[2021] JMCC COMM 18

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

COMMERCIAL DIVISION

CLAIM NO. 2018CD00603

BETWEEN	**SKYROCK CAPITAL LIMITED**	**CLAIMANT**
AND	**MINETT LAWRENCE**	**1ST DEFENDANT**
AND	**LOWELL LAWRENCE**	**2ND DEFENDANT**

IN CHAMBERS

Ms Terri-Ann Guyah instructed by Carolyn Reid & Co., Attorneys-at-Law for the Claimant (formerly by Captain Paul Beswick, Ms Terri-Ann Guyah and Ms Gina Chang, instructed by Ballantyne Beswick & Co)

Dr Mario Anderson, Attorney-at-Law for the Defendants

Heard: 11th December 2020; 1st and 16th June 2021

Practice and procedure - Application for Summary Judgment - Principles - Part 15. 2 (b) of the Civil Procedure Rules

Mediation clauses – Application for stay of claim in favour of mediation - Principles to be applied - Whether similar to stay in favour of arbitration – Effect if any of steps taken in the proceedings.

Promissory note - Validity - Defences - requirement of stamping - Whether claim based on promissory note or whether promissory note is being used as supporting evidence only

LAING, J

The background

[1] The Claimant (referred to sometimes as “Skyrock” where contextually appropriate), is a company duly incorporated under the laws of Jamaica.

[2] The Defendants held shares directly in a company named Symbiote Investments Limited (“Symbiote”) and were also shareholders in a St Lucian company named Nary Singh LLC which was itself a shareholder in Symbiotie.

[3] On the 3rd July 2017 the Claimant, the Defendants and other entities signed a Non-Disclosure, Non-Circumvention, and Non-Competition Agreement (“the Non-Disclosure Agreement”).

[4] On 30th August 2017, an agreement, (“the Agreement”) was executed. The recitals stated that it was between the Claimant and “Minette Lawrence & Lowell Lawrence, both being officers and shareholders of Symbiote Investments Limited”. Symbiote was defined as “the Company” in the recitals.

[5] The execution clause shows that it was signed and sealed by Winston Finzi, Director for and on behalf of the Claimant, signed and sealed by Minette Lawrence Secretary for and on behalf of Symbiote Investments Limited and Shareholder Nary Singh LLC, and signed and sealed by Lowell Lawrence, Director for and on behalf of Symbiote Investments Limited and shareholder Nary Singh LLC.

[6] On the face of the Agreement, it is not patently clear that the Defendants purported to execute it in their personal capacities. This Application proceeded on the basis that the Claimant and Defendants are proper parties to the Agreement. For this reason, I will continue on the understanding that this is an accepted position and references to the parties herein are references to the Claimant and the Defendants unless otherwise specified. I would also note that there was no company seal of either Symbiote or Nary Singh LLC affixed. However, no issue of due execution was raised presumably because the claim at its core is to recover moneys which

were alleged to have been paid on behalf of the Defendants and for which they derived a benefit.

[7] In the Agreement, the Company, (as distinct from the Defendants), made a number of representations and warranties, including, pursuant to Clause 4:

> *The Company and the two specified Officers and shareholders of the Company being signatories herein, are duly authorized to enter into this Agreement for the purposes contemplated herein, and are under no impediment that would preclude or prevent it from performing any of the obligations set out hereunder. The Company will not by entering into this agreement, be acting in breach of or contrary to any applicable law or regulation and that it otherwise has the requisite legal, functional, and other capacity to undertake or perform the said transfers, appointments and actions hereunder and that it will all times be in full compliance with all statutory and regulatory regimes.*

[8] Paragraph11 of the Agreement provided as follows:

> *11. This Agreement represents a binding commitment by the Parties that the Company, having signed this Agreement, has offered to Skyrock an irrevocable option to purchase 39.001% of the Officer's joint and several legal and beneficial interest in the Company. In consideration for this Option, Skyrock will pay such sums, in such ways and in such manner as detailed in the Letter of Interest attached hereto. Minett Lawrence and Lowell Lawrence herein, jointly and severally warrant and agree that their legal and beneficial interest as detailed in Schedule II, will be so allocated so as to cause Skyrock to obtain derive [sic] the 39.001% shareholding in the Company which must be ratified concomitantly to the signing of this Agreement.*

[9] The Agreement also provided at paragraphs 10 and 13 as follows:

> *"10. …Without limiting the generality of the foregoing, the Proposed Acquisition will be contingent upon, among other things, (i) successful completion of legal, financial, commercial and technical due diligence, (ii) satisfactory review of any litigation or regulatory issues, threatened or otherwise, (iii) execution and delivery of Transaction Documents and other satisfactory legal documentation, and (iv) negotiation of a complete acquisition of the entity providing Skyrock exercises such option.*
>
> *…*
>
> *13. As a condition precedent to this Agreement coming into force, the Directors of the Companies shall cause the following to be executed:-*
>
> *(a) The Share Transfer Certificates to be signed:*

