IN THE COMMONWEALTH OF THE BAHAMAS

IN THE SUPREME COURT

Common Law & Equity Division

2021/CLE/gen/00354

B E T W E E N

ALPHA AVIATION LIMITED

Plaintiff

AND

KEVIN PETER TURNQUEST

First Defendant

AND

RANDY LARRY BUTLER

Second Defendant

AND

LARONA BUTLER

Third Defendant

Before: **The Honourable Madam Justice Carla D. Card-Stubbs**

Appearances: **Michael Scott KC & Marnique Knowles of Counsel for the Plaintiff; Robert Adams KC & Samuel Brown of Counsel for the First Defendant; Michael Horton for the Second & Third Defendants**

Hearing Dates: **October 11, 12, 13, 14, 2022 and December 14, 2022**

Conspiracy to Defraud- Deed of Release- Loss of Mortgage Collateral – Whether the Defendants agreed to injure the Plaintiff
Director's Fiduciary Duties- Companies Act- Duty of Care – Whether Breach of Duty by executing a Deed of Release
Whether Plaintiff Company suffered a loss

There is in civil law, lawful means conspiracy and unlawful means conspiracy. The starting point for each is whether there was a concerted action and agreement between the Defendants with a predominant purpose to cause damage to the claimant (lawful means conspiracy/conspiracy by lawful means) or whether there was a concerted action and

agreement between the Defendants with an intention to injure the Plaintiff (unlawful means conspiracy/conspiracy by unlawful means). In this case, the Plaintiff failed to prove an agreement between the Defendants and therefore the conspiracy claim failed. However, having regard to the sole acts of the director in this case, he is liable for breach of fiduciary duty. No damages are recoverable where the breach of duty does not cause a measurable loss.

JUDGMENT

Introduction

[1] This is a suit brought by the Plaintiff alleging a conspiracy by the First, Second and Third Defendants to defraud the Plaintiff. The Plaintiff also alleges a breach of a fiduciary duty by the First Defendant.

[2] For the reasons that follow, this Court holds (1) that the Plaintiff has not proven a conspiracy to defraud the Plaintiff, (2) that the First Defendant is in breach of a fiduciary duty and a statutory duty to exercise care, diligence and skill and (3) that the Plaintiff has suffered no measurable loss as a result of that breach.

Background

[3] It is the Plaintiff's case that the First, Second and Third Defendant conspired to defraud it of the outstanding balance owed under a mortgage agreement and that the First Defendant as Manager and Director of the Plaintiff breached his fiduciary duty to the Plaintiff by executing a Deed of Release in relation to the said mortgage without first securing payment of the money owing under the mortgage.

[4] The Plaintiff's action as laid out in its Specially-Indorsed Writ of Summons is for:

i. Damages;
ii. A Declaration that the Plaintiff holds the legal title to the Property by virtue of the Mortgage and Further Charge;
iii. A Declaration that the Defendants hold the sum of $220,313,43 and/or all assets representing such sums, on constructive or resulting trust for the Plaintiff;
iv. Compensation for breach of director's duties by the First Defendant;
v. Interest pursuant to the Supreme Court Act or in equity
vi. Further or other relief; and
vii. Costs

[5] The following facts are agreed among the parties.

i. The Plaintiff is a company incorporated in The Commonwealth of The Bahamas.
ii. On January 7, 2005, the Plaintiff lent the sum of $279,000.00 *"Mortgage"* to the Second and Third Defendants which was to be repaid at a rate of 4% per annum over 20 years and secured by a mortgage over property described as Lot 5 Block 13 Winton Heights Estate subdivision "*Winton Property*."
iii. On March 28, 2007, the Plaintiff lent a further sum of $120,000.00 to the First and Second Defendants which was referred to as a Further Charge over the property "*Further Charge"*.
iv. The Plaintiff was the mortgagee of the Winton Property.
v. The Second and Third Defendants were the mortgagors of the Winton Property.
vi. On December 17, 2008, the Second and Third Defendants executed a conveyance of the fee simple of the Winton Property to Mr. & Mrs. Smith by way of sale.
vii. The First, Second and Third Defendants executed a Deed of Release dated March 15, 2017.
viii. Mr. Fredrick Kaiser was at all material times the beneficial owner of the Plaintiff.
ix. The First Defendant was a Director and Manager of the Plaintiff from about November 1998 to May 2017.
x. The First Defendant was a Manager and Director of the Plaintiff at the time that the loans under the Mortgage and Further Charge were made and at the time that the Deed of Release was executed.

[6] The following allegations are disputed and go to the matters in issue.

DISPUTED FACTS – PLAINTIFF'S ALLEGATIONS

i. The Plaintiff alleges that the Second and Third Defendants conspired to defraud the Plaintiff by purporting to convey the Winton property without the knowledge or consent of the Plaintiff. The Plaintiff alleges that the conveyance did not reflect a mortgage in favour of the Plaintiff and that the proceeds of sale were not used to redeem the mortgage.
ii. The Plaintiff alleges that at the time of the execution of the Deed of Release, there was a significant sum of money owing under the mortgage. The Plaintiff alleges that the First, Second and Third Defendants knew that at the time of the execution of the Deed of Release there was a significant sum of money owing under the mortgage and that they conspired to defraud the Plaintiff.
iii. The Plaintiff alleges that the First Defendant breached his duty as a Director.

DISPUTED FACTS –DEFENCE OF FIRST DEFENDANT

i. The First Defendant filed an Amended Defence on May 9, 2022. The First Defendant denies the allegations of conspiracy to defraud and of breach of duty as a director.

ii. The First Defendant alleges that the mortgage and further charge were made on the instructions of Mr. Kaiser. They were to be made on the condition that they were secured by way of mortgage over the Winton Property.

iii. The First Defendant alleges that he was informed by the Second Defendant in 2012 that the Winton Property had been sold to Mr. & Mrs. Smith and that the proceeds of sale would be used to pay off a mortgage on their new home. The First Defendant alleges that the Second Defendant also informed him that the Second Defendant and the Third Defendant would execute a mortgage over the new home as security for the money due and payable under the previous mortgage and further charge of the Winton Property, viz that they had agreed to substitute the security.

iv. The First Defendant alleges that thereafter, also in 2012, he was contacted by the lawyers for the mortgagee Mr. & Mrs. Smith, purchasers of the Winton property. The lawyer also acted for the Purchasers' mortgagor. The lawyer requested that the Plaintiff execute a Deed of Release. The First Defendant alleges that he denied the request but executed the Deed in 2017 following an in-person meeting with Mr. Kaiser who concurred to the execution of the Deed of Release.

v. The First Defendant also alleges that he agreed to the request to execute the Deed of Release because (1) he was advised that the validity of the mortgage could be challenged since the Plaintiff Company did not have exchange control approval to make the loans and obtain security, (2) the Second Defendant and the Third Defendant were repaying the loans as agreed, (3) the Second Defendant and the Third Defendant had agreed to secure the debt by way of mortgage over the new home and (4) Mr. Kaiser concurred.

DISPUTED FACTS – DEFENCE OF SECOND AND THIRD DEFENDANTS

I. The Second Defendant and Third Defendant filed a Defence on May 12, 2021. The Second Defendant and Third Defendant deny the allegations of conspiracy to defraud.

II. The Second Defendant and Third Defendant allege that the Winton property was sold with the knowledge and approval of the Plaintiff, who introduced the Purchaser to them. This is a reference to the First Defendant who the Second Defendant and Third Defendant claim acted on the Plaintiff's behalf.

III. The Second Defendant and Third Defendant allege that they were called upon years after the sale transaction to sign the Deed of Release. They also allege that they never received the proceeds of sale of the Winton Property.

[7] **ISSUES**

The broad issues before this Court are:

a. Whether the First, Second and Third Defendants conspired to defraud the Plaintiff?
b. Whether the First Defendant breached his fiduciary duty to the Plaintiff by executing a Deed of Release?
c. Whether the Plaintiff suffered any loss as a result of a breach attributable to either the First, Second or Third Defendant and, if so, what is the measurement of that loss?

[8] **ISSUE 1 – CONSPIRACY TO DEFRAUD**
Whether the First, Second and Third Defendants conspired to defraud the Plaintiff?

Submissions of the parties

[9] The Plaintiff alleges that the Second and Third Defendants purported to convey the Winton property without the Plaintiff's permission, that the conveyance to the Smiths did not reflect the Plaintiff's mortgage, that the sale proceeds were not used to redeem the mortgage and further charge and that the Defendants executed the Deed of Release thus extinguishing the Plaintiff's security. The Plaintiff submits that the Defendants by the signing of the Deed of Release must have had a meeting of the minds with the clear intention of causing damage and did so by defrauding the Plaintiff since they knew that the debt was outstanding and did not take steps to pay it off. The Plaintiff submits that they caused the Plaintiff financial loss in the amount outstanding under the mortgage and further charge.

[10] The Plaintiff submitted that in determining the agreement necessary for conspiracy, that such an agreement may be formal, informal, express or tacit and may be inferred per *Kuwait Oil Tanker Co SAK v Al Bader* [2000] 2 All ER (Comm) 271and that there must be a meeting of the minds per *Crofter Hand Woven Harris Tweed Co Ltd v Veitch* [1942] AC 435 at 479, [1942] 1 All ER 142 at 167). The Plaintiff submitted that the Defendants actions caused the Plaintiff to suffer damage. Relying on *Belmont Finance Corp v Williams Furniture Ltd [1979] Ch 250, [1979] 1 All ER 118, and Crofter Hand Woven Harris Tweed Co Ltd v Veitch,* the Plaintiff submitted that the test was not what the Defendants contemplated but what was the object in the minds of the Defendants when they acted as they did. The Plaintiff also relied on the following cases for the various elements of conspiracy: *Lonrho Plc v Fayed (No 5) [1994] 1 All ER 188, 1 WLR 1489, Huntley v Thornton [1957] 1 WLR 321, G 1 Globinvestment Ltd and others v VP Fund Solutions (Luxembourg) Ltd and others [2022] EWHC 1872 (COMM)), Attorney General v Zambia v Meer Case & Desai [2008] EWCA Civ 1007, R v Siracusa (1990) 90 Cr App R 340, Total Network SL (a company incorporated in Spain) v HM Customs [2008 UKHL 19], In re B (Children) (Care Proceedings: Standard of Proof) (CAFCASS intervening) [2009] AC 11.*

[11] Counsel for the First Defendant relied on Butterworth's Common Law Series: The Law of Tort, Second Edition, paragraph 29.68, for the pronouncement of law as it relates to the tort of conspiracy. They also relied on the cases of *Jennifer Bain and Family Guardian Insurance Company Limited* 2016/CLE/gen/00217 and *Lonrho plc v Fayed and others* [1992] 1 AC 448 for the law for the elements of the tort.

[12] The First Defendant submitted that Mr. Kaiser, the beneficial owner of the Plaintiff, approved the execution of the Deed of Release. The First Defendant submitted that Mr. Kaiser was very informal in his business dealings with the First Defendant and that there were no Director's meetings, minutes or resolutions in connection with the Deed of Release. He contends that the Plaintiff was aware of the agreement for the sale of land and the Deed of Release prior to the execution. The First Defendant prays in aid the Duomatic principle submitting that "The effect of the Duomatic principle is that if all members of the company, being aware of the relevant facts, either give their approval to a certain course of action, or so conduct themselves as to make it inequitable for them to deny that they have given their approval, then a formal meeting or formal resolution authorizing the director of the company to take such a course of action is unnecessary."

[13] Relying on the Duomatic principle, Counsel submitted that the First Defendant had the consent of the Plaintiff's beneficial owner to execute the Deed of Release and in, such a case, there could be no conspiracy.

[14] Counsel for the Second and Third Defendant submitted that the evidence does not support allegations of conspiracy and fraud. It was submitted that the sale of the collateral by itself was not a fraud and that the sale was not done with the purpose of injuring the Plaintiff. It was further contended that the sale of the property was made known to the beneficial owner who approved same.

LEGAL DISCUSSION AND ANALYSIS

[15] Conspiracy in civil law, as opposed to criminal law, is an economic tort. It can form the substratum of one type of economic tort - torts that cause injury to a person's trade or business. It is sometimes helpfully referred to as a "conspiracy to injure". The tort of conspiracy may either be conspiracy by lawful means ('lawful means conspiracy') or a conspiracy by unlawful means ('unlawful means conspiracy'). In essence, in each case, persons come to an agreement and, in pursuance of that agreement, act in concert for the purpose of causing damage to another person and damage does result. For *lawful means conspiracy*, while individually, each person's act is not illegal, it is their acting in concert for an illegitimate purpose with ensuing damage that gives rise to a tort. For *unlawful means conspiracy*, the action taken to cause damage is itself illegal. Further, in *unlawful means conspiracy*, the conspirators by virtue of employing unlawful means may be deemed to be acting for the purpose of causing damage once they execute the conspiracy.

[16] At Atkin's Court Forms (LNUK), Torts Vol 38(1), paragraph 79, the law is summarized as follows:

> The elements of the tort of lawful means conspiracy are:
>
> 1. concerted action between two or more persons (a combination);
> 2. a predominant purpose to cause damage to the claimant;
> 3. an overt act in pursuance of the agreement and undertaking; and
> 4. damage.

[17] And again at paragraph 85:

> The elements of a cause of action in tort for unlawful means conspiracy are:
>
> i. concerted actions between two or more persons (a combination);
> ii. use of unlawful means
> iii. knowledge of the unlawfulness;
>
> iv. intention to injure the claimant, whether or not it is the predominant purpose of the defendant to do so;
>
> v. overt act in pursuance of the agreement or undertaking; and
>
> vi. loss or damage as a result.

