises where the cause of action in the later proceedings is identical to that in the earlier proceedings, the latter having been between the same parties or their privies and having involved the same subject matter. In such a case the bar is absolute in relation to all points decided unless fraud or collusion is alleged, such as to justify setting aside the earlier judgment. The discovery of new factual matter which could not have been found out by reasonable diligence for use in the earlier proceedings does not, according to the law of England, permit the latter to be re-opened. (104D-E).**
>
> **Issue estoppel may arise where a particular issue forming a necessary ingredient in a cause of action has been litigated and decided and in subsequent proceedings between the same parties involving a different cause of action to which the same issue is relevant one of the parties seeks to re-open that issue." (105E).**

**The case before the committee was treated as one of issue estoppel, because the cause of action was concerned with a**

**different rent review from the one considered by Walton J. But it is important to appreciate that the critical distinction in Arnold was not between issue estoppel and cause of action estoppel, but between a case where the relevant point had been considered and decided in the earlier occasion and a case where it had not been considered and decided but arguably should have been. The tenant in *Arnold* had not failed to bring his whole case forward before Walton J. On the contrary, he had argued the very point which he now wished to reopen and had lost. It was not therefore *Henderson v Henderson* case. The real issue was whether the flexibility in the doctrine of res judicata which was implicit in Wigram V-C's statement extended to an attempt to reopen the very same point in materially altered circumstances. Lord Keith of Kinkel, with whom the rest of the Committee agreed, held that it did.**

21. **Lord Keith first considered the principle stated by Wigram V-C that res judicata extended to "every point which properly belonged to the subject of litigation and which the parties exercising reasonable diligence might have brought forward at the time." He regarded this principle as applying to both cause of action estoppel and issue estoppel. Cause of action estoppel, as he had pointed out, was "absolute in relation to all points decided unless fraud or collusion is alleged". But in relation to points not decided in the earlier litigation, *Henderson v Henderson* opened up**

> **"the possibility that cause of action estoppel may not apply in its full rigour where the earlier decision did not in terms decide, because they were not raised, points**

**which might have been vital to the existence or non-existence of a cause of action" (105B).**

**He considered that in a case where the earlier decision had decided the relevant point, the result differed as between cause of action estoppel and issue estoppel:**

> **"There is room for the view that the underlying principles upon which estoppel is based, public policy and justice, have greater force in cause of action estoppel, the subject matter of the two proceedings being identical, than they do in issue estoppel, where the subject matter is different." (108G-H)**

**The relevant difference between the two was that in the case of cause of action estoppel it was in principle possible to challenge the previous decision as to the existence or non-existence of the cause of action by taking a new point which could not reasonably have been taken on the earlier occasion; whereas in the case of issue estoppel it was in principle possible to challenge the previous decision on the relevant issue not just by taking a new point which could not reasonably have been taken on the earlier occasion but to reargue in materially altered circumstances an old point which had previously been rejected. He formulated the latter excerption at 109B as follows:**

> **"In my opinion your Lordships should affirm it to be the law that there may be an exception to issue estoppel in**

**the special circumstances that there has become available to a party further material relevant to the correct determination of a point involved in the earlier proceedings, whether or not that point was specifically raised and decided, being material which could not by reasonable diligence have been adduced in those proceedings. One of the purposes of estoppel being to work justice between the parties, it is open to courts to recognize that in special circumstances inflexible application of it may have the opposite result."**

**This enabled the House to conclude that the rejection of Walton J's construction of the rent review clause in the subsequent case-law was materially altered circumstance which warranted rearguing the very point that he had rejected.**

**22. Arnold is accordingly authority for the following propositions:**

**(1) Cause of action estoppel is absolute in relation to all points which had to be and were decided in order to establish the existence or non-existence of a cause of action.**

**(2) Cause of action estoppel also bars the raising in subsequent proceedings of points essential to the existence or non-existence of a cause of action which were not decided because they were not raised in the earlier proceedings, if they could with reasonable diligence and should in all the circumstances have been raised.**

(3) **Except in special circumstances where this would cause injustice, issue estoppel bars the raising in subsequent proceedings of points which (i) were not raised in the earlier proceedings or (ii) were raised but unsuccessfully. If the relevant point was not raised, the bar will usually be absolute if it could with reasonable diligence and should in all the circumstances have been raised.**

