

IN THE SUPREME COURT OF BELIZE, A. D. 2011

CLAIM NO. 645 OF 2011

BETWEEN:

(1DB CORPORATE RETREAT CLUB LTD.	1 <sup>ST</sup> CLAIMANT
(RUSTY JOHNSON	2 <sup>ND</sup> CLAIMANT
(TONJA JOHNSON	3 <sup>RD</sup> CLAIMANT
(	
(AND	
(	
(GREEN LIGHT EQUITY PARTNERS LLC	1 <sup>ST</sup> DEFENDANT
(NIGEL MIGUEL	2 <sup>ND</sup> DEFENDANT
(HERBERT DOGAN	3 <sup>RD</sup> DEFENDANT
(SCOTT WEISSMAN	4 <sup>TH</sup> DEFENDANT
(TERENCE KUPFER	5 <sup>TH</sup> DEFENDANT
(ESTATE OF SHARON KUPFER	6 <sup>TH</sup> DEFENDANT
(DAVID LUTHER	7 <sup>TH</sup> DEFENDANT

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***BEFORE THE HONOURABLE MADAM JUSTICE MICHELLE ARANA***

**Mr. Eamon Courtenay, S. C., and Pricilla Banner of Courtenay Coye LLP for the Claimants/Respondents**

**Mrs. Robertha Magnus-Usher for the First and Fourth Defendants/Applicants**

**Mrs. Deshawn Arzu Torres of Young's Law Firm for the Second and Third Defendants/Applicants**

**Mr. Fred Lumor, S. C., for the Fifth, Sixth and Seventh Defendants/Applicants**

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**J U D G M E N T**

- 1) This is an application by the Defendants/Applicants to strike out the claim in this matter and for the costs of the application to be paid by the

Claimants/Respondents taxed if not agreed. The application is supported by the affidavit of the Seventh Defendant dated January 31<sup>st</sup>, 2013.

2) The grounds of the application are that the Claimants have no real prospect of succeeding on the Claim in that –

a) The Agreements upon which the Claimants rely created no legal rights or interests in the Claimants as the requisite stamp duty required by sections 71(4) and 73:01(1), (2) and (5) of the Stamp Duties (Amendment) Act, 2005 (Act No. 22 of 2005) has not been paid on the said Agreements.

b) The Agreements have not been registered and therefore they are of no effect by virtue of the provisions of section 73:01(5) (b) of Act No. 22 of 2005.

c) Since 22<sup>nd</sup> January, 2010 the legal and beneficial interest of the 1<sup>st</sup> Claimant in the properties have been charged or mortgaged to the 5<sup>th</sup>, 6<sup>th</sup> and 7<sup>th</sup> Defendants.

3) The Applicants also argue that the Statement of Claim is an abuse of the process of the court and is likely to obstruct the just disposal of the case, and the Statement of Claim discloses no reasonable ground for bringing

the claim since the 2<sup>nd</sup> and 3<sup>rd</sup> Claimants had no capacity or authority to commence proceedings in the name of or on behalf of the 1<sup>st</sup> Claimant.

### **The Facts**

- 4) The facts are set out in the chronology of events leading up to this application helpfully set out in the Respondent's Skeleton Arguments opposing this Strike Out Application.

20 <sup>th</sup> June, 2008	SPA (Stock Purchase Agreement) for the sale of the 2 <sup>nd</sup> and 3 <sup>rd</sup> Claimants (Rusty Johnson and Tonja Johnson) shares in the First Claimant (1DB Corporate Retreat Club Ltd) is executed between the 1 <sup>st</sup> , 2 <sup>nd</sup> and 3 <sup>rd</sup> Claimants and the 1 <sup>st</sup> , 2 <sup>nd</sup> and 3 <sup>rd</sup> Defendants (Green Light Equity Partners LLC, Nigel Miguel and Herbert Dogan).
24 <sup>th</sup> July, 2008	SPA Note is executed by the 1 <sup>st</sup> , 2 <sup>nd</sup> and 3 <sup>rd</sup> Claimants and the 1 <sup>st</sup> , 2 <sup>nd</sup> and 3 <sup>rd</sup> Defendants.
4 <sup>th</sup> August, 2008	The Board of Directors of the 1DB accepts the terms of the Stock Purchase Agreement and the 2 <sup>nd</sup> Defendant (Nigel Miguel), 3 <sup>rd</sup> Defendant (Herbert Dogan) and 4 <sup>th</sup> Defendant (Scott Weissman) are appointed as Directors of 1DB; the 3 <sup>rd</sup> Claimant (Tonja Johnson) is removed as Director of 1DB.
3 <sup>rd</sup> August, 2009	Ordinary resolution passed on a special meeting of members of the 1 <sup>st</sup> Claimant company resolving that, inter alia, the Directors of 1DB shall not issue debentures, debenture stock or other securities either outright or as a

security for any debt, liability or obligation of 1DB or of any 3<sup>rd</sup> party without the majority approval of the members evidenced in writing. None of the Defendants were present at this meeting. Only Rusty Johnson and his wife Tonja Johnson were present. The members (Rusty and Tonja Johnson) also resolved that the Directors could not mortgage or charge its undertaking, property and uncalled capital, could not borrow money on behalf of 1DB, without the majority approval of the members evidenced in writing.

14<sup>th</sup> July, 2011

Rusty Johnson is informed at a meeting with the 4<sup>th</sup> Defendant Scott Weissman and the 7<sup>th</sup> Defendant David Luther that 1DB's property had been mortgaged for several million dollars.

2<sup>nd</sup> August, 2011

Nigel Miguel, Herbert Dogan and Scott Weissman are removed as Directors and Rusty Johnson and Tonja Johnson are appointed as Directors of 1DB by Special Resolution of members; the Annual Returns of 1DB filed in the Companies Registry reflects this change. None of the Directors were present at this meeting, as only Rusty and Tonja were present and voted. The members unanimously resolve that Courtenay Coye LLP Attorneys at Law have been retained to protect 1DB from the improper attachment of mortgage/liens on 1DB's assets

14<sup>th</sup> October, 2011

Fixed Date Claim Form commenced by the Claimants seeking several declarations against the Defendants *inter alia* challenging the validity of the actions of the 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> Defendants in mortgaging the property of 1DB as

fraudulent and without lawful authority, and alleging breach of fiduciary duty and collusion of 5<sup>th</sup>, 6<sup>th</sup> and 7<sup>th</sup> Defendants to denude the 1DB of its assets, damages, interest and costs.

23<sup>rd</sup> September, 2012 The Board of Directors of 1DB (Rusty Johnson and Tonja Johnson) resolve that Courtenay Coye LLP will continue to protect 1DB from the improper attachment of mortgage/liens of the Company's assets by the Defendants.

Rusty and Tonja Johnson remain Directors and 100% shareholders of 1DB as stated in the Company's Annual Returns for 2012.

**Issue**

- 5) Should the application for striking out this claim be granted?

**Applicant/Defendant's Legal Submissions**

- 6) Mr. Fred Lumor, SC, argues on behalf of the Applicants/Defendants that the 2<sup>nd</sup> and 3<sup>rd</sup> Claimants (Rusty Johnson and Tonja Johnson) lacked the capacity to bring this claim because they were not Directors of 1DB Corporate Retreat Club Ltd. at the time they instituted the claim. The Directors were 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> Defendants Nigel Miguel, Herbert Dogan and Scott Weissman and they did not authorize the filing of this claim.

Learned Senior Counsel relies on the principle of **Foss v Harbottle** as cited in **Blackstone's Civil Practice** (2008) p 209 at para. 14.42:

*"It is not possible for a company's right to be enforced in proceedings brought in the name of a company (**Foss v Harbottle** (1843) 2 Hare 461) because the company is the proper claimant to enforce its own rights ..."*

*"The articles of association of a registered company usually confers on its directors a general power to manage the business of the company...The power to litigate in the name of the company is part of this general power of management and so it may be exercised by the directors, not the members (shareholder ...) The members may take a decision to litigate in the company's name if there is no board of directors capable of acting ..."*

Mr. Lumor, SC, also contends that the appointment of the new directors was made in accordance with the SPA and the SPA Note. He further states that the directors of the Claimant Company could only vacate their office by virtue of Article 96 of the Articles of Association.

In addition, Learned Counsel submits that the Second and Third Claimants could not exercise the rights or powers attached to their shares because their shares were held in escrow until the performance of conditions stated in the SPA and SPA Note. Notice of default that would trigger the release of the shares from escrow was not given as required under the SPA section 6D.

Mr. Lumor, SC, also states that since stamp duty was not paid on the SPA and the SPA Note as required by the Stamp Duties (Amendment Act) 2005 Act 22 of 2005, those agreements are null and void and cannot be enforced by the court. He cites Claim No. 26 of 2007 ***DMV Ltd v Tom Vidrine*** and Claim No. 186 of 2007 ***John Diaz v Ivo Tzankow*** in support of this point. He also asserts that the Agreements have not been registered as required by section 73:01(5)(b) of Act No. 22 of 2005 and are therefore of no effect.

Finally, he says that the legal and beneficial interest in the Claimant Company's property has been mortgaged and transferred to the 5<sup>th</sup>, 6<sup>th</sup> and 7<sup>th</sup> Defendants by the company, and the company cannot derogate from its grant of the mortgages. The 2<sup>nd</sup> and 3<sup>rd</sup> Claimants are not named as parties to the mortgage deed and therefore they cannot sue on them or take any benefit under them as they are strangers to the mortgages.

### **Respondent/Claimant's Legal Submissions**

- 7) Mr. Eamon Courtenay, SC, in his submissions against this strike out application argues that *"the jurisdiction to strike out must be sparingly*

*used, as its exercise deprives a party of the normal procedure for establishing rights by way of trial without discovery and oral evidence tested by cross examination". A statement of claim should only be struck out "if it is clear and obvious that the claim is unsustainable and is bound to fail". (para 29 and 46 of **Anthony Burnett-Biscombe v Fadelle** Claim No. DOMHCV 2010/0022 High Court of Dominica December 30<sup>th</sup>, 2011.*

He contends that the Defendants are unable to satisfy the Court that the statement of claim is an abuse of the process of the court, is likely to obstruct the just disposal of the proceedings, or that the claim discloses no reasonable grounds for bringing the claim. In addition, the fact that the Defendants have filed a Defence prior to filing this application militates against striking out, and the Court is more likely than not to exercise its discretion against striking out.

In answer to the Defendants' argument that the 2<sup>nd</sup> and 3<sup>rd</sup> Claimants have no authority to bring this claim, Mr. Courtenay, SC, submits that the registration of the special resolution authorizing these proceedings, removing the Defendants as Directors and appointing the 2<sup>nd</sup> and 3<sup>rd</sup>



Claimants as Directors on August 2<sup>nd</sup>, 2011 and the resolution of the 1<sup>st</sup> Claimant's Board of Directors on September 23<sup>rd</sup>, 2012 have been a matter of public record. He states that at no time since the appointment of the 2<sup>nd</sup> and 3<sup>rd</sup> Claimants as Directors in August 2011 have the Defendants sought to invalidate their appointments. The annual returns of the 1<sup>st</sup> Claimant in fact reveals that the 2<sup>nd</sup> and 3<sup>rd</sup> Claimants were duly appointed directors for 2011 and 2012.

Mr. Courtenay, SC, submits that if the Court is to determine the validity of the Defendants' contention in respect of the voting rights of the 2<sup>nd</sup> and 3<sup>rd</sup> Claimants as members to remove the Defendants as Directors of the company, then the Court would be required to interpret the same SPA Agreement that the Defendants are saying is unenforceable. This would imply that the Defendants are accepting the validity of the agreement. He argues that the 2<sup>nd</sup> and 3<sup>rd</sup> Claimants have exercised their rights as 100% shareholders to remove the directors of the 1<sup>st</sup> Claimant and to commence proceedings in respect of those directors' breaches of their duties to the company. The Claimants submit that if the court is to consider the validity or otherwise of those acts, then the Court must

also consider the breach of the SPA by the Defendants as per relief 17 and 18 in the Statement of Claim. These are clearly issues for trial.

