COMMONWEALTH OF THE BAHAMAS

IN THE SUPREME COURT

Common Law and Equity Division

2020/CLE/gen/00329

BETWEEN

SUNSET EQUITIES LTD

Plaintiff

AND

(1) STERLING ASSET MANAGEMENT LTD
(2) DAVID KOSOY
(3) STEPHEN TILLER

Defendants

Before the Hon. Chief Justice Sir Ian R. Winder

Appearances:
Gail Lockhart Charles KC with Charles McKay for the Plaintiff
Brian Simms KC with Ramonne Gardiner for the Defendants

12 October 2022 and 16 March 2023

DECISION

WINDER, CJ

[1.] On 16 March 2023 I gave my decision in this matter: (1) refusing the defendants' application for the striking out of the action; (2) granting leave to re-amend the Statement of Claim; and (3) Ordering Security for Costs in the amount of $120,000. On giving my decision I promised to put that decision in writing and I do so now.

[2.] The applications are supported by the affidavit of David Kasoy filed on 7 September 2020, the affidavits of Valdere Murphy filed on 17 March 2021 and 5 October 2021, the affidavits of Ross Brennan filed on 13 October 2022 and 6 December 2022, the affidavit of Candice Knowles filed on 12 October 2021, and the second and third affidavits of Yaron Herscho both filed on 25 October 2022.

[3.] On 6 April 2017 in action 2017/COM/com/000004 (the Liquidation Claim) the first defendant (Sterling) had petitioned the Court, as a contributory, for the winding up of Sunset Equities Limited (Sunset). Sterling had acquired its shareholding in the Company by virtue of providing a loan facility to the Company. The loan facility by Sterling to the Company has since been repaid in full. The Petition alleged that Sunset was insolvent and prayed that it be wound up pursuant to the provisions of the Companies Winding Up Amendment Act (CWUAA).

[4.] On 26 July 2018 Sunset filed a Notice of Motion seeking to strike out the Petition. On 23 September 2019, this Court acceded to Sunset's application and dismissed the Petition.

[5.] Sterling appealed the striking out of the Liquidation Claim to the Court of Appeal which, on 8 April 2021, reinstated the Liquidation Claim, remitting it back to the Supreme Court for hearing.

[6.] Prior to the conclusion of the appeal Sunset had commenced this action by Writ of Summons (Amended) on 14 May 2020 seeking damages for malicious prosecution and unlawful means conspiracy against the Defendants in the bringing of winding up proceedings in the Liquidation Claim.

Strike out application

[7.] On 22 July 2020 Sterling applied by Summons seeking to strike out this action against itself and the Second Defendant (Kasoy) and for an order that Sunset provide security for their costs. The Summons is settled in the following terms:

> LET ALL PARTIES CONCERNED attend before _____ a Judge of the Supreme Court in Chambers at the Supreme Court Building, Bank Lane, New Providence, the Bahamas at _____ o'clock in the _____ noon on _____ the ____ day of _____, 2020, for the hearing of an application by the Second Defendant pursuant to section 285 of the Companies Act, section 16(3) of the Supreme Court Act, Order 18 Rule 19 (b) of the Rules of the Supreme Court and/or the inherent jurisdiction of the Court for an Order that:
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> 1. The Plaintiff do within 7 days give security for the costs of the Second Defendant in the amount of $450,000.00;
> 2. All further proceedings in this action be stayed pending the determination of SCCivApp/17 of 2020 and/or COM/com/0004 of 2017;
> 3. The Amended Writ of Summons be struck out against the Second and Third Defendants on the basis that it is frivolous or vexatious; and
> 4. The costs of and occasioned by such application be paid by the Plaintiff.

On (17 March 2021) Sterling sought to amend the Summons, seeking instead to strike out the entirety of the action against all defendants and to include a ground of abuse of process. They have asserted that "the Court of Appeal in SCCivAPP 16 of 2020 acceded to [Sterling's] Appeal resulting in the substratum of this action falling away."[1] Leave was granted to the Defendants on 13 October 2021 to amend their Summons.

[1] Sterling's submissions 6 October 2021

[8.] Subsequently, however, on 28 March 2022, upon the application of Sterling, leave was granted to withdraw the Petition in the Liquidation Claim, effectively ending the Liquidation Claim.