(b) The Letter of Intent to be signed and

(c) To sign any supplementary documentation that will give effect to the performance by any party of any action as contemplated by the Letter of Intent and this agreement;"

[10] The Letter of Intent was signed by the Defendants on 30th August 2017 which was the same date on which the Agreement was executed. The Agreement at schedule 1 thereto exhibits the Letter of Intent. The Letter of Intent at clause 2 provides as follows:

> *Payment. It is understood that the National Commercial Bank (Jamaica) Limited has an outstanding mortgage on the private residence of Minett and Lowell Lawrence. Upon signing this agreement, there shall be an immediate payment of JM$38,500,000.00 from Skyrock to Minett Lawrence from which NCB's mortgage will be settled in exchange for the release of the title to Skyrock; and Skyrock will hold the title pending repayment by Minett Lawrence from the proceeds of sale herein. Skyrock shall be at liberty to (1) register a caveat on the property for its equitable interest; (2) register a mortgage on the said title for the JM$38,500,000 at an interest rate of 19% per annum, and/or (3) prepare an Agreement for Sale which you irrevocably agree to execute for the benefit of Skyrock and/or their nominee. Concomitantly with this agreement, you will execute a Promissory Note for the amount of JM$38,500,000.*
>
> *The amount of US$10 million will be paid in accordance with the following schedule:-*
>
> | ***Amount USD*** | ***Due Date For Payment*** | ***Balance*** |
> |---|---|---|
> | *$1,500,000.00* | *pending payment of deposit by GOJ in separate transaction* | |
>
> *The Balance being US$8.5 Million less the funds detailed in the promissory note, will be paid on a schedule to be negotiated in good faith by the Parties, provided that the period shall not exceed 12 months, after the payment of the US $1.5 Million deposit, without the provision of appropriate security. You specifically agree that with regards to payment time shall not be of the essence in the performance of this contract, but the parties will act in good faith to ensure that payments are made as soon reasonably practicable."*

[11] The Letter of Intent provides that Skyrock is prepared to begin due diligence with respect to the proposed acquisition of the shares in Symbiotie and its affiliates on the execution of the Letter of Intent and The Agreement by all Shareholders and

relevant parties. This explains in part the form of the execution clause in The Agreement to which I have earlier referred.

[12] The Letter of Intent at clause 3 contains an indemnification clause by which the Defendants agreed to indemnify and hold harmless Skyrock and other affiliated parties from and against any and all direct losses, claims, damages, liabilities and other expenses in certain circumstances. The Claimant also agreed to indemnify and hold harmless the Defendants in like manner. It also provides as follows:

> *… Further you hereby agree to wholly indemnify Skyrock should they decide, after conducting the due diligence exercise to withdraw from this agreement, whereupon any and all monies paid shall become a debenture on the Company and you will also be liable jointly and severally to Skyrock for the repayment of any and all sums you have received.*

[13] It is undisputed that the parties also executed a promissory note dated 30th August 2017, pursuant to which the Defendants promised to pay the Claimant the sum of $38,500,000.00 upon demand with all sums remaining unpaid as at the date of demand attracting interest at the rate of 19 percent per annum in addition to other specified charges ("the Promissory Note").

[14] There is also no dispute between the parties as to the fact that the Defendants by letter dated 30th August 2017, instructed the Claimant to pay to the National Commercial Bank (Jamaica) Limited ("NCB") the sum of $36,000,000.00. This was in return for NCB handing over the duplicate Certificate of Title to property comprised in Certificate of Title registered at Volume 1355 Folio 834 of the Register Book of Titles in the name of Minett Palmer nee Lawrence ("the Property"), as well as the Discharge of Mortgage to Messrs Ballantyne Beswick & Co.

[15] It is likewise undisputed that the Defendants also instructed the Claimant by a letter dated 30th August 2017 to deposit the sum of $2,500,000.00 to an NCB account in the name of both Defendants.

[16] The monies were paid to NCB as per the Defendants' instructions and on 5th September 2017 NCB sent the duplicate Certificate of Title for the Property and the duly executed Discharge of Mortgage form to Messrs Ballantyne, Beswick & Co.

The Claim as originally filed

[17] As a general rule it is the amended Statement of Case of a litigant which is of primary importance. In this case the development of the pleadings is helpful in understanding the current issues which fall for determination. The Claimant by its Claim Form filed on 12th November 2018, claimed against the Defendants jointly and severally. This was for payment of the sum of $55,001,418.48 being the sum owed pursuant to the terms of the duly stamped promissory note dated 30th August 2017 for the amount of $38,500,000.00 ("the Promissory Note"), payable with interest of 19 percent per annum on amounts unpaid from the 31st of August 2017 along with Collector's Fees of 15 percent of the total sum owed, Court Costs, Attorneys Fees and Fixed Costs.

The 9th January 2019 Defence

[18] The Defendants denied that they jointly borrowed money from the Claimant for their personal benefit. They asserted that the parties executed a "*binding letter of intent*" pursuant to which the Claimant was liable to pay the Defendants a deposit in the sum of US$1,500,000.00 and it was agreed that the sum of $38,500,000.00 would have been disbursed on the Defendants' instructions. The Defendants also averred that the Promissory Note was fully satisfied on the 31st day of August 2018 in accordance with its terms which stipulated that same would be satisfied on execution of the agreement for sale of shares. The Defendants contend that the agreement to purchase the shares was signed by both parties on August 31, 2018. The Defendants also put the Claimants to proof that the Promissory Note is valid.

The Amended Claim

[19] By an Amended Claim Form Filed 26th July 2019, the Claimant pleaded that the sum of $55,001,418.48 was owed pursuant to the terms of the Agreement "*and which is supported by the Promissory Note*". It is not clear whether the Amended Particulars of Claim is purporting to assert separate claims based on a breach of the Agreement and/or in the alternative a breach of the Promissory Note. This raises the question as to what is the meaning of the words "*and which is supported by the Promissory Note*" and I will return to this issue later in this decision.

[20] The Claimant also claims a declaration that it holds an equitable interest in property being all that parcel of land part of Constant Spring in the parish of Saint Andrew, comprised in Certificate of Title registered at Volume 1355 Folio 834 of the Register Book of Titles and registered to Minett Palmer, the 1st Defendant, ("the Property") in the amount of $38,500,000.00 with interest of 19 percent per annum as of 30th August 2017. The Claimant also seeks an order for sale of the Property and other consequential relief as well as costs.

The Defendants' application for a stay of these proceedings

[21] The Defendants have applied for a stay of these proceedings. The Defendants' application is founded on the Agreement, paragraph 22 of which provides as follows:

> *22. If any dispute shall arise in respect of any provision contained in this agreement, then such dispute shall:-*
>
> *(a) in the first instance be referred to the senior partner/s having not less than ten (10) years experience in commercial law of the firm of attorneys Ballantyne, Beswick and Company and of the firm representing the Companies for their joint deliberation and resolution;*
>
> *(b) if there is no resolution amongst the parties using the aforesaid method then the matter be referred to an agreed Mediator at the Dispute Resolution Foundation who, in determining such dispute shall, if the mediator deems it necessary, be entitled to receive oral or written representations from the parties. The parties shall jointly nominate the mediator provided that if the parties shall be unable to agree then the parties agree that the Mediator*

> *shall be selected by the Dispute Resolution Foundation or the President of the Jamaica Bar Association. It is the intention of the parties that any dispute referred for resolution under this clause shall be resolved expeditiously and in any event within fourteen (14) days of the date of the dispute being raised.*

[22] Section 11 of the Arbitration Act of 2017 provides as follows:

> *11(1) A court before which an action is brought in a matter which is the subject of an arbitration agreement shall, if a party so requests not later than when submitting his first statement on the substance of the dispute, refer the parties to arbitration unless it finds that the agreement is null and void, inoperative or incapable of being performed.*

[23] In the English Court of Appeal case of ***Channel Tunnel Group Ltd and another v Balfour Beatty Construction Ltd and others*** [1992] 2 All ER 609; the Court had to consider whether it had the power to order a stay of a claim where the relevant contract contained a provision for disputes to be settled by arbitration after an initial reference to a panel of experts and such a required preliminary reference had not been made. The Court held that although a contract contained an arbitration clause but provided for some preliminary step to be taken before there was an arbitration, the fact that the preliminary step had not been taken did not prevent the court from ordering a stay under s 1 of the 1975 Act.

[24] ***Section 1 of the English Arbitration Act***, ***1975*** so far as material, provides:

> *'(1) If any party to an arbitration agreement to which this section applies … commences any legal proceedings in any court against any other party to the agreement … in respect of any matter agreed to be referred, any party to the proceedings may at any time after appearance, and before delivering any pleadings or taking any other steps in the proceedings, apply to the court to stay the proceedings; …*
>
> *(2) This section applies to any arbitration agreement which is not a domestic arbitration agreement; …'*

[25] In the ***Channel Tunnel*** case (supra) the reference was to a panel of experts and not mediation. However, the operative portion of the clause which grounded the application for the stay was in respect of the arbitration.

[26] It must be appreciated that clause 22 of the Agreement is not an arbitration clause and there is no equivalent legislation to section 11(1) of the Arbitration Act of 2017. However, Counsel submitted that a mediation agreement is similar to an arbitration agreement in that it is a contractual basis for the parties to resolve their dispute. Accordingly, in the absence of a specific statutory regime the Court ought to adopt a similar approach.

[27] Counsel relied on the observations of Colman J in **Cable & Wireless Plc v IBM United Kingdom** [2002] All ER (D) 277

> *The reference to ADR is analogous to an agreement to arbitrate. As such, it represents a free-standing agreement ancillary to the main contract and capable of being enforced by a stay of the proceedings or by injunction absent any pending proceedings. The jurisdiction to stay, although introduced by statute in the field of arbitration agreements, is in origin an equitable remedy. It is further a procedural tool provided for under CPR 26.4 to encourage and enable the parties to use ADR. In the Commercial Court it is rare for proceedings to be stayed. The normal practice in this court is to adjourn the proceedings or to extend time limits or, more usually, to space out the case management timetable to allow a limited period during which ADR can be attempted: see Commercial Court Guide, (2002 edition) section G7. However, the availability of the remedy whether of a stay or an adjournment or other case management order must be a matter for the discretion of the court.*
>
> *How ought the discretion to be exercised in the present case?*
>
> *On the face of it, there can be no doubt that C&W has declined to participate in any ADR exercise. As such it is in breach of clause 41.2. IBM is thus at least prima facie, entitled to the enforcement of the ADR agreement. However, given the discretionary nature of the remedy it is important to consider what factors might also be relevant to the way in which the court's discretion should be exercised. Analogously to enforcement of a reference to arbitration, strong cause would have to be shown before a court could be justified in declining to enforce such an agreement. For example, there may be cases where a reference to ADR would be obviously futile and where the likelihood of a productive mediation taking place would be so slight as not to justify enforcing the agreement. Even in such circumstances ADR would have to be a completely hopeless exercise.*

[28] The learned judge did not directly address the consequence of a litigant taking a step in the proceedings and whether a similar approach should be taken by the court as in the case of an arbitration clause. As it relates to taking a step in the

proceedings, in the ***Eagle Star Insurance Co Ltd v Yuval Insurance Co Ltd*** [1978] 1 Lloyd's Rep 357, Lord Denning MR put the principle in this way at p 361:

> *"On those authorities, it seems to me that in order to deprive a defendant of his recourse to arbitration a "step in the proceedings" must be one which impliedly affirms the correctness of the proceedings and the willingness of the defendant to go along with a determination by the Courts of law instead of arbitration".*

[29] I am of the view that a similar approach should be taken. The application for stay is a discretionary remedy and the Defendants having committed to the Court process ought not to at this stage be permitted to resile from their position and revert to the ADR procedure.

Conclusion on the application for a stay

[30] Having regard to the foregoing, the Court concluded that there was no proper basis for a stay of the Claim and the Defendants' Notice of Application was dismissed.

The Summary Judgment application

[31] By a Notice of Application filed 22nd January 2019 the Claimant seeks Summary Judgment on the Claim and seeks the reliefs which are prayed for in its Amended Claim Form and the following orders:

*(a) "Summary judgment in favour of the Claimant on their entire claim of **J$55, 001, 418.48**, as at the date of filing, being November 12, 2018 and interest of **J$28, 630.88** accruing per diem till the date of payment;*

(b) A declaration that the Claimant holds an equitable mortgage over ALL THAT parcel of land part of CONSTANT SPRING situated in the parish of SAINT ANDREW, being the land comprised in Certificate of Title- Volume 1355 Folio 834 registered to Minett Palmer in the amount of $38, 500, 000 with interest at 19% per annum as of August 30, 2017;

(c) The Claimant is hereby granted an Order for sale for ALL THAT parcel of land part of CONSTANT SPRING situated in the parish of SAINT ANDREW, being the land comprised in Certificate of Title - Volume 1355 Folio 834 registered to Minett Palmer as Mortgagee to recover their mortgage proceeds and expenses thereto;

(d) That the Registrar of the Supreme Court be empowered to sign any document with respect to the sale of the said property;

(e) That Ballantyne, Beswick & Company retain Carriage of Sale of the property herein and shall supply such accounting to the Defendants herein as Mortgagors;

(f) Liberty to apply;

(g) Costs of this application and of the claim to the Claimant;

(h) Such further order/s as this Honourable Court deems fit."

[32] The Claimant in its application for summary judgment relies on ***CPR 15.2 (b)*** which provides as follows:

> *The court may give summary judgment on the claim or on a particular issue if it considers that-*
>
> > *(b) the defendant has no real prospect of successfully defending the claim or the issue.*

[33] I will adopt the guidance given in ***Swain v Hillman*** [2001] 1 All ER 91 at page 92, where Lord Woolf MR in considering the equivalent provision to our CRP 15. 2 said:

> *'Under r 24.2, the court now has a very salutary power, both to be exercised in a claimant's favour or, where appropriate, in a defendant's favour. It enables the court to dispose summarily of both claims or defences which have no real prospect of being successful. The words "no real prospect of succeeding" do not need any amplification, they speak for themselves. The word "real" distinguishes fanciful prospects of success or, as Mr Bidder QC*

> *[counsel for the defendant] submits, they direct the court to the need to see whether there is a "realistic" as opposed to a "fanciful" prospect of success.'*

The learned Judge is often quoted for his equally important guidance at page 95 where he stated the following:

> *Useful though the power is under Pt 24, it is important that it is kept to its proper role. It is not meant to dispense with the need for a trial where there are issues which should be investigated at the trial. As Mr Bidder put it in his submissions, the proper disposal of an issue under Pt 24 does not involve the judge conducting a mini-trial, that is not the object of the provisions; it is to enable cases, where there is no real prospect of success either way, to be disposed of summarily.*

The claim for breach of The Agreement

[34] The Claimant avers in paragraph 4 of its Amended Particulars of Claim that the parties entered into the Agreement for the sale of 39.001% of the shares in Symbiote Investments Limited. The Agreement was "*duly signed*" by the parties on 30th August 2017, it was never "*executed nor brought into effect*" due to the failure of the Defendants to adhere to paragraphs 10 and 13. Paragraph 10 provided that:

> *10. "Skyrock is prepared to begin due diligence with respect to the Proposed Acquisition on execution of this Agreement by the two (2) Shareholders. The Proposed Acquisition is subject in all respects to the negotiation, execution and delivery of definitive acquisition documentation, financing agreements and security documents, guaranties and other agreements, instruments and documents that both Parties consider necessary or advisable, in each case in form and substance reasonably satisfactory to both Parties and containing such other terms and provisions as are customary for transactions of this type (collectively, the "Transaction Documents"). Without limiting the generality of the foregoing, the Proposed Acquisition will be contingent upon, among other things, (i) successful completion of legal, financial, commercial and technical due diligence, (ii) satisfactory review of any litigation or regulator issues, threatened or otherwise, (iii) execution and delivery of Transaction Documents and other satisfactory legal documentation, and (iv) negotiation of a complete acquisition of the entity providing Skyrock exercises such option."*

[35] Paragraph 13 of the Agreement which has previously been quoted at paragraph 9 herein, provided a condition precedent to the Agreement coming into force. This was that the Directors of "the Companies" shall cause the Share Transfer

Certificates and Letter of Intent to be signed and to sign any supplementary documentation that will give effect to the performance by any party of any action as contemplated by the Letter of Intent and the Agreement.

[36] The Claimant avers in its Amended Particulars of Claim at paragraph 10 that despite repeated requests by the Claimant for performance by the Defendants, the Defendants failed to properly execute and deliver the Share Transfer Certificates. As a consequence, the Agreement therefore never came into force and the Promissory Note remains valid.

[37] The Claimant further pleads in its Amended Particulars of Claim as follows:

> *12. That the Claimant has no way of completing due diligence and due to the material breaches committed by the Defendants, the Claimant cannot complete the intended acquisition; as the Defendants do not have any shares to sell. Less than **TWO (2) MONTHS** after the agreement of August 30, 2017 was entered into by the Defendants with the Claimant, they pledged their shares in Symbiote, both the Defendants being the Company Secretary and Director Respectively of the entity, Symbiote Investments Limited, by executing a Notice to the Registrar of Companies dated October 25, 2017 indicating that 85,000 shares were transferred from Narysingh Limited to Involution Limited, 500 ordinary shares to Banhyl LLC on December 1, 2017 and 1000 ordinary shares were transferred to Paul Hoo on or before March 23, 2018. That this represents over 90% of their holdings in the entity. (reproduced without underlining).*

[38] The Claimant therefore asserts that the Defendants failed due diligence and are in breach of the Non-Disclosure Non-Circumvention and Non-Competition Agreement dated the 3rd of July 2017 which was expressly agreed to in the Agreement and later signed by the Defendants. It is also asserted that the Defendants are in breach of paragraph 16 of the said Agreement.

[39] The Claimant relies on its assertion that it terminated the Agreement by 'Notice of Material Breach of Agreement and Notice of Failure of Due Diligence by Symbiote Investments Limited'. It further asserts that the Notice of Material Breach of Agreement and Notice of Failure of Due Diligence by Symbiote Investments Limited required the Defendants to sign a Mortgage Agreement in

accordance with paragraph 15 of the Agreement and paragraph 2 of Schedule I thereof which is the Letter of Intent.

[40] Therefore, the main plank of the Claim is that the Defendants have failed to properly execute and to deliver the Sale Purchase Agreement by failing to sign the Share Transfer Certificates and further for the reasons specified in the '*Notice of Material Breach of Agreement and Notice of Failure of Due Diligence by Symbiote Investments Limited*'. The Claimant also asserts that even if the Share Transfer Certificates were executed they would be of no value to the Claimant, as the shares no longer belong to the Defendants herein.

[41] Ms Guyah has also submitted that it is a matter of public record evident from the case of ***Symbiote Investments Limited v Minister of Science and Technology*** [2019] JMCA App 8 that Symbiote is no longer the holder of a telecommunications licence and the shares are in any event in a company of a different character than was contemplated by the Agreement and the transaction it was intended to support. This is because the Claimant had a specific interest in acquiring the shares as held by the Defendants of a cellular company which professed to hold certain licenses and warranted such. Counsel further submitted that the Claimant should not be forced to accept substituted assets that it did not agree to or want to acquire.

The Defence

[42] I have earlier raised the question as to what is the significance of the Promissory Note in the context of the Claim. This Claim is for money owed pursuant to the terms of the Agreement "*and which is supported by the Promissory Note*". This raises the issue as to whether this is a claim on the Promissory Note or whether its execution is being used as evidence supportive of the Agreement. In adopting a conservative approach giving the Claimant the benefit of the doubt for purposes of this application I will examine the defences to a promissory note on the

assumption that this Claim constitutes an independent claim on the Promissory Note.

Defences to a claim on a promissory note

[43] Promissory notes in Jamaica are governed by the ***Bills of Exchange Act***, section 83 of which defines a promissory note as:

> *"…an unconditional promise in writing, made by one person to another, signed by the maker, engaging to pay, on demand or at a fixed or determinable future time, a sum certain in money, to or to the order of a specified person, or to bearer."*

[44] *Section 89 of the* ***Bills of Exchange Act*** provides as follows:

> *" 89 – (1) Subject to the provisions in this Part, and except as by this section provided, the provisions of this Act relating to bills of exchange apply, with the necessary modifications, to promissory notes…."*

[45] It is important to note that the only defences to an action on a bill which is accepted as genuine are that it has been obtained by fraud or illegality or where there has been a total failure of consideration, see ***Wayne Chen v Tiksi International Management Inc.*** *[2015] JMCA App 14*

Is the promissory note valid?

[46] The Defendants are challenging the validity of the Promissory Note. The Defendants seek to rely on sections 35 and 36 of the ***Stamp Duty Act*** which provide as follows:

> *"35. The Commissioner shall not stamp any inland or foreign bill of exchange, or promissory note, or foreign bill of lading, after the lapse of seven days from the execution thereof, or any coast-wise receipt, or inland bill of lading after the execution thereof.*
>
> *36. No instrument, not duly stamped according to law, shall be admitted in evidence as valid or effectual in any court or proceeding for the enforcement thereof."*

[47] Counsel has relied on the Court of Appeal case of ***Garth Dyche v Juliet Richards and Michael Banbury*** [2014] JMCA Civ 23 in which the appeal arose from the

decision of a Judge of the Supreme Court after a preliminary objection was raised by a respondent before the commencement of the trial in relation to the admissibility of a document entitled "promissory note". The learned judge ruled that the document was not adequately stamped, had no evidentiary effect and could not be relied on as a Promissory Note. In that case there was no dispute that the document was stamped in breach of section 35 of the Stamp Duty Act because it was not stamped until some 4 years after it was executed. The Court of Appeal confirmed that by virtue of this breach the document was not admissible in any court proceeding as a valid promissory note to enforce it, pursuant to section 36 of the Stamp Duty Act.

[48] In this case it is not necessary for me at this stage to decide whether the Promissory Note is valid and enforceable and I will decline to make such a finding.

[49] Ms. Guyah submitted that the Promissory Note has in fact been stamped and that the Claimant would at trial be entitled to rely on the provisions of section 50 of the ***Stamp Duty Act***, the material portion of which, (for purposes of this Application) provides as follows:

> *"Every person who issues, endorses, transfers, negotiates, presents for payment, or pays any bill of exchange, or promissory note liable to duty, and not being duly stamped, shall incur a fine or penalty not exceeding one hundred dollars and the person who takes or receives from any other person such bill or note, either in payment, or as security, or by purchase, or otherwise, shall not be entitled to recover thereon, or to make the same available for any purpose whatever, except that the same may be used for the purposes of evidence on payment of the stamp duty payable thereon, together with a penalty equal to the stamp duty payable thereon, which penalty shall be in lieu of the penalty imposed by section 32:*
>
> *…*

[50] In explaining the effect of section 50 Phillips J A at paragraph 54 of ***Garth Dyche*** (supra) made the following observations:

> *[54] The wording of section 50 indicates that it does not amplify nor repeal section 36. It therefore still remains that a document thus described in that section could not be admitted in evidence in order to recover on or enforce it. What, in my opinion, section 50 does, however, allow, is that on payment*

> *of the required stamp duty and a fine and/or penalty, the document may be used for the purposes of evidence. By virtue of this section, a person in the appellant's position is able to say, "This document is corroborative of an agreement I had with the deceased. I know seek to tender it." It is my view that in so far as the learned judge failed to appreciate this, he fell into error.*

[51] In this Claim, there has been no pleading by the Defendants that the Promissory Note has been procured by fraud. The Defendants assert in their Defence that the Promissory Note was fully satisfied on 31st August 2018 in accordance with its terms because the Share Purchase Agreement was executed by the parties on 31st August 2018.The Defendants aver that the parties intended to, and used the Promissory Note as interim security to cover the disbursement by the Claimant for the period between 30th August and 31st August 2018 when the Share Purchase Agreement was executed.

[52] In his affidavit filed on 12 June 2019, the second Defendant averred in paragraph 8 that he and the 1st Defendant signed the Share Purchase Agreement, the Transfer of Shares form and the Escrow Agreement which were scanned and e-mailed to Mr Finzi, Mr Omar Guyah and Mr Paul Beswick. The 2nd Defendant also asserted that the signed originals were to be held by Mr Beswick as the escrow agent once he signed the escrow agreement but the 2nd Defendant asserted that he was yet to receive the signed escrow agreement.

[53] In paragraph 7 of his affidavit filed 13th June 2019 in response to paragraph 8 of the 2nd Defendant's affidavit to which I have referred, Mr Finzi conceded that the Promissory Note would not be enforceable if the Share Purchase Agreement was executed, however he stated that up to the date of serving the Notice of Material Breach of Agreement, no Transfer of Shares Form and no Escrow with Recission Agreement was received from the Defendants. He averred that there was no email which was received whether on the 1st September 2017 or at any other time from either of the Defendants with these documents.

[54] The Claimant acknowledges that the Promissory Note provides as follows:

> *"… that the said Promissory Note shall be deemed satisfied in full and of no further legal effect on the date of the execution of the Share Purchase Agreement between the parties".*

However, it is the Claimant's case as pleaded at paragraph 7 of its Particulars of Claim that as at the date of filing of the claim "…*there has been no Share Purchase Agreement and the shares contemplated by the said Share Purchase Agreement have been surreptitiously transferred to a third party by the Defendants herein, in breach of their agreements with the Claimant herein*."

[55] In its written submissions filed 11th June 2019, at paragraph 2 the Claimant stated the following as one of the grounds in support of the application for summary judgment:

> *"…c) The Defendants in their Defence have referred to an Agreement for Sale of the Shares which was duly signed by the parties on August 30, 2017, however that have failed to advise this Honourable Court that the Agreement was never executed nor brought into effect due to the failure of the Defendants to adhere to the terms of the said Agreement."*

[56] At paragraph 21 of the submissions the Claimant developed this point and posited as follows:

> *"21. The Defendants have referred to the Agreement for Sale of the Shares which was duly signed by the parties on August 30, 2017, however they have failed to advise this Honourable Court that the Agreement was never fully executed nor brought into effect due to the failure of the Defendants to adhere to paragraph 13 of the said Agreement …"*

What is the Share Purchase Agreement and was it executed?

[57] I have not identified in the suite of documents a reference to "the share purchase agreement between the parties" save and except for in the Promissory Note. Counsel for the Claimant has submitted that it was the intention of the parties that such a document would have been a separate and distinct agreement that would have been subject to the due diligence process. Counsel for the defendants has submitted that the share purchase agreement to which reference is made in the Promissory Note is in fact the Agreement.

[58] Dr Anderson submitted that the Agreement constitutes a valid share purchase agreement because it contains all the elements that are necessary for that agreement to be workable. He submitted, that it constitutes an irrevocable option to purchase shares, it identifies the shares and the number of shares, the price for the shares, the procedure for payment and remedies in the event of failure to complete the Agreement. These submissions of Counsel for the Defendants is consistent with the Defence of the Defendants. However, the assertion by the Second Defendant in his affidavit filed on 12th June 2019, that he and the 1st Defendant signed the Share Purchase Agreement, the Transfer of Shares form and the Escrow Agreement which were scanned and e-mailed to Mr Finzi, Mr Omar Guyah and Mr Paul Beswick, confuses the issue. This is because this assertion seems to contradict the assertion in the Defence that the Agreement was in fact the Share Purchase Agreement referred to in the Promissory Note.

[59] Based on my preceding analysis, I have formed the opinion that this issue as to what was the "*Share Purchase Agreement*" referred to in the Promissory Note and whether such a "*Share Purchase Agreement*" was executed is an issue which cannot be properly explored and resolved in the context of this Summary Judgment application and is an issue best left for the trial.

[60] In the context of the Amended Claim an issue arises as to how the Promissory Note ought to be treated if it is being deployed only as a document supporting the Agreement. The Court will have to consider whether the Claimant will be able to have recourse to section 50 of the ***Stamp Duty Act*** as Ms Guyah has suggested may be necessary. This is by no means a straightforward issue and it requires more mature consideration adequately suited for analysis within the context of a trial and not during a summary judgment application.

Breach of the Agreement

[61] The Claimant has complained that the Defendants in their Defence have failed to bring to the Court's attention the fact that the Agreement was terminated by the

Claimant on the 28th August 2018 by '*Notice of Material Breach of Agreement and Notice of Failure of Due Diligence by Symbiote Investments Limited*' by reason of the Defendants' breaches. The breaches which are being relied upon by the Claimant, as contained in the said notice include the Defendants doing the following:-

> *a. Committing a material misrepresentation of the shares held in Symbiote and fraudulently inducing Skyrock to enter into said agreement contravening paragraphs (8) and (11);*
>
> *b. Failing to carry out your [the Defendants'] obligations in an efficient and timely manner, and also in good faith in accordance with the letter and spirit of this Agreement in breach of paragraph (6);*
>
> *c. Willfully (sic) altering the share capital of the company contrary to paragraph (14) (d); and*
>
> *d. Despite written requests for disclosure of company documents you [the Defendants] have failed to supply same.*

[62] The Claimant has not specifically pleaded but in its submissions relies on paragraphs 15 and 16 of the Agreement which provides as follows:

> *"15. This investment is entirely conditional on the company successfully passing the Due Diligence exercise which will be undertaken in keeping with paragraph 11 of the Non-Disclosure, Non-Circumvention and Non-Competition Agreement dated July 3, 2017 signed between the parties. Should the companies fail due diligence, as determined solely by an independent auditor or financial analyst appointed by Skyrock, at the Company's expense, any investment made in furtherance of this Agreement, shall be converted to a mortgage and will be a debenture chargeable against the companies effective from the date of disbursement hereof, without further notice to the parties. Interest shall accrue from the date of disbursement at the rate of nineteen percent add-on per annum and the directors and shareholders of the companies, at the time of signing this agreement, with the exception of Skyrock, shall be jointly and severally liable, with the Companies.*
>
> *16. This agreement being executed without the completion of Due Diligence will be subjected to such date of execution of the Letter of Intent wherein Skyrock will be at liberty to convert any monies invested, as a Debenture on the company and the current Directors and Shareholders at the time of signing this agreement will be jointly and severally liable."*

[63] There is no issue joined between the parties as to the fact that the due diligence process was not completed. At the heart of the Claimant's case is its assertion that the Defendants have not done all that they were supposed to do in facilitating the process in accordance with the Agreement. The position of the Defendants is that they have satisfied all the conditions precedent as per clause 12 of the Agreement and are willing and able to complete the Agreement. Furthermore, the Defendants have said that they "requested the Claimant to attend its office (sic) to complete due diligence which they have failed to do".

[64] Ms. Guyah submitted that the fact that the due diligence was not completed is sufficient evidence of a breach of the Agreement by the Defendants. I respectfully disagree. The reasons for the due diligence process not being completed is unclear and there are counter allegations in this regard. In my opinion these are issues of fact which ought properly to be resolved at a trial.

[65] Another main plank of the Claimant's case is the fact that shares in Symbiote have been transferred to 3rd parties in breach of the Agreement. These transfers must be viewed in the context of the Defendants' assertion that they remain in a position in which they are ready and able to have the shares transferred to the Claimant in accordance with the Agreement. Ms.Guyah submitted that this is a bare assertion by the Defendants which is not substantiated by evidence as to how it is that they are in such a position. I am not of the view that the Defendants need to support that assertion at this stage with detailed evidence of the manner in which they are still able to exercise control over those shares. There are numerous legal tools for example a declaration of trust, by which the Defendants may still have control over those shares and it is not necessary to go behind their assertion in this regard. I am reminded of the observations of Lord Woolf MR in ***McPhilemy v Times Newspapers*** [1999] 3 All ER 225. In that case he supported the position that in the modern era of witness statements, there is no longer the necessity for extensive and fully particularized pleadings so long as the pleