IN THE COMMONWEALTH OF THE BAHAMAS

IN THE SUPREME COURT

Common Law and Equity Division

2020/CLE/gen/01180

B E T W E E N

BANK OF THE BAHAMAS LIMITED

Plaintiff

AND

GALLERIA CINEMAS LIMITED

First Defendant

ISLAND BLOOM RESTAURANT LIMITED
(Guarantor)

Second Defendant

GRAND BAHAMA THEATERS LIMITED
(Guarantor)

Third Defendant

CHRISTOPHER MORTIMER
(Guarantor)

Fourth Defendant

Before: The Honourable Mr. Justice Neil Brathwaite

Appearances: Attorney Michela Barnett-Ellis for the Plaintiff
Attorney Gregory Moss for the Defendants

DECISION

FACTUAL SUMMARY

[1.] The Plaintiff commenced this action by way of an Originating Summons filed on 20 November 2020, and alleged that, under the terms of a Commitment Letter dated 4th December 2017, the Plaintiff agreed to advance the sum of $1,500,000.00 to the First Defendant, which was guaranteed by the Second, Third, and Fourth Defendants. The Plaintiff claims to be a "Lender under debentures dated 22nd February 2013 and 8th July 2013 respectively made between the Defendants (as Borrowers & Guarantors) and the Plaintiff, and avers that the Defendants breached the loan agreement by failing to repay, and that the sums due became payable as at 17th May 2017. The Plaintiff therefore claims the following relief:

> Payment of all monies due and owing to the Plaintiff by the Defendants.
> Delivery by the Defendants of possession to the Plaintiff all (sic) fixed and floating assets to satisfy the debt.
> Further and other relief.
> Costs.

[2.] A Notice of Appointment to Hear Originating Summons was duly filed in the matter. The hearing was initially scheduled to be heard on 7th September 2022, but was adjourned to 23rd June 2022. Prior to that date, the Second, Third, and Fourth Defendants filed a summons seeking the following relief:

> 1. Pursuant to Order 18, rule 19 (1)(a), (b) and (d) of the Rules of the Supreme Court that the proceedings herein against the Second, Third and Fourth Defendants be struck out as, in respect of the said Second, third and Fourth Defendants, the Plaintiff's Originating Summons which was filed herein on the 30" day of November, A.D. 2020 discloses no reasonable cause of action, is scandalous, frivolous or vexatious, may prejudice, embarrass or delay the fair trial of the action and is otherwise an abuse of the process of the court.
> 2. Alternatively, pursuant to Order 28, rule 8 of the Rules of the Supreme Court that the proceedings herein continue as if the cause or matter had been begun by Writ of Summons.
> 3. That the Plaintiff do file a Statement of Claim within fourteen (14) days of the date of the said Order.
> 4. That the Defendants do file their respective Defences to the Statement of Claim, inclusive of any Counterclaim which the Defendants or any of them may make against the Plaintiff, within fourteen (14) days of service of the same upon the Defendants' Counsel.
> 5. That there be liberty to each party to apply.

[3.] The Applicants also pray that the costs of this application be paid by the Plaintiff to the Applicants to be taxed if not agreed, in any event.

THE DEFENDANT'S CASE

[4.] In support of the summons, the Defendants have proffered the affidavit of Christopher Mortimer, who avers in part as follows:

> 1.I am the person named as the Fourth Defendant herein. I am also the beneficial owner of the issued shares of the First Defendant ("GCL"), the Second Defendant ("IBRL"), and the Third Defendant ("GBTL") herein and the President and a Director of each of the said IBRL and GBTL of and as such am duly authorized to make this Affidavit on behalf of myself and each of the said IBRL and GBTL.
>
> .....
>
> 4.Based upon my past dealings with the Plaintiff ("BOBL"), BOBL by its officers and managers well knew that as far as repayments to BOB were concerned I utilized the assets and revenues of each one of GCL, IBRL and GBTL to assist the others of them including by way of using the assets and revenues of either of those companies to service, manage or pay off the any BOBL loans of any other of those companies.
>
> .....
>
> 6.The Debenture from IBRL to BOBL dated 22"d February, 2013 which is recorded in the Registry of Records in Volume 11958 at pages 356 to 373 and Exhibited to the Paulette Butterfield Affidavit as "Exhibit PB1", was not secured by the Guarantees exhibited as "Exhibit PB5" and "Exhibit PB6" to the Butterfield Affidavit. That Debenture was secured by:
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> (1) Corporate Guarantees of IBRL and GBTL dated in or about 2013 referred to under the heading "Security Now Held", at Page 2, Item 3 of the Commitment Letter dated 4" December, 2017 and Exhibited to the Paulette Butterfield Affidavit as "Exhibit PB7" ;
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> (2) Personal Guarantee of myself dated in or about 2013 referred to under the heading "Security Now Held", at Page 2, Item 4 of the Commitment Letter dated 4"' December, 2017 and Exhibited to the Paulette Butterfield Affidavit as "Exhibit PB7".
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> 7. The Guarantees which are exhibited as "Exhibit PB5" and "Exhibit PB6" to the Butterfield Affidavit only arose after BOBL unlawfully withheld one of my two shares in IBRL (which comprised Fifty percent (50%) of the issued share capital of IBRL) for approximately Twenty (20) months being from in or about 7th March, 2016 to in or about 27th November, 2017.
>
> 8. BOBL eventually and belatedly only released that one unlawfully withheld share in IBRL to me after being threatened by me and my Attorneys with a claim in the Supreme Court for the release of the same, together with a claim or damage for resulting loss and damage to me and to GCL, IBRL and GBTL by reason of my inability to sell, mortgage, charge or otherwise raise funds over or in respect of IBRL to service, manage or pay off the BOBL loan to GCL and otherwise. There are now produced and shown to be respectively marked "Exhibit CM1", "Exhibit CM2", "Exhibit CM3", "Exhibit CM4", "Exhibit CM5", and "Exhibit CM6" a collection of emails and letters between me and my counsel on my behalf, of the one part, and officers and managers of BOBL, of

the other part, in respect of my demand for that IBRL share and the eventual and belated release of the same by BOBL.

9. IBRL was my most profitable business venture at that time and but for BOBL's unlawful withholding of my IBRL share I would have had no difficulty in servicing the BOBL loan to IBRL and my other business ventures by short term financing from financiers who had in the past repeatedly and consistently financed such short term business loans to me upon the pledging of my shares in my companies such as IBRL.

10. Regrettably, but predictably, I was not able to access any such short term business loans over the shares of IBRL as one of those shares was being unlawfully withheld by BOBL.

11. I repeatedly requested that BOBL release that one share of IBRL and told them, both by myself and my counsel, that their unlawful withholding of the same was causing me significant loss and damage.

12. The unlawful withholding of the IBRL share, and the belated release of the same to me, by BOBL has caused me tremendous loss and damage. I ask that the Court strike out the BOBL claim against me, IBRL and GBTL as prayed in the aforesaid Summons or, in the alternative, to order that same be continued as a Writ Action in order that I, IBRL and GBTL can be afforded an opportunity to have proper pleadings put forward by BOBL by the filing of a properly pleaded Statement of Claim and for myself, IBRL and GBTL to have a proper opportunity to respond to such Statement of Claim by the filing of our respective Defences and Counterclaims thereto.

[5.] The Applicants submits that the debenture dated 8th July 2013 from the First Defendant to the Plaintiff is the sole substratum of the Originating Summons, and that no guarantee was made in support of any other debenture, notwithstanding the debentures attached to the affidavit of Paulette Butterfield, upon which the Plaintiff relies. They further submit that no claim can be made against a guarantor in a mortgage action, and rely on the authority of **National Westminster Bank v Kitch (1966) 1 WLR 1316, CA**, in which it was said that **"..an action by a bank for payment of an overdraft, even if secured, is not a "mortgage action" and is outside O. 88 because the obligation to pay does not arise under the mortgage."** They therefore suggest that with respect to the guarantors, the instant action is not a mortgage action, as it arises under the 2013 debenture, and should have been commenced by ordinary writ.

[6.] The Applicants next submit that the Originating Summons is fatally flawed as drafted, as no claim is made against the Second, Third and Fourth Defendants as guarantors, a defect which they say cannot be cured by averments in the affidavit of Paulette Butterfield, which is relied upon by the Plaintiff. The Applicant also suggests that the guarantees are not under seal, and were not for good consideration, and are therefore null and void and of no effect, as a result of which no order can be made to give effect to those guarantees. They rely on **Riordan & Mulligan v Carroll T/A Wyvern Gallery (1995), as well as Allied Irish Banks PLc v Casey (2016) IEHC 192**, in

which it was held that a security made on the basis of past consideration was not valid. With respect to the issue of the sealing of the guarantees, they say that guarantees not made for consideration and not under seal are unenforceable, and rely on **First National Securities Lt. V Jones and another (1978) 2 All ER 221, and Southdown Building Society v Leighton Stradling Dyer (1991) Lexuis Citation 1864, CA**, among others.

[7.] In proffering the affidavit of the Fourth Defendant, the Applicant have placed before the court a statement by the Fourth Defendant that the Second Defendant was the most profitable of the ventures engaged in by the Fourth Defendant, and that the Plaintiff knew that the Fourth Defendant utilized the resources of all his ventures to satisfy his loan obligations. It is averred that the unlawful withholding of one of the shares of the Second Defendant resulted in the Fourth Defendant being unable to access short term financing which could have been used to satisfy loan obligations.

[8.] It is further submitted that the unlawful withholding of that share had the effect of interfering with the principal debtor's ability to repay, and therefore materially and adversely affected the relationship between the Plaintiff and the First Defendant. The Applicants rely on a number of authorities to substantiate the principle that a creditor's interference with the ability of a debtor to repay could have the effect of releasing a guarantor from his obligations, and cite in particular the case of Standard Chartered Bank Ltd v Walker and another (1982) 1 WLR 1410, in which the learned Lord Denning MR said the following: "There is a triable issue whether or not the bank did interfere with the sale in such a way as to take away some of the receiver's discretion, not only by directing him to sell as quickly as possible but also in regard to publicity and so forth. On reading the affidavit of Mr. Walker it seems to me that, until there has been discovery, there is an arguable case for saying that the bank did interfere not only in the timing of the sale, but also in other respects. So the matter should be investigated to determine the liability of the bank".

[9.] The Applicants therefore pray that the Originating Summons be struck out as disclosing no reasonable cause of action, and as being scandalous, frivolous, and vexations, or in the alternative the court should order that the matter be continued as if begun by writ, pursuant to Order 28 of the Rules of the Supreme Court, on the basis that there are substantial disputes of fact which cannot be resolved through the application of the summary procedure contemplated by Order 77.

RESPONDENT/PLAINTIFF'S CASE

[10.] In response the Plaintiffs submit that the Applicants, by suggesting that this application is not a mortgage action against the guarantors, and therefore cannot be brought under Order 77 of the Rules of the Supreme Court, have mischaracterized the nature of the relationship of the Applicants to this transaction. The Plaintiff submits that the Applicants guaranteed the repayment of monies due to the Plaintiff, and are therefore jointly and severally liable for the repayment of

that debt. They cite the case of **CIBC v City Lodge Ltd (2003) BHS J No. 45**, in which the learned Lyons J granted an order for vacant possession and judgment against a borrower as well as guarantors.

[11.] In addressing the application to strike out, the Plaintiff notes that this a draconian step which should only be taken in exceptional cases, as the taking of such a step deprives a litigant of his right to a trial and the ability to fortify his case. They further submit that the court should not embark upon a deep dive into the case, and that the application to strike out is merely meant to delay proceedings, as the Plaintiff's case is not inherently flawed, is not an abuse of the Court's process, and is not frivolous or vexatious.

[12.] The Plaintiff further submits that the application to have this matter converted to a writ action should only be considered if there were substantial disputes of fact. They submit that in this case the salient facts are not in dispute, as there is no dispute that money was loaned by the Plaintiff to the First Defendant, who agreed to repay that money, and that promise to repay was guaranteed by the Second, Third, and Fourth Defendants. They further note that there is no dispute that the First Defendant has breached its repayment obligations, and the Defendants have failed to satisfy a demand for repayment. The Plaintiff cites the case of **Citibank N.A. v Paul D. Major (2001) BHS J No 6** in which the court said the following:

> "The position at law is that where under a legal mortgage being an instalment mortgage, the whole mortgage money becomes payable by reason of the default of the mortgagor and the mortgagee is entitled to possession of the mortgaged property, the court has no jurisdiction to refuse to make an order for possession or to adjourn the summons, either on terms or not on terms as to keeping up payments or paying arrears, if the mortgagee does not agree to that course; but this does not exclude power to direct an adjournment for a short time to enable the mortgagor to pay off the mortgage in full or otherwise satisfy the mortgage if there is a reasonable prospect of the mortgagor being able to do so."

[13.] The Plaintiff therefore submits that the application should be refused, and the various reliefs sought by the Applicants be denied, with cost to the Plaintiff.

DISCUSSION

[14.] At the outset, I must emphasize that references to facts in this decision are not to be taken as findings or conclusions on the facts, which must be reserved for the actual trial of the matter. However, it is necessary to consider the facts in order to arrive at a just resolution of the issues that have been raised.

APPLICATION TO STRIKE OUT

[15.] The law on striking out has long been settled. Striking out is a discretionary power of the Court reserved for those pleadings that are incurably bad. Order 18 Rule 19 of the Rules of the Supreme Court provide in part:

> "(1) The Court may at any stage of the proceedings order to be struck out or amended any pleading or the indorsement of any writ in the action, or anything in any pleading or in the indorsement, on the ground that —
> (a) it discloses no reasonable cause of action or defence, as the case may be; or
> (b) it is scandalous, frivolous or vexatious; or
> (c) it may prejudice, embarrass or delay the fair trial of the action; or
> (d) it is otherwise an abuse of the process of the court, and may order the action to be stayed or dismissed or judgment to be entered accordingly, as the case may be.
> (2) No evidence shall be admissible on an application under paragraph (1) (a)."

[16.] In ***Drummond-Jackson v British Medical Association (1970) 1 WLR 688***, Smith, L.J. stated:

> "...It seems to me that when there is an application made to strike out a pleading, and you have to go to extrinsic evidence to shew that the pleading is bad, that rule does not apply. It is only when upon the face it is shewn that the pleading discloses no cause of action or defence, or that it is frivolous and vexatious, that the rule applies... "

[17.] In ***Danckwerts LJ in Wenlock v Moloney [1965] 2 All ER 871*** elucidated at p. 874

> "There is no doubt that the inherent power of the court remains; but this summary jurisdiction of the court was never intended to be exercised by a minute and protracted examination of the documents and facts of the case, in order to see whether the plaintiff really has a cause of action. To do that, is to usurp the position of the trial judge, and to produce a trial of the case in chambers, on affidavits only, without discovery and without oral evidence tested by cross-examination in the ordinary way. This seems to me to be an abuse of the inherent power of the court and not a proper exercise of that power."

[18.] The power to strike out has also been extensively consider by the learned Stewart J in **Romona Farquharson–Seymour v Carolyn Vogt Evans (in the capacity as Stipendiary and Circuit Magistrate) 2018/CLE/gen/00203**, where the court referenced the Court of Appeal decision of **Sandyport Homeowners Association Limited v. P. Nathaniel Bain SCCivApp & CAIS No. 289 of 2014** and said the following:

31. In AML Food Limited v. Dennis Williams 17th June 2020 SC 2018/CLE/gen/00169 (unreported) I considered the effect of Order 18, rule 19 (1) (a) of the RSC and reviewed the existing authorities in the law. I repeat them there.

"In Sandyport Homeowners Association Limited v. P. Nathaniel Bain SCCivApp & CAIS No. 289 of 2014, the Court of Appeal discussed the role of a judge when considering whether to accede to an application pursuant to O 18 r. 19 (1) (a) of the RSC. Crane-Scott JA in delivering the judgment of the Court stated:

"8. The scope and effect of the foregoing rule is succinctly explained in note 18/10/1 of the 1999 edition of the Supreme Court Practice in the following terms:

"There are two jurisdictions pursuant to which the Court may impose sanctions for breaches of the rules of pleading, (1) under the provisions of this rule...and (2) under the inherent jurisdiction...Not every writ or pleading which offends against the rules will be subjected to sanctions. An applicant must show that he is in some way prejudiced by the breach...In applying this rule, it must be remembered that "it is not the practice in the civil administration of our Courts to have a preliminary hearing, as it is in crime." (per Sellers L.J., in Wenlock v. Maloney [1965] 1 W.L.R. 1238 at 1242."

9. The following extract from Volume 36 of the Fourth Edition of Halsbury's Laws of England is also instructive as to how the discretion under Ord. 18,

r. 19 ought to be exercised:

"Although no evidence is admissible on an application invoking the rule, if the summons additionally invokes the court's inherent jurisdiction evidence may be filed, and all the relevant facts considered. The practice is not to consider the evidence until the question whether or not on the face of the pleadings some reasonable cause of action... is disclosed has been determined. In judging the sufficiency of a pleading for this purpose the court will assume all the allegations in it to be true and to have been admitted by the other party. If the statement of claim then shows on the face of it that the action is not maintainable or that an absolute defence exists, the court will strike it out. A pleading will not, however, be struck out if it is merely demurrable; it must be so bad that no legitimate amendment could cure the defect. The jurisdiction to strike out a pleading should be exercised with extreme caution and only in obvious cases; and where a question of general importance or a serious question of law would arise on the pleadings, the court will not strike out the pleading unless it is clear and obvious that the action will not lie." [Emphasis added]

10. The "Strike-out application" in this case was instituted under Ord. 18, r. 19 on the sole ground that the indorsements of the appellant's Writ and Statement of Claim disclosed no reasonable cause of action against the respondent. As paragraph (2) of rule 19 clearly states, no evidence is admissible where the only ground on which the application is made is that the pleadings disclose no reasonable cause of action. See for example Republic of Peru v. Peruvian Guano Co. Ltd. (1886-90) All ER Rep 368 at 371."

Crane-Scott JA continued:

"14. Case law also shows that the discretion to strike-out a pleading should be exercised with extreme caution and only in clear and obvious cases. The discretion to strike may be exercised if it is clear and obvious on the pleadings that no reasonable cause of action is disclosed (meaning a cause of action with some chance of success) or if it is obvious that the pleadings are so bad that no legitimate amendment could cure the defect in its pleadings."

"18. The authorities in the Annual Practice also show that so long as the statement of claim or the particulars disclose some cause of action, or raise some question fit to be decided by a Judge or a jury, the mere fact that the case is weak, and not likely to succeed, is no ground for striking it out. See Wenlock v. Maloney [1965j 2 All ER 871 discussed below."

19. The Court's power to strike is a draconian one and should only be used where there is clearly no cause of action pleaded or inferred. The Court must be careful not to dispossess the Plaintiff of its right to be heard where there is the possibility of a weak or strong case against the Defendant. Likewise, if upon reviewing a pleading and the Court is satisfied that there is a cause of action, although not properly pled, the Court can exercise its discretion to grant leave to amend the pleading. At all times the power to strike should only be exercised where it is impossible to save the action by amendment. In B.E. Holdings Limited v. Lianji (also known ae Linda Piao-Evans or Lian Ji Piao-Evans) - [2017] 1 BHS J. No. 28 Charles J stated:

"7 As a general rule, the court has the power to strike out a party's case either on the application of a party or on its own initiative. Striking out is often described as a draconian step, as it usually means that either the whole or part of that party's case is at an end. Therefore, it should be taken only in exceptional cases. The reason for proceeding cautiously has frequently been explained as that the exercise of this discretion deprives a party of his right to a trial and his ability to fortify his case through the process of disclosure and other procedures such as requests for further and better particulars.

8 In Walsh v Misseldine [2000] CPLR 201, CA, Brooke LJ held that, when deciding whether or not to strike out, the court should concentrate on the intrinsic justice of the case in the light of the overriding objective, take into account all the relevant circumstances and make 'a broad judgment after considering the available possibilities.' The court must thus be persuaded either that a party is unable to prove the allegations made against the other party; or that the statement of claim is incurably bad; or that it discloses no reasonable ground for bringing or defending the claim; or that it has no real prospect of succeeding at trial."

[19.] The Applicants contend that no claim can be made against a guarantor in a mortgage action, and that the action must be commenced by writ, and relies on **National Westminster Bank Plc v Kitch (1996) 1 WLR 1316**, in which an action for repayment of an overdraft which was secured by a mortgage, and in which, having considered the provisions of Order 88 of the Rules of the Supreme Court, which are the equivalent of Order 77 of the Rules of the Supreme Court Chapter 53 Statute Laws of the Commonwealth of the Bahamas, the court ruled that the action was not a mortgage action within the meaning of Order 88. In the **Supreme Court Practice 1999 at 88/1/2** the following is said with respect to Order 88:

"payment of money secured by a mortgage- In National Westminster Bank Plc v Kitch (1996) 1 WLR 1316, it was held, contrary to the previous understanding of the rule, that a claim to payment of money secured by a mortgage only falls within the definition of r. 1 (1)(a) if the plaintiff is relying on the mortgage to make his claim. The mere fact that the moneys claimed are secured by a mortgage does not of itself bring the action within the definition. The effect this decision is that

an action by a bank for payment of an overdraft, even if secured, is not a "mortgage action" and is outside Ord. 88 because the obligation to pay does not arise under the mortgage. Therefore such claims can be brought in the QBD and judgment in default can be entered without leave. The Court of Appeal was in that case concerned with an ordinary overdraft on current account. Presumably a claim by a bank for repayment of a home purchase loan is still within O. 88 even if the bank could frame its case without referring to the mortgage securing the debt."

[20.] In the instant case, there is exhibited to the affidavit of Paulette Butterfield a commitment letter, which is signed by the borrower and the guarantors, by which the First Defendant agrees to repay the sums advanced, and the guarantors guarantee repayment of those sums. The action is for repayment of the sums advanced as a result of that loan, and the obligation to repay arises as a result of that loan, and the guarantee of repayment as indicated by the signatures of the guarantors on the commitment letter. The action is therefore not for repayment of an overdraft on a current account, as contemplated in National Westminster Bank and referenced in the Supreme Court Practice as cited above. In my view there is no merit to this submission, nor any requirement that this action must be commenced by writ.

[21.] The Applicants suggest that the Originating Summons is fatally flawed, as no claim is made against the Second, Third, and Fourth Defendants as guarantors. In considering this issue, I note that the Originating Summons states that **"This Originating Summons is issued on behalf of the Plaintiff, Bank of the Bahamas Limited, a company incorporated under the laws of the Commonwealth of the Bahamas and carrying on the business of banking in the said Commonwealth who claims to be a Lender under debentures dated the 22nd February 2013 and 8th July 2013 respectively made between the Defendants (as Borrowers & Guarantors) (emphasis mine) and the Plaintiff (hereinafter referred to as "the Debenture")."** There is no other reference to Guarantors, nor any reference to which of the Defendants are guarantors. There is also no reference to the debentures of 2017.

[22.] While I accept that the Originating Summons could have been drafted with more specificity, so as to clearly identify which of the defendants are borrowers and which are guarantors, I do not accept that there is no claim made against the guarantors. Further, in order to strike out the claim on this basis, the court must find that the claim is "incurably bad." I am unable to so find, as the document could be amended to identify the various capacities of the Defendants to provide clarity, and also to make reference to the debentures of 2017, if these were absolutely necessary. In my view they are not. As I have indicated, the action is said to be against the defendants as borrowers and guarantors. The rubric of the Originating Summons clearly identifies which of the Defendants are guarantors. I also do not necessarily consider that specific reference must be made in the pleadings to the debentures of 2017, as clause 8 in the debentures of 2013 states the following: **"The security hereby given to the Lender shall be without prejudice and in addition to any other security whether by way of mortgage**

equitable charge or otherwise howsoever which the Lender may now or at any time hereafter hold on the property of the Company or any part thereof for or in respect of all or any part of the indebtedness of the Company to the Lender or any interest thereon." I am of the view that those debentures could therefore apply to debt incurred at that time as well as future debt.

[23.] I also note that, on the evidence before the court, the loan was certainly made, and the guarantees were certainly given. In the case of the Second and Third Defendants, the guarantees were secured by debentures, while the Fourth Defendant gave a personal guarantee, and had pledged shares in the Second Defendant in 2013. While the Applicants contend that no loan was actually made, the commitment letter exhibited to the Butterfield affidavit and signed by the parties clearly evidences the advance of a credit facility in the amount of $1,500,000.00 to refinance an original loan granted in August 2013 and to term out overdraft and credit card. The accounts exhibited to that affidavit also show a principal disbursal of $1,190,694.84. Further, the affidavit of Christopher Mortimer, on which the defendants rely, does not actually say that there was no loan. There is therefore no evidence before me to substantiate the submission that there was no loan.

[24.] The Defendant claims that the Plaintiff's Statement of Claim discloses no reasonable cause of action. In ***Drummond-Jackson v British Medical Association [1970] 1 All ER 1094***, Lord Pearson explained that a reasonable cause of action is one "with some chance of success". He continues by stating that 'if when the allegations in the pleadings are examined it is found that the alleged cause of action is certain to fail, the statement of claim should be struck out.' Having examined the pleadings, I am satisfied that the action has some chance of success, and is not certain to fail. I therefore decline to strike out the action.

[25.] The Applicants also seek as an alternative to striking out, to have the matter converted to a writ action, pursuant to Order 28 Rule 8 of the Rules of the Supreme Court, which reads as follows:

> (1) Where, in the case of a cause or matter begun by originating summons, it appears to the Court at any stage of the proceedings that the proceedings should for any reason be continued as if the cause or matter had been begun by writ, it may order the proceedings to continue as if the cause or matter had been so begun and may, in particular, order that any affidavits shall stand as pleadings, with or without liberty to any of the parties to add thereto or to apply for particulars thereof.

[26.] This provision ordinarily arises for consideration where there are substantial disputes of fact which would be better elucidated through the trial process, including full pleadings, discovery, witness statements, and oral evidence. However, it is necessary for there to be more

than simply the raising of an issue, as such a low bar could have the effect of robbing the Originating Summons procedure of all utility. The Applicants are therefore required to show that there substantial disputes as to facts on the issues raised.

[27.] The Applicants suggest that the Debentures of 2017 issued by the Second and Third Defendants and of 2018 issued by the Fourth Defendant are not under seal and were not for good consideration, and are therefore null and void and of no effect. The Applicants accept that no consideration is necessary if the debentures are under seal.

[28.] This issue has been considered by the courts, and in one of the authorities placed before the court by the Defendants, **Southdown Building Society v Leighton Stradling Dyer (1991) Lexus Citation 1864**, the Court of Appeal of England said the following:

> "How then do the authorities stand in relation to the present case? The view of Mr Justice Danckwerts, approved by this court in First National Securities Ltd v Jones, was that it is unnecessary for the person executing a deed to place his finger on a wax seal or wafer on the document, provided, first, that the document bears a wax or wafer seal or other indication of a seal and, secondly, that he signs it with the intention of executing it as a deed.
>
> It is suggested that the first of these requirements is not satisfied by a blank column headed "Seals". I am unable to see why that should be so. Goff LJ said that it was enough if the document had no more than an indication where the seal should be. It is established by First National Securities Ltd v Jones that a circle containing the letters "LS" is a sufficient indication for that purpose. That can only be because the circle indicates where the finger of the person executing the document ought to be placed. In like manner there is here an indication that the finger ought to be placed in the blank column headed "Seals". The judge thought that in the modern English usage "Seals" was, if anything, more explicit than a circle with "LS" in it. I certainly do not dissent from that view. I hold that the first requirement was satisfied in this case.
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> With regard to the second requirement, Mr Dyer relies on the absence of the customary words "NOW THIS DEED WITNESSETH" and of a full attestation clause starting with the words "IN WITNESS whereof". In my view those words and that clause are not essential. The document is expressed to be signed sealed and delivered" and you cannot ascribe any purpose to the words "sealed and delivered" except to express an intention that the document is to be executed as a deed. If it had been intended that it should be executed under hand, those words would have been unnecessary. Mr Dyer also relies on the fact that in First National Securities v Jones the signature was written across the circle with "LS" in it. I accept that that was treated as further evidence of an intention to execute the document as a deed, but I agree with Sir David Cairns that that is not a decisive factor. For these reasons I hold that the second requirement was also satisfied in this case. That means that, subject to the effect, if any, of the extrinsic evidence to which I now turn, the mortgage was executed by Mr Dyer as a deed."

[29.] In the instant case, the debentures all end with the following concluding phrase: **"AS WITNESS the hands and seals of the undersigned, at"**. The documents are then signed, and on the line for signatures there appears a circle containing the words "**AFFIX SEAL.**" The documents therefore clearly bear an indication of where the seals should be, in fulfillment of the first requirement as identified by Mr. Justice Dankwerts and approved by the Court of Appeal. The documents are also signed on the line which bears the indication of where the seal would be, fulfilling the second requirement.

[30.] I accept that these facts might be negated by extrinsic evidence. However, I have carefully reviewed the affidavit of the Fourth Defendant, which would constitute extrinsic evidence, and nowhere in that document is it intimated that there was no intention to execute those debentures under seal. I am therefore not satisfied, on the evidence before me, that there is a substantial dispute as to the validity of the debentures. For the sake of completeness, while the question of consideration does not arise if the documents are under seal, I note also that the documents are said to be in consideration of the Lender dealing with Galleria Cinemas Limited, which they have in fact done. There was therefore, it appears, some consideration for the debentures.

[31.] In the instant case, the Applicants contend that the unlawful withholding of the shares pledged by the Fourth Defendant materially affected the ability of the Defendants to meet their obligations, and rendered the guarantees void. In considering this matter, I note firstly that the shares were pledged as a result of earlier financial obligations. The Pledge itself states at page 3 that "The Pledgors have on the date hereof transferred or caused to be transferred into the name of the Lender or nominees on its behalf the shares of the Company." This clause has the effect, in my view, of the Lender becoming the owner of the shares. The Applicants would therefore be arguing that the Lender unlawfully withheld something that it owned.

[32.] The affidavit of Christopher Mortimer refers to correspondence by which he sought to determine the amount necessary to redeem that share, and the return of that share. To that affidavit is also exhibited a letter from counsel on behalf of the lender dated 27th November 2017, by which the Lender indicated its agreement to the release of the share on payment of certain outstanding sums. Clause 5 of the Pledge is headed "Redelivery of Collateral", and provides that the pledge shall cease upon the discharge or payment in full of the obligations. It appears therefore that the conditions precedent to the redelivery of the shares had not been fulfilled, as there were outstanding sums.

[33.] I note also that Clause 10 of the pledge prohibits the Pledgors from selling, assigning, transferring, exchanging, or otherwise disposing of the collateral without prior written consent. It seems therefore that the Fourth Defendant is seeking to argue that he was harmed, and the relationship was materially altered, because he was not able to utilize the shares to access

further financing, when a pledge had been given which prohibited such activity without written permission.

[34.] I must also emphasize that the credit facility which is the subject of the instant action was concluded on 4th December 2017, after the Lender had agreed to the release of the share. Any failure to abide by the obligations under this credit facility could not be attributed to an unlawful withholding of shares and any damage which would have been occasioned by that withholding, when that would have occurred prior to the entry into the instant agreement, which did not occur until after the Lender indicated a willingness to return the pledged share.

[35.] On the facts before me, I conclude that it is not arguable that the Lender unlawfully withheld shares, of which by virtue of the pledge they were deemed to be the owner, and by that unlawfully withholding materially altered the ability of the Defendants to meet their obligations under this credit facility to the extent of causing a default in those obligations, and particularly in circumstances where the Lender indicated a willingness to end the withholding prior to the commencement of this agreement. I am also not satisfied that the evidence before me reflects an arguable case that the loan does not exist to warrant the conversion of this action from the present Originating Summons type action.

CONCLUSION

[36.] In all the circumstances of this case, and for the reasons set out above, the application is dismissed, with costs to the Respondent to be taxed if not agreed.

Dated this 20th day of August, A.D. 2024

Neil Brathwaite
Justice