COMMONWEALTH OF THE BAHAMAS
IN THE COURT OF APPEAL
SCCivApp Supreme Court Civil Appeal Side
B E T W E E N

SccAppCais No. /2018

Junkanoo Estates Ltd — First Appellant

Yuri Starostenko — Second Appellant

Irina Tsareva-Starostenko — Third Appellant

AND

UBS (Bahamas) Ltd (In Voluntary Liquidation) — Respondent

NOTICE OF APPEAL MOTION

TAKE NOTICE that the Court of Appeal will be moved so soon as Counsel for the First Appellant and the Second and Third Appellants Pro Se can be heard on Appeal from the whole of the Order herein of the Honourable Mr Justice Milton Evans made on 23 March 2015, whereby it was ordered that *"(1) the Plaintiff do recover against the Defendants the sum of USD$920,164.87 for principal money and interest, due and owing as of 4th December, 2014, secured by the Mortgage dated 18th September, 2012 ("the Mortgage") over Lot 5 in Block Number 7 of the Number 1 Subdivision of "Lyford Cay" in the Western District of New Providence ("the Property") which has been lodged for record in the Registry of Records in Volume 11712 at pages 87 to 98. (2) the Defendant to pay to the Plaintiff the money hereby adjudged to be recovered and all other money (if any) secured to the Plaintiff by the above mentioned Mortgage, the Plaintiff (subject and without prejudice to the due exercise of the power of sale for the time being vested in it do release to the Defendants the security constituted by the said Mortgage. (3) unless the defendants, within 21 days of the date hereof (i.e. on or before 13th April, 2015) pay to the Plaintiff the sum of USD$920,164.87 due and owing as of 5th December, 2014, together with interest thereon at the rate of USD$129.82 per day from that date until payment, the Defendants must (1) deliver up vacant possession of the Property to the Plaintiff within 28 days thereof (i.e. on or before 21st April, 2015) and (2) take all necessary steps to ensure that all documents in their possession or control relating to the said*

Property be delivered to the Plaintiff. (4) that the Defendants do pay the Plaintiffs costs of this Action to date, such costs to be taxed if not agreed."

The Appellants pray for Orders:

(1) to have the whole of the Order made on 23 March 2015 set aside; and

(2) Judgment be entered on behalf of the Appellants as herein; and

(3) the matter be remitted to the Supreme Court for trial.

FURTHER TAKE NOTICE that the Appellants applied to the Court with a view to obtaining clarification of the law relative to possession in the jurisdiction of the Commonwealth of The Bahamas, namely, the Court of Appeal's position in the case of *Citibank, N.A. v. Major* - [2001] BHS J. No. 6.

AND FURTHER TAKE NOTICE that the grounds of this Appeal are listed in the Schedule at the end of this Notice of Appeal Motion.

Dated this 31 day of January 2018.

The Second Appellant Pro Se on behalf of the above-named Appellants.

To: Lennox Paton Chambers Attorneys for the above-named Respondent.

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SCHEDULE TO THE NOTICE OF APPEAL MOTION

(Appeal from the whole of the Order herein of the Honourable Mr Justice Milton Evans made on 23 March 2015)

(1) GROUND 1 is that the Order of the Honourable Mr Justice Milton Evans made on the day of 23 March 2015 was made at a time when there had been confusion as to the date of the hearing, as was made clear by Counsel who then acted for the (Defendants) Appellants and, as result, neither they nor their affidavit in opposition to the application for summary judgment with the voluminous correspondence exhibited were not before the Supreme Court on 23 March 2015 and Counsel was not prepared, and the (Defendants) Appellants can resile from the position of Counsel Mr Charles Mackay who then acted for the (Defendants) Appellants never told the Defendants that he had no answer to authorities such as *National Westminster Bank Plc v Skelton* [1993] 1 All ER 242, 246 (per Slade LJ) to the effect that a counterclaim was not normally a sufficient basis for resisting a mortgagee's summary application for possession to which Counsel for the (Plaintiff) Respondent had drawn his attention; and if Mr Charles Mackay acknowledged or consented to the judgment in the name of the (Defendants) Appellants without their consent:

(a) he is guilty of felony and the (Defendants) Appellants, on 8 November 2017, have applied to the Supreme Court pursuant Order 52 and the application is pending before the Supreme Court; or

(b) in the alternative to (a), he acted contrary to his instructions by (Defendants) Appellants not to enter into any compromise with the (Plaintiff) Respondent, and he was thereby in breach of his fiduciary duty and in violation of the Bahamas Bar Association's Code of Professional Conduct failing to advise his clients as diligently as he should have done and failing to disclose all the information in its possession;

(c) he exceeded the limit of his ostensible authority to compromise action; and

(d) the (Plaintiff) Respondent and its Counsel had notice of the actual limitation on the ostensible authority of Mr Charles Mackay, thereby they had not been entitled to assume that he had had ostensible authority to compromise the possession action on behalf of the (Defendants) Appellants.

(2) GROUND 2 is that the defence which the (Defendants) Appellants filed on 4 November 2014 and wished to raise before the Court was not considered by the learned Judge. The defence in question was of equitable set-off available to the (Defendants) Appellants in that there are serious issues to be tried in respect of the mortgage contract the mortgage transaction itself, namely among other things:

(a) the terms of the mortgage contract in relation to the First (Defendant's) Appellant's money and assets taken by the (Plaintiff) Respondent and held for itself deposited in the first (Defendant's) Appellant's investment account 32377 with the (plaintiff) Respondent all material times as an additional security in cash in the amount equal to 50% of loan capital or non-real estate funded collateral as a makeweight to real estate security for the loan, while the first (Defendant) Appellant was paying the interest on that money, were manifestly disadvantageous to the first (Defendant) Appellant as the Mortgagor and to the second and third (Defendants) as the personal Guarantors;

(b) the mortgage contract between the (Plaintiff) Respondent and the First (Defendant) Appellant and second and third (Defendants) Appellants was merely voidable in respect of the aforesaid terms being:

(i) a disposition made by the (Plaintiff) Respondent with an intent to defraud and at undervalue voidable at the instance of the First (Defendant) Appellant thereby prejudiced under Section 4 of the Fraudulent Dispositions Act, 1991;

(ii) a disposition at no consideration in that Second and Third (Defendants) Appellants received nothing for guarantees while being bound for the performance of the covenants, obligations, representations and

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warranties contained in the mortgage contract and no commissions or fees for guarantees were paid by the (Plaintiff) Respondent to them; and

(iii) a device through which the (Plaintiff) Respondent held back more than half of the loan capital, giving themselves fraudulent preference in contravention of statutory provisions conferred by bankruptcy laws;

(c) the (Plaintiff) Respondent had acquired rights under the aforesaid terms of the mortgage contract by means of fraudulent misrepresentation, omissions, non-disclosure of all the information in its possession on the part of the (Plaintiff) Respondent and not of joint efforts of the parties, where it is immaterial that the arrangements had been entered into not with a view to circumventing any legislation, and in the absence of competent independent advice by the (Plaintiff) Respondent inviting or inducing the (Defendants) Appellants to sign the Commitment to Finance (which became a part of the mortgage contract); or

(d) in the alternative to (c), the transaction was, in itself, a non-fair one and materially prejudicial to the (Defendants') Appellants' interests, having regard to all the circumstances, being entered into as a result of conduct which, though not amounting to actual fraud or deceit, was contrary to good conscience;

(e) the (Plaintiff's) Respondent's delay (laches) in seeking equitable relief was a bar to the Respondent's claim for equitable relief;

(f) the (Plaintiff's) Respondent's "acquiescence" since April 2013 in retaining the sums lower than USD$700,000.00 of the first (Defendant's) Appellant's money and assets taken by the (Plaintiff) Respondent and held for itself deposited in the first (Defendant's) Appellant's investment account 32377 making these terms of the mortgage contract invalid as if the mortgage contract had never been made on these terms, was a bar to the (Plaintiff's) Respondent's claim for equitable relief;

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(g) the (Plaintiff) Respondent had acted in bad faith inducing the (Defendants) Appellant in the mortgage contract and pursuing possession of their property, where the conduct of the party applying for relief is always an important element for consideration and where it may suffice if the (Plaintiff) Respondent has acted unfairly in performing the contract, even though he has not broken any promise;

(h) the (Plaintiff's) Respondent's right to vacant possession was bound by the tenancy of the second and third (Defendants) Appellants who enjoyed it since 2008 and that the first (Defendant) Appellant transfer it to the (Plaintiff) Respondent in accordance with the provisions of the mortgage contract.

(3) GROUND 3 is that the (Defendants) Appellants have a good defence of equitable set-off against the claim for possession and had a real prospect of success. The defence of equitable set-off is not just that the debt was abated by the Counterclaim but that the event of alleged default was brought about by the (Plaintiff's) Respondent's own breaches of duties and obligations to the (Defendants) Appellants in the relationships regulated by the contracts between the parties, namely, to carry on a securities business with money in the account 32377 under their management in accordance with (A) the Terms and Conditions; (B) the Information on the Order Execution Policy of UBS AG; (C) the UBS Executions Standards and Policies, and applicable laws and regulations, namely, (D) the Securities Industry Act, 2011, the Securities Industry Regulations, 2012, and the Purpose Trust Act, 2004, as a result, the (Plaintiff) Respondent breached also their statutory duties and obligations. The (Plaintiff) Respondent breached their duty of care and obligations to the Appellants in business with securities, an agreement in the relationship in the securities business, where the (Plaintiff) Respondent was an agent which carries out sales or purchases of securities on behalf of the principal, the first Appellant, following its trade orders or otherwise carries on securities business with the principal acting on its behalf and act under Securities Industry Act, 2011, Securities Industry Regulations, 2012. In particular, the (Plaintiff) Respondent failed:

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(a) to provide an electronic trading platform for investing funds under management;

(b) to grant Direct Market Access (DMA);

(c) to provide all-in-fee "flat" time based fee before 2 August 2013 while the First (Defendant) Appellant has paid interest in the period of eight (8) months from 28 September 2012 to 12 June 2013 for the funds under management, and high fees for transactions in the period from 12 June 2013 to 2 August 2013 in the amount of USD$2,812;

(d) to obtain the best possible result (or "best execution") either when executing Client Orders or receiving and transmitting Client Orders for execution where the Appellants legitimately relied on the (Plaintiff) Respondent to protect their interests in relation to the pricing of the transactions that were affected by how the (Plaintiff) Respondent executed Client Orders;

(e) to comply with applicable laws and regulations, for example, to provide a full report and clearing market information of the transactions, to ensure that individuals associated and shared premises with Respondent were engaged in securities business acted in lawful manner and the conditions necessary for the legality of both transactions and engagement existed;

(f) to exclude the improper and even harmful behavior of individuals associated with and shared premises with the (Plaintiff) Respondent and to resolve complaints; and

(g) that there is pending action against the (Plaintiff) Respondent begun by the (Defendants) Appellants in the equity jurisdiction of the Court claiming, *inter alia,* relief in the first instance from an unconscionable bargain, allowing the (Defendants) Appellants to give proper detached consideration to their independent interest in the mortgage transaction, which involved substantial risk to them and that this claim goes to the root of the mortgage transaction, which was to the manifest disadvantage of the (Defendants) Appellants; and more particularly: in 2015, the Appellants issued Cross-action, an action based on the fraudulent conduct of the Respondent company to the detriment of the Appellants (referred to for its terms and held to be repeated herein *brevitatis causa*), claiming damages with the total amounts from USD$1,926,000 to USD$6,000,000:

(i) 1. for breach of agreement;

(ii) 2. for specific performance for breach of statutory duty;

(iii) 3. for willful misfeasance;

(iv) 4. for repudiatory breach of agreement;

(v) 5. for conspiracy to injure by unlawful means;

