

COMMONWEALTH OF THE BAHAMAS

IN THE SUPREME COURT

Common Law & Equity Division

2017/CLE/gen/00914

BETWEEN

TAL NEMZER

AND

ZVI YOSIFON

Plaintiffs

AND

ZRK LIMITED

Defendant

Before Hon. Chief Justice Sir Ian R. Winder

Appearances: Ashley Williams for the Plaintiffs
Charles Mackay for the Defendant

JUDGMENT

WINDER, CJ

The plaintiffs have brought this action against the defendant (ZRK) for breach of a management agreement and/or negligence in the performance of the same.

Background

1. In or around August 2016, the plaintiffs say that they entered into a Management Agreement (the MA) with ZRK. The MA was supposed to allow the plaintiffs to manage and/or operate a cosmetics/beauty supplies business from the property that they leased from ZRK for a term of five (5) years on Bay Street in downtown Nassau.

2. The MA provides as follows:

THIS MANAGEMENT AGREEMENT is made as of the [] day of August, 2016 (the "Effective Date") by and between **ZRK LIMITED**, a Bahamian incorporated international business company (the "Owner") and **Tal Nemzer and Zvi Yosifon**, (the "Operator"). Owner and Operator are sometimes referred to collectively in this Agreement as the "Parties" and each individually as a "Party".

RECITALS

WHEREAS Tal Nemzer and Zvi Yosifon are in the business of selling beauty products and managing the operation of such businesses; and

...

WHEREAS, The Operators are knowledgeable and have extensive experience in the management and operation of businesses engaged in the sale of beauty products and services provided in relation to the same and Owner desires to engage Operators to manage and promote the sale of the beauty products under the terms hereof utilizing the name and trading as Truffoire/Lionesse (together with certain other Operator Trademarks). And Operators desire to do so under the terms hereof.

...

1. Operations and Management

1.1 The Operators shall manage the Business pursuant to the terms and conditions of this Agreement. The Owners acknowledge that the Business is being conducted at Market St & Bay Street, Nassau, the Bahamas (hereinafter the "Premises"). The Owners acknowledge that the Premises are owned by an affiliated entity of the Owners (hereinafter "the Affiliate"). The Owners further acknowledge that the Operators will be responsible for paying the rental amount for the Premises. The Owners further acknowledge that they could not run the Business without the assistance of the Operators. Therefore in consideration for the Operators providing the Services hereunder and the resultant rental income to the Affiliate, the Operators shall receive a management fee of 100% of the Business' net profit.

1.2 The Owners acknowledge that the Operators may manage or operate competing businesses within the Commonwealth of the Bahamas.

2. Termination

2.1 The term of this Agreement shall be for Five (5) years from the date of this Agreement ("Term"). The Term may be modified, provided that such modification is in writing, executed by the Parties. This Agreement may not be terminated by the Owners during the Term except for breach of this Agreement by the Operators. Upon breach of this Agreement by the Operators the Owners shall give the Operators thirty (30) days to rectify the breach. Failure to do so shall result in terminations by the Owners.

...

4. Services and Management Obligations

4.1 Employees. The Operators will employ all of the Employees and properly supervise or hire suitable managers and supervisors to supervise them in their employment in carrying out the Services, and in this respect will be responsible for all salary, wages, workers compensation premiums, holiday pay, long service leave, sick pay, and for the payment of all other sums of whatsoever kind or nature that the Operators as an employer is obligated to pay to or in respect of its Employees.

4.2 Outgoings. The Operators are responsible for the payment of all outgoings and expenses that in any way relate to the employment of the Employees along with all taxes payable in conducting the Business and rendering the Services, including but not limited to National Insurance payments, Value Added Tax payment and Customs duties.

...

4.4 Agency. In order to facilitate the provision of the Services, the Owner hereby appoints the Operators as its agents and representative with full power to do all things on behalf of the Owner which the Owner could do in order to properly and effectively carry on the Business. These powers include but are not limited to the following:

- i. To enter into Contracts on the Owner's behalf;
- ii. To accept and commit to Obligations on the Owner's behalf;
- iii. To pay any liability on behalf of the Owner;
- iv. To accept payment from any person on behalf of the Owner;
- v. To make any application to any government authority on behalf of the Owner;
- vi. To tender for any contract on behalf of the Owner;

...

4.8 Management. The Operators must ensure at all times in providing the Services that the Business is well managed in accordance with good business practice, that all laws and regulations in force at the time in the Commonwealth of The Bahamas are complied with, and that proper and complete records are kept in respect of all matters relating to compliance.

...

7. Indemnification

7.1 To indemnify and keep indemnified the Owner from and against all loss, damage or liability suffered by it as a result of the Operators acts or omissions.

8. Representation and Warranties

8.1 The Operator shall have the following duties on behalf of and for the benefit of the Owner:

...

- d. To oversee and arrange for the following
 - i. Payment in a timely manner of any taxes related to the operation of the Business, including, but not limited to National Insurance and Customs duties on all goods imported.

- ii. Timely filing and payment of all reports, returns, and all associated liability payments.
- iii. On a monthly, quarterly, and/or annual basis, the Operators shall provide to the Owner copies of the required tax return prior to the due date, along with the check for payment or proof of payment.

Provided, however:

- iv. The payment of the Owner's Business' tax liability resulting from net profit during the term of this Agreement shall be paid out of the gross proceeds of the Business by the Operator; and

...

3. The plaintiffs pleaded that they paid ZRK a security deposit, along with the first and last month's rental payments towards the lease of the Bay Street property. In addition to the monthly rental, the plaintiffs aver that they spent additional funds to renovate and outfit the property in order to carry on business from the property.

4. However, on 15 March 2017, the plaintiffs aver that despite owing no rent to ZRK, one of the directors of ZRK breached the MA by serving an eviction letter with immediate effect on them. ZRK admits to serving the eviction letter on the plaintiffs. They say that the plaintiffs were operating contrary to the laws of The Bahamas, and as such they were compelled to end the business relationship with the plaintiffs.

5. The letter of 15 March 2017 was settled as follows:

Re: ZRK Ltd

Zivi/Tal

As I have indicated to you in the past via email/text and in person I am extremely unhappy about the way that ZRK is being managed.

To date since you have opened you have not collected any taxes for the government which you are required to do so on behalf of the company as stated in our management agreement and Bahamian Law. As per communication sent to you on December 30th 2016 and January 18th 2017 and February 22nd 2017 (sic), you have failed to collect Value Added Taxes, which is a breach of the Value added (sic) Tax Act, we note that you have failed to cure these breaches.

You are operating a second location without a business License, which is once again against the law. This is a breach of the Business License Act. Since this store's opening you have not cured this breach.

You consistently fly employees into the Bahamas to work without the proper work permit/authorizations. Your excuse is that they will get permits later, however this is once again against the law. This is a violation of the Immigration Act.

Only yesterday I walked by your store and noticed a new foreign employee working. I asked your manager if she had a work permit and he responded that she did not but she will have one in the future.

You have not produced any monthly reports as agreed in our management agreement.

You currently have no or maybe one Bahamian working in your stores. I have instructed both of you that according to our Immigration regulations, you are supposed to be training and employing Bahamians.

It has come to come to (sic) my attention that BOTH of you do not have approval to work in the Bahamas much less have the right to manage a company here. This is both highly illegal and unethical.

As I indicated in previous emails to you and communications with your manager "Guy" that I no longer have any interest in continuing this business and I am immediately closing all bank accounts.

As of your receipt of this letter I am giving you notice to cease operations immediately as you are operating illegally.

As such I am giving you notice to evict the premises within 30 days given that you have had in excess of 70 days to cure these breaches.

Regards,

John Skandaliaris

6. The plaintiffs' claim as set out in the Statement of Claim provides:

...

12. By letter dated the 15th March 2017, Mr. John Skandaliaris, a Director of the Defendant wrote to the Plaintiffs terminating the Agreement with immediate effect in breach of the terms of the Agreement, which allowed the Plaintiffs thirty (30) days to remedy any breach. According to the said letter, the reason for the termination was due to the Plaintiffs failing to apply for and collect value added tax an obligation that the Plaintiffs could not

perform due to the negligence of the Defendant and/or its Directors failing to provide the Value Added Tax Certificate after assuming responsibility for doing so.

13. That due to the Defendant's breach of contract and/or negligence the Plaintiffs have suffered loss and damages.

PARTICULARS OF LOSS AND DAMAGE

- a. Loss of income under the management agreement for the remainder of the five year period.
- b. Loss of funds belonging to the Plaintiffs totaling B\$60,000.00 held on account at FirstCaribbean Bank (Bahamas) Limited.
- c. Loss of half of the last month's rent (up to 15th March 2017) and security deposit totaling B\$36,000.00.
- d. Loss of fixtures valuing in or around B\$100,000.00 which currently remain on the Property.