[18] In **Kuwait Oil Tanker Co SAK v Al Bader** [2000] 2 ALL ER (Comm) 271, CA, *Nourse LJ* explained the nature of each type of conspiracy:

> 107. It is common ground that there are two types of actionable conspiracy, conspiracy to injure by lawful means and conspiracy to injure by unlawful means. The first is sometimes described simply as a conspiracy to injure and the second as a conspiracy to use unlawful means (see eg Clerk and Lindsell on Torts (17th edn, 1995) pp 1267–1268, paras 23–76). In our view they are both conspiracies to injure and their ingredients are the same, with one crucial difference. In both cases there must be conspiracy to injure the claimant, but in the first case (in which the means employed would otherwise be lawful) the predominant purpose of the conspiracy must be to injure the claimant whereas in the second case, although the defendant must intend to injure the claimant, injury to the claimant need not be his predominant purpose.
>
> 108. We shall treat them as different torts, although, as it seems to us, they are better regarded as species of the same tort. It matters not. For present purposes we would define them as follows. (1) A conspiracy to injure by lawful means is actionable where the claimant proves that he has suffered loss or damage as a result of action taken pursuant to a combination or agreement between the defendant and another person or persons to injure him, where the predominant purpose of the defendant is to injure the claimant. (2) 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 predominant purpose of the defendant to do so. We shall call them a 'lawful means conspiracy' and an 'unlawful means conspiracy' respectively.

109. Those principles seem to us to be consistent with the authorities, including in particular *Lonrho Ltd v Shell Petroleum Co Ltd* (*No 2*) [1981] 2 All ER 456, [1982] AC 173 and *Lonrho plc v Fayed* [1991] 3 All ER 303, [1992] 1 AC 448, which analyse the leading cases. (See also for example *Rookes v Barnard* [1964] 1 All ER 367 at 400, [1964] AC 1129 at 1209where Lord Devlin drew a clear distinction between the two types of conspiracy.)

110. It is important to note that the tort of conspiracy to injure by unlawful means is different in significant respects both from the crime of conspiracy and from the law of contract. A criminal conspiracy is in essence an agreement to commit a crime and, as such, is complete when the agreement is made, whether or not it is carried out. For this reason care must be taken in considering decisions in criminal cases where (as here) the question is whether the tort of conspiracy was committed. Lord Diplock put it in this way in the *Shell Petroleum* case:

> 'Regarded as a civil tort, however, conspiracy is a highly anomalous cause of action. The gist of the cause of action is damage to the plaintiff; so long as it remains unexecuted, the agreement, which alone constitutes the crime of conspiracy, causes no damage; it is only acts done in execution of the agreement that are capable of doing that. So the tort, unlike the crime, consists not of agreement but of concerted action taken pursuant to agreement.' (See [1981] 2 All ER 456 at 463, [1982] AC 173 at 188.)

In that passage Lord Diplock appears to have been referring to both types of conspiracy. The essence of the unlawful means conspiracy is injury to the claimant as a result of an unlawful act or acts where two or more people have combined to cause the injury. It is not necessary that every overt act is done by every conspirator, but the act must be done pursuant to the conspiracy or combination.

111. A further feature of the tort of conspiracy, which is also found in criminal conspiracies, is that, as the judge pointed out (at p 124), it is not necessary to show that there is anything in the nature of an express agreement, whether formal or informal. It is sufficient if two or more persons combine with a common intention, or, in other words, that they deliberately combine, albeit tacitly, to achieve a common end. Although civil and criminal conspiracies have important differences, we agree with the judge that the following passage from the judgment of the Court of Appeal Criminal Division delivered by O'Connor LJ in *R v Siracusa* (1990) 90 Cr App R 340 at 349 is of assistance in this context:

> 'Secondly, the origins of all conspiracies are concealed and it is usually quite impossible to establish when or where the initial agreement was made, or when or where other conspirators were recruited. The very existence of the agreement can only be inferred from overt acts. Participation in a conspiracy is infinitely variable: it can be active or passive. If the majority shareholder and director of a company consents to the company being used for drug smuggling carried out in the company's name by a fellow director and minority shareholder, he is guilty of conspiracy. Consent, that is agreement or adherence to the agreement, can be

> inferred if it is proved that he knew what was going on and the intention to participate in the furtherance of the criminal purpose is also established by his failure to stop the unlawful activity.'
>
> Thus it is not necessary for the conspirators all to join the conspiracy at the same time, but we agree with the judge that the parties to it must be sufficiently aware of the surrounding circumstances and share the same object for it properly to be said that they were acting in concert at the time of the acts complained of. In a criminal case juries are often asked to decide whether the alleged conspirators were 'in it together'. That may be a helpful question to ask, but we agree with Mr Brodie that it should not be used as a method of avoiding detailed consideration of the acts which are said to have been done in pursuance of the conspiracy.
>
> 112. In most cases it will be necessary to scrutinise the acts relied upon in order to see what inferences can be drawn as to the existence or otherwise of the alleged conspiracy or combination. It will be the rare case in which there will be evidence of the agreement itself. Curiously this is such a case, although it appears to us that in crucial respects it is also necessary to draw inferences as to the extent of the agreement from what happened after it. … the extent of the agreement will depend upon inferences to be drawn both from the surrounding circumstances and subsequent events.

[19] Concerning the "means" in unlawful means conspiracies, the Court considered that, at paragraph 130:

> The unlawful means may be both tortious and criminal or both tortious and a breach of contract or all three. Or in a case of this kind A and B may conspire to injure C by a breach of contract by B such that B would be liable for the breach of contract but A would be liable in tort for inducing the breach of contract. We are far from sure how the doctrine of merger would or could operate in such a case. Moreover we can see no reason in principle to restrict the tort in this way.

[20] **Kuwait Oil Tanker Co SAK v Al Bader** considered and applied **Lonrho plc v Fayed** [1991] 3 All ER 303, [1992] 1 AC 448, a case in which the Plaintiff alleged a conspiracy by unlawful means. In that case the Plaintiff, Lonhro plc, made a bid to take over a company known as House of Fraser, and awaited a decision by the Secretary of State. The First to Third Defendants (the Al Fayeds) via the Fourth Defendant, a company, made a successful bid for the House of Fraser before the Plaintiff obtained a decision on its bid. The First to Third Defendants were found to have relied on false statements. The Plaintiff alleged that the first three Defendants conspired and falsified financial statements in order to place a bid that was accepted and, in so doing, tortiously interfered with the Plaintiff's right to bid for the shares, or alternatively, had conspired against the Plaintiff. The Defendants argued that any false statement made would have been for the purpose of furthering the business interests of the Defendants and would not have been for the primary purpose of injuring the Plaintiff. The House of Lord determined that, as a matter of law, it was sufficient to establish the tort for the Plaintiff to prove that the Defendants intended by their conspiracy to injure

the Plaintiff even if the primary or predominant purpose of the conspiracy was to further or protect their own legitimate interests. At paragraph 118:

> 118. In our view, the effect of the two *Lonrho* cases is simply that, in order to establish an unlawful means conspiracy, it is necessary to establish an intention to injure the claimant but not a predominant intention or purpose to do so.

[21] Common to both torts of conspiracy are the elements of concerted action between two or more persons (a combination), an overt act in pursuance of the agreement and undertaking and damage. Where the conspiracy is by lawful means, it must be shown that the predominant purpose was to cause damage to the claimant. Where the conspiracy is by unlawful means, it is not necessary to prove that the predominant purpose was to cause damage to the claimant but it must be proven that there was an intention to injure the Plaintiff. Additionally, for the tort of conspiracy by unlawful means, one must also prove the use of unlawful means and knowledge of the unlawfulness.

[22] In this case, the parties appear to be *ad idem* on the law. This case will turn on the facts.

[23] The starting point then, is whether there was a concerted action and agreement between the Defendants with a predominant purpose to cause damage to the claimant (lawful means conspiracy/conspiracy by lawful means) or whether there was a concerted action and agreement between the Defendants with an intention to injure the Plaintiff (unlawful means conspiracy/conspiracy by unlawful means).

[24] The Concerted Action, Agreement and Intention
The Plaintiff must prove a "concerted action between two or more persons". This requires a meeting of the minds of such persons – persons combining on the same facts with a common intention. In **Kuwait Oil Tanker Co SAK v Al Bader CA** , supra, *Nourse LJ* expressed this as (paragraph 111):

> ….it is not necessary to show that there is anything in the nature of an express agreement, whether formal or informal. It is sufficient if two or more persons combine with a common intention, or, in other words, that they deliberately combine, albeit tacitly, to achieve a common end.

[25] Therefore the agreement may be a formal or informal express agreement or a tacit one. The agreement must be carried out in pursuit of a common/shared end.

[26] The case of **Crofter Hand Woven Harris Tweed Co Ltd v Veitch** provides useful guidance on the formation of an agreement with an intention to injure and, in the case of a lawful means conspiracy/conspiracy by lawful means, finding a predominant purpose. The Plaintiff was an importer of yarn and tweed cloth. Millowners who spun local yarn could not compete with the prices of those who spun imported yarn. As a result, those millowners could not agree security of jobs or an increase of wages for workers who were members of the union. The respondent trade unionists instructed dockers to refuse to handle imports of

the Plaintiff. The effect of the Respondents' instructions was to place an embargo on the Plaintiff's imports. The Plaintiff brought an action against the Respondents alleging that they had conspired to injure the Plaintiff since the effect of the embargo would be to destroy the Plaintiff's businesses. On appeal and on a finding of fact that the purpose of the embargo was to further the interests of the employees, the House of Lords held that there was no tort proven in that case in the absence of the employment of unlawful means. The predominant purpose was not the injury of the Plaintiff but the furtherance of the interests of those who acted in concert.

[27] At page 149 , *Viscount Simon LC* explained the law as

> The question to be answered, in determining whether a combination to do an act which damages others is actionable even though it would not be actionable if done by a single person, is not: "Did the combiners appreciate, or should they be treated as appreciating, that others would suffer from their action?" It is: "What is the real reason why the combiners did it?" Or, as Lord Cave LC puts it: "What is the real purpose of the combination?" The test is not what is the natural result to the plaintiffs of such combined action, or what is the resulting damage which the defendants realise, or should realise, will follow, but what is in truth the object in the minds of the combiners when they acted as they did. It is not consequence that matters, but purpose. The relevant conjunction is not, "so that," but, "in order that." Next, it is to be borne in mind that there may be cases where the combination has more than one "object" or "purpose." The combiners may feel that they are killing two birds with one stone, and, even though their main purpose may be to protect their own legitimate interests notwithstanding that this involves damage to the plaintiffs, they may also find a further inducement to do what they are doing by feeling that it serves the plaintiffs right. The analysis of human impulses soon leads us into the quagmire of mixed motives, and, even if we avoid the word "motive," there may be more than a single purpose or object. It is enough to say that, if there is more than one purpose actuating a combination, liability must depend on ascertaining the predominant purpose. If that predominant purpose is to damage another person and damage results, that is tortious conspiracy. If the predominant purpose is the lawful protection or promotion of any lawful interest of the combiners, it is nor [sic] a tortious conspiracy, even though it causes damage to another person.

[28] In **Crofter Hand Woven Harris Tweed Co Ltd v Veitch**, *Viscount Simon LC* came to the following conclusion at page 150:

> In the present case, the conclusion, in my opinion, is that the predominant object of the respondents in getting the embargo imposed was to benefit their trade union members by preventing under-cutting and unregulated competition, and so helping to secure the economic stability of the island industry. The result they aimed at achieving was to create a better basis for collective bargaining, and thus directly to improve wage prospects. A combination with such an object is not unlawful, because the object is the legitimate promotion of the interests of the combiners, and because the damage necessarily inflicted on the appellants is not inflicted by criminal or tortious means and is not "the real purpose" of the combination. I agree with Lord Fleming when he says

> in his judgment that it is not for a court of law to consider in this connection the expediency or otherwise of a policy adopted by a trade union. Neither can liability be determined by asking whether the damage inflicted to secure the purpose is disproportionately severe. This may throw doubts on the *bona fides* of the avowed purpose, but, once the legitimate purpose is established, and no unlawful means are involved, the quantum of damage is irrelevant, I move that this appeal be dismissed with costs.

[29] In the case before me, based on its pleadings, the Plaintiff must prove an agreement among the Defendants pursued with the common intention of defrauding the Plaintiff.

[30] In the case before me, the Plaintiff invited the Court to draw the inference from certain facts that it submitted would demonstrate that there was an agreement /or a meeting of minds and that the First and Second Defendants knew the essential facts and entertained the same objective of extinguishing the mortgage, thereby defrauding the Plaintiff. The Plaintiff points to the evidence of the Second Defendant that he expected that the First Defendant would extinguish the mortgage. The evidence of the Second Defendant was that,

> "At the time, we were content that Mr. Turnquest, on behalf of the mortgage [sic] company would pay out the debt, and close the books on the Mortgage" [Para 17, Second Defendant's witness statement]. The Second Defendant also stated: "Such requests for documents coming so long after the Further Charge was signed by us over to [sic] the Winton property, left me thinking that everything now would be straightforward, and that the lawyers and Mr. Turnquest would at last act to put the required documents in place." [Para 17, Second Defendant's witness statement].

[31] In response to questions during cross-examination as to the status of the loan and whether it had been repaid, the Second Defendant testified that:

> "There was an email from Sydney Cambridge saying to Stephen Turnquest to look in the file for a Mortgage that was paid and signed -- paid off and signed by Peter Turnquest" [Transcript October 14, 2022, page 60, lines 18-21].

[32] The Plaintiff submitted that those facts, together with the Second Defendant's representation to Dawn Arnold that the mortgage was paid off at the time of the conveyance, and taking into account the First Defendant's maneuverings to execute the Deed of Release, must have arisen from an agreement to defraud the Plaintiff.

[33] In response, the Defendants deny the allegation of conspiracy.

[34] Plaintiff's Evidence

The Plaintiff sought to show that an agreement to sell the Winton property, which was collateral for the loan made by the Plaintiff, and to execute the Deed of Release was entered into and undertaken with the intention to defraud the Plaintiff.

