COMMONWEALTH OF THE BAHAMAS
IN THE COURT OF APPEAL
SCCivApp Supreme Court Civil Appeal Side

SccAppCais No. 0024/2018

BETWEEN

Junkanoo Estates Ltd

First Appellant

Yuri Starostenko

Second Appellant

Irina Tsareva-Starostenko

Third Appellant

AND

UBS (Bahamas) Ltd (In Voluntary Liquidation)

Respondent

3RD AFFIDAVIT - STATEMENT OF CLAIM & EVIDENCE TAKEN IN THE SUPREME COURT

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1. I, Irina Tsareva-Starostenko, of the Western District of New Providence Island, one of the Islands of The Commonwealth of the Bahamas, the above-named Third Appellant, in support of the Appellants submissions prepared for the hearing of 13th January 2020:

    1.1. depose hereto on the basis of my personal knowledge of the matters referred to, and the content thereof is to the best of my knowledge, information and belief true and correct, including a Statement of Claim filed in the Supreme Court against UBS clearly disclosing the fraud and irregularity and challenging the mortgage transaction itself and the validity of the exercise of the mortgagee's power;

    1.2. wish to rely on evidence taken by affidavit in the Supreme Court bearing on questions of fact involved in this Appeal exhibited to this Affidavit;

    1.3. bring before this Honorable Court by the production of office copies of these affidavits pursuant to Sub-Rule 18(a) of the Court of Appeal Rules, 2005; and

    1.4. to rely on the objection that the Respondent shall not be entitled on the hearing of the Appeal to apply for any relief not specified or to support the decision of the

Supreme Court upon any grounds not relied upon by the Supreme Court, and thereby precluded from relying on the second objection of the Notice by Respondent of Intention to Rely upon Preliminary Objection filed on 4th September 2019 regarding the grounds of appeal specified in the Notice of Appeal on the grounds that the Respondent failed to serve a respondent's notice in compliance to the provisions of Sub-Rules 20(2), 20(3) and 20(4) of the Court of Appeal Rules, 2005, and the time to do so had expired on 16th February 2018.

2. I believe that an appeal will usually proceed on the basis of the evidence as it was before the lower court and fresh evidence will generally be allowed where:

2.1. (a) it could not have been obtained with reasonable diligence for use at the trial or hearing in lower court;

2.2. (b) the evidence, if given to the lower court, would probably have had an important influence on the result of the case, although it need not have been decisive; and

2.3. (c) the evidence must be apparently credible, although it need not be incontrovertible.

3. And I believe that in relation to this Appeal the Court of Appeal draws inferences of fact and gives a judgment and makes an order which ought to have been given or made, and makes such further or other order as this case may require, having the power to do under Sub-Rule 24(3) of the Court of Appeal Rules, 2005.

Summary of the facts relied on

4. Ihis is a mortgage action, in which ares raised serious questions to be tried within the meaning of the legal principles and authority in ***Citibank, N.A. v. Major***, such as that the debt was uncertain as in ***Macleod's*** case; that the mortgage transaction was unconscionable as in ***Bowkett's*** case; that there was a question concerning the validity of

the exercise of the power of sale as in ***Clarke's*** case; that the mortgage transaction was invalid as in ***Glandore's*** case.

5. The serious questions to be tried involve either the validity of the mortgage transaction itself or fraud, which arise out of or result from operative provisions in the contract of financial service, of which UBS took advantage, which gave rise to a special relationship beyond that of mortgagor/mortgagee and in which there was statutory, equitable and contractual defence, including challenge to the validity of the mortgage, and being so, to require the jurisdiction of the Court to go to the unconscionability of the bargain which is to the manifest disadvantage of the Appellants, and therefore the whole money never became payable because there was no any default on the part of the mortgagor and the legal mortgagee was never entitled to possession of the mortgaged property.

6. There is pending action in the equity jurisdiction of the Supreme Court raised by the Appellants in September 2015, who filed a Statement of Claim against the Respondent in November 2017 (the "Statement of Claim", a copy of which is now produced and shown to me marked '**Exhibit-1**') claiming, among other things, relief from an unconscionable bargain, as a result of the Bank acting in a way which prevented the respondent from giving proper detached consideration to his independent interest in the mortgage transaction, and which involved substantial risk to him, making such conduct unconscionable, which goes to the root of the mortgage transaction itself, and highly likely it could be established that the mortgage was to the manifest disadvantage of the Appellants, taking in consideration that UBS failed to secure any witness to its case.

7. In particular, the Statement of Claim alleges that UBS had the Second and Third Appellants sign the UBS' Commitment to Finance Letter containing dense and ambiguous legalese, which UBS falsely describes as being the written version of what the Appellants have already agreed to. UBS rushed and pressured the Appellants to sign both the Commitment to Finance and the Indenture to Mortgage - part and parcel of UBS' fraudulent scheme which does not vitiate the Appellants' reasonable reliance being

secured by fraud and are otherwise tainted by Illegality - and engaged in other deceptive and coercive behavior to secure their signatures by, for example, misrepresenting and concealing the contents of the documents themselves in order to induce the Appellants to sign them. In addition to misrepresenting the contents of the documents, UBS did not give the Appellants a fair opportunity to read the documents, the contents of themselves interfered significantly with the Appellants' ability to discover the real terms of the mortgage, which has been drafted by UBS with the specific intent of misleading the Appellants of their scheme and obscuring the true nature of what they intended to do with the Appellants' money and time.

8. UBS used fraudulent practices to facilitate the mortgage, took considerable, calculated steps to falsely assure the Appellants that their trading activity will be legitimate and not in violation of securities laws of The Bahamas and the United States.

9. In particular, it is alleged and never disproved that UBS' contracting practices were tainted by procedural unconscionability in that the said UBS' documents, standardized forms drafted by UBS and/or their attorneys, were presented to Appellants Plaintiffs to sign immediately without any opportunity for negotiation and that UBS occupied a position of superior bargaining strength which understates the reality of the circumstances at the moment that Appellants were made to sign these documents. The fact that the mortgage was not subject to negotiation is evidenced, for example, by the instances in which UBS unilaterally decided to pay Appellants less than what was initially promised in order to compensate for their not received gains due to UBS' faults in servicing Appellants' trading activities.

10. In particular, it is alleged and never disproved that UBS engaged in a single, unbroken scheme and course of conduct in which they drew Appellants in by fraudulent misrepresentations and maintained that fraud through the execution of the documents-including by mispresenting the nature and content of the agreement itself. UBS' tactics have caused the money on the First Appellant's trading account were used

by UBS for unknown purposes extraneous to trading and the waste of the Appellants' time - the very things that the Appellants feared and that UBS expressly assured them would not happen.

11. In particular, it is alleged and never disproved that UBS deceived and induced the Appellants into making a disastrous investment to their forbearance, detriment, responsibility, loss or damage as a result of fraudulent misrepresentations, conspiracies, fraudulent trading and illegality on the part of UBS.

12. For example, Claim No. 6 against UBS is for rescission for illegality of certain clauses of a contract, the object of which would be to commit a tort, or a crime such as fraud on a third person or on the public, on the grounds that they were giving UBS a fraudulent preference in that UBS retains, at all material times, the money of the First Appellant as an additional security in cash as a makeweight to a security by a mortgage on real estate property in contravention of statutory provisions conferred by bankruptcy laws.

13. The Appellants have suffered financial loss and continue to suffer far-reaching and often tragic consequences. Collectively with their than minor children, they have experienced severe harassment, emotional and psychological trauma, and reputational harm; lost their professional engagement in financial trading, academic opportunities for their children and personal relationships; and had their lives derailed and uprooted.

14. UBS has sought to evade accountability for their actions by funneling the fruits of the securities crime out of jurisdiction of The Bahamas and in March 2015, days before the hearing of their summary judgment application resolved to go into voluntary liquidation.

15. Despite ample evidence of fraud and illegality alleged in the Statement of Claim, UBS has not been able to provide a single witness and it has defaulted in its undertaking arising from the oral Order made on 6th July 2019 by The Hon. Mr. Justice Ian R. Winder, in that it failed to file and exchange with the Plaintiffs witness statement(s) on or before the 23rd April 2019, and therefore it failed to disprove any allegation that the

Appellants have proven in affidavits and witness statements filed in the Supreme Court.

16. In December 2018, UBS has been granted leave to amend its Defence filed on 28th November 2017 by Order of the Court dated 10th December 2018 given by The Hon. Mr. Justice Ian Winder (a copy of which is now produced and shown to me marked '**Exhibit-2**').

17. In April 2019, UBS sought an order that the Appellants provide further particulars of their Statement of Claim after being allowed by the Supreme Court to amend its Defence.

18. On 31st July 2019, UBS applied to the Supreme Court for later trial dates arguing that the Court should give them more time to secure witnesses. That UBS' application had no legal basis either in the statute or in common law.

19. On 1st August 2019, the Respondent filed an Affidavit of Renate Raeber (a copy of which is now produced and shown to me marked '**Exhibit-6**') in support of their application for the later trial date which reads, among other things:

> *"5. I am advised by UBS counsel and verily believe that it is impractical for the trial of this Action to proceed on 23 - 27 Septembers 2019 ...*
>
> ...
>
> *8. I would point out that over the last several months,* ***UBS has faced significant challenges securing witnesses to assist its case*** *... I am advised that it is unlikely that witness statements will be finalized and filed in less than 6 weeks. This time frame of course assumes that UBS is successful in its further and better particular request ...*
>
> *9. At the moment, UBS is in the process of attempting to locate and retain expert witnesses ..."* (Emphasis added)

20. On 17th September 2019, the Appellants applied to the Supreme Court for the condition to be imposed on UBS such as the payment of US$11,281,645.00 into court to be held

until the final outcome of the case, which is a sum of money at the Prayers to Claims No.No. 1, 4, 5, 6, 7, 8 and 9 of the Particulars of Claims of the Statement of Claim.

21. The trial in the Supreme Court, the beginning of which was fixed by the Court on 23rd September 2018, was vacated, without the Appellants' application for payment into court of US$11,281,645.00 being heard.

22. On 24th September 2019, the Appellants applied to the Supreme Court pursuant to Rule 27 of the Court of Appeal Rules, 2005 for leave to appeal the Order given by the Court on the 23rd September 2019 during the 'housekeeping' hearing that the application by UBS of 31st July 2019 for later trial dates be allowed and the trial dates be vacated.

23. I truly believe that this evidence and the evidence taken in the Supreme Court raise many disputed mortgage issues, which mandated a departure from the general rule in ***Citibank, N.A. v. Major*** and there is therefore proper grounds to the Court of Appeal or the Supreme Court to interfere to deprive UBS of the benefit of its security, being engaged in an improper conduct which gave rise to this action in the presence of fraud or irregularity.

24. Also, I truly believe that the Court's duty in every instance is to do equity between the parties in this case where the validity of the mortgage transaction itself being challenged and alleged irregularity, fraud and breach of fiduciary duty on the part of UBS in order to attract the intervention of the Court.

SWORN to at New Providence, the Bahamas)

This 9th day of January, A.D., 2020) ______________________

Before Me,
NOTARY PUBLIC

COMMONWEALTH OF THE BAHAMAS
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SccAppCais No. 0024/2018

B E T W E E N

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First Appellant

Yuri Starostenko

Second Appellant

Irina Tsareva-Starostenko

Third Appellant

AND

UBS (Bahamas) Ltd (In Voluntary Liquidation)

Respondent

CERTIFICATE

I hereby certify that the following exhibits in this affidavit of Irina Tsareva sworn herein representing the Statement of Claim and evidence taken by affidavit in the Supreme Court listed and numbered herein in reverse chronological order of filling dates, except items 1 and 2:

1. Statement of Claim in action 2015/CLE/gen/No.01451 of Junkanoo Estates Ltd et. al v UBS (Bahamas) Ltd (In Voluntary Liquidation filed on 14th November 2017;
2. Order of the Court dated 10th December 2018 given by The Hon. Mr. Justice Ian Winder;
3. 26th Affidavit - civil restraint order against UBS filed on 21st October 2019;
4. 24th Affidavit - payment of US$11,281,645.00 into court filed on 17th September 2019;
5. Witness Statement of Irina Tsareva filed on 1st August 2019;
6. Affidavit of Renate Raeber filed on 1st August 2019;
7. Expert Report of Muhammad Zakir filed on 27th May 2019;
8. Affidavit of Renate Raeber filed on 17th May 2019;
9. Witness-Expert Statement of Alex Krainer filed on 24th April 2019;

10. Witness-Expert Statement of Adrienne Toghraie filed on 23rd April 2019;

11. Affidavit of Renate Raeber filed on 15th April 2019;

12. 5th Affidavit of Renate Raeber filed on 7th March 2019;

13. 2nd Affidavit of Renate Raeber filed on 1st February 2019;

14. 14th Affidavit - Reply to Second Bonaby Affidavit - Breach of undertaking - Oppression filed on 28th December 2018;

15. 2nd Affidavit of Lena Bonaby filed on 10th December 2018;

16. 12th Affidavit - Striking out paragraphs of Amended Defence filed on 3rd December 2018;

17. 11th Affidavit - Registration with Securities Commission - Contract Notes filed on 3rd December 2018;

18. 5th Affidavit - Activities in Securities - Registrations Required - Offences under Ch. 363 filed on 8th November 2018;

19. Affidavit of Lena Bonaby filed on 7th November 2018;

20. Order for consolidation of the Supreme Court dated 4th November 2017;

21. Affidavit filed on 10th April 2015 in support of Summons by the Appellants filed with the Supreme Court on 9th April 2015;

22. Summons by the Appellants filed with the Supreme Court on 9th April 2015 for an Order to vary or set aside the Order of the Court dated 23rd March 2015.

This day of January, A.D., 2020.

Before Me,
NOTARY PUBLIC

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YURI & IRINA STAROSTENKO, *pro se*
Roofless since 27 February 2018
New Providence, The Bahamas