(vi) 6. for giving fraudulent preference and fraudulent trading;

(vii) 7. for breach of statute pursuant to the Fraudulent Dispositions Act;

(viii) 8. for conspiracy to defraud;

(ix) 9. for fraudulent misrepresentation;

(x) 10. for the malicious institution of civil proceedings;

(xi) 11. for conspiracy to defraud public authority; and

(xii) 12. for malicious execution, where, in particular, it was alleged that the Respondent's agents acting on its behalf or on its instructions or with its encouragement were minded to punish and humiliate the Second and Third Appellants and members of their family in a malicious and high-handed way; and therefore it was illegal;

(4) GROUND 4 is that an oral submissions by Counsel Mr Charles Mackay that the application for summary judgment had been opposed to the extent of the mortgage contract and the management of investment business between the parties was not considered by the learned Judge and he wrongly held that there was no opposition to possession on the part of the (Defendants) Appellants.

(5) GROUND 5 is that the learned Judge wrongly found that the (Defendants) Appellants accepted the facts that being the validity of the mortgage and the outstanding nature of the debt.

(6) GROUND 6 is that the learned Judge wrongly found that the (Defendants) Appellants were not opposing the fact that monies are due, thereby the learned Judge wrongly held that the only question for the Court to determine is whether the parties cannot agree, whether there is a set amount and what is that amount; and that same to be what the live issue is.

(7) GROUND 7 is that the learned Judge misapplied the law relative to possession in the jurisdiction of the Commonwealth of The Bahamas, namely, the Court of Appeal's position in the case of *Citibank, N.A. v. Major - [2001] BHS J. No. 6* because:

(a) in *Ashley Guarantee plc v Zacaria and another - [1993] 1 All ER 254* cited by Ganpatsingh J.A. in para 14 of *Citibank* per Ralph Gibson and Woolf LJJ - Where a guarantor is required to give possession of his home despite the existence of unliquidated claims, a stay on terms pending trial of the claim to the set-off might be appropriate under s 36 of the Administration of Justice Act 1970 (which empowers the court to grant relief to a defaulting mortgagor of a dwelling house where he is likely to be able within a reasonable period to pay the sums due or to remedy the default) if the existence and prospects of success of the claims can be regarded as enabling the sums due to be paid within a reasonable time;

(b) the (Defendants) Appellants had raised serious questions to be tried, involving fraud (perjuries) and irregularity in the exercise of the power of sale;

(c) the (Defendants) Appellants were forced out of investment business by the (Plaintiff) Respondent and had lost their ability to make profit, that gave rise to a special relationship;

(d) the whole amount of the interest would have paid by the First Appellant and had not been resulted being in arrear if the Respondent not failed to effect an

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advance payment of the interest in the amount for the full term of the loan for the purposes of investment business, i.e. upon 28 September 2017 from moneys in the sum of USD$589,362 or about standing to the First Appellant's credit in the investment account 32377 at UBS, as it was proposed by the Appellants in email sent to UBS on 9 October 2013 timed to 11:35 and 11:41 AM, which *inter alia* reads: "The possible solutions we propose to consider: A. Modifying of credit agreement and release of all 50% of mortgage amount to Junkanoo estates. The UBS can retain the future fees for the credit [the interest], insurance rates till the end of our rapport, 4 years from now, October 2017";

(e) the wrongful repudiation of the investment business on the part of the (Plaintiff) Respondent was a machination designed only to give them the right to call up the mortgage, and on default to exercise the power of sale;

(f) in the investment business the (Plaintiff) Respondent was a trustee for the first (Defendant) Appellant and acted in breach of fiduciary and trust duties.

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BETWEEN

Junkanoo Estates Ltd

First Appellant

Yuri Starostenko

Second Appellant

Irina Tsareva-Starostenko

Third Appellant

AND

UBS (Bahamas) Ltd (In Voluntary Liquidation)

Respondent

NOTICE OF APPEAL MOTION

SccAppCais No. /2018

Starostenko

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The Second and Third Defendants Pro Se
On behalf of the above-named *Appellants*

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