23. **It was submitted to us on behalf of Virgin that recent case-law has re-categorised the principle in *Henderson v Henderson* so as to treat it as being concerned with abuse of process and to take it out of the domain of res judicata altogether. In the circumstances, it is said, the basis on which Lord Keith qualified the absolute character of res judicata in Arnold v National Westminster Bank by reference to that principle is no longer available, and his conclusions can no longer be said to represent the law.**

24. **I do not accept this. The principle in Henderson v Henderson has always been thought to be directed against the abuse of process involved in seeking to raise in subsequent litigation points which could and should have been raised before. There was nothing controversial or new about this notion when it was expressed by Lord Kilbrandon in *Yat Tung.* The point has been taken up in a large number of subsequent decisions, but for present purposes it is enough to refer to the most important of them, Johnson v Gore-Wood & Co [2002] 2 AC 1, in which the House of Lords considered their effect. This appeal arose out of an application to strikeout proceedings on the ground that the plaintiff's claim should have been made in an earlier action on the same subject-matter brought by a company under his control. Lord Bingham took up the earlier suggestion of Lord**

**Hailsham of St. Marylebone LC in Vervaeke v Smith [1983] 1 AC 145, 157 that that the principle in Henderson v Henderson was "both a rule of public policy and an application of the law of res judicata". He expressed his own view of the relationship between the two at p 31 as follows:**

> **"*Henderson v Henderson* abuse of process, as now understood, although separate and distinct from cause of action estoppel and issue estoppel, has much in common with them. The underlying public interest is the same: that there should be finality in litigation and that a party should not be twice vexed in the same matter. This public interest is reinforced by the current emphasis on efficiency and economy in the conduct of litigation, in the interests of the parties and the public as a whole. The bringing of a claim or the raising of a defence in later proceedings may, without more, amount to abuse if the court is satisfied (the onus being on the party alleging abuse) that the claim or defence should have been raised in the earlier proceedings if it was to be raised at all. I would not accept that it is necessary, before abuse may be found, to identify any additional element such as a collateral attack on a previous decision or some dishonesty, but where those elements are present the later proceedings will be much more obviously abusive, and there will rarely be a finding of abuse unless the later proceeding involves what the court regards as unjust harassment of a party. It is, however, wrong to hold that because a matter could have been raised in earlier proceedings it should have been. So as to render the**

**raising of it in later proceedings necessarily abusive. That is to adopt too dogmatic an approach to what should in my opinion be a broad, merits-based judgment which takes account of the public and private interests involved and also takes account of all the facts of the case, focusing attention on the crucial question whether, in all the circumstances, a party is misusing or abusing the process of the court of seeking to raise before it the issue which could have been raised before."**

**The rest of the Committee, apart from Lord Millett, agreed in terms with Lord Bingham's speech on this issue. Lord Millett agreed in substance in a concurring speech. He dealt with the relationship between res judicata and the *Henderson v Henderson* principle at pp 58H-59B as follows:**

**"Later decisions have doubted the correctness of treating the principle as an application of the doctrine of res judicata, while describing it as an extension of the doctrine or analogous to it. In *Barrow v Bankside Members Agency Ltd [1996]* 1 WLR 257, Sir Thomas Bingham MR explained that it is not based on the doctrine in a narrow sense, nor on the strict doctrines of issue or cause of action estoppel. As May LJ observed in Mason v Vooght [1999] BPIR 376, 387, it is not concerned with cases where a court has decided the matter, but rather cases where the court has not decided the matter. But these various defences are all designed to serve the same purpose: to bring finality to litigation and avoid the oppression of subjecting a defendant unnecessarily to**

**successive actions. While the exact relationship between the principle expounded by Sir James Wigram V-C and the defences of res judicata and cause of action and issue estoppel may be obscure, I am inclined to regard it as primarily an ancillary and salutary principle necessary to protect the integrity of those defences and prevent them from being deliberately or inadvertently circumvented."**

**25. It was clearly not the view of Lord Millett in Johnson v Gore-Wood that because the principle in Henderson v Henderson was concerned with abuse of process it could not also be part of the law of res judicata. Nor is there anything to support that idea in the speech of Lord Bingham. The focus in Johnson v Gore-Wood was inevitably on abuse of process because the parties to the two actions were different, and neither issue estoppel nor cause of action estoppel could therefore run (Mr. Johnson's counsel conceded that he and his company were privies, but Lord Millett seems to have doubted the correctness of the concession at p 60D-E, and so do I). Res judicata and abuse of process are juridically very different. Res judicata is a rule of substantive law, while abuse of process is a concept which informs the exercise of the court's procedural powers. In my view, they are distinct although overlapping legal principles with the common underlying purpose of limiting abusive and duplicative litigation. That purpose makes it necessary to qualify the absolute character of both cause of action estoppel and issue estoppel where the conduct is not abusive. As Lord Keith put it in Arnold v National Westminster Bank at p 110G, "estoppel per rem judicatam, whether cause of action estoppel,**

**or issue estoppel is essentially concerned with preventing abuse of process."**

**26. It may be said that if this is the principle it should apply equally to the one area hitherto regarded as absolute, namely cases of cause of action estoppel where it is sought to reargue a point which was raised and rejected on the earlier occasion. But this point was addressed in Arnold, and to my mind the distinction made by Lord Keith remains a compelling one. Where the existence or non-existence of a cause of action has been decided in earlier proceedings, to allow a direct challenge to the outcome, even in changed circumstances and with material not available before, offends the core policy against the re-litigation of identical claims."**

[47] In the case of HENDERSON V HENDERSON (1843) 3 Hare 100 Sir James Wigram V-C stated:-

**"In trying this question, I believe I state the rule of the court correctly, when I say, that where a given matter becomes the subject of litigation in, and of adjudication by, a court of competent jurisdiction, the court requires the parties to that litigation to BRING FORWARD THEIR WHOLE CASE, and will not (except under special circumstances) permit the same parties to open the same subject of litigation in respect of matter which might have been brought forward as part of the subject in contest, but which was not brought forward, only because they have, from negligence, inadvertence or even accident omitted part of their case. The plea of res judicata applies, except in special cases, not only to points upon which the court was actually**

**required by the parties to form an opinion and pronounce a judgment, BUT TO EVERY POINT WHICH PROPERLY BELONGED TO THE SUBJECT OF LITIGATION, and which THE PARTIES, EXERCISING REASONABLE DILIGENCE, might have brought forward at the time."**

[48] The 2nd Defendant's summons prays for an Order pursuant to Order 18 rule 19 (1) and under the Court's inherent jurisdiction that this action be struck out as being:

**"frivolous, vexatious and an abuse of process on the grounds that the plaintiff's claims are res judicata having been heard and determined by Arbitration."**

[49] The 1st and 3rd Defendants' summons which is in more detail prays for an Order pursuant to Order 18 rule 19 (1), (a), (b) and/or (d) of the Rules of the Supreme Court 1978 ("RSC 78") and/or under the inherent jurisdiction of the Court that the Plaintiff's Fourth Amended Writ of Summons and Statement of Claim filed herein on 4th September, A.D., 2019 be struck out as being frivolous or vexatious and/or an abuse of process of the Court and that the action be dismissed on the grounds that:-

**"1.1 The Plaintiff is precluded from pursuing this action against the First and Third Defendants by virtue of the principles of *res judicata* and issue estoppel;**

**1.2 The Plaintiff's current claims arise from the same or substantially the same facts as arose in the arbitration proceedings between the Plaintiff and Bimini Bay Resort Management Limited and RAV Bahamas Limited (the "RAV Parties");**

**1.3 The First and Third Defendants would be prejudiced by the Fourth Amended Writ of Summons and Statement of Claim as the claims which were not previously advanced or raised in the Action but regardless have been determined as between the Plaintiff and the RAV Parties, and/or which otherwise in law would be deemed to have been waived; and**

**1.4 By virtue of the alleged factual and causative matrix which underpinned each of the Plaintiff's claims in the Fourth Amended Writ of Summons and Statement of Claim, the Plaintiff's damages have been satisfied in respect of all of its justiciable claims (as all of the various damages claims intended to be advanced against the First and Third Defendants are in form and/or substance duplicative of those determined in form and/or substance against the RAV Parties);**

**2. Costs, including the costs of this application, to be taxed if not agreed; and**

**3. Such further or other relief as the Court deems just."**

[50] Despite the fact that the 2nd Defendant has not specifically pleaded issue estoppel, it is pleaded by the 1st and 3rd Defendants. In my opinion however, issue estoppel, cause of action estoppel and abuse of process are intimately intertwined. I am of this view in light of what **LORD SUMPTION** said in the case of **VIRGIN ATLANTIC AIRWAYS LIMITED V ZODIAC SEATS UK LIMITED [2013] UKSC 46** (supra) which is set out at paragraph 47:

[51] The above, would appear to me to be in keeping with the Latin MAXIM "INTEREST REIPUBLICATE UT SIT FINIS LITIUM", which means "It is in the public interest that there be an end to litigation."