[35] The Plaintiff's first witness was Mr. Kaiser. Mr. Kaiser, beneficial owner of the Plaintiff, testified as to the informality of the relationship between he and the First Defendant. (Transcript October 11, 2022, pages 61 to 62)

17. A. I don't know if he responded. We could have

18 talked on the telephone.

19 Q. It was not cus' -- you could have spoken on

20 the phone?

21 A. Yes. We could have.

22 Q. So the way you and Mr. Turnquest operated was

23 that sometimes decisions were made as between you and

24 him through the exchange of email messages and, then,

25 sometimes, it was just simply by discussion over the

26 phone, verbally?

27 A. No. The final decision was always up to me,

28 not to Mr. Turnquest. Okay?

29 Q. Yes.

30 A. I mean, he made his own decisions, when I was

31 not involved; and I did not authorize them. Okay? And

32 there's plenty of those, if you want to get into that.

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1 Q. So, Mr. Kaiser, I'm just trying to understand

2 your evidence as to how you and Mr. Turnquest operated

3 as between each other. Sometimes, it was by email and,

4 then, sometimes, it was verbally?

5 A. Yes. But a lot of times whatever was most

6 convenient.

[36] By his Witness Statement, Mr. Kaiser's evidence is that he knew that the Butlers were thinking of moving house but that he was unaware of their intention to sell (paragraph 10). On cross-examination he testified that "someone mentioned to me that, actually, Mrs. Butler felt she couldn't live in the home anymore…." He denied being told of any intention on the part of the Butlers to sell. (Transcript October 11, 2022, page 57, lines 12 to 26.) Mr. Kaiser vehemently denies having a conversation with the First Defendant about the validity of the mortgage or about Exchange control permission or about approving the execution of the Deed of Release. (Transcript October 11, 2022, pages 65 to 66.) His evidence is that that he did not know of its existence until 2020 (paragraph 13, First Witness Statement) or perhaps 2019/2020 (paragraph 1.1. Supplemental Witness Statement). His evidence is that he would have objected to the execution of the Deed of Release "unless and until the mortgage was paid in full." (paragraph. 15 First Witness Statement) Challenged in cross-examination, he admitted that he may have known since 2019. His evidence is that he said nothing to Mr. Christie, the lawyer about it, because "this is irreversible" nor did he speak with the First Defendant about it thereafter. (Transcript October 11, 2022, pages 70 to 71.) Mr. Kaiser admitted speaking with the First Defendant in 2017 – after he resigned from the company but denied being told about the Deed of Release.

[37] Mr. Kaiser's evidence was that he was introduced to Mr. Butler, the Second Defendant, by Mr. Turnquest, the First Defendant. (paragraph 3 Witness Statement). Both Counsel for the First Defendant and for the Second and Third Defendants challenged Mr. Kaiser on his recollection as to how he came to know Mr. Butler, the second Defendant as a means of demonstrating his unreliability as a witness. Having had time to think about it subsequent to the cross-examination of Counsel for the First Defendant, Mr. Kaiser admitted that it might have been "an introduction through a Mr. Mitchell." (Transcript October 11, 2022, page 83, lines 22 to 28.) The suggestion is that if Mr. Kaiser was shown to be wrong in this regard as well as when he first learnt of the Deed of Release, then he is to be deemed unreliable. I find that as far as his answers concern his business transactions, his answers are consistent. In those two instances where it was demonstrated that his recollection may be wrong, it seems to me that those are issues that do not touch the heart of this case nor do they affect his credibility in the context of a man who spent much of his time overseas. I view him as a mistaken but honest witness. The evidence of this witness is that he was unaware of the intended sale of the Winton property and did not know of, or approve of, the execution of the Deed of Release.

[38] To my mind, the essence of the Plaintiff's complaint is captured in the beneficial owner's evidence that "Those two gentlemen did the whole transaction behind my back." (Transcript October 11, 2022, page 106, lines 19 to 20.)

[39] Re the execution of the Deed of Release, Mr. Kaiser testified (Transcript October 11, 2022, page 110, lines 6 to 14) that the Deed of Release was fraudulently done because it was done without his authorization and because only he could authorize that.

[40] Mr. Kaiser, via evidence on re-examination, was adamant that there was no handover meeting in 2017 when the First Defendant would have made him aware of the Deed of Release. (Transcript October 11, 2022, page 121, lines 23 to 32 and page 122, lines 1 to 9)

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Q. Now, when Mr. Turnquest retired from the company to go into government, that was in May of 2017. This question was beaten to death by Mr. Adams: Did you have any kind of formal sit-down with Mr. Turnquest in which you went through all of the affairs of the company that happened at the office or anywhere in Freeport?

A. Absolutely not. He was so preoccupied with this election, I didn't even get his time. He used my offices with my permission; but he, actually, had no time. He was too busy.

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Q. So your evidence was there was no hand-over meeting?

A. No.

Q. And was there any time in 2017, between

5 January and May of that year, any discussion with

6 Mr. Turnquest on the issue of the Butler -- the loans to

7 Mr. and Mrs. Butler and any satisfaction and any

8 provision of substitute security or alternate security?

9 A. None.

[41] The Plaintiff also relied on the evidence of Rose Delancy. She could not speak to the circumstances surrounding the execution of the Deed of Release nor could she speak to any allegation of dishonesty. She could not recall how many parties had signed the deed. Her evidence was that to have an unsecured mortgage is "not good" but she conceded on cross-examination that nothing would be wrong with it if it had the approval of the beneficial owner. (Transcript October 11, 2022, page 133, lines 8 to 32 and page 134, lines 1 to 17)

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8 … Again, again, Ms. Delancy, you don't

9 have any evidence, beyond what you've told us already,

10 to verify any of the allegations of dishonesty as

11 against Mr. Turnquest; do you?

12 A. To sign a release which meant that the

13 Plaintiff will not have a secure Mortgage, that's not

14 good.

15 Q. Well, you say it's not good; but Mr. Turnquest

16 case, and I put it to you, is that he executed that Deed

17 of Release with Mr. Kaiser's consent and prior approval.

18 Now, you weren't there when they had that discussion; is

19 that correct?

A. That's correct.

Q. But you would accept that if the Deed was signed, with Mr. Kaiser's consent, there's nothing wrong with that; is there?

A. No. Not if the beneficiary owner --

Q. -- approved it?

A. -- of the Plaintiff --

Q. Yeah.

A. -- approved it.

Q. And also Mr. Kaiser was a director of Alpha, at that time; wasn't he? In addition to being beneficial owner?

A. Yes. He might have been. Yes.

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Q. He might have been? You're not sure?

A. Was he a director? Yes. He's a director of Alpha.

Q. Yes. And I'm just taking it in a separate context. If, in the context of Mr. Kaiser being his co-director, both of them agreed that that was the best course of action for the company, do you see anything

wrong with that?

A. If they both agree.

Q. Yeah.

THE COURT: Mrs. Delancy, what is the answer? If they both agree?

THE WITNESS: If they both agree, then, there's nothing wrong with it.

MR. ADAMS: There's nothing wrong with it.

THE WITNESS: If that's the decision that they --

THE COURT: Okay. I need your answers for the record, ma'am.

THE WITNESS: No problem.

BY MR. ADAMS:

Q. So your earlier evidence or statement that execution of the Deed of Release was, quote, not good or isn't good, end of quote, really is one that you would qualify by saying, it's okay. If there was concurrence and consent of Mr. Kaiser?

A. Correct.

[42] Ms. Delancy also gave evidence that mortgage "was paid until the 27th of May 2019" by the Second Defendant and Third Defendant, the Butlers, and that that was the last payment received. (Transcript October 11, 2022, page 134, lines 28 to 31.) Her evidence

was that the loan was not paid for 3 months and became delinquent in August 2019, and that the Butlers would have been advised of the delinquency although she could give no evidence of such notice. Ms. Delancy's evidence is that she became aware of the Deed of Release in early 2019. Her evidence is that she took over from the First Defendant, Mr. Turnquest, as managing director, that he cleared his office, taking with him the CPU. She denied having a conversation with Mr. Turnquest, authorizing him to keep the CPU because the company had the information.

(Transcript October 11, 2022, page 141, lines 3 to 14)

A. I disagree because I would not have known what was on his CPU --

Q. You would have --

A. -- to make such a statement.

Q. -- known that company information, more than likely, was on the CPU; would you agree?

A. I would not have a clue as to what's on Mr. Turnquest's -- in his emails and on his CPU.

Q. Right. You wouldn't had a clue? even though that CPU --

A. I would not have known to make such a strong statement like that, is my point.

(Transcript October 11, 2022, page 142, lines 7 to 29.)

Q. You, as managing director, however, you don't send an email message? you don't write a letter? you don't ask Peter Turnquest to return the CPU? Do you?

A. No, I didn't. And the reason -- there's a

reason for it because --

Q. You had the information.

MR. SCOTT: Let her answer.

THE WITNESS: No. Let me answer it. I know Mr. Turnquest very well, for many, many years; and the fact that Mr. Turnquest would have taken the CPU was deliberate. And I saw that as saying, this my computer. I'm taking it. Don't ask me nothing about it and I didn't. That's how I -- because Mr. Turnquest is fully aware of protocols and what happens in transition in management. The fact that he would have taken the CPU, the fact that he would have not have a clear exit --

BY MR. ADAMS:

Q. Oh, we're going to come to the exit. We're talking about the CPU.

A. -- that's deliberate. That's a clear intent to say, listen, this computer is mine. I taking it. Don't ask me nothing about it and, then, secondly, you're on your own.

[43] Ms. Delancy testified that she knew and respected the Defendant who had made himself available to answer her questions during the transition and that she interpreted his taking the CPU as deliberate and that no questions were to be asked in relation to the taking of the CPU.

[44] The Plaintiff also relied on the evidence of Mr. Brenford Christie, attorney-at-law, who appeared in response to a subpoena. His evidence was that he prepared the mortgage over the Winton property on the instruction of the First Defendant. Those instructions were in writing. (Transcript October 12, 2022, page 28, lines 6 to 25.) His evidence is that he prepared the mortgage, arranged for it to be registered and recorded and gave instructions for the mortgagees to endorse the Plaintiff as the loss payee on a fire insurance policy. Mr. Christie also identified a letter of instruction from the First Defendant in regard to the further advance.

[45] As far as it concerned the Deed of Release, Mr. Christie could not recall whether the First Defendant sent him instructions by email but he did recall speaking with the First Defendant on the phone who indicated that "there was an intention to discharge the mortgage and further charge." (Transcript October 12, 2022, page 33, lines 22 to 30.) His evidence is that, (Transcript October 12, 2022, page 34, lines 15 to 32 and (Transcript October 12, 2022, page 35, lines 1 to 13), :

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15 A. I was informed by Mr. Turnquest that there

16 was some arrangement, I think either with respect to

17 the discharge of the security; I also had a telephone

18 call from Mr. Randy Butler indicating to me that that

19 was the arrangement, that the mortgage and further

20 charge were going to be discharged, and that

21 Michael Allen would be acting on his behalf. So I

22 wrote this letter and I also copied it to

23 Mr. Turnquest.

24 Q. Yes, he has been copied on that letter.

25 Now, did Mr. Randy Butler indicate to you, in

26 your telephone conversation, how he propose to satisfy

27 the mortgage and further charges?

28 A. No.

29 Q. What was your understanding as to how it was

30 to be satisfied?

31 A. Now, I have to get the chain of events, but I

32 believe that there is a record of the fact that

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1 Mr. Turnquest had indicated to me that the property

2 was going to be sold and that Mr and Mrs Butler were

3 going to provide other security for the property. I

4 had no confirmation as to what that property would be.

5 But the logical inference that I made at that time is

6 that the security would be the new property that they

7 were acquiring.

8 Q. So that the existing mortgage and further

9 charges would be satisfied?

10 A. Yes.

11 Q. In that connection, at that time, did you ever

12 have any discussion with Mr. Fred Kaiser?

13 A. No, sir.

[46] Mr. Christie's evidence is that by letter dated March 17, 2008, he wrote attorney Michael Allen based on the Second Defendant's information that Michael Allen represented the Second and Third Defendants in the sale of the Winton property. At that time he indicated that he waited confirmation of the sum required to discharge the mortgage and further advance.

[47] By letter dated April 6, 2009 and addressed to the First Defendant, Mr. Christie followed up on the phone call from Mr. Turnquest, the First Defendant. He enquired about the status of the discharge and whether substitute security had been received. His letter to the First Defendant ends:

> "…it seems particularly important that you determine the current status of this matter to protect the interest of Alpha Aviation Limited."

[48] Some seven years later, on April 13, 2016, the First Defendant responded by email to Mr. Christie's letter, the contents of which were read into evidence as follows:

(Transcript October 12, 2022, page 39, lines 19 to 30)

19 A. "Dear Brenford. I refer to your letter to me

20 dated 6th April, 2009, where it appears we never

21 finalized the execution of satisfactions of the

22 above-mentioned mortgage and further charge. The

23 matter has been brought to my attention by the

24 attorneys of the purchasers of this property and is

25 affecting their ability to make a further transaction

26 in that regard.

27 "As such, I would be grateful if you would

28 execute that document as soon as possible and let me

29 have the original registry documents such that I can

30 have them delivered to the new owners".

[49] Mr. Christie's evidence is that he later signed the document after Mr. Turnquest "requested to meet with me urgently". His recollection is that the First Defendant may have been on his way from Freeport to Nassau. (Transcript October 12, 2022, page 67, line 1). Mr. Christie's evidence is that he did not prepare the document but noted that while the security was being released, the document preserved the Plaintiff's right to collect the outstanding balance. (Transcript October 12, 2022, pages 43 to 44) and he assumed that the substitute collateral was being secured. (Transcript October 12, 2022, page 45, lines 20 to 27).

[50] According to Mr. Christie, he had not been asked to prepare any documents and had been left out of the entire process.

[51] Evidence of the First Defendant
The evidence of Mr. Turnquest, the First Defendant, is that in 2015 (2 years before executing the Deed of Release) he was asked to do so but declined. He said that after the Second Defendant sold the Winton Property, he was asked to issue a Satisfaction of Mortgage which he delayed doing because he was awaiting substitute collateral by the Second and Third Defendants. He testified that he met with Mr. Kaiser in 2017and that Mr. Kaiser verbally approved the execution of the Deed of Release. There is no written evidence, email chain, directors' minutes or resolutions concerning this approval. The First Defendant points to the informality of the relationship between himself and Mr. Kaiser and relies on the legal Duomatic principle to absolve him of any actionable wrong as far as the execution of the Deed of Release is concerned.

[52] The First Defendant gave evidence that Mr. Kaiser was the one who introduced him to Mr. Butler. His evidence is that Mr. Kaiser is the one who proposed lending Mr. Butler the money for a mortgage and that he, the First Defendant, opposed it, raising at the same time the issue of exchange control. His evidence under cross-examination is: (Transcript October 13, 2022, page 22, lines 14 to 32; Transcript October 13, 2022, page 23, lines 1 to 21).

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14 Q. Now, tell us about this mortgage to -- that
15 is, actually, the subject of this Action, the mortgage
16 to Randy and Larona Butler.
17 A. Right.
18 Q. What was your role in that?
19 A. So, at some point, Mr. Kaiser came to the
20 office. He said that he wanted to make a loan -- a
21 mortgage loan to Mr. Butler to help him because the
22 interest rate on the mortgage that he was -- that he
23 currently had with whatever -- with his financial

institution was very high and he thought that he can assist him by giving him a better interest rate.

And he asked me to arrange it. We had a discussion about it and I told him, I said, Mr. Kaiser, you know, we're not into the lending business. I really don't want to deal with Bahamians like that because we're not set out for that nor does our Central Bank approval give us the authority to enter into this kind of --

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Q. Well --

A. -- arrangement. As you recall, the letter itself says that any --

Q. That's true. That is all true. That is all true and you're aware of the letter?

A. Yes. Yes. So --

Q. Now -- and you're aware of the restriction on investments?

A. Correct.

Q. Now, are you sure -- and I want you to think very hard about this, Mr. Turnquest -- that it wasn't you who suggested to Mr. Kaiser that Mr. Butler was a

13 good person and up and coming person with -- and he was

14 developing business ties with Mr. Kaiser that you might

15 help him with a Mortgage?

16 A. So let's be clear --

17 Q. Yes.

18 A. -- as I spoke to you earlier, I said to you

19 earlier, I was not involved in the Aviation industry. I

20 had no reason to know Mr. Butler or Mr. Mitchell. I did

21 not know them.

[53] The First Defendant went on to detail that he was "very upset and disappointed" that Mr. Kaiser would make loans to others and not to staff.

[54] The First Defendant noted the informal way in which matters were dealt with at the Plaintiff Company (Transcript October 13, 2022, page 32). He acknowledged the email exchanges between himself and Mr. Kaiser and that, in relation to the further advance to the Butlers, the Second and Third Defendants, Mr. Kaiser's e-mail response was to enquire about additional security. (Transcript October 13, 2022, page 35, lines 22 to 23).

[55] In relation to the substitute security that the First Defendant said was agreed, his evidence under cross-examination is that he informed Mr. Kaiser of the Butler's wish to sell the home and that the Butlers, the Second and Third Defendants, had agreed to make their new home the security for the loan (Transcript October 13, 2022, page 39, lines 3 to 32, Transcript October 13, 2022, page 40, lines 1 to 14)

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3 Q. So if Mr. Kaiser says, which he did, that in

4 the evidence -- and you were here. You heard it -- that

5 he did not have any such discussion with you, you can't

6 prove that you did. Can you?

7 A. And he can't prove that he didn't.

Q. Well --

A. My evidence is that we did.

Q. You did? You did?

A. Yes, sir.

Q. And what did Mr. Kaiser say to you in that conversation?

A. The conversation was all around the wish of the Butlers to distance themselves from the memory that was brought back by that house. He was very sympathetic, very sympathetic.

Q. So your -- and your view would be that Mr. -- as long as Mr. Kaiser was being paid out of the proceeds of sale, he wouldn't care one way or the other, would he?

A. Abso' -- whether it was paid out or whether he -- it was transferred to another property. It didn't matter to him.

Q. So what was the position there?

A. In terms of?

Q. What was the intention?

A. The intention was always that the house was going to be sold. They are buying a new house. That

30 this house would be settled and the proceeds would pay

31 off the financial institution that they'd engaged for

32 the new house. And they were going to give us a new

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1 security or substituted security on the new house.

2 Q. So they were going to sub' -- so they were

3 going to discharge that mortgage; right?

4 A. Right.

5 Q. And they were going to give Mr. Kaiser a

6 Mortgage over their new house?

7 A. Correct. Consolidate the --

8 Q. And what was that -- can you tell us about

9 that new house? Where was it going to be?

10 A. So they were going to consolidate between

11 two -- the original mortgage and the further charge into

12 a new mortgage on their new home.

13 Q. And where was that new home going to be?

14 A. In Adelaide.

[56] The First Defendant denied introducing the Second Defendant and Third Defendant, the Butlers, to the eventual purchasers of the Winton property and denied being at the office of the lawyer, Sidney Cambridge, with Mr. Butler, Second Defendant, and the purchasers. (Transcript October 13, 2022, pages 46 to 47). Confronted with the request from Mr. Christie as to the principal balance, the evidence of the First Defendant is that he would have

provided same. He insisted that the evidence for that would be in files left in the office. (Transcript October 13, 2022, page 52)

[57] The First Defendant did not know the value of the Adelaide property that he stated was to be given as a substitute for the collateral and, when pressed on whether he made any enquiries as to the adequacy of the Adelaide property, responded that he had a conversation about "the general values" in the area. (Transcript October 13, 2022, page 58 lines 1 to 32, page 59 lines 12 to 32, page 60 lines1 to 6)

12 Q. So when you were involved in this process and

13 as you put it, the plan was to substitute one security

14 for another, did you make any inquiries regarding the

15 value of the property to be taken at Adelaide and

16 whether or not it would be adequate security for the

17 advance that had been made?

18 A. I recollect having a conversation about the

19 general value of property in the area. I don't know

20 that we had a specific conversation about that

21 particular value.

22 Q. So you wouldn't have known one way or the

23 other whether or not the security in question was

24 adequate sec' -- whether the property in question was

25 adequate security? Is that what you're saying?

26 A. You can infer, I suppose.

27 Q. So would that not have been a -- would you not

28 have been remissed in your responsibilities?

29 A. No.

30 Q. Why?

31 A. Again, the property, that was being sold, was

32 valued, at least, $300,000.00 that you mentioned; and

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1 having the relationships that we had with Mr. Butler, I

2 suspect, would have taken the position that if there was

3 a shortfall that that money would be paid over.

4 Q. Paid over from whom?

5 A. Mr. Butler.

6 Q. So -- but the plan, as you put it, was that

7 Mr. Butler was going to -- you were going to free up the

8 charge, the Mortgage and Further Charge on the Winton

9 property and put it on the new property -- some

10 property, some unparticularized property in Adelaide.

11 Is that your understanding? Is that correct?

12 A. Correct.

13 Q. And in doing that, would it not have been

14 reasonable for you to inquire as to what the value of

15 the new security was to ensure that it was going to be

16 on a debt to equity ratio, adequate security.

17 A. What I did know, the value of the Winton house

18 and --

Q. No. That was being sold.

A. -- reasonable -- yeah. A reasonable position would be that if there was a deficit in the collateral that was being substituted, then, that difference was going to have to be made up somehow.

Q. And who was going to make that up?

A. And, presumably, that would come from the proceeds of the sale.

Q. And did you have that discussion with Mr. Butler?

A. Not that detailed. We had -- the discussion we had was that there was going to be substitute collateral.

Q. Well, it's funny you should make that point

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because Mrs. Larona Butler, when she gives evidence, will say that she had no intention of giving any mortgage. In fact, that had nothing -- as she will put it, nothing to do with Mr. Kaiser.

A. I didn't have any conversation with Mrs. Butler about the mortgage.

[58] In relation to the First Defendant's handwritten note leading up to the execution of the Deed of Release, the First Defendant's evidence was as follows (Transcript October 13, 2022, page 84 lines 23 to 32, page 85 lines 1 to 32)

23 Q. Is that your handwriting, Mr. Turnquest?

24 A. It is.

25 Q. And can you read it, please?

26 A. Sure. "Randy, please have you and Larona sign
in the appropriate spaces and send the document to me.
27 I will have Sidney witness your signatures when I send
it back to him or you can arrange that before you send
28 to me which may be better so that Brenford does not ask
me stupid questions."
29

30 Q. I have --

31 A. "Thank you [sic]."

32 Q. -- two questions. That's your note?

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1 A. That is my note.

2 Q. Yes. When did you send this note?

3 A. There's no date on it so I'm not sure.

4 Q. That's correct. There is no date but you know

5 when -- you must know when you sent it? Or roughly when

6 you sent it?

7 A. Again, I don't know.

8 Q. Or maybe you could be more helpful by what did

you mean by stupid questions?

A. So if you read the note -- take away your bias and read the note --

Q. I didn't know I was.

A. Okay. "Please have you and Larona sign in the appropriate spaces and send the document to me. I will have Sidney" -- "I will have Sidney witness your signatures" -- I will have Sidney witness your signature "when I send it back to him or you can arrange that before you send it back [sic] to me which may be better so that Brenford does not ask me stupid questions."

Q. So what --

A. In other words --

Q. Yes. Go on.

A. -- you have two options here, that I was suggesting to him. You can sign the documents, send them to me, and I will have Sidney witness your signatures or you could go to Sidney and sign the document in front of him and have -- and send it back to me, which is better so that Brenford doesn't ask me who signed the document? when did they sign it? whose signature is it?

Q. So what stupid questions did you apprehend that you would get from Brenford Christie?

A. Just that. Whose signature? When did they

31 sign it? Where did they sign it? How am I supposed to

32 sign that and I didn't see them sign it or --

[59] The First Defendant's evidence is that the Deed of Release was prepared by the lawyer for the purchasers of the Smith property. He obtained that document and sent it to the Butlers, the Second and Third Defendants, to be signed. (Transcript October 13, 2022, page 138).

[60] The First Defendant's evidence is that for the first mortgage and for the subsequent advance on the loan, Mr. Kaiser insisted that there be a security attached. There are email chains between the men evidencing the exchange and portraying the rather informal nature of their communications in that regard. However, on the execution of the Deed of Release, there is no communication via that method. The First Defendant's evidence is that he informed Mr. Kaiser about the Release, which Mr. Kaiser denies. Questioned on why that would have been agreed to, the First Defendant's position is that since Mr. Kaiser had made unsecured loans, this would be no different. Yet the evidence of the First Defendant is also that he was busy about the business of securing alternative or substitute collateral from the Butlers, the Second and Third Defendants, for the loan. His evidence is that the Second and Third Defendants had agreed to make the substitution. This is an allegation that the Second and Third Defendants strongly reject. As it turns out, no substitute collateral was ever secured from them.

[61] Case of the Second and Third Defendants

The evidence of the Third Defendant was that he and his wife determined to sell the Winton property after the unfortunate incident there which resulted in the tragic loss of their child.

[62] The evidence of the Second Defendant is that he did not ask Mr. Kaiser for a loan but instead it was Mr. Kaiser who offered him the mortgage that the parties eventually entered into and which was secured by the Winton Property. (Transcript October 14, 2022, pages 9 to 10). His evidence is that it was also Mr. Kaiser who offered him a further advance. (Transcript October 14, 2022, page 12). In relation to the sale of the Winton property, the Second Defendant testified he was introduced to the purchasers by Mr. Turnquest and Mr. Cambridge (Witness Statement, paragraph 14). Under cross-examination, he testified that he met the purchasers at the office of their lawyer, Sidney Cambridge. He had, before that, met with Mr. Turnquest and Mr. Cambridge at Mr. Cambridge's office. His evidence is that Mr. Turnquest represented Alpha Aviation, the Plaintiff.

[63] The Second Defendant, under cross-examination, conceded that he "may not have" told Mr. Kaiser about the impending sale to the Smiths but that he had sold the house. (Transcript

October 14, 2022, page 18 and page 22) . The evidence of the Second Defendant is that he is unaware as to what happened to the sale proceeds Transcript October 14, 2022, page 26, lines 2 to 10):

2 Q. Do you know personally? It was your property
3 and your Mortgage -- or your property of yourself and
4 your wife. Do you know whether or not the sales
5 proceeds from yourselves, you and Mrs. Butler, to the
6 Smiths, was it applied to satisfy the Mortgage, the
7 loan?
8 A. I had left that all into the hands of the
9 attorneys and I think Callenders & Co. ended up
10 acting --

[64] What follows is the Second Defendant's acknowledgement that no alternative security was in place for the mortgage. His evidence is that he signed the Deed of Release because "there was some hitch and this was the result of what can fix whatever needed to be done." (Transcript October 14, 2022, page 33, lines 6 to 7). The Second Defendant's evidence is that he continued making payments after executing the Deed of Release. He also seemed to consider the possibility that he was free to stop payments given the execution of the Deed of Release although he gives no credible explanation as to why that would be so. The evidence is as follows (Transcript October 14, 2022, page 34, lines 4 to 32 and page 35 lines 1 to 32):

4 Q. And what do you understand this document to
5 be?
6 A. Deed of Release.
7 Q. A Deed of Release; right?
8 A. Yes, sir.
9 Q. A release of the Mortgage; right?

A. Yeah, I guess.

Q. Yeah. Okay. Now, at that time, were you paying the Mortgage?

A. Yes.

Q. All -- and the monies due under the Mortgage and the Further Charge; right?

A. Yes. And additional payments also.

Q. Right. Okay. Now -- and did you continue that after 2017?

A. Yes.

Q. So just a small question for you, Mr. Butler. Why would you continue to pay -- make payments under a Mortgage, which had been satisfied?

A. Yeah. I asked myself the same question when all this came up and it cause me to look back and see and find out more about what was going on here.

Q. But you are continuing to make payments?

A. Yes.

Q. In fact, you made payments right up to May of 2019; is that not correct?

A. Yes, sir.

Q. Right. And yet you -- as far as you're

32 concerned, that Mortgage had been satisfied?

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1 A. In terms of -- yes.

2 Q. Did you ever contact Mr. Turnquest and asked

3 him, well, why am I paying for a Mortgage, which has

4 already been satisfied?

5 A. No, sir.

6 Q. You never did that?

7 A. No, sir.

8 Q. Did you ever --

9 A. This was one -- I don't even know if this ever

10 hit the radar screen all the times we were -- it was a

11 minute [MY-NUTE] --

12 Q. Okay.

13 A. -- I'll use minute [MY-NUTE] -- minutiae or

14 whatever y'all call it.

15 Q. So at -- after that, did you -- once you had

16 satisfied that Mortgage and Further Charge, did you, for

17 example, write to or telephoned Mr. Kaiser and say,

18 thank you very much for having given us the Mortgage. I

19 want you to know you're all paid off now?

20 A. No, sir.

21 Q. You never did?

22 A. No, sir.

23 Q. Because you knew you weren't; weren't you?

24 A. We had a lot of other things going on. It was

25 way more than that to talk and say -- talk about.

26 Q. But did you -- did you -- did you -- had you

27 paid out the Mortgage?

28 A. At that time, as far as I was concerned, we

29 still paying the loan. And as the letter was written to

30 me --

31 Q. You still owed the money; didn't you?

32 A. Yes. And --

[65] The Second Defendant refuted the First Defendant's evidence that he and the First Defendant had agreed that the new home, the Adelaide home, would be charged with the loan balance. The Second Defendant was adamant that he did not agree to provide his new home as substitute collateral (Transcript October 14, 2022, page 37, lines 16 to 29).

16 Q. No. But I'm just asking: Did you have -- did

17 you agree with Mr. Turnquest to provide security over

18 another property to Alpha Aviation?

19 A. No, sir.

20 Q. You did not?

21 A. No, sir.

22 Q. And so it would not be -- so you did not have

23 that discussion? Did you ever offer to put up the

24 Adelaide property, to which you had moved, Chazon

25 Estates? Did you ever offer to put that property up?

26 A. No, sir.

27 Q. Did Mr. Turnquest ever ask you to put that

28 property up?

29 A. No, sir.

[66] The Second Defendant later sought to represent that the lawyers in handling the sale of the Winton Property, also handled the mortgage and that the mortgage was paid off. His evidence was (Transcript October 14, 2022, page 47, lines 31 to 32, page 48 lines 1 to 32 and page 49 lines1 to 32, page 50 lines 1 to 6).

31 MR. ADAMS: Yes. Was the Alpha Mortgage paid

32 off when you closed and completed the sale of the Winton

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1 Heights property to the Smiths?

2 A. My understanding, from the lawyers, when I

3 finished, the deal was completed. The house now is the

4 Smith's home.

5 Q. Did you understand that the Mortgage was -- to

6 Alpha was paid out, when the deal was closed with the

7 Smiths?

8 A. I think it was -- it was all in the lawyers'

9 hand. They were dealing with it. I think so.

Q. We all know your evidence is that it was all in the lawyers' hands. I want to know do you know, do you believe, did you understand that you and your wife had paid off the Mortgage to Alpha, when you sold the house to the Smiths?

A. The lawyers dealt with that and there was no issues with paying the Mortgage. I was continuing to pay the Mortgage --

Q. Mr. --

A. I had owed the money to the -- yes. I kept paying it.

Q. We're going to come to that. My only question, at this stage, is whether what was your understanding at the time you closed the deal. Did you pay the Mortgage off?

A. My understanding is that the deal was done and that it was paid or it was closed. The deal was done.

Q. The deal was done, meaning the sale was completed?

A. Yes.

Q. But did you have the same kind of understanding in 2008 that you had when you sold or

32 when, sorry, the Finco Mortgage was paid off in 2005?

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1 A. I should say now, that I think back at it,
2 yes. It -- but at that time in 2008 conditions were
3 different.
4 Q. Well, let's put conditions to one side. I'm
5 just trying to understand your understanding.
6 A. Yes. My understanding that the whole deal was
7 complete and it was done.
8 Q. The deal was completed?
9 A. Yes.
10 Q. Alpha was paid off?
11 A. Alpha -- it was done. The deal was --
12 Q. No. No. Alpha was paid off? Is that your
13 evidence?
14 A. I give the evidence that the deal was done.
15 The attorneys were --
16 Q. No. Was Alpha paid off, Mr. Butler?
17 A. The deal was done, Mr. Adams. Alpha --
18 Q. You could get it out. You could say it.
19 A. I'll say it again --
20 Q. -- Alpha was paid off?

21 A. -- the attorneys were handling it and I was

22 informed the deal was done.

23 Q. One last time and, then, I'll move on.

24 A. The deal was done.

25 Q. Mr. Butler, was Alpha paid off?

26 A. My understanding --

27 Q. Yes or no?

28 A. My understanding the deal was done.

29 Q. Okay. Mr. Butler, I suggest to you that when

30 the sale of the Winton Heights property to the Smiths

31 was completed, you knew Alpha was not paid off. Do you

32 agree or disagree?

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1 A. I believe that the deal was done. That all

2 that needed to be done was done.

3 Q. Under oath, you're saying you believe Alpha

4 was paid off?

5 A. Under oath, I believe the deal was done. That

6 the attorneys had completed it.

[67] The Second Defendant also testified that he never received a completion statement from the lawyers regarding the sale of the house and was unaware of the sales price of the property. His evidence is that he set a sale price of $420,000 which he communicated to the lawyer who completed the transaction but that he did not know whether that price was received. (Transcript October 14, 2022, pages 74 to 75).

[68] The evidence of the Third Defendant, Mrs. Larona Butler, corroborates some of the evidence of the Second Defendant. She confirms that she made the mortgage payments to Apha Aviation's (Plaintiff's) account by cheque. Her evidence is that she wished to convey a property to the Smiths that was free and clear from mortgage and that she assumed that the Alpha Aviation mortgage would be paid off out of the proceeds of sale. (Transcript October 14, 2022, pages 80 to 81). She confirmed executing the Deed of Release and continuing to make payments to Alpha Aviation, the Plaintiff. (Transcript October 14, 2022, page 91). Her evidence is that the Deed of Release was sent over to her office by the First Defendant and that she signed it as requested but did not read it thoroughly (Witness statement, paragraph 9). When she next saw the document, it was during the course of these proceedings and she observed that it had also been signed by Alpha Aviation. The evidence of the Third Defendant is that she did not agree to put up her new home as substitute security (Witness statement, paragraph 12 and Transcript October 14, 2022, pages 92 to 93).

[69] The Third Defendant also gave evidence of the last payment made and why the payments were stopped. (Transcript October 14, 2022, page 104, lines 12 to 17)

9 Do you recall the last date of your payment?

10 THE WITNESS: That would be May 2019.

11 THE COURT: May 2019.

12 Why did you stop paying in May?

13 THE WITNESS: Well, by that time, the

14 relationship with Alpha and the principals of Alpha

15 along with Mr. Butler had, I guess you could say,

16 soured; and by then also, I would not have had monies to

17 make payments.

[70] On review of the evidence, the Plaintiff submits that there could have been no honest reason for the Defendants executing the Deed of Release and that their clear intention was to enrich themselves, not pay back the loan and thus defraud the Plaintiff. The Plaintiff also submitted that since the mortgage debt remained unpaid, there was "no corresponding benefit" under this scheme and so the predominant purpose of the undertaking was to "injure the Plaintiff by depriving it of its collateral".

[71] Such a conclusion would require an inference based on the actual effect of the execution of the Deed of Release.

[72] There is no gainsaying that the Deed of Release had the effect of depriving the Plaintiff of its collateral but was it as a result of a conspiracy to defraud the Plaintiff? Was the Deed of Release executed by the Defendants with an intention to enrich themselves? I do not find that that such a case has been made out.

[73] The evidence accepted by all parties is that, subsequent to execution of the Deed of Release, the Second and Third Defendants made periodic payments in the manner that they were used to doing before the execution of the Deed of Release. If their intention were to treat the loan at an end, or to not pay back the loan or to defraud the Plaintiff, why did they continue to make payments? There is some evidence that the Second Defendant may have formed the opinion subsequent to the execution of the Deed of the Release that the loan was paid off. If that was so, rightly or deceitfully, that subsequently-held view cannot retroactively supply the element of agreement or of an intention as it concerned the execution of the Deed of Release.

[74] The two-part question that I must ask myself is how did the Defendants come about executing the Deed of Release and why? Did they come together by design to act in concert to achieve a certain end? If so, what was that end? Conspiracy is a tort with an element of intention. Human beings often act with mixed motives. For lawful conspiracy, the Plaintiff must prove that the predominant reason was financial injury to the Plaintiff.

[75] In conspiracy by unlawful means, I would have to find that the Defendants employed unlawful means (such as breach of contract, a crime, or a tort) to achieve that end. It is not enough that injury is foreseeable although foreseeability of injury that most likely would occur, may be used as evidence of the formation of intention. So, for example, if the injury were inevitable, that knowledge could be attributed to the Defendants and a court could thereby infer intention once the Defendants executed their agreement.

[76] Otherwise, generally it is not enough to prove that loss occurred. If mere proof of loss were sufficient, then there would be no need for an element of intention.

[77] I found Mr. Kaiser, witness for the Plaintiff, credible. His evidence was forthcoming and believable. Where he was unable to recollect, he admitted same and much of it appears attributable to the hands-off way in which he approached the operation of Alpha Aviation. Mr. Christie and Ms. Delancy were also believable although Ms. Delancy was not directly involved in much of the transactions.

[78] The evidence of the First Defendant is riddled with inconsistencies. Some of it appears to be hapless fabrication and parts, in my view, were recently-fashioned.

[79] The evidence of the Second and Third Defendants was vague. I found the Second Defendant evasive, deflective and deliberately vague. Incredulously, the Second Defendant, a business man, was unaware of what his home sold for. However, I do believe the evidence of the Second and Third Defendant that they did not agree to a substitute collateral. The Third Defendant was also vague. She appeared furthest removed from the transactions and I find that to be the explanation of the vagueness of some of her answers. Largely, as it concerned the transactions – she acted on her husband's instructions. It was the Second Defendant who sought and secured the mortgage and advance and it was he who told her that they had found a purchaser for the house. His instructions included the instructions to pay the mortgage.

[80] I make the following findings:

i. I find that the First Defendant was involved in the facilitation of the process of the sale of the Winton home of the Second and Third Defendant to the Purchasers.
ii. I find that the First and Second Defendant wished to sell their home as a result of the tragic accident involving their child.
iii. I find that the First Defendant was motivated to procure the execution of the Deed of Release on a request generated on behalf of the purchasers and not by any consideration of the Plaintiff's interest.
iv. I find that the First Defendant on realizing that he did not procure substitute collateral, did not inform the beneficial owner, Mr. Kaiser, or Mr. Christie of his intention to execute a Deed of Release.
v. I find that at all material times, the First Defendant acted on behalf of the Plaintiff company.
vi. I find that the Second and Third Defendants were motivated to execute the Deed of Release in order to finalize the sale of the Winton Property and to put that transaction behind them.
vii. I find that the Second and Third Defendants continued to pay the loan subsequent to the execution of the Deed of Release.
viii. I find that the Second and Third Defendants acknowledged the debt subsequent to the execution of the Deed of Release.
ix. I find that the Second and Third Defendants stopped making payments because of the deterioration of the relationship with Mr. Kaiser and because they determined that they had no money to make the payments.
x. I find that there was no meeting of the minds or agreement to sell the Winton property for the common purpose of defrauding the Plaintiff.
xi. I find that there was no meeting of the minds or agreement to execute the Deed of Release for the common purpose of defrauding the Plaintiff.

[81] The First, Second and Third Defendants were all parties to the Deed of Release. Did the execution of the Deed of Release deprive the Plaintiff of its collateral? The evidence is that it did. Did each party agree to execute the Deed of Release? The evidence is that they did. Did the First, Second and Third Defendants agree to sell the Winton home and to execute the Deed of Release for the purpose of injuring the Plaintiff? I find not. The Plaintiff has not proven this.

[82] I find that there was no meeting of the minds as to the execution of the Deed of Release for a common reason or objective. I find that while the First Defendant, on behalf of the Plaintiff company, and the Second and Third Defendants, in their capacities as mortgagors, executed the Deed, that they did so as necessary parties. There is no evidence that the execution of the Deed of Release was in furtherance of an agreement to injure the Plaintiff, i.e. to defraud the Plaintiff. Their signatures cannot, without more, be construed as acting in furtherance of an agreement to injure the Plaintiff, any more than the signature of the Assistant Secretary, Mr. Christie, could be.

[83] I further find that the Second and Third Defendants executed the Deed of Release to advance their own purpose – which was to finalize the sale of the Winton property and put that behind them. I hold that there was no predominant purpose (lawful means conspiracy) to defraud the Plaintiff nor a simple intention to injure the Plaintiff (unlawful means conspiracy). The actions of the Second and Third Defendant in continuing to pay on the mortgage subsequent to the execution of the Deed of Release, to my mind, goes to show that they understood that they were still under an obligation to pay. This is not a finding on what they thought they were to pay. The evidence is that subsequent to the execution of the Deed, they paid until they determined otherwise. The inference is that at the time of its execution, the mortgagors considered themselves liable under contract of loan to the Plaintiff. There is no cogent evidence that by executing the Deed of Release, they thought that the loan was extinguished. I find that they thought that the collateral had already been transferred to the purchasers. If they were right, the signed transfer would already have constituted a deprivation of the Plaintiff's security and there would be no need to execute a Deed of Release. I cannot infer from the execution of the Deed of Release, a legal document with legal effect, that because of its effect, the Defendants agreed to execute same with the intention to injure the Plaintiff. Sometimes an agreement can be inferred by the nature of the acts and by reference to the loss/injury or damage that ensues. This is especially so when the parties use unlawful means (breach of contract, tort or a crime) to execute the agreement for it can usually be said that the injury to the Plaintiff would be foreseeable and inevitable. That is not the case here.

[84] The First Defendant executed the Deed of Release in his capacity as Managing Director of the Plaintiff. He had ostensible authority to do so and the Second and Third Defendants were entitled to rely on that. Unless it can be shown that they both knew that he acted without authority, they are entitled to rely on his execution of the Deed of Release.

[85] The First Defendant cannot form a conspiracy by himself. For his part, he has offered several reasons for the execution of the Deed of Release. Even if the reasons ring hollow, it is for the Plaintiff to prove agreement and intention and this they have not done.

[86] The simple answer for me in this case is that I can find no agreement to act in concert for the purpose of defrauding the Plaintiff. The Plaintiff may understandably feel "defrauded" by hitherto close-business associates. His evidence is that the sale of the Winton property and the execution of the Deed of Release were done without his knowledge. The very informality of doing business brought about a situation where the First Defendant acted on his own on behalf of the Plaintiff- sometimes without the knowledge of Mr. Kaiser. However, the failure to disclose the existence of the Deed of Release and the execution of same is not enough to constitute a case of conspiracy.

[87] The Plaintiff is bound by its pleadings. The burden is on the Plaintiff to prove a conspiracy and it has not proven an agreement, whether formal or informal, tacit or express, or otherwise which is a fundamental element in the tort of conspiracy. Having considered the evidence, I can find no agreement between the First, Second and Third Defendants that would form the element of an actionable conspiracy. Nor has the Plaintiff proven that the acts carried out were carried out with the intention to injure the Plaintiff as a predominant motive (lawful conspiracy) or otherwise.

[88] In the circumstances there is no reason to analyze the evidence for the further elements of the tort. The lack of an agreement and common intention is fatal to the Plaintiff's claim.

[89] APPLICATION TO STRIKE OUT
Counsel for the First Defendant had filed an application to strike out paragraphs of the Plaintiff's pleadings.

[90] This Court's ruling was that the application would be dealt with as part and parcel of the determination of this matter. The application to strike out was filed on October 6, 2022 and was filed subsequent to the Pre-Trial Review. As a reminder, the purpose of such a review is to check compliance with the Court's directions, for readiness for trial and for the Court to give final directions as to the trial itself.

[91] The Defendant-Applicant had long filed a Defence in answer to the Plaintiff's allegations in the Statement of Claim complained about. Subsequently, the First Defendant had taken several fresh steps.

[92] Under the Rules of the Supreme Court, (R.S.C. 1978, as amended), while Order 18, Rule 19(1) provided that the application may be made "at any stage in the proceedings", the

general rule was that such application was to be made as promptly as possible – and, as a general rule, before the close of pleadings.

[93] At the time of the First Defendant's application, the parties were already in trial-preparation mode and there was nothing to put the Plaintiff on alert before the filing of the First Defendant's application that issue was being taken with the pleadings. The First Defendant had already proceeded in a manner that appeared to answer those pleadings and which induced the Plaintiff to incur trial preparation costs. The power that the Court had been asked to exercise was to determine the matter without trial. It is clear that a court's power to strike out should be exercised judiciously since it could effectively determine the litigant's case without consideration of the merits of that case. The power is to be exercised in clear and obvious cases.

[94] The Application of the First Defendant was pursued in the course of the trial and was that the Plaintiff had failed to plead whether its cause of action was a conspiracy by lawful or unlawful means and that the pleadings were devoid of the particulars of fraud. The First Defendant asked the Court to exercise its jurisdiction to strike out paragraphs 7 through 10 of the Statement of Claim.

[95] Given my findings that no agreement upon which a conspiracy could be founded has been proven, a decision on the strike out application at this time would amount to an academic exercise. It is my opinion that such a decision is rendered unnecessary in the circumstances and therefore I make no ruling in relation to same.

ISSUE 2 – FIDUCIARY DUTY

Whether the First Defendant breached his fiduciary duty to the Plaintiff by executing a deed of release?

[96] It is agreed that there were only two directors of Alpha Aviation at the material times. In cross-examination, Mr. Kaiser indicated that he was the original director and appointed the First Defendant as a director at a later date. He continued to serve as a director. The evidence is (October 12, 2022 Transcript, page 33, lines 17 to 28):

> 17 Q. Like Mr. Turnquest, you were also a director;
>
> 18 yes? Is that correct?
>
> 19 A. No. No. I was original director and I
>
> 20 appointed him at a later date to be a director.
>
> 21 Q. After you appointed Mr. Turnquest to be a

22 director, you continued to be a director of Alpha

23 Aviation; is that not correct?

24 A. Correct.

25 Q. And the only two directors -- sorry, the only

26 persons who served as directors of Alpha Aviation

27 Limited was you and Mr. Turnquest; is that correct?

28 A. That is correct.

Submissions of the Parties

[97] Plaintiff's submissions
The Plaintiff submits that the First Defendant was under a duty to: "act honestly and in good faith with a view to the best interests of the company" and "exercise the care, diligence and skill that a reasonably prudent person would exercise in comparable circumstances" in accordance with the Companies Act, Chapter 308, section 81(1) (a) and (b) and that the First Defendant failed to discharge his statutory duties.

[98] The Plaintiff submitted that "as a Managing Director, who is also a certified Public Accountant in exercising care and diligence ought to check to ensure that all regulations were complied with in respect of the Plaintiff's operations, including exchange controls. Alternatively, the Defendant had the option of seeking advice from Mr. Christie or another lawyer regarding how to proceed in respect of the exchange control question. So far or concerns the second justification, the fact that the Second and Third Defendant has been repaying the loans cannot be a justification for extinguishing the Plaintiff's security by executing a Deed of Release. In relation to the third justification, the First Defendant was duty bound to ensure that the Plaintiff maintained its security and that the mortgage and Further Charge were secured over the Second and Third Defendant's new home and that this remained in place until the mortgage was paid off. Without its security, the Plaintiff was not able to carry out repossession steps and/or other legal action to recover the mortgage and further charge. The acceptance of the Second and Third Defendant's word that they would secure the loans on their new property (which both Defendants deny in any event) does not afford the Plaintiff a legal right to sue to recover the loans. The reality is that the First Defendant is attempting to justify the unjustifiable. His actions are in clear breach of his duties as a director of the Plaintiff company."

[99] The evidence of the Plaintiff, via Mr. Kaiser, is that he relied on the First Defendant for the management of the company and was not involved in its day-to-day operations. His evidence (paragraphs 2 and 3 Supplemental Witness Statement) is:

> [2.] Mr. Turnquest's assertion that I was intimately involved in the minute and exhaustive management of the Plaintiff Company and that day-to-day decision making in respect of the Plaintiff Company which was routinely discussed with me, is false. I have business operations spanning a number of countries and different sectors throughout the world. It would have been physically impossible for me to exercise the kind of involvement that Mr. Turnquest is asserting that I had….
>
> [3]…Given that Mr. Turnquest is a qualified Certified Public Accountant with a vast amount of experience in the corporate world, I left him to get on with the job of managing the Plaintiff Company. I relied on him to fulfill his fiduciary duties to the Plaintiff.

[100] First Defendant's submission

The First Defendant submits that the execution of the Deed of Release had been approved by the beneficial owner and that therefore there could be no breach of duty. The First Defendant contends that the Duomatic principle applies, given the informality of the company's operations and that he had discussed and secured Mr. Kaiser's approval to execute the Deed of Release. He submits, alternatively, "even if the *Duomatic principle* does not apply, the First Defendant contends his actions in executing the Deed of Release did not amount to a breach of his duties as a director of the Plaintiff." The First Defendant argued that maintaining the security could expose the Plaintiff to litigation and liability and that, further, the Second Defendant had agreed to provide a substitute collateral. He also submitted that unsecured loans were not new for the Plaintiff or for Mr. Kaiser who had made unsecured loans to third parties. Unsecured loans were said to have been advanced to employees, business associates and acquaintances of Mr. Kaiser including him, the First Defendant and to the Second Defendant. The First Defendant argues that "on the facts of this particular case, the First Defendant exercised the care and diligence that a reasonably prudent person would exercise who acted as director for the Plaintiff, alongside Mr. Kaiser as beneficial owner."

LEGAL DISCUSSION AND ANALYSIS

[101] The Duomatic principle is a reference to the rule set out in **Re Duomatic Ltd.** [1969] 1 All ER 161

[102] In **Re Duomatic Ltd.**, the liquidators of a company sought repayment of directors' salaries on the basis that the sums had never been voted on by resolution in a general meeting. *Buckley J*, as he then was, enunciated the Duomatic principle, taking into account the meeting of the minds of the directors on this issue even though the formal steps had not been taken. He said at at pages 167 to 168 of [1969] 1 All ER 161:

> Counsel for the liquidator in the present application, has contended that, where there has been no formal meeting of the company and reliance is placed on the informal consent of the shareholders, the cases indicate that it is necessary to establish that all shareholders have consented, and he says that as the preference shareholder is not shown to have consented in the present case that requirement is not satisfied and the assent of those shareholders—that is to say, Mr Elvins and Mr East—who knew about these matters, and who did approve the figures relating to them in the accounts for the year ending 30 April 1963, is of no significance. It seems to me that if it had occurred to Mr Elvins and Mr East, at the time when they were considering the accounts, to take the formal step of constituting themselves a general meeting of the company and passing a formal resolution approving the payment of directors' salaries, that would have made the position of the directors—that is to say, Mr Elvins and Mr Hanley—who received the remuneration, secure, and nobody could thereafter have disputed their right to retain their remuneration. The fact that they did not take that formal step but that they nevertheless did apply their minds to the question of whether the drawings by Mr Elvins and Mr Hanley should be approved, as being on account of remuneration payable to them as directors, seems to me to lead to the conclusion that I ought to regard their consent as being tantamount to a resolution of a general meeting of the company. In other words, I proceed on the basis that where it can be shown that all shareholders who have a right to attend and vote at a general meeting of the company assent to some matter which a general meeting of the company could carry into effect, that assent is as binding as a resolution in general meeting would be.

[103] The Duomatic principle was applied in **Ciban Management Corp v Citco (BVI) Ltd and another** [2020] UKPC 21 in a case of ostensible authority.

In that case*, Lord Burrows* gave the decision of the Board and noted:

> **[22]** The Board sees nothing wrong with the reasoning and conclusion of the Court of Appeal (upholding Bannister J) that TCCL was not in breach of its duty of care. In general terms, this is because of the context in which TCCL was operating. The context was one in which Mr Byington wished to be kept out of the public eye. The shares were bearer shares held for Mr Byington as ultimate beneficial owner by Mr Stollman; and Mr Byington had set up a system whereby his instructions were being given to TCCL (and Citco BVI) by Mr Costa. That system had been used, without any concerns being raised, for the issuing of four previous POAs over some two years. Mr Byington expected TCCL (and Citco BVI) to follow the instructions of Mr Costa. To use Bannister J's words (at para [51]), Mr Byington 'remained in the shadows while Mr Costa communicated his instructions and was the point of contact'. In so doing, as Bannister J said (at para [50]), Mr Byington 'accepted the risk that Mr Costa might one day betray him', as indeed happened. In the Board's view, the law does not, and should not, allow Mr Byington to shift that risk to the respondents.
>
> **[31]** The *Duomatic* principle is, in short, the principle that anything the members of a company can do by formal resolution in a general meeting, they can also do informally if all of them assent to it: see generally *Palmer's Company Law* (25th edn, 2020), paras 7.434–7.449; and P Watts, *Informal unanimous assent of beneficial shareholders* (2006) 122 LQR 15. The principle derives its name from *Re Duomatic Ltd* [1969] 1 All ER 161 at 168, [1969] 2 Ch 365 at 373, in which it was encapsulated by Buckley J as follows:

'… where it can be shown that all shareholders who have a right to attend and vote at a general meeting of the company assent to some matter which a general meeting of the company could carry into effect, that assent is as binding as a resolution in general meeting would be.'

[38] The question therefore becomes whether one can apply the *Duomatic* principle of informal unanimous shareholder consent to ostensible authority. As a matter of principle, there seems no reason why not. If actual authority can be conferred informally by unanimous shareholder consent the same should apply to ostensible authority. So here Mr Byington's informal consent to the representation by conduct, that Mr Costa had authority to instruct TCCL (and Citco BVI) in relation to the fifth POA, binds Spectacular.

[39] It is important to add that the *Duomatic* principle explains why there is also no problem about the informality of Mr Byington's conduct even in relation to s 80 of the IBC. This is because if it was reasonable for TCCL to rely on the instructions of Mr Costa – on the basis that he was conveying the instructions of Mr Byington, the ultimate beneficial owner – there would be no need to go through the formality of a company resolution ratifying the sale. As far as TCCL was concerned Spectacular would have already given its authorisation through Mr Byington. That the *Duomatic* principle can be applied not merely where the requirement for formal approval derives from the company's articles but also where it derives from statute is demonstrated by, eg, *Re Oceanrose Investments Ltd* [2008] EWHC 3475 (Ch), [2009] Bus LR 947(at [23]). This will turn on the correct interpretation of the statutory provision in question but in our view (which is consistent with the Court of Appeal's reasoning, at para [69], that 'Mr Byington in his capacity as the sole member must be taken to have approved the sale') s 80 of the IBC should not be construed as removing the *Duomatic* principle.

[47] A further possible qualification of the *Duomatic* principle is that, in some cases, doubts have been expressed as to whether the principle applies where it is the beneficial owners, rather than the registered shareholders, who consent. See, eg *Palmer's Company Law* (25th edn, 2020) para 7.439. But the correct view is that, at least as here where the ultimate beneficial owner and not the registered shareholder is taking all the decisions in the relevant transactions, the *Duomatic* principle applies as regards the consent of (and authority given by) the ultimate beneficial owner.

[54] There are two final general observations. …Secondly, the Board is conscious that the kind of arrangements put in place by Mr Byington – by which he chose to hide from public view his position as ultimate beneficial owner – may not be uncommon. In this case, it has not been necessary for the Board to consider the propriety of that course of action but it may be required to do so in other circumstances. A central message of the decision in this case is that the ultimate beneficial owner who chooses such arrangements takes the risk of being betrayed by an agent who is being used to convey instructions to the director. Although there may be claims by the ultimate beneficial owner against the agent, the ultimate beneficial owner, on facts comparable to this case, cannot throw the risk taken onto the director by instigating an action by the company against the director for breach of the director's duty of care. The courts will treat the ultimate beneficial owner – Mr Byington in this case – as having been hoist by his own petard.

[104] **Belmont Finance Corpn Ltd v Williams Furniture Ltd** [1979] 1 All ER 118 deals with the knowledge of the directors to be imputed to a company on an allegation of conspiracy. The Court of Appeal determined that the directors' knowledge of illegality could

not be transmitted to the company when it was a victim of the conspiracy. At pages 261 to 262, *Buckely LJ* in considering the facts of the case before the court, stated the law as follows:

> On the footing that the directors of the plaintiff company who were present at the board meeting on October 11, 1963, knew that the sale of the Maximum shares was at an inflated value, and that such value was inflated for the purpose of enabling the third, fourth, fifth and sixth defendants to buy the share capital of the plaintiff company, those directors must be taken to have known that the transaction was illegal under section 54.
>
> It may emerge at a trial that the facts are not as alleged in the statement of claim, but if the allegations in the statement of claim are made good, the directors of the plaintiff company must then have known that the transaction was an illegal transaction.
>
> But in my view such knowledge should not be imputed to the company, for the essence of the arrangement was to deprive the company improperly of a large part of its assets. As I have said, the company was a victim of the conspiracy. I think it would be irrational to treat the directors, who were allegedly parties to the conspiracy, notionally as having transmitted this knowledge to the company; and indeed it is a well-recognised exception from the general rule that a principal is affected by notice received by his agent that, if the agent is acting in fraud of his principal and the matter of which he has notice is relevant to the fraud, that knowledge is not to be imputed to the principal.
>
> So in my opinion the plaintiff company should not be regarded as a party to the conspiracy, on the ground of lack of the necessary guilty knowledge.

[105] The Companies Act 1992 Chapter 308 makes provisions for the management of companies by directors. Section 81 sets out the duty of care of a Director of a company and provides:-

> (1) Every director and officer of a company in exercising his powers and discharging his duties shall –
>
> (a) Act honestly and in good faith with a view to the best interests of the company; and
>
> (b) Exercise the care, diligence and skill that a reasonably prudent person would exercise in comparable circumstances.
>
> (2) The duty imposes by subsection (1) on the directors of a company is owed by them to the company alone and the duty shall be enforceable in the same way as any other fiduciary duty owed to a company by its directors.
>
> (3) Every director and officer of a company shall comply with this Act and with the articles of the company.
>
> (4) The burden of proving that a director or an officer of the company did

not in accordance with any provision of this section shall lie on the person making the allegation."

[106] In determining whether the First Defendant complied with the statutory requirements in the exercise of his powers and the discharge of his duties, I am required to consider both:

(i) Whether he acted honestly and in good faith with a view to the best interests of the company; and

(ii) Whether he exercised the care, diligence and skill that a reasonably prudent person would exercise in comparable circumstances.

[107] The acts of the First Defendant which are complained of in this regard are acts alleged by the Plaintiff to have formed part of the pleaded conspiracy. This court having found that no conspiracy was proven, must consider the acts of the First Defendant in light of this claim. The analysis applied to the evidence on the failed claim of conspiracy, also applies here. The findings of fact are adopted here.

[108] For the reasons already given, I prefer the evidence of Mr. Kaiser over that of the First Defendant. Mr. Kaiser's evidence is that "he did not include me in the decision making at all." (Transcript October 11, 2022, page 77, lines 24 to 25.)

[109] Much ado was made about when Mr. Kaiser learnt of the Deed of Release. There is no direct evidence of when Mr. Kaiser was told or learnt of the execution. The evidence is that it was sometime in 2019 or 2020. In either event, I am satisfied that he was unaware of its execution prior to it being done and that he was unaware that the loan was rendered an unsecured loan.

[110] I find that the First Defendant procured the execution of the Deed of Release without the knowledge of the beneficial owner, the other director of the company. The Duomatic principle does not offer him protection in these circumstances. While it cloaks him with ostensible authority vis-à-vis a third party, the principle has no application when in fact there was no agreement – informal or otherwise – among the directors to do what he did. I find that he acted alone, i.e. without the knowledge of Mr. Kaiser. I find that when Mr. Christie executed the Deed of Release, he did so on the premise that Mr. Turnquest was authorized to make that request/instruction. Despite Mr. Christie's enquiries, the First Defendant was evasive and dilatory. The actions of the First Defendant do not reflect the conduct of a director required to "act honestly and in good faith with a view to the best interests of the company."

[111] It is my finding that the First Defendant's explanations are fraught with inconsistencies and are internally illogical. For example, Mr. Turnquest explains that he thought it best to execute the Deed of Release because the Plaintiff at that time did not have the necessary licence to hold an interest in the collateral yet he thought it appropriate to execute the Deed of Release because the Second and Third Defendants would provide substitute collateral, i.e.

the new house. It seems to me that the same objection would obtain regarding securing the new (Adelaide) house as collateral if the Plaintiff did not have the necessary permissions or licences.

[112] Further, the evidence is that the mortgage was executed in January 2005 and the further charge in March 2007. This state of affairs existed for over 10 years prior to the execution of the Deed of Release. I find that there is no credible evidence that the First Defendant ever raised the issue of the requisite exchange control approval or licence with Mr. Kaiser or with Mr. Christie. If the First Defendant had been aware that the necessary approvals were needed, then he failed in his duty in exercising "the care, diligence and skill that a reasonably prudent person" would exercise in the carrying out of the affairs of the company.

[113] The First Defendant also explained that unsecured loans were not unknown to Mr. Kaiser and therefore he felt it appropriate, given Mr. Kaiser's approval, to execute the Deed of Release even if it meant that there would be an unsecured loan. This explanation and submission is inconsistent with the First Defendant's admitted actions in "slow-walking" the Deed of Release and in attempting to secure substitute collateral. It also does not square with the First Defendant's admission and the evidence of Mr. Kaiser that on the advance of each sum, Mr. Kaiser raised the question of security. I find that the First Defendant was well-aware that the issue of security was important to Mr. Kaiser, and, by extension, the Plaintiff.

[114] The First Defendant testified that Mr. Kaiser made unsecured loans to third parties and that, in that context, there was no dereliction in duty as a director since unsecured loans were known to the entity and since the Butlers were repaying the loan. It is curious that, in relation to this loan, a loan to which the First Defendant testified that he had objected to, that Mr. Kaiser had directed that security be attached in a climate of "unsecured loans". If it is that holding collateral for the creditor is of value to the Plaintiff company, and there is no suggestion that it is not, then seems to me that in such an instance, the duty of the Director would be to ensure that in those instances where the company held collateral, it would maintain same unless the board of directors otherwise determined.

[115] Pressed on the issue of the loss of security, under cross-examination, the First Defendant testified that the difference could be made up elsewhere. (October 13, 2022 Transcript, page 103, lines 1 to 32, page 104 lines 1 to 32):

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1 substitute security for the loans, as agreed."

2 Let's stop there. Now, are you admitting

3 there, Mr. -- or stating there, Mr. Turnquest, that you

4 agreed to the Release but the -- you did not have the

ultimate security and all you've had, in your mind, was an undertaken [sic] to provide that security? Is that not the position?

A. That's correct.

Q. So in other words, you converted the Alpha Mortgage and Further Charge into an unsecured promissory note; did you not?

A. With the full knowledge and okay from discussions with Mr. Kaiser.

Q. And he was agreeable to taking a mortgage, which he had -- which was secured and taking the lesser position of simply being the Lender under a promissory note?

A. Because we had a undertaken [sic] from Mr. Butler, with whom he had a relationship, whom he had adequate alternative means of securing that debt, if we had to --

Q. What was the alternative means?

A. We were shareholders in common in a hangar of which Mr. Butler had 30 percent. We had -- also he was invested. I was a shareholder in Sky Bahamas so we had more than enough to cover that, in the event that something did happen; but we didn't anticipate something

27 happening.

28 Q. So -- but -- and so you rationalized -- so

29 your evidence is that -- and did you discuss all of this

30 with Mr. Kaiser, at the time?

31 A. Absolutely.

32 Q. And Mr. Kaiser agreed to this?

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1 A. Yes.

2 Q. That he would take the shares as collateral

3 for the Mortgage and since you were going to Release the

4 collateral?

5 A. No. I didn't say that. I said that if

6 something went wrong, that we would be able to collect.

7 This is not the only loan that we -- that Mr. Kaiser or

8 Alpha Aviation has given that has been unsecured.

9 Q. But --

10 A. And the position -- it wasn't anticipated that

11 we were going to have that significant a gap that they

12 were going to come through with their collateral.

13 Q. Mr. Turnquest, would you, as a businessman --

14 you have lent money to someone and you have taken a

15 Mortgage over their home. Would you, as a businessman,

16 release that Mortgage, in exchange for an

17 unparticularized undertaken, to produce at some time,

18 another security?

19 A. Yes. I would.

20 Q. You would?

21 A. If the person was my business partner up to

22 that point; we didn't have any difficulties; they were

23 paying the mortgage on time so there's no evidence that

24 there was any intent to defraud or to not pay their

25 commitment; I know their source of income, yeah. Why

26 not?

27 Q. But that wasn't -- it wasn't your money; was

28 it?

29 A. No. It wasn't my money. It was the Company's

30 money.

[116] Under cross-examination by Counsel for the Plaintiff, the First Defendant sought to justify the execution of the Deed of Release as being authorized by Mr. Kasier and considered by Mr. Christie. (October 13, 2022 Transcript, page 113, lines 1 to 26):

1 A. Myself, Mr. Kaiser and Mr. Christie, at the

2 end. We deliberately took the decision that we would

3 release a property in favour of an undertaken to

4 substitute collateral for the new property.

Q. But, Mr. Turnquest, on the 15th of March, the date of this document, 2017, right -- and remember that your duty as a director is owed to the company, not to any specific shareholder. When you release that security, was there any security in its place? Forget the undertaken [sic]. Was there -- it's a fact. Either it was or there wasn't. It's not maybe.

A. There was no --

Q. -- security?

A. We did not have it in hand. No.

Q. No. So at the date of this document, the mortgage encumbrances, the original mortgage and the Further Charge, when this document was delivered, there was no security to take the place of Lot 5, Block 13, Winton Estates, was there?

A. No. There wasn't. But we were very comforted by the fact that we had control of alternative security, should the need arise.

Q. And you had the promise of the Butlers; right?

A. Not only the promise of the Butlers. As I said, we had control of other assets of which Mr. Butler was a shareholder that was in excess of --

[117] Under cross-examination by Counsel for the Second and Third Defendants, the First Defendant spoke to the request for a satisfaction of mortgage from the purchasers of the Winton Property. (October 13, 2022 Transcript, page 131, lines 28 to 32, page 132, lines1 to 32, page 133, lines 1 to 21):

THE COURT: Please do.

BY MR. HORTON:

Q. Mr. Turnquest, I return to Alpha and the responsibility that Alpha would have had under the directorship of yourself and Mr. Kaiser. When the mortgage was not found to be satisfied, do you know what happened to the monies that came from the sale of the

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property, the asset?

A. No, I don't.

Q. And were you, at any point, concerned with obtaining a Satisfaction for that mortgage?

A. I was -- well, a Satisfaction was being demanded of me.

Q. It was being asked of you?

A. Yes.

Q. Was this being asked of you, in the context of the sale of the property?

A. Correct.

Q. And who was the attorney handling the

transaction?

A. The attorney I knew as having to complete a transaction was Callenders & Co..

Q. Callenders & Co.. There is evidence here that Callenders & Co. represented not only the mortgagee -- I'm sorry, not only the Mortgagor but also the Purchaser of the asset, the property, the Winton property and also the new mortgagee. Not Alpha but the mortgagee to the Buyers, three different parties. Did you find that to be so?

A. That's my understanding.

Q. Could you say who asked you for a Satisfaction?

A. Initially, I believe it was Mr. Cambridge, from Callenders & Co.. Followed after that -- it went quiet, for a while. Nobody was saying anything and, then, in 2015, when the property was sold, then, there was a whole -- persons pursuing the Satisfaction. RBC -- well, RBC, I don't think, ever wrote me. It would have been Ms. --

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Q. Can --

A. -- Arnold, Cambridge. I think those were the two.

Q. Do you know whether Mr. Christie sought to?

A. I don't think so.

Q. Mr. Turnquest, between 2008, when the property was sold, and 2016 or '17, when this deed -- this infamous Deed of Release -- I say infamous. Taking that one -- was put in place, what happened? What was going on between Alpha and Mr. Butler, Mr. Kaiser and the lawyers?

A. During that period, I would have been chasing -- trying to get Mr. Butler to give me this collateral. I think at one point there was a request of the Satisfaction and I kind of ignored it because I didn't have the satisfaction and there was very, very few inquiries about it from the lawyers, at that point. But I was continuing to follow-up with Mr. Butler: When am I going to get my security. But like I say, nothing formally came forward, again, until the whole issue was reignite with this sale or divorce proceeding.

Q. Divorce?

A. The Smiths got a divorce.

[118] The First Defendant has about 35 years' experience in accounting and held the position of Manager and Director of the Plaintiff until his departure from the Plaintiff in 2019. The First Defendant in his capacity as manager and director of the Plaintiff had the responsibility of the day-to-day management of the Plaintiff. The First Defendant held a key position within the Plaintiff and assumed a fiduciary duty requiring him to act honestly. The First Defendant owed Alpha Aviation a duty of fidelity.

[119] It is my opinion that a director in exercising "the care, diligence and skill that a reasonably prudent person" in the carrying out of the affairs of the company, would have seen to it that the requisite permissions were obtained if indeed the company was to facilitate the sort of lending that he, Mr. Turnquest, the First Defendant, as a director accommodated.

[120] The evidence of Mr. Brenford Christie, senior attorney at law and Assistant Secretary of the Plaintiff, is instructive on this point. He testified that, (Transcript October 12, 2022, page 33, lines 23 to 32 and Transcript October 12, 2022, page 34, lines 1 to 32), :

23 Q. What was the exchange control status of

24 Alpha Aviation Limited?

25 A. I guess what was relevant was the condition

26 that Alpha Aviation was not to make any further

27 investments without prior reference to the exchange

28 control department.

29 And before you ask me the question,

30 Mr. Scott, I should volunteer and say that in the

31 course of dealing with this matter I was guilty of

32 gross omission in not having made application to the

Transcript October 12, 2022, page 34, lines 1 to 24

Exchange Control Department. But I became aware of that omission in the course of these proceedings. I immediately, as soon as I could collect the available information, I submitted an application to the Exchange Control Department for those loans to be noted. They respond within nine days indicating that they have noted those loans, but Alpha Aviation should revert to them in the event of the realization of the security.

Q. Thank you for that. Now, you were aware of the Central Bank or Exchange Control designation and the restrictions or directions regarding it operation in The Bahamas. Would Mr. Christie have known -- would

14 Mr. Turnquest have known that?

15 A. I would assume so. He would have had at all

16 material times a copy of the Exchange Control

17 designation, which I would have provided previously.

18 And I am not sure how that omission came to light, as

19 disclosed in these proceedings --

20 Q. Let me put the question this way, if I may.

21 I am sorry to stop you. Did Mr. Turnquest ever come

22 back to you and say where is the exchange control

23 permission for these?

24 A. No, sir.

[121] Mr. Brenford Christie describes the failure to secure exchange approval as a "gross omission". He had not been made aware of it prior to the proceedings and took steps to rectify it. I accept his evidence that Mr. Turnquest did not inform him or give him instructions to rectify the matter so that the Plaintiff's affairs could be secured.

[122] Mr. Christie's evidence on cross-examination is as follows:

Transcript October 12, 2022, page 91, lines 28 to 32, page 92, lines 1 to 32, page 93, lines 1 to 8

Questions have been raised to you with regard to exchange control approval.

A. Correct. Yes, sir.

Q. Did you make any application for exchange control approval in relation to this transaction or any other transaction related to it?

A. I confess quite openly that it was a gross omission on my part that I overlooked submitting the

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application to the Exchange Control Department.

Q. In relation to this?

A. Yes, sir. I have no excuse for that, only that I would say that after forty seven years of

dealing with the Exchange Control Department, if you had wake me up at 3 o'clock in the morning I could tell you what the procedure is. And somehow that slipped.

Q. I will assure you, sir, I am not condemning you or otherwise call you to reckon anything.

A. I want to say this, that I have seen evidence that, certainly in the context of Mr. Turnquest's statement that he had apprised Mr. Kaiser of his misgivings regarding exchange control.

Q. Yes.

A. I never heard anything about that. When the occasion came up for the further charge, if that was a concern, it could have been brought up and it would

have jogged my old memory. It only came to my attention as a result of these proceedings. And as I said, immediately as I was able to gather all of the supporting documentation, with full knowledge that the Exchange Control Department does not have authority to retroactively approve a transaction. But what they do is that if it is a transaction that they would ordinarily would have approved, and subject to provision of all the requisite documentation, they will confirm that the transaction, the loans, have been noted.

I made an application on the 20th of September, and on the 29th of September they granted that approval and they also indicated in the letter,

1 in the event that the security is realized,

2 representation or reference should be made to the

3 Exchange Control Department. Which to my mind is an

4 indication that they had no objection whatsoever to the

5 transaction. So, I attempted that as soon as it was

6 reasonable and humanly possible to do so.

7 Q. Yes. You attempted to cure the lack.

8 A. Yes, sir.

[123] It is curious that Mr. Turquest, the First Defendant, made no attempts personally or through the company's lawyers to protect its assets. I adopt the description of the witness that this constituted a 'gross omission' and I also find that it was a breach of the fiduciary duty of the First Defendant.

[124] I accept the Plaintiff's submissions that it was part of the First Defendant's duty as a Director to "check to ensure that all regulations were complied with in respect of the Plaintiff's operations, including exchange controls." These were checks that the First Defendant ought to have made with respect to the business' operations. There is no evidence that he checked personally or instructed the company's attorney-at-law or instructed the administrative staff to enquire into the situation. The evidence of the First Defendant is that he became concerned with this state of affairs, and was persuaded to act, when the spectre of litigation was raised in relation to the charge on the sold Winton Property. His actions were not motivated by his duty to the Plaintiff but were, on his evidence, in response to outside requests from third party interests. Those third parties had an interest that competed with that of the company – namely financial collateral.

[125] The First Defendant as Manager and Director of the Plaintiff, in acting in "good faith with a view to the best interests of the company" ought to have acted in a way such as to secure the company's financial interest. That would include ensuring that the obligations under Mortgage and Further Charge executed between the Plaintiff, the Second and Third Defendants dated 2nd May 2001, and 28th March 2007 were met. There was no informality with the charges which were written contractual terms. There is no reason put forward that the loan could have been extinguished or that the security could have been done away with, without recourse to the written contractual terms. The First Defendant failed in its fiduciary duty to the company to act in its best interest.

[126] Similarly, the First Defendant failed in its fiduciary duty to the company to act in its best interest in executing the Deed of Release in the circumstances in which he did.

[127] Preamble (C) of the executed Deed of Release provides in part: "It is accepted acknowledged and understood that the outstanding debt has not been satisfied and that the same shall continue on and shall be henceforth not be secured by hereditaments in any way whatsoever as a result of the said agreement between the Mortgagors and the Releasor. As a result of the said agreement the Releasor and the Mortgagors have agreed to execute such Release as is hereinafter contained." Clause 2 provides: "It is hereby declared that nothing herein contained shall prejudicially effect [sic] the interest, right and entitlement of the Releasor to enforce the said Mortgage and Further Charge as against the Mortgagors save that the subject hereditaments shall no longer form a part of the security of the said Mortgage and Further Charge nonetheless additional premises remain subject to the said Mortgage and Further Charge (if any).

[128] If one were to believe the First Defendant, the execution of the Deed of Release was prompted by a request ensuing from the purchase of the Winton property and not from any considered deliberation of the interest of the Plaintiff. It seems to me that if converting the secured loan into an unsecured loan was not a matter of concern for the business of the Plaintiff, enough to make a director pause, then there would have been no reason to "slow-walk" the Deed of Release and the First Defendant would have executed it long before the several years that it took. The First Defendant would not have been so concerned to try and extract new security as he testified. Neither would there have been the secrecy that shrouded the execution of the Deed of Release as I have already found that neither Mr. Kaiser nor Mr. Christie were aware of its execution.

[129] The evidence is that the First Defendant was well aware of the implications to the Plaintiff and had merely resigned himself to the fact that the difference could be made up somehow.

[130] In these circumstances, a prudent director acting in the best interest of the company would have either sought to ensure that the loan was paid off at the time of the execution of the Deed of Release or that substitute collateral had been secured. Indeed, this is what the First Defendant indicated that he attempted to do. This is what he did not do. I find that the

the First Defendant in procuring the execution of the Deed of Release, and in executing same himself, acted against the company's best interest. As a result, I hold that the First Defendant failed in his fiduciary duty to the company to act in its best interest.

[131] Additionally, the First Defendant by his own admission was aware that the Plaintiff did not have the requisite approvals and permits to carry on the business of lending/investments in The Bahamas and any investments made must have received approvals of the Central Bank of The Bahamas. However, the First Defendant proceeded with Mr. Kaiser to enter into a mortgage agreement with the Second and Third Defendants which also amounted to a breach of both his fiduciary duty and his duty to exercise due care, diligence and skill.

ISSUE 3 – LOSS SUFFERED

Whether the Plaintiff suffered any loss as a result of a breach attributable to either the First, Second or Third Defendant and, if so, what is the measurement of that loss?

Having found no liability of the part of the Second and Third Defendants, this issue is now reframed as " Whether the Plaintiff suffered any loss as a result of a breach attributable to the First Defendant and, if so, what is the measurement of that loss?"

[132] The parties agree that the execution of the Deed of Release converted a secured loan to an unsecured loan.

Submissions of the Parties

[133] Plaintiff's Submissions

The Plaintiff submits that the Plaintiff suffered pecuniary loss. The Plaintiff submits that there is extant an enforceable unsecured loan. As to whether there is a quantifiable difference between an unsecured loan and a secured loan, i.e., a mortgage, the Plaintiff submits that the "answer lies in the absence of collateral." The Plaintiff submits that its mortgage security has been extinguished and it is thus unable to sue for recovery of possession or exercise a power of sale to recover the sums loaned. The Plaintiff submits the Defendants remain liable to the Plaintiff for the outstanding mortgage balance of $194,157.32 as at November 30, 2022 plus interest accruing at the contractual rate.

[134] The First Defendant's Submissions

The First Defendant submits that if any loss was suffered, that the Plaintiff must prove that there was a causal connection between any breach of the First Defendant and the loss alleged to have been suffered. The First Defendant submits that the Plaintiff required a permit in order to have validly acquired an enforceable interest in the security. He argues that it was not the responsibility of a Director to secure the permit but that the Director relied on the advice of the company's counsel. The essence of counsel's argument is that in the absence of a permit, the Plaintiff did not acquire an interest in the security and that it would be that failure to which any loss would have been attributable. The First Defendant relied on *Madoff Securities International Ltd (in liq) v Raven* [2013] EWHC 3147 (Comm), [2013] All ER (D)

216 (Oct) to support the submission that no loss is recoverable when no loss was suffered as a result of the Director's actions. The First Defendant further submitted that the Deed of Release related to the release of the security but not to the relinquishing of the loan.

LEGAL DISCUSSION AND ANALYSIS

[135] This court finds the Plaintiff is in no worse position than it would have been had it attempted to enforce the security in 2017. The Court cannot ignore the admissions of the Plaintiff and the evidence of the parties. Statute provides that the Plaintiff could retroactively get permission and indeed, there was some attempt to prove that the same was received by the Plaintiff. In those circumstances, where statute provides for retroactive approval, and approval is granted, the prior absence of licences is not a bar to recovery in the way that the First Defendant suggests. However, what this court must determine is whether the loss of the security is the loss of the loan.

[136] What the Plaintiff has lost is the security by which it could enforce loan payments. The ease of recovery of the sums outstanding under a loan, when secured by collateral, cannot be understated. However the ease of recovery is not the measure of the loss. The Plaintiff has not lost its entitlement to the sums outstanding. The Deed of Release extinguished the security but on the face of it, it is clear that the debt was not extinguished. Therefore there is nothing to prevent the Plaintiff from recovering the full sums outstanding once proven, using other mechanisms, including the process of the court.

[137] I accept that the pursuit of recovery of sums outstanding under a loan is fraught with difficulties where the sum is unsecured and that it may be difficult to recover if the mortgagor is bereft of means to satisfy a lender. However what a lender is entitled to by virtue of a mortgage agreement is the repayment of the sums advanced together with the interest and any other sums agreed. It is not entitled to the property per se. In basic terms, the property charged is available as an enforcement mechanism in the event of a default. If the mortgagor satisfies the contractual arrangements and pays off the loan, then the security/collateral is not in issue since the mortgagor holds an equity of redemption. In the absence of the ability to enforce a charge upon the real property for the discharge of the loan, a lender is left to other enforcement mechanisms. It may be said that the risk factor has changed. He may have lost his right attached to the security but he has not lost his right to the sums outstanding. In such circumstances, a Plaintiff is still entitled to, and can, pursue the debtor for the full sums outstanding.

[138] Is a value to be attached to that right for the ease of doing business? It seems to me that if the lender must pursue other mechanisms for the repayment of the loan, then in normal circumstances, the lender would be entitled to recoup the sums necessary for that process. That is not dissimilar to what would obtain if the lender had to pursue, for example, foreclosure proceedings in relation to a mortgage loan with security.

[139] While the commercial desirability for secured loans is evident, I conclude that there is no measure of loss to be assessed in favour of an entity that has seen the disappearance of its loan collateral in the particular circumstances before me.

[140] I hold that, in this case, in the absence of proof to the contrary, the Plaintiff has suffered no loss that is attributable to the First Defendant's breach of duty.

[141] No damages are awarded.

COSTS

[142] The parties are invited to make written submissions on costs and to provide same to the court within 30 days hereof.

CONCLUSIONS AND DECISION

[143] It is this Court's determination in this matter that:

1. The Plaintiff failed to prove conspiracy to defraud the Plaintiff on the part of the First, Second and Third Defendants;
2. The First Defendant breached his statutory fiduciary duty and the statutory duty of care, diligence and skill; and
3. The Plaintiff did not suffer a measurable loss as a result of the First Defendant's breach of duty. As a consequence, damages as pleaded are not awarded.

Dated this 15th day of April 2024

Carla D. Card-Stubbs, J