COMMONWEALTH OF THE BAHAMAS
IN THE SUPREME COURT

COMMERCIAL DIVISION

2022/COM/com/00034

IN THE MATTER of s. 68 of the International Business Companies Act

BETWEEN

STERLING ASSET MANAGEMENT LTD

Claimant

AND

SUNSET EQUITIES LTD

Defendant

Before:	**Her Ladyship The Honourable Madam Senior Justice Deborah Fraser**
Appearances:	**Mr. Ramonne Gardiner with Mr. Wilfred P. Ferguson Jr. for the Claimant**
	Mrs. Gail Lockhart-Charles K.C. with Mr. Charles McKay for the Defendant
Judgment Date:	**20 June 2023**

Over-riding Objective – Rules 1.1 and 1.2 of the Supreme Court Civil Procedure Rules, 2022 – Dealing with cases justly and at proportionate cost - Request to cross-examine deponents – Affidavit Evidence – Rule 8.25 of the Supreme Court Civil Procedure Rules, 2022 – Discretionary power to direct witnesses to attend for cross-examination

JUDGMENT

1. This is an application by Sunset Equities Ltd ("**Sunset**") requesting cross-examination of deponents at trial.

Background

2. In March of 2013, Sterling Asset Management Ltd ("**Sterling**"), through a series of credit facilities ("**Credit Facilities**"), loaned Sunset funds in the amount of USD$12,500,000. The funds were loaned to Sunset to assist it in the financing and purchase of *"1.349 acres [and] 1.069 acres respectively situate at the South-Western junction of West Bay Street and the beachfront resort hotel formerly known as the Nassau Palm Resort"* ("**Property**"). The Credit Facilities were also intended to cover the costs of redevelopment of the Property, which was branded as Marriott Courtyard Downtown Hotel ("**Redevelopment Project**").

3. Under the Credit Facilities, Sterling became a shareholder of Sunset (a Shareholder's Agreement was subsequently executed by the parties). It is alleged by Sunset that, it sought to explore other financing opportunities to satisfy Sterling's loan and obtain funding elsewhere to complete construction and renovations for the Redevelopment Project. It is also alleged by Sunset that Mr. David Kosoy, ("**Mr. Kosoy**") Chairman and Chief Executive Officer of Sterling, was informed of Sunset's intention to pay off its loans with Sterling and that Mr. Kosoy, as lender, had no objection to Sunset seeking financing from third parties to satisfy the loan.

4. Sunset further alleges that Mr. Kosoy sought to introduce a new obligation that Sunset would, in addition to paying off the loans, have to pay Sterling for the 15% equity, which it owned (by this time, Sterling claimed to be entitled to a further 5% equity in addition to the initial 10% that it received at the time that the Shareholder's Agreement was signed.). This, Sunset alleges, was the first time such a term was introduced. Sunset claims that Sterling did not provide terms that were better than terms Sunset received from third party lenders. In any event, the loan from Sterling to Sunset was ultimately satisfied.

5. It is also alleged by Sunset that, in July of 2016, Sterling put forward a commitment letter ("**July 2016 Commitment**") requiring that $1,830,000 be deducted from a proposed $6,030,000 credit facility and be paid to Sterling to re-purchase its equity in Sunset that Sterling had received as a condition of its initial financing arrangement.

6. It is further alleged by Sunset that, in addition to insisting on a $1,830,000 claw back of the proposed loan proceeds for the repurchase of Sterling's equity in Sunset, Sterling also sought to make Sunset bound to it for future financing by making the July 2016 Loan Commitment conditional on the *"Agreement of the Borrower to provide the Lender and/or an affiliated company with the right of first offer and/or the right of first refusal to refinance the Project at any time"*. Sunset claims that, at every turn, Sterling has attempted to prevent Sunset from seeking financing from any third parties and that Sterling is attempting to make Sunset subservient to it.

7. Prior to July of 2016, Sterling received monthly reports of operations of the hotel from Sunset. Sterling alleges that, since July of 2016, Sunset ceased providing Sterling with financial information relating to Sunset.