[52] Counsel for the Plaintiff says that the 1st, 2nd and 3rd Defendants prevented her client from benefitting economically/financially by entering into various arrangements with the Rav parties who are no longer parties to this action. The reliance is on what the Plaintiff claims to be "a varied lease agreement."

[53] The Arbitrators decision, for classification, is one of a competent court as I have highlighted at paragraph 27 in the case of **MICHAEL WILSON & PARTNERS** (supra). **LORD JUSTICE REYES in PARKOU SHIPPING PTE LTD V JINHUI SHIPPING AND TRANSPORTATION LTD (2010)** stated:

> **"62. A similar approach was adopted by Hamblen J in Arts & Antiques Ltd. v Richards and others [2014] Lloyd's Law Rep (Ins and Reins) 21.**
>
> **20. It is apparent that abuse of process may be relied upon by a non-party to the earlier litigation said to give rise to the abuse. This is illustrated by the case of Taylor Walton (a firm) v David Eric Laing [2007] EWCA Civ 1146. That case concerned a negligence claim brought by Mr. Laing against his solicitors. The claim made depended on Mr. Laing proving that the agreements, about the drafting of which complaint was made, were in the terms alleged by Mr. Laing in proceedings between him and the other party to the agreement. That decision had not been appealed**

**and the Court of Appeal held that it was an abuse of process to seek to relitigate that decision in the further proceedings brought.**

**63. Having cited [49] and [50] of Teare J's judgment in the present case, Hamblen J continued.**

**23. It is also apparent that abuse of process may be relied upon where the earlier decision was that of an arbitral tribunal rather than a court and that arbitration involved a different party.**

**24. <u>In the circumstances of that case Teare J decided that it would be an abuse of process to allow a collateral attack on the decision of the arbitral tribunal to be made, even though the court proceedings were brought against a non-party to the arbitration."</u>**

[54] What is set out above makes it clear that abuse of process may be relied upon by a non-party to earlier litigation which is said to give rise to the alleged abuse. It is also patently clear that abuse of process can be relied upon where the earlier decision is that of an arbitral tribunal rather than a court and that arbitration involved a different party. The Plaintiff is relying on a varied lease agreement to connect its claim to the 1st, 2nd and 3rd Defendants. This issue of whether the Sakara Lease was varied to include the Atlantic Seafood Restaurant/Building, which would have then created a nexus between the Plaintiff and the 1st, 2nd and 3rd Defendants was determined in the arbitration hearing. **JUSTICE CHERYL A.P. ALBURY (Ret.), DHS** (Arbitrator) opined at paragraphs 85 – 95 as follows:

"85. Having carefully assessed the conduct of both Edwards and Reyes parties and documentary evidence such as the email exchanges between Edwards and Reyes after execution of the Lease, it is possible to conclude that there was a variation of the Lease Agreement.

86. The foregoing shows that there was a chain of activities which Garrick Edwards undertook in furtherance of his verbal understanding that there was an agreement to operate three additional restaurant venues.

87. However, Mr. Bethell has raised the determinative issue with regard to the purported VLA by reference to Therapy's corporate records.

88. Mr. Bethell produced records of Therapy, which were admitted into evidence. Those records show that Therapy was incorporated on 15th January 2012, with Garrick Edwards as President. Subsequently, according the Therapy's corporate records Garrick Edwards was removed as President and Director of the company on 21 March 2012 and Aniska V. Demille was appointed President and Director of Therapy. Therapy's corporate records further show that Edwards was again recorded as President of Therapy on 23rd March 2014. On 1st May 2017 Therapy was dissolved, but it was subsequently reinstated.

89. Mr. Bethell submits that based on those corporate records Therapy's cannot rely on any actions taken by Edwards during the period 21st March, 2012 to 28th March 2014 when he was not an officer of Therapy in support of its claim of a VLA.

**90.** When cross-examined by Mr. Bethell on the period during which he was not an officer of the company Edwards' answers were evasive. Further, if his removal as President and/or Director of Therapy was indeed, as he claimed, due to a mistake of his attorney, it strains credibility that this "mistake" remained uncorrected for two years.

**91.** Mrs. Rolle did not address the issue of Mr. Edwards' removal as President of Therapy, and consequent lack of authority to act for the Claimant during her re-examination of Mr. Edwards, or at all. She however did term the cross-examination of Mr. Edwards on his Tax Returns and bank statements as "red herrings". No evidence was adduced to show that Edwards was, subsequent to his removal as an officer of Therapy appointed an agent of Therapy. Such designation would have clothed him with the requisite authority to act for Therapy.

**92.** Therapy Inc. is the Claimant in this Arbitration, not Garrick Edwards. It is trite law that a corporate entity acts through its officers and directors. Consequently I find that Therapy cannot rely on any discussions and/or verbal understandings which occurred prior to its incorporation. Further Garrick Edwards, as shown by email exchanges as late as 13th December 2011 appeared to be negotiating with Reyes as an affiliate of UCA, Miami.

**93.** Similarly Therapy cannot rely on any actions taken by Garrick Edwards personally when he was <u>not</u> an officer and/or director or agent of Therapy, in furtherance of its claim that there was a VLA, from 21st March 2012 to 28th March 2014.

**94.** I am not satisfied that Garrick Edwards was an officer of Therapy and authorized to ace on its behalf from 21st March to 28th March 2014. Accordingly for these reasons Therapy's

**Claim that there was a variation of the Lease Agreement must fail. I so find.**

**95. In the result I must also decline to make the award for General Damages under this head which the Claimant seeks."**

[55] The Arbitrator's award was not appealed thereby removing the opportunity of reliance by the Plaintiff on the proposition that there was a variation of the Lease.

[56] Counsel for the Plaintiff placed heavy reliance on the case of SPECIAL EFFECTS LTD. V. L'OVEAL SA and another [2006] EWHC 481 (Ch), [2007] EWCA Civ 1. In particular paragraph 27 Ch wherein SIR ANDREW MORPITTC stated:

[27] **"I should also note that Lord Bingham of Cornhill ([2001] 1 ALL ER 481 at 500, [2002] 2 AC 1 at 32) approved the test of PRIVITY formulated by Sir Robert Megarry V-C in GLEESON V J WIPPELL & Co. Ltd. [1977] 3 LL ER 54 at 60, [1977] 1 WLR 510 AT 515:**

**Second, it seems to me that the substratum of the doctrine is that a man ought not to be allowed to litigate a second time what has already been decided between himself and the other party to the litigation. This is in the interest both of the successful party and of the public. But I cannot see that this provides any basis for a successful defendant to say that the successful defence is a bar to the Plaintiff suing some third party or for that Third party to say that the successful defence prevents the Plaintiff from suing him UNLESS THERE IS A SUFFICIENT DEGREE OF IDENTITY between the successful defendant and the third party. I do not say that one must be the alter ego of the**

**other: but it does seem to me that, HAVING DUE REGARD TO THE SUBJECT MATTER OF THE DISPUTE, THERE MUST BE A SUFFICIENT DEGREE OF IDENTIFICATION BETWEEN THE TWO TO MAKE IT JUST TO HOLD THAT THE DECISION TO WHICH ONE WAS PARTY SHOULD BE BINDING in proceedings to which the other is party. It is in that sense that I would regard the phrase "PRIVITY OF INTEREST".**

[57] As it relates to a sufficient degree of identification, the Plaintiff, in an effort to identify as clearly as possible amended its Writ of Summons inclusive of its Statement of Claim four times. In this regard the Plaintiff clearly identified the inter-relationships between the 1st, 2nd and 3rd Defendant and the Rav parties which was known to the Plaintiff at the time of arbitration and before. The Plaintiff also at paragraph 39, 40 and 41 of its Statement of Claim states:

**39. "Further or in the alternative, Resorts World AT ALL MATERIAL TIMES HAD IMPUTED and/or CONSTRUCTIVE KNOWLEDGE of the Plaintiffs right to possess the Atlantic Seafood Building for the duration of the term provided for in the Sakara Lease and for any renewed term as provided for therein by reason of Mr. Rafael Reyes being a director of both Rav and of the Second Defendant.**

**40. Further, Resorts World at all material times had ACTUAL KNOWLEDGE of the fact that the Plaintiff had the right to manage, promote and operate the Atlantic Seafood Restaurant.**

**41. Further, or in the alternative, Resorts World at all material times had IMPUTED and/or CONSTRUCTIVE KNOWLEDGE of the Plaintiff's right to manage, promote and operate the Atlantic**

**Seafood Restaurant by reason of Mr. Rafael Reyes being a Director of both Rav and of the Second Defendant.**

[58] I remind myself that the applications by the 1st, 2nd and 3rd Defendants are pursuant to Order 18 rule 19 (1) and the inherent jurisdiction of the Court (2nd Defendant) and as it relates to the 1st and 3rd Defendants pursuant to Order 18 rule 19 (1), (a) (b) and/or (d) of the Rules of the Supreme Court and/or under the inherent jurisdiction of the Court. The 1st and 3rd Defendants say by virtue of the principles of RES JUDICATA and ISSUE ESTOPPEL and the 2nd Defendant says RES JUDICATA.

[59] It is clear that so far as Order 18 rule (1), (a) is concerned no affidavit evidence may be admitted for the purpose of striking out the pleadings on the ground that they do not disclose a reasonable cause of action. However, as a matter of principle, when the inherent jurisdiction of the court is invoked, resort may be had to affidavit evidence.

**"Issue estoppel is said to arise where a plea of cause of action estoppel could not be established because the causes of action are not the same. Paragraph 977 of Volume 16 of the 4th Edition of Halsbury's Laws of England, suggests that a party is precluded from contending the contrary of any precise point which having once been DISTINCTLY PUT IN ISSUE, has been solemnly and with certainty determined against him and that the conditions for the application of issue estoppel are:**

**(a) the same question was decided in both proceedings;**

**(b) the judicial decision said to create the estoppel was final; and**

**(c) the parties to the judicial decision OR THEIR PRIVIES were the same persons as parties to the proceedings in which the estoppel is raised or their privies."**

[60] Therefore after careful consideration of the authorities and after review of the content of the pleadings I am satisfied that the conditions relative to privies and a sufficient degree of identity between the successful defendants (the Rav parties) and the third parties in the instant matter have been met.

[61] I am also satisfied that to allow the Plaintiff to relitigate matters which have been highlighted already would be an abuse of process. The lifeline of the Plaintiff's case in this matter was hinged on whether there was a variation of the Sakara Lease agreement. It is patently clear that that issue was litigated and a decision rendered. At paragraph 94 of the Arbitrator's award she said;

> **"I am not satisfied that Garrick Edwards was an officer of Therapy and authorized to act on its behalf from 21st March 2012 to 28th March 2014.**
>
> **Accordingly for these reasons THERAPY'S CLAIM THAT THERE WAS A VARIATION OF THE LEASE AGREEMENT MUST FAIL. I so find."**

[62] The finding therefore took away any reliance on the alleged exclusivity right to the operation, management or promotion of the Atlantic Seafood Restaurant Building or any other restaurants or buildings of like character.

[63] It is to be noted that judges have an inherent and residual discretion to prevent an abuse of the court's process so that proceedings are not unfair to the point that they are contrary to the interest of justice. Put another way, the doctrine of abuse of process engages the inherent power of the court to prevent the misuse of its

procedure, in a way that would bring the administration of justice into disrepute. This is so that it prevents the misuse of its procedure so that it is not manifestly unfair to a party to the litigation.

[64] In light of the above therefore, I accept the applications of the 1st, 2nd and 3rd Defendants and hereby order that:

**1st and 3rd Defendants**:

(a) The Forth Amended Writ of Summons and Statement of Claim is hereby struck out as being frivolous or vexatious and/or an abuse of process of the Court on the grounds as set out in the summons filed November 13th, 2019.

(b) Costs to the 1 and 3rd Defendants including the costs of this application to be taxed if not agreed.

**2nd Defendant:**

(a) The action as against the 2nd Defendant herein is hereby struck out as being frivolous, vexatious and an abuse of the process on the grounds that the Plaintiff's claim are res judicata having been heard and determined by Arbitration.

(b) Costs of and occasioned by the application to the 2nd Defendant to be taxed if not agreed.

I so order.

Dated this 17th day of February, A.D., 2021.

Keith H. Thompson
Justice