AND THE PLAINTIFFS CLAIM:

- (1) Damages for breach of the management agreement;
- (2) Damages for breach of duty and/or negligence;
- (3) Damages for consequential losses;
- (4) Special damages and/or the return of the Plaintiffs fixtures;
- (5) An injunction preventing the Defendant from accessing funds held on account at FirstCaribbean International Bank (Bahamas) Ltd;

...

7. ZRK filed a Defence and Counterclaim to the action on 28 August 2018 which provided, in part, the following:

(3.) Paragraph 3 – Whilst the Defendant admits that the parties purported to enter into a management agreement (the "Agreement"), in or around or about August 2016, allowing the Plaintiffs to manage and/or operate their beauty supplies business for a specified period it is contended by the Defendant that the Plaintiffs were in fundamental breach of the Agreement or in breach of fundamental terms thereof from inception by failing, inter alia to obtain from the Central Bank of the said Commonwealth and the Bahamas Investment Authority any or all approvals necessary to permit them to enter into the Agreement, contrary to their expressed assurances otherwise. It is expressly not admitted that the Agreement was for a five-year period. Further, the Plaintiffs employed persons in breach of the Agreement, who did not have permits to engage in gainful occupation in the Bahamas nor did they themselves obtain the necessary work permits to allow them to carry out their duties under the Agreement. In purporting to

carry out their contractual duties under the Agreement the Plaintiffs committed a plethora of frauds on the Revenue, the Business Licence Department, HM Customs and the National Insurance Board. In short, the Plaintiffs operated illegally from premises owned by Mr. George Skandaliaris and exposed both the Defendant and Mr. Skandaliaris to severe criminal and civil penalties. At the very least, the Plaintiffs have committed egregious frauds on the Defendant by virtue of the above. Notwithstanding, the Defendant admits there was an agreement for a term of three years.

(4.) Paragraph 4 – it is admitted that the Plaintiffs fraudulently entered into a lease, having failed to obtain the necessary authorizations as set out above and operated an illegal business from the same premises, thereby putting them in breach of Clause 14 of the same lease by failing to ensure they complied with any and all statutory requirements. The Plaintiffs have caused the Defendant loss and damage by precipitating failure of the lease. In the premises of this Paragraph 4, the Plaintiffs operated their beauty supplies business as a fraudulent and criminal enterprise and the Defendant is entitled to a complete indemnity by virtue of Clause 7 of the Agreement.

...

(7.) Paragraph 7 – the Defendant has no knowledge of what sums, if any, the Plaintiffs may or my (sic) not have expended on the outfit and puts the Plaintiff to strict proof in relation to the same. The Defendant believes that the Plaintiff was and is in breach of the Agreement and has forfeited any and all rights under the same Agreement.

...

(9.) Paragraph 9 – the Defendant denies that the Plaintiff is owed any monies under the Agreement by virtue of its breaches of the same. Without limitation Paragraph 9 is denied in its entirety. Further the Defendant's bankers FirstCaribbean International Bank refused to allow the Plaintiffs to act as signators as they did not have regulatory approval.

...

(12.) Paragraph 12 – Whilst it is admitted that the Defendant wrote to the Plaintiffs terminating the Agreement on 15 March 2017, it is denied that the Defendant is in anyway in breach of the Agreement considering the Plaintiff own breaches and failures. It is further denied, again that the Defendant assumed any responsibility to the Plaintiffs to provide the VAT Certificate of Registration.

...

COUNTERCLAIM

...

(2.) By reason of the matters pleaded above but specifically paragraphs 3 and 4, the Defendant counterclaims for any and all losses attributed to it by virtue of the Plaintiffs' actions and breaches specifically:

(a) Failing to obtain necessary approval from the Central Bank and/or the Bahamas Investment Authority;

- (b) Failure to obtain any and all necessary work permits to enable them to work in the Bahamas;
- (c) Knowingly employing illegal workers to work from the Defendant's premises;
- (d) Failing to collect VAT or obtain the necessary VAT Certificate of Registration to enable them to do so (in breach of clause 8 d)i));
- (e) Failure to pay National Insurance contributions for themselves and their purported employees;
- (f) Failure to pay business licence fees or contributions due in respect of the beauty supplies business;
- (g) Committing various frauds on several Government agencies;
- (h) By reason of the above, breaching the terms of the Agreement and lease causing the Defendant loss of revenue and rental income.