8. Sterling further alleges that it was also denied access to the books and records of Sunset and continues to be denied such access.

9. In addition, it is alleged by Sterling that Sunset has defaulted under the terms of a mortgage with SF IV BE LP ("**Loan Agreement**"). Sterling also asserts that Sunset's main asset, being the Courtyard Marriot Hotel, was recently sold under a power of sale and Sunset appears to be insolvent. Sterling further alleges that details of the sale were never provided to Sterling.

10. In accordance with the Loan Agreement entered between Sunset and SF IV BE LP, Sunset received $2,300,000.00, the proceeds of which have been allegedly allocated to all of its shareholders, save and except Sterling. Sterling also claims that no accounting of this transaction was ever provided to Sterling.

11. Sterling then commenced Winding Up proceedings by petition as against Sunset on the basis that Sunset was insolvent.

12. After a myriad of litigation, Sunset withdrew its petition for Winding Up. Following a ruling made by the Court of Appeal (SCCIVApp 152 of 2022) where it indicated that s. 68 of the International Business Companies Act, 2000 ("**Act**") is the correct mechanism to seek inspection of books and records of Sunset, Sterling then made a request (pursuant to s. 68 of the Act) by letter dated 11 March 2022 to Sunset.

13. On 28 March 2022, Sunset denied the request on the basis that such request was not made in good faith or for a proper purpose. Page 3 of that letter states:

> **"The record reflects that Sterling has acted in bad faith and has abused its dual position as shareholder and money lender…Sunset is aware that Sterling is seeking discovery of Sunset's books and records via S 68 in order to obtain information to support the filing of a further winding up petition against Sunset. This is not a proper purpose, as Sterling is contractually bound by the Shareholders Agreement not to present or cause to be presented any petition for the Winding up of the Company."**

14. By Originating Summons filed on 24 June 2022, Sterling seeks an order of the Court pursuant to s. 68 of the Act and its inherent jurisdiction for inspection of Sunset's books and records.

15. Both parties then filed several comprehensive affidavits advancing their respective cases for the action.

16. Prior to the substantive hearing of the matter, Sunset's counsel made a request to cross-examine the deponents of affidavits filed by Sterling. Sterling's counsel objected to this request.

Issue

17. The issue that the Court must decide is whether deponents of the affidavits ought to appear in court for cross-examination.

Sunset's Submissions

18. Sunset's counsel asserts that cross-examination is not only appropriate in the instance case, but is essential. Counsel submits that the issue before the Court is not straight forward and if cross-examination was not permitted, it would contravene the overriding objective of the Supreme Court Civil Procedure Rules, 2022 ("**CPR**").

19. Sunset's counsel further asserts that the action concerns disclosure of Sunset's books and records, pursuant to section 68 of the Act and that this will require the Court to resolve conflicting evidence contained in the affidavits filed by the parties. Counsel maintains that, in order for the Court to provide a proper and fair evaluation of the evidence, cross-examination of the deponents is essential.

20. Counsel then cites s. 68 of the Act, which reads:

> **"68. (1) A member of a company may, in person or by attorney and in furtherance of a proper purpose, request in writing specifying the purposes, to inspect during normal business hours the Share Register of the company and the books, records, minutes and consents kept by the company and to make copies of extracts therefrom.**
>
> **(2) For the purposes of subsection (1), a proper purpose is a purpose reasonably related to the member's interest as a member.**
>
> **(3) If a request under subsection (1) is submitted by an attorney for a member, the request shall be accompanied by a power of attorney authorising the attorney to act for the member.**
>
> **(4) If the company, by a resolution of directors, determines that it is not in the best interest of the company or of any other member of the company to comply with a request under subsection (1), the company may refuse the request.**
>
> **(5) Upon refusal by the company of a request under subsection (1), the member may before the expiration of a period of 90 days of his**

receiving notice of the refusal, apply to the court for an order to allow the inspection."