[9.] The application to strike out was launched, in part, on the basis that the substratum of the malicious prosecution and unlawful means conspiracy, namely the Liquidation Claim, had been restored or was likely to be restored. Notwithstanding the ending of the Liquidation Claim, the Defendants maintain its claim to have the action struck out.

[10.] The Defendants' say[2]:

> 6. Reference is made to paragraphs 15-42 of the Defendants' main Submissions. The Defendants' application for strike out is 2-fold. Firstly, the Defendants seek to strike out the action against Sunset on the basis that its causes of action relies upon the Ruling of 23rd September 2019 wherein the Petition was struck out in the winding up proceedings. As the Petition was reinstated, this action is an abuse of process. It is submitted, that unless the Court accedes to Sunset's application for amendment, the Court should strike out the action on such basis. Nevertheless, even if the Court accedes to Sunset's application to amend the Amended Writ of Summons, the action against the Second and Third Defendants should still be struck out on the basis that such cause of action is frivolous and vexatious.
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> 9. In considering the Amended Statement of Claim and/or the proposed draft Re-Amended Statement of Claim, Sunset alleges that the Second Defendant, David Kosoy and Third Defendant, Stephen Tiller as directors of Sterling, entered a conspiracy with Sterling (or between themselves as directors) to maliciously prosecute Sterling's winding up Petition and under the proposed draft Re-Amended Statement of Claim, to prosecute the petition in breach of a shareholders' agreement. The cause of action for conspiracy under both the Amended Statement of Claim and the proposed draft Re-Amended Statement of Claim are bound to fail.
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> 10. The authorities establish that there must be some personal involvement on the part of the director to lose their protection from

[2] Sterling's submissions 5th October 2022

personal liability. Reference is made to the authorities at paragraphs 30-36 of the Defendants' main Submissions.

11. In MCA Records Inc v. Charly Records Ltd [2001] EWCA Civ 1441 [Tab 2] Chadwick LJ opines at paragraph 49 of the Ruling:

> "49. First, a director will not be treated as liable with the company as a joint tortfeasor if he does no more than carry out his constitutional role in the governance of the company – that is to say, by voting at board meetings. That, I think, is what policy requires if a proper recognition is to be given to the identity of the company as a separate legal person. Nor, as it seems to me, will it be right to hold a controlling shareholder liable as a joint tortfeasor if he does no more than exercise his power of control through the constitutional organs of the company – for example by voting at general meetings and by exercising the powers to appoint directors. Lord Justice Aldous suggested, in Standard Chartered Bank v Pakistan National Shipping Corporation and others (No 2) [2000] 1 Lloyd's Rep 218, 235 – in a passage to which I have referred – that there are good reasons to conclude that the carrying out of the duties of a director would never be sufficient to make a director liable. For my part, I would hesitate to use the word 'never' in this field; **but I would accept that, if all that a director is doing is carrying out the duties entrusted to him as such by the company under its constitution, the circumstances in which it would be right to hold him liable as a joint tortfeasor with the company would be rare indeed**. That is not to say, of course, that he might not be liable for his own separate tort, as Lord Justice Aldous recognised at paragraphs 16 and 17 of his judgment in the Pakistan National Shipping case."
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> [Emphasis added]

[11.] Order 18 Rule 19 of the Rules of the Supreme Court provides:

19. (1) The Court may at any stage of the proceedings order to be struck out or amended any pleading 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 vexatious; 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, and may order the action to be stayed or dismissed or judgment to be entered accordingly, as the case may be.

(2) No evidence shall be admissible on an application under paragraph (1)(a).

[12.] In ***West Island Properties Limited v Sabre Investments Limited*** [2012] 3 BHS J. No. 57 the Court of Appeal has provided useful guidance on the issue of striking out under Order 18 Rule 19 of the Rules of the Supreme Court. According to Allen P:

> 15 In the case of Drummond-Jackson v. British Medical Association [1970] 1 W.L.R. 688, Lord Pearson determined that a cause of action was reasonable where it had some chance of success when considering the allegations contained in the pleadings alone. That is, beginning at page 695, he said the following:
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> > "Over a long period of years it has been firmly established by many authorities that the power to strike out a statement of claim as disclosing no reasonable cause of action is a summary power which should be exercised only in plain and obvious cases.
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> > In my opinion the traditional and hitherto accepted view - that the power should only be used in plain and obvious cases - is correct according to the intention of the rule for several reasons. First, there is in paragraph (1)(a) of the rule the expression "reasonable cause of action," to which Lindley M.R. called attention in Hubbuck& Sons Ltd. v. Wilkinson, Heywood & Clark Ltd. [1899] 1 Q.B. 86, pp. 90 - 91. No exact paraphrase can be given, but I think "reasonable cause of action" means a cause of action with some prospect of success, when (as required by paragraph (2) of the rule) only the allegations in the pleading are considered. If when those allegatios are examined it is found that the alleged cause of action is certain to fail, the statement of claim should be struck out. In Nagle v. Feilden [1966] 2 Q.B. 633Danckwerts L.J. said, at p. 648:
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> > 'The summary remedy which has been applied to this action is one which is only to be applied in plain and obvious cases when the action is one which cannot succeed or is in some way an abuse of the process of the court.'
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> > Salmon L. J. said, at p. 651:
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> > 'It is well settled that a statement of claim should not be struck out and the plaintiff driven from the judgment seat unless the case is unarguable.'

> Secondly, subparagraph (a) in paragraph (1) of the rule takes some colour from its context in subparagraph (b) "scandalous, frivolous or vexatious," subparagraph (c) "prejudice, embarrass or delay the fair trial of the action" and subparagraph (d) "otherwise an abuse of the process of the court." The defect referred to in subparagraph (a) is a radical defect ranking with those referred to in the other subparagraphs. Thirdly, an application for the statement of claim to be struck out under this rule is made at a very early stage of the action when there is only the statement of claim without any other pleadings and without any evidence at all. The plaintiff should not be "driven from the judgment seat" at this very early stage unless it is quite plain that his alleged cause of action has no chance of success. The fourth reason is that the procedure, which is (if the action is in the Queen's Bench Division) by application to the master and on appeal to the judge in chambers, with no further appeal as of right to the Court of Appeal, is not appropriate for other than plain and obvious cases.

West Island Investments confirms the test that claims ought to only be struck out in plain and obvious cases and the plaintiff should not be driven from the judgment seat unless it is quite plain that the claim has no chance of success.

[13.] In response to the strike out application, and whilst they maintain that the action is viable, Sunset has applied by Summons (12 October 2021) to re-amend the claim in the terms of a draft re-amendment attached to the Summons.

[14.] Order 20 Rule 7 of the Rules of Supreme Court provides:

> 7. (1) For the purpose of determining the real question in controversy between the parties to any proceedings, or of correcting any defect or error in any proceedings, the Court may at any stage of the proceedings and either of its own motion or on the application of any party to the proceedings order any document in the proceedings to be amended on such terms as to costs or otherwise as may be just and in such manner (if any) as it may direct.

[15.] Additionally, in response, Sterling's arguments that a director may not conspire with a company or be a joint tortfeasor with the company, they say:

> 37. The elements of unlawful means conspiracy are set out by Nourse LJ at paragraph 108 in the case of Kuwait Oil Tanker Co SAK v Al Bader [2000] 2 All ER (Comm) 271 as follows:

[108]. ... A conspiracy to injure by unlawful means is actionable where the claimant proves that he has suffered loss or damage as a result of unlawful action taken pursuant to a combination or agreement between the defendant and another person or persons to injure him by unlawful means, whether or not it is the pre-dominant purpose of the defendant to do so.

38. In the present case, the unlawful means pertains to the filing of the Winding-up petition in breach of contract. The unlawful means therefore pertains to the contractual breach. The Plaintiff maintains that there is no doubt that the Winding up Petition was filed in breach of contract, and, as such, the Plaintiff is entitled to pursue damages for unlawful means conspiracy in the context of the present proceedings.

39. Similarly, the causes of action for breach of contract and procuring or inducing breach of contract arise out of the facts pleaded in the Statement of Claim. The Plaintiff relies on the authority of Palmer Birch (a partnership) v Lloyd and another [2018] 4 WLR 164 where it was held that directors or agents of a company who are not acting in good faith are not able to invoke the protection of the rule in Said v Butt which protects directors and agents from liability while carrying out their constitutional functions on behalf of the company. The following extracts from Palmer Birch are instructive:

> 208 ... For the purposes of the inducement tort she said the rule in Said v Butt[1920] 3 KB 497, 506, means that an agent acting bona fide within the scope of his authority who procures a breach of his principal's contract is not liable in tort for doing so. Ms Lee cited the judgment of Lord Evershed MR in DC Thomson & Co Ltd v Deakin[1952] Ch 646, 681, where he approved textbook authority which relied upon Said v Butt for just that proposition where the company would be vicariously liable for its servant's acts of procurement or breach taken within the scope of his own authority. She submitted the latter principle is no less applicable to the tort of conspiracy (based upon a wrongful breach of contract) than it is to the inducement tort. Accordingly, Ms Lee submitted, no personal liability can attach to Christopher personally in respect of any conspiracy that HHL should breach the Contract with PB.
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> 209 In Digicel (St Lucia) Ltd v Cable & Wireless plc [2010] EWHC 774 (Ch) at Annex I, [78], Morgan J (referring to MCA Records Inc v Charly Records Ltd (No 5) [2001] EWCA Civ 1441; [2002] BCC 650) observed that a director or shareholder who does no more than carry out his constitutional role within the company, in the relevant capacity, will not ordinarily be liable with the company in conspiracy. MCA Records Inc v Charly Records was in fact a decision concerning a director's potential liability as a joint tortfeasor with his company, more specifically whether he was personally liable as a joint tortfeasor for procuring breaches of copyright where the company (of which he had acted as a de facto or shadow director) was the primary infringer. It was not a conspiracy case and the proposition derived from it by Morgan J seems unsurprising. Claims

in conspiracy (or for the inducement tort or unlawful interference or many other torts where the concepts of separate corporate personality and vicarious liability have some meaning) would become very oppressive tools if, without more, mere fulfilment of board functions or attendance at members' meetings exposed individuals to joint liability with the company of which they were directors or members.

210 Consideration of the proposition does, however, raise the question as to whether a director (or shareholder) who has the necessary intention to injure the claimant—and who, for his part, therefore satisfies the second of the ingredients mentioned in para 203 above—can nevertheless be said to be carrying out his constitutional role within the company or, for that matter, acting bona fide. I note that, immediately after the passage in DC Thomson & Co Ltd v Deakin upon which Ms Lee relied, Lord Evershed MR went on to note that the author of the textbook later stated: "If the servant does not act bona fide, presumably he is liable on the ground that he has ceased to be his employer's alter ego, and so on."

...

215 So far as Christopher's potential personal liability is concerned, the judgment of Chadwick LJ in MCA Records v Charly Records shows that this may hinge upon an "elusive question" (as Rimer J at first instance had put it). But it is clear that liability on the part of a director for the tort of conspiracy can arise where the company itself is also a wrongdoer. So much is clear from the judgment of Chadwick LJ (with whom Tuckey and Simon Brown LJJ agreed). He said (at para 37) "the relevant inquiry is whether he has been personally involved in the commission of the tort ... to render him liable as a joint tortfeasor" and (at para 41) "would A's involvement in the acts of B be such as to give rise to liability as a joint tort-feasor if A were not a director of B". These statements were made by reference to a number of authorities and the judge was addressing the position of joint tortfeasors generally. They included The Koursk [1924] P 140, 156, and Williams v Natural Life Health Foods Ltd[1998] 1 WLR 830, paras 20–21, and Chadwick LJ recognised that a director who becomes concerned with his company in a joint act done in pursuance of a common purpose, or who procures or induces the company to commit the tort, himself becomes a joint tortfeasor.

216 It is certainly not the case, therefore, that a director cannot be personally liable in tort for acts taken by him in that capacity any more than it is the case that merely acting as a director or employee will result in the office-holder being jointly liable for any tort committed by the company with his involvement. As Morgan J said in Digicel, the question will involve a detailed examination of the facts, subject always, in a case of conspiracy, to the observation I have made about the doubt over a claim which is made only against a company

> and its sole controller. The claimant needs to show a degree of involvement in the tort on the part of the director, and that his acts (and, where relevant, intention) are sufficiently bound up in the company's acts, to make him personally liable. In this case, the thrust of PB's allegations against Christopher is that he in fact abnegated his duties to HHL and knowingly, and therefore without any good faith on his part, permitted the company to carry into effect Michael's conspiratorial designs
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> 234 I proceed on the same basis, that a breach of contract is an "unlawful" act for the purposes of an unlawful means conspiracy. To borrow the expression used by Nourse LJ in Kuwait Oil Tanker v Al Bader at para 130 (which he applied to the suggested exclusion of tortious means from its scope and made the obiter observation that breaches of contract were within it) it would be anomalous to exclude breaches of contract from the eligible categories of legal wrong. In my judgment it would be anomalous to do so for the reason touched upon in para 232 above (there may be others) and also because to do so would appear to ignore the very essence of actionability in the conspiracy context (the Quinn v Leathem point about unlawfulness lying in the fact of conspiracy which I have addressed in para 187 above in the context of the unavailability of a justification defence). I also bear in mind the requirement, discussed below, for the relevant breach to be instrumental in relation to the claimant's loss—to be the means by which harm is inflicted—rather than a merely incidental fact of the conspiracy.

> 40. In the present case, the unlawful means pertains to the filing of the Winding-up petition in breach of contract. The unlawful means therefore pertains to the contractual breach. The Plaintiff maintains that there is no doubt that the Winding up Petition was filed in breach of contract, and, as such, the Plaintiff is entitled to pursue damages for unlawful means conspiracy as pleaded in the present proceedings. The Plaintiff also maintains that the role of the second and third defendants in the wrongdoing far exceeded simply carrying out their constitutional role in governance of the company, such as attending and voting at board meetings. Indeed, the acts done by the company were done at the instigation of the Second and Third Defendant, in furtherance of their conspiracy to harm the Plaintiff through filing the Winding up Petition. It is submitted that the facts pleaded disclose that there was material assistance by the Second and Third Defendant in the wrongful act and that this assistance was in in relation to a common design between the company and director.

[16.] It is trite law that if any defective pleading can be cured by amendment, the amendment, if applied for, should be allowed. In the circumstances of this case, where the factual matrix has been reshaped, it seems proper that the re-

amendment ought to be granted to ensure that all the matters in issue are properly before the court. I was not persuaded by the Defendants' arguments on issue estoppel. Additionally, whilst the Defendants may be correct as to whether there could have been any conspiracy by the 2nd and 3rd Defendants with the company, I was not satisfied, on considering the authorities, that such a finding ought to be made at the pleadings stage but rather after evidence has been led and assessed. I also did not find merit in the submission that the action be struck out as an abuse of process on the basis of issue estoppel.

[17.] In the circumstances, having regard to the test which was outlined in ***West Island Properties***, I dismissed the Defendants' Summons to strike and permitted the re-amendment to proceed. It cannot be said that the claims are plain and obviously unsustainable, having no chance of success.

[18.] I ordered that the Re-Amended Statement of Claim be served within 14 days and gave the Defendants 28 days to respond. The action has since proceeded to case management.

Security for Costs

[19.] The Defendants sought security for costs in the amount of $450,000. Section 285 of the Companies Act provides:

> Where a limited liability company is plaintiff in any action, suit or other legal proceedings, a judge having jurisdiction in the matter may, if it appears by any credible testimony that there is reason to believe that if the defendant is successful in his defence the assets of the company may be insufficient to pay his costs, require sufficient security to be given for such costs, and may stay all proceedings until such security is given.

[20.] Sunset resisted the application citing what they say is the poor conduct of Sterling which led to the financial ruin of Sunset. I accepted that notwithstanding the allegations as to the conduct of Sterling, that Section 285 of the Companies Act was relevant and that Sunset ought to be made to put up security for the costs of the action. In the circumstances, having considered the draft bill of costs, the

nature of the dispute and the likely and reasonable costs, I found that the sum of $120,000 would be adequate in the circumstances.

[21.] I ordered that the said sum be provided, within 28 days, by way of bank guarantee or letter of credit in favour of the Defendants. Alternatively, the sum may be paid into the joint account of Counsel. In the usual circumstances, the action was to be stayed pending the provision of the security.

Dated this 17th day of August 2023

Sir Ian Winder
Chief Justice