Particulars of Loss and Damage

- a) Exposure to litigation risks and associated costs for early termination of the lease;
- b) Loss of income and profits from the running of the business from the premises;
- c) Loss of marketing opportunities.

AND THE DEFENDANT CLAIMS

- 1) Damages for breach of the management agreement;
- 2) Damages for breach of duty and/or negligence;
- 3) Damages for serial frauds on the Defendant;
- 4) Equitable Compensation;
- 5) Damages for consequential losses;
- 6) Special damages for any and all criminal and civil penalties the Defendant may be exposed to/have imposed on it;
- 7) Punitive damages;
- ...
- 10) An indemnity pursuant to clause 7 of the Agreement.
- ...

8. On 19 November 2020 the plaintiffs filed a Defence to Counterclaim which provided, in part, as follows:

...

- 2. Paragraph 2 of the Defendant's counterclaim is denied, and the Plaintiffs put the Defendant to strict proof to its claim for loss and/or damages.
- 3. Any and all further relief sought and pleaded by the Defendant in its counterclaim are denied.

9. At trial both plaintiffs testified on their own behalf. Their witness statements were both filed on 21 February 2020. John Skandaliaris testified on behalf of ZRK, his witness

statement was filed on 28 February 2020. All witnesses were subject to cross examination on their evidence.

10. Nemzer, an American citizen who resides in the state of Florida, says that it was ZRK that owned the cosmetics business carried out from the Bay Street property. He says he managed the business along with Yosifon under the MA with ZRK. According to Nemzer it was agreed that he and Yosifon would be responsible for the renovations and furnishings of the storefront and payment of rent. However, notwithstanding their compliance with the MA, ZRK terminated for breach, without giving them the 30 days provided in the MA to allow them to remedy any breach.

11. In 2015 while on holiday in The Bahamas, Yosifon says he met Antonius, John and Emmanuel Skandalariis. He also deposed that in August 2016 he and Nemzer executed the MA with ZRK that was intended to allow them to operate ZRK Limited trading as Truffoire. He says that the equipment used in the business were still in the possession of ZRK and it was allowing another entity who was running a skincare business to utilize it from the Bay Street property.

12. He averred that one of ZRK's directors, Emmanuel Skandalariis, had assumed responsibility for obtaining all regulatory approval necessary for him and Yosifon to operate the cosmetics business.

13. Under cross examination Nemzer told the Court that there was a franchise, sub-franchise and investment agreements between the parties. Counsel for ZRK questioned him as to why the various agreements he spoke of were not produced. In answer he says he probably had the agreements but could not confirm whether they were executed or not. He also advised that the cosmetics business had very little cash sales.

14. John Skandalariis who testified on behalf of ZRK told the court that he and his father (George) were approached by the plaintiffs in early 2015. He agreed to put the business in his name knowing that the plaintiffs were not yet approved to open their own business by the Bahamas Investment Authority. He orally agreed to do this for a fee of

\$5,000 per month but was not paid. He also says that ZRK is not an IBC as averred by the plaintiffs. The plaintiffs, he says, were unwilling to pay fees to the attorneys with whom they had consulted as to what was necessary to obtain a business licence. Further, he contended that the plaintiffs knew that they would be responsible for obtaining their own business licence.

15. However, according to Skandaliaris, the plaintiffs went ahead and opened the cosmetics store without the proper licences and only 'a piece of paper saying that they had applied for a licence. To his knowledge they also did not register for VAT or get a VAT exemption for tourist sales, even after a business licence was obtained. Skandaliaris says that he also believed that only 2 of the 10 foreign employees, who were brought in by the plaintiffs to work in the cosmetics business, possessed work permits. Further, they say that the plaintiffs were sending money to bank accounts of which ZRK had no knowledge.

Analysis and Disposition

16. The principal issue in this case is whether the contract is void for illegality. It is a longstanding common law principle that, "*No court will lend its aid to a man who founds his cause of action upon an immoral or an illegal act*" per Lord Mansfield in ***Holman v Johnson* 1775 1 Cowp 342, 343**. The traditional result of the principle was that the court would let the loss lie where it falls.

17. ZRK submits that the plaintiffs 'camouflaged' themselves as a Bahamian company. They had already sought advice from a local law chambers, with regard to doing business in the Bahamas, advice that they did not heed. Notwithstanding this, Counsel for ZRK submits that the Directors of ZRK did not execute the MA relied on by the plaintiffs. Attention is drawn to clause 1 which says that the plaintiffs are entitled to 100% of the profits from the cosmetics business.

18. ZRK acknowledges that it served notice on the plaintiffs in the letter dated 15 March 2017 terminating the lease of the Bay Street property. They say it was intended that John Skandaliaris and Manoli Skandaliaris were to be shareholders in the cosmetics business as Bahamians along with the plaintiffs. However, this did not materialize as when the plaintiffs did not get approval to operate they continued as if the business was owned by Bahamians. This was a breach of clause 4.8 of the MA.

19. Counsel for ZRK submits the following with regard to the violations of Bahamian law by the plaintiffs in the operation of the cosmetics store at the Bay Street property:

“...The activities of the plaintiffs which contravene various statutes are set out in paragraphs 3 and 4 of the defence and paragraph 2 of the counterclaim and they are (i) the Business Licence Act, (ii) the Exchange Control Regulations administered by the Central Bank of The Bahamas, (iii) the Immigration Act, (iv) The National Insurance Act and (v) the Value Added Tax Act.”

20. ZRK submits that sections 3(1) and 4(2) of the Business Licence Act were contravened. Sections 3(1) and 4(2) of the Business Licence Act provided:

3(1) No person shall carry on a business within The Bahamas without the grant of a licence duly issued to him in accordance with the requirements of this Act.

4(2) The Secretary shall not grant a licence to a foreign person unless such application has received the approval of the Minister of Finance.

21. ZRK submits that the plaintiffs opened the business without a business licence. On the evidence, one of the plaintiffs emailed Skandaliaris about getting the business licence for the business. Further, the business licence displayed in evidence is in the name of Emmanuel Skandaliaris, not the plaintiffs.

22. With respect to the Central Bank approval, ZRK submits that the plaintiffs never received approval to operate a Bahamian dollar account in accordance with Regulation 8 of the Exchange Control Regulations. They also say that no work permits were issued to the plaintiffs or to the persons who they had brought in from outside of the country to work

in the cosmetics business. ZRK allege that there was contravention of section 29 of the Immigration Act.

23. Relative to contraventions of the National Insurance Act and the Value Added Tax Act, no contributions were being made and no revenue was being forwarded to the authorities from sales in the cosmetics store on Bay Street. ZRK accuses the plaintiffs of by-passing the system which would have recorded the sales amounts so that there would not be a record of them. As such ZRK put an end to the lease to avoid personal liability of its directors with the National Insurance Board in particular. There was no breach on the part of ZRK and further, no negligence was pleaded on the part of the plaintiffs submits Counsel for ZRK.

24. Counsel for the plaintiffs relies on clause 2 of the MA. He says that in the event of any breach of the MA the plaintiffs were entitled to 30 days to remedy the breach. The plaintiffs were served with an eviction notice with immediate effect by John Skandalariis dated 15 March 2017 for breach of the MA. As such the plaintiffs claim anticipatory breach of the MA, as they were not afforded 30 days to remedy the breach.

25. The plaintiffs submit, in accordance with their pleadings, that it was solely ZRK's responsibility to ensure all regulatory approvals were in place. ZRK, they say, was also responsible for the registration of the business with the Department of Inland Revenue. It was therefore, ZRK that breached the MA and/or negligently failed to obtain the regulatory government approvals for the business, causing them to suffer loss and damage.

26. The plaintiff say that ZRK has not specifically identified any statute that the MA has offended. They accept that statutory illegality will hold a contract to be illegal whether or not a contracting party had knowledge of the illegality. However, they say that common law illegality requires both participation and knowledge (as per *Okedina v Chikale [2019] EWCA Civ 1393*). They argue that ZRK has failed to prove on a balance of probabilities that the plaintiffs participated with knowledge of an illegal contract.

27. In reliance on the English Court of Appeal case of *ParkingEye Ltd v Somerfield Stores Ltd [2012] EWCA Civ 1338*, Counsel for the plaintiffs says that if the illegality complained of is incidental or peripheral to the contract then illegality is no defence to its enforceability. In *ParkingEye*, the plaintiff was a parking monitoring company engaged by the defendant, a supermarket. Somerfield terminated the contract early because ParkingEye had misled the stores customers that if they overstayed the parking time allowed ParkingEye had the authority to bring civil proceedings against them. Somerfield contended that because of this the contract with ParkingEye should be void. In that case it was submitted that the court should consider: i) the object and intent of the party seeking to enforce the contract; ii) whether the illegality was a major part of the contract or whether it was incidental or peripheral and iii) the nature of the illegality. The defence of illegality was rejected. Counsel for the plaintiffs herein, say that it was ZRK who had knowledge that the contract was illegal, the plaintiffs did not.

28. Counsel for the plaintiffs also rely on the following dicta from Toulson LJ, in *Parking Eye* (supra):

78. I see no justice in Somerfield having the option of either behaving in that way or, if it preferred, of repudiating the contract. This would give Somerfield a windfall reward for its own previous illegality. If Somerfield's argument is taken to its logical conclusion, on appreciating that the letter was objectionable, it could have kept the point up its sleeve until ParkingEye had installed all the monitoring equipment at its car parks which it required, and then terminated the contract at whatever moment best suited its commercial interest, so enabling it to keep for itself all subsequent payments by users of the car parks who overstayed. To borrow Devlin J's phrase, that would not contribute to public morality.

79. In summary, the disallowance of ParkingEye's claim on the ground of illegality is not compelled by the authorities, and it would not be a just and proportionate response to the illegality.

29. With respect to the Defendant's counterclaim, the plaintiffs say, ZRK has not proven its case and the MA is valid and subsisting. As such it is capable of enforcement despite as they submit; "having a taint of illegality". They also submit, ZRK willfully took advantage of the plaintiffs' ignorance of Bahamian law and would be unjustly enriched if the MA is not enforced.

30. There is no doubt that public policy is a ground to invalidate a contract such as the MA. According to the learned authors of *Chitty on Contracts, 32nd edition, Vol 1:*

Illegality and Public Policy – 16-006

Objects which on grounds of public policy invalidate contracts may, for convenience, be generally classified into five groups: first, objects which are illegal by common law or by legislation; secondly, objects injurious to good government either in the field of domestic or foreign affairs; thirdly, objects which interfere with the proper working of the machinery of justice; fourthly, objects injurious to marriage and morality; and fifthly, objects economically against the public interest. This classification is adopted primarily for ease of exposition. Certain cases do not fit clearly into any of these five categories.

The enterprise engaged in is restricted to Bahamian ownership no doubt for at least the fifth above-stated ground that it is economically against the public interest.

31. Further, in *Chitty on Contracts, 32nd edition, page 1249, paragraph 16-019:*

Both parties aware of legally objectionable features.

Neither party can sue upon a contract if:

- (a) Both knew that its performance necessarily involved the commission of an act which, to their knowledge, is legally objectionable, that it is illegal or otherwise against public policy; or
- (b) Both knew that the contract is intended to be performed in a manner which, to their knowledge is legally objectionable in that sense; or
- (c) The purpose of the contract is legally objectionable and that purpose is shared by both parties; or
- (d) Both participate in performing the contract in a manner which they know to be legally objectionable.

32. It is the unchallenged evidence that “*i) wholesale and retail operations, ii) personal cosmetic/ beauty establishments are sectors reserved for Bahamians.*” The plaintiffs themselves have accepted that the public policy in The Bahamas limits participation in retail business to Bahamians. They assert however, that they did not know that they were operating illegally and had no intention to do so. Counsel for the plaintiffs submits, as per the case of *ParkingEye*, that this is merely a case of common law illegality.

33. The factors that should be taken into account when considering the doctrine of illegality was discussed in the United Kingdom Supreme Court case of *Patel v Mirza 2016 UKSC 42*, in which the subject was discussed in depth. The questions to be asked are as follows:

[120] The essential rationale of the illegality doctrine is that it would be contrary to the public interest to enforce a claim if to do so would be harmful to the integrity of the legal system... . In assessing whether the public interest would be harmed in that way, it is necessary (a) to consider the underlying purpose of the prohibition which has been transgressed and whether that purpose will be enhanced by denial of the claim, (b) to consider any other relevant public policy on which the denial of the claim may have an impact and (c) to consider whether denial of the claim would be a proportionate response to the illegality, bearing in mind that punishment is a matter for the criminal courts.

34. The plaintiffs response to Patel was reflected in paragraph 22 of their submissions:
22. The Plaintiffs submit the following for consideration by the Court in relation to the criteria enumerated above:

(1) The object and intent of the party seeking to enforce the contract.

The object and intent at the time of contracting was to manage a beauty business which the Plaintiffs had the care and skill to perform. The Defendants have failed on a reverse burden to prove that the Plaintiffs were aware that the contract was illegal.

(2) Whether the illegality was a major part of the contract or whether it was incidental or peripheral.

The Court in answering this question should apply the test of proportionality. The Plaintiffs only managed the business for three (3) months prior to the breach. However, in relation to the Agreement, the Plaintiffs incurred rent charges, construction expenses, and other consequential losses. All of which were legal and form part of their claim.

(3) The nature of the illegality

A breach of a public policy that prohibits foreign persons from conducting retail business in The Bahamas. However, the Plaintiffs were not conducting retail business but were rather operating the Defendant Company's business which was entitled to conduct such business.

35. Respectfully, the primary object of the MA was to permit the plaintiffs to own and operate a business in the Bahamas which, but for the cloak of ZRK, they would be unable to do. The business licence states that it was granted to ZRK Limited as Truffoire on 12 August 2016. The MA entered into by the parties is oft described in the Bahamian vernacular as a *'fronting operation'*. Simply put, the plaintiffs were the true owners of the cosmetics business, with a fee to be paid to ZRK to *'act'* as the Bahamian owners. Clause 1.1 of the MA states that the Operators (the plaintiffs) were to receive 100% of the profit from the business. I was not convinced that the plaintiffs were ignorant that their actions and that opening and operating a business in the Bahamas, without the requisite approvals and licences was an innocent venture. The plaintiffs never had any status in the country outside of that of a visitor, yet they were "managing" the business of ZRK. In addition, the evidence reflects that the plaintiffs sought legal Counsel and there was never any evidence proffered that the advice was deficient relative to the requirements to engage in the cosmetics business as non-Bahamians.

36. The illegality was a major part of the agreement and not merely peripheral. But for the agreement the business would not materialize.

37. At some point the Directors of ZRK realized that simply speaking with Yosifon and Nemzer about the non-payment of National Insurance benefits, VAT and other concerns was not inspiring the plaintiffs to resolve any of the issues raised. However, this brings me to the submission of Counsel for the plaintiffs regarding common law and statutory illegality. On balance I find it difficult to accept that the plaintiffs did not have the requisite knowledge that the contract that they entered into with ZRK may have put them in contravention of Bahamian public policy and at the very least Bahamian Immigration law. These were men who entered the country with visitor status and started a business on which they needed to operate through Bahamians to carry out.

38. It appears that the MA between the parties was used to facilitate the circumvention of a widely known public policy in this country, that retail business in cosmetics is reserved for Bahamians. I am satisfied that this is not merely a public policy issue by a statutory illegality as the true owners of the business are not reflected on the business license. If

that had been properly reflected in the application there would likely have been no license issued. Additionally, the venture appears to have been operated in contravention of various laws relating to Immigration, National Insurance and Value Added Tax. Agreements such as the MA entered into by the plaintiffs and ZRK is to be avoided.

39. Having regard to my decision that the MA is invalid, it is otherwise unenforceable. There shall be no recovery for loss of business, loss of income or the refund of rent as claimed by the plaintiffs. The principle of *the loss lying where it falls* is applicable. The plaintiffs have brought no claims for unjust enrichment as was pursued in *Patel*. I will grant only the claim for the plaintiffs' security deposit to be returned as this payment was clearly akin to the landlord and tenant aspect of the relationship and not the unlawful business venture.

40. While the MA is invalid, ZRK's decision to avoid becoming further embroiled in violations of the law by evicting the plaintiffs was nonetheless reasonable in the circumstances. However, ZRK's involvement in the creation of the invalid MA cannot be denied or ignored. It likewise cannot, having regard to its part in the illegality, pursue claims against the plaintiffs. ZRK's Counterclaim is hereby dismissed.

41. There shall be no order as to costs.

Dated this 3rd day of March 2023

A handwritten signature in black ink, appearing to be 'I. Winder', written over a horizontal line.

Sir Ian R. Winder

Chief Justice