21. Counsel then asserts that the crux of the matter is determining whether or not such disclosure sought by Sterling is for a proper purpose. This, counsel submits, can only be determined on the particular facts of the case. Sunset's counsel relies on the case of **Fruit Shippers Ltd. v Pembroke Company Ltd et al [1999] BS 1999 CA 31** ("**Fruit Shippers**") to support this assertion. The case discusses s. 66 of the former legislation – the International Business Companies Act, 1989. Section 68 of the Act mirrors s. 66 of the former legislation, thus making ***Fruit Shippers*** relevant to the instant case. In ***Fruit Shippers***, Gonsalves-Sabola P opined:

> **"13. I have come to the conclusion that the disposition of this appeal does not require the court to make a definitive categorization of facts and circumstances which would constitute or not constitute "a proper purpose" within section 61(1) of the Act. I think that in the application of the section, the court ought to proceed on a case-by-case basis. What is being construed is relatively virgin legislation in The Bahamas, and authority on the precise parameters of the phrases in subsections (1) and (2) is lacking. <u>Therefore, the court should restrict itself to the determination as to whether the particular facts of cases as they arise from time to time, set in the matrix of their peculiar circumstances, do or do not establish "a proper purpose". Always, that purpose must bear a reasonable relationship to the member's interest qua member of the company.</u>**
>
> **16. What is required of a judge under section 66(5) is what is routine in our courts, that is to say, an adjudication on the facts of a particular case, having regard to the applicable law, holding the applicant to the ordinary civil standard of proof on a balance of probabilities. There is nothing special in section 66(5) which enlarges the function of a judge or indeed, the burden on an applicant, beyond that (emphasis added)."**

22. Counsel asserts that the evidence of the respective parties is heavily contested as there is a long contentious track record of litigation between them. She maintains that cross-examination is not only necessary but important in an adversarial litigation process. Counsel further contends that cross-examination is of crucial assistance to the Court as it can reveal inconsistencies, contradictions or weaknesses in the witness' testimony and provides the Court with an opportunity to determine whose evidence is reliable and truthful. Further, Sunset's counsel submits that it would be extremely unfair and inefficient to leave it to the Court to read through heavily contested affidavit evidence and determine whose evidence will be accepted and whose evidence will be rejected without

giving counsel an opportunity to challenge the evidence through cross-examination.

23. Sunset's counsel also submits that it is a well-established legal principle that the use of affidavits in court proceedings, without deponents being called for cross-examination, is problematic as it allows the deponent to manipulate the evidence in his/her favor, without facing the scrutiny of cross-examination.

24. Counsel relies on the case of **BHP International Markets Limited v Wason Holdings Limited [2016] 2 BHS J. No. 97** for the proposition that cross-examination is crucial for fairness and to test the accuracy of witness testimony.

25. Counsel concludes by requesting the Court to permit cross-examination in the substantive trial.

Sterling's Submissions

26. Sterling's counsel vehemently opposes Sunset's request for cross-examination. Counsel submits that cross-examination is not necessary in the instant case as to permit such would be in contravention of the overriding objective of the CPR.

27. Counsel relies on **Rule 8.25(2) of the CPR**, which provides:

> ***"8.25 Evidence-General***
>
> ***(2) The Court may give directions requiring the attendance for cross-examination of a witness who has given written evidence (emphasis added).***

28. Counsel advances, that the CPR makes cross-examination discretionary and is thus no longer as of right. He then cited **Rules 26.1 (2)(p) and 30.1 (3) of the CPR**, which read:

> **"26.1 Court's general powers of management.**
>
> **(2) Except where these rules provide otherwise, the Court may –**
>
> **(p) require the maker of an affidavit or witness statement to attend for cross-examination**
>
> **30.1 Affidavit evidence.**
>
> **(3) Whenever an affidavit is to be used in evidence, any party may apply to the Court for an order requiring the deponent to attend to be cross-examined (emphasis added)."**

29. Counsel submits that cross-examination would delay a determination of the issues before the Court and would be disproportionate to the simplicity of the matter. Sterling's counsel further asserts that the Court exercising its discretion

must consider the overriding objective of the Court and what is necessary *"to ensure the just, most expeditious and least expensive determination of every cause or matter on its merits"*.

30. Like Sunset, Sterling's counsel also relies on the ***Fruit Shippers*** decision and highlights that the Court can make a determination in an application under s. 68 of the Act solely on affidavit evidence, without cross-examination.

31. Counsel then quotes **Rules 1.1 and 1.2 of the CPR** to highlight the overriding objective and the need to have judicial matters dealt with in a cost-effective and expeditious manner. **Rules 1.1 and 1.2 of the CPR** provide:

> **"1.1 The Overriding Objective.**
>
> **(1) The overriding objective of these Rules is to enable the Court to deal with cases justly and at proportionate cost.**
>
> **(2) Dealing justly with a case includes, so far as is practicable:**
>
> **(a) ensuring that the parties are on an equal footing;**
>
> **(b) saving expense;**
>
> **(c) dealing with the case in ways which are proportionate to —**
>
> **(i) the amount of money involved;**
>
> **(ii) the importance of the case;**
>
> **(iii) the complexity of the issues; and**
>
> **(iv) the financial position of each party;**
>
> **(d) ensuring that it is dealt with expeditiously and fairly;**
>
> **(e) allotting to it an appropriate share of the Court's resources, while taking into account the need to allot resources to other cases; and**
>
> **(f) enforcing compliance with rules, practice directions and orders.**
>
> **1.2 Application of overriding objective by the Court.**
>
> **(1) The Court must seek to give effect to the overriding objective when —**
>
> **(a) exercising any powers under these Rules;**
>
> **(b) exercising any discretion given to it by the Rules; or**
>
> **(c) interpreting these Rules.**

> **(2) These Rules shall be liberally construed to give effect to the expeditious and least expensive determination of every cause or matter on its merits (emphasis added).”**

32. Sterling’s counsel also relies on the Privy Council decision of **Charmaine Bernard (Legal Representative of the Estate of Reagan Nicky Bernard) v Ramesh Seebalack [2010] UKPC 15** (“**Charmaine**”) at paragraphs 23 and 31 for the following proposition:

> **“23 But under the CPR (and the England and Wales CPR) it is no longer right to say that the court's function is to do substantive justice on the merits and no more. The overriding objective adds the imperatives of deciding cases expeditiously and using no more than proportionate resources. Thus, interpreting Part 20.1(3) so as to enable the court to give effect to the overriding objective does not require a strained interpretation of the word "change" so as to limit it to "an alteration of the tenor and character of the statement of case" (Bereaux J's formulation) or a "fundamental" change (the epithet used by Kangaloo JA in the present case).**
>
> **31. In interpreting Part 20.1(3), the Board has had regard to the litigation context in which the Rules Committee drafted the CPR. On any view, as Warner JA pointed out in the present case, Part 20.1 provides for a more inflexible regime for amendment than the corresponding Part 17.1 of the England and Wales CPR. Part 17.1(2) provides that, if the statement of case has been served, a party may amend it only (a) with the written consent of all the other parties or (b) with the permission of the court. The power of the court in England and Wales to give permission to amend is circumscribed only to the extent that it must be exercised so as to give effect to the overriding objective. But it is clear from remarks such as those of Jamadar JA that rules such as that in Part 20.1(3) were drafted in an attempt to introduce more discipline into the conduct of civil litigation and defeat the endemic laissez-faire attitude to it. The Board considers that it would be wrong for it to adopt an interpretation to the rules which would undermine the attempts made by the Rules Committee (supported by the Court of Appeal) to improve the efficiency of civil litigation in Trinidad and Tobago (emphasis added).”**

33. Sterling’s counsel asserts that proportionality and the financial viability of the parties must be considered when adhering to the overriding objective of the CPR. He contends that Sunset is impecunious as it previously defaulted under the Loan Agreement and has no known assets in its possession.

34. Sterling’s counsel asserts that Sunset ought not be allowed to take steps to substantially increase the costs of litigation where it appears unlikely that it will be

able to pay Sterling's costs, should it be determined that Sterling is successful in the main trial.

35. Further, counsel submits that cross-examination would likely require additional days for trial (as the deponents would also be open to re-examination) and the Court must also consider allotting appropriate resources to judicial matters.

36. Counsel further advances that the Court exercising its discretion permitting cross-examination in the instant case would be inappropriate, as the matter should be dealt with in the least expensive manner and it would be more expeditious if the Court dealt with the matter purely on the affidavit evidence alone.

37. Finally, Sterling's counsel submits that the request for cross-examination be refused, but if the Court is minded to permit it, that Sterling would also seek leave to cross-examine Sunset's deponents.

DISCUSSION AND ANALYSIS

Whether deponents of the affidavits ought to appear in court for cross-examination.

38. By virtue of **Rule 26.1 (2)(p) and 30.1(3), of the CPR**, the Court has a discretion to permit and compel cross-examination of deponents of affidavits.

39. The Court also observes and adheres to the over-riding objective of the CPR as outlined at Rules 1.1 and 1.2. The Court must also ensure matters are dealt with justly, fairly, expeditiously and at proportionate costs.

40. Sunset's counsel is of the view that cross-examination is essential, based on the matters before the court in the instant case, whereas Sterling's counsel forms the view that cross-examination would be time consuming, costly and unnecessary to decide the simple matter before the Court.

41. At this juncture, I find it useful to itemize all affidavits relevant to the matter:

- The Affidavit of David Kosoy filed 24 June 2022 (which exhibits a compendium of corporate documents of Sunset, correspondence of the parties, pleadings and decisions of both the Supreme Court and Court of Appeal regarding different proceedings involving the parties);
- The Affidavit of Sheila Cuffy filed 02 November 2022 (which exhibits the Third Affidavit of Ron Hersho in different proceedings involving the parties. The exhibited affidavit also has its own extensive exhibits);
- The First Affidavit of Ron Hershco filed 30 January 2023 (which also exhibits the Third Affidavit of Ron Hersho); and

- The Affidavit of Ross Brennan filed 09 March 2023 (which exhibits the Affidavit of Ross Brennan in different proceedings involving the parties. It also exhibits orders and decisions of other courts from different proceedings involving the parties).

42. Each of the listed affidavits contain voluminous information and conflicting evidence that the Court must consider. I also must bear in mind the principles emanating from the ***Charmaine*** decision :

> **"….it is no longer right to say that the court's function is to do substantive justice on the merits and no more. <u>The overriding objective adds the imperatives of deciding cases expeditiously and using no more than proportionate resources</u> (emphasis added)."**

43. Accordingly, when I consider the four affidavits listed above and the authorities cited, the Court is inclined to permit cross-examination. Though the sole issue for determination at trial is whether or not the documents being sought for inspection are for a proper purpose, as required under s. 68 of the Act, the extensive history of the matter warrants further examination of the evidence provided.

44. Though examination of the affidavits alone was done in the ***Fruit Shippers*** decision, these proceedings have information and evidence that are quite extensive and require further and close analysis prior to the Court making a final determination.

45. Allowing cross-examination would indeed require scheduling hearing dates, further consideration of the case by counsel to formulate questions to be put to the deponents and, of course, more legal expense. Notwithstanding this, the Court is of the view that the over-riding principles do require that justice be done and that all parties are on equal footing. The Court would need to hear from the parties on their respective cases to determine whose evidence is preferred over the others. As costs and the financial viability of Sunset appear to be the main concerns of Sterling, the CPR does allow it to make certain applications, if it so chooses.

46. In keeping with the spirit and tenor of the over-riding objective of the CPR, I rule that cross-examination is appropriate in the present case.

CONCLUSION

47. In accordance with the above authorities and reasoning provided, I exercise my powers as permitted under **Rules 26.1 (2)(p) and 30.1 (3) of the CPR** and direct that all deponents of affidavits in this matter do appear in court for cross-examination and re-examination (if necessary).

48. Costs shall be in the cause.

Senior Justice Deborah Fraser

Dated this 20th day of June 2023