In answer to the Defendants' arguments regarding the non-compliance with the Stamp Duty Act and the subsequent invalidity of the SPA and SPA Note, Mr. Courtenay, SC, contends that such issues need to be ventilated in a full trial. In any event, even if the issue is resolved now this would not result in a striking out of the claim in its entirety because those issues relate only to reliefs 17 and 18 of the Claim Form. There are other substantive grounds on which the Claim can proceed.

He submits further that the sections of the Stamp Duty Act cited by Mr. Lumor, SC, on behalf of the Defendants are inapplicable to the SPA and the SPA Note in this case. The facts bear out that the 2<sup>nd</sup> and 3<sup>rd</sup> Claimants never executed an agreement to pass legal title, equitable interest or give some interest in land. The 2<sup>nd</sup> and 3<sup>rd</sup> Claimants sought to sell their shares in the 1<sup>st</sup> Claimant Company, and those shares only gave the Defendants legal and equitable interest in the shares themselves and dividends payable. The shares would upon transfer only have entitled the purchasers to exercise their rights as shareholders of

the company and nothing more. The land is owned by the company. The SPA did not result in placing the Defendants in possession of the property. It was the appointment of the Defendants as Directors that allowed them certain rights (as restricted by members) to deal with the 1st Claimant's assets. The shares in the 1<sup>st</sup> Claimant were never transferred to the Defendants. The Defendants merely managed the 1<sup>st</sup> Claimants property, which always remained in the possession and control of the 1st Claimant. Again, these are matters which must be ventilated at a full trial.

On the issue of whether the 1<sup>st</sup> Claimant can be allowed to derogate from its grant of mortgages to the 5<sup>th</sup>, 6<sup>th</sup> and 7<sup>th</sup> Defendants by the lawful Board of Directors, this is rejected by the Claimants as bad law. Mr. Courtenay, SC, submits that the question as to whether this was lawfully done by the Directors establishes that there is a *lis* between the parties which this Court will be called upon to determine.

In addition, he argues that the formal admission by the 3<sup>rd</sup> Defendant at paragraph 3 of his Defence that "*The Third Defendant will say that the execution of the said document by him is a forgery,*" brings this claim

within the caution referred to in *Burnette-Biscombe v Fadelle* (cited above), that to strike out a claim would be to deprive the Claimants of the normal procedure for establishing their rights at trial. He submits that the Defendants have failed to make any challenge to the veracity of the other reliefs claimed, other than that claimed in 17 and 18. The application to strike out should be refused.

### **Ruling**

- 8) I am grateful to both Counsel for their submissions. It is established that Stamp Duty has not been paid on the SPA and the SPA Note. However, even if, as Mr. Lumor, SC, contends, the SPA and SPA Note lack validity because of lack of compliance with the Stamp Duty Act (an issue which I am not prepared to determine at this juncture), that would still not result in the case being struck out. Was the nature of these documents, i. e., SPA and SPA Note such as to bring them within the parameters of the Stamp Duty Act? Who were the Directors of the Company when the resolution was passed on August 3<sup>rd</sup>, 2009? Was the special resolution passed by the Claimants on August 2<sup>nd</sup>, 2011 a valid resolution sufficient to remove the Defendants as Directors under the Articles of Association? Was that meeting duly convened? Were notices of that

meeting sent to the Defendants as Directors? Did the Claimants retain their voting rights? Are the shares in escrow? Was the real property of the 1<sup>st</sup> Claimant ever vested in the Defendants? Was the signature of the Third Defendant forged? Did the Defendants breach their fiduciary duties owed to the 1<sup>st</sup> Claimant Company by executing and registering mortgages on the Company's real property? Were the Defendants merely managers of the 1<sup>st</sup> Claimant? What happened to the 2.3 million dollars obtained by the Defendants from the mortgages on the Claimants' property? These are just a few of the many unanswered questions at this stage raised by the other reliefs claimed by the Claimants, questions which can only be properly answered by the ventilation of issues in a full trial. The application is therefore dismissed.

Costs awarded to the Claimants to be taxed or agreed.

***Dated this 3<sup>rd</sup> day of December, 2014.***

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**Michelle Arana  
Supreme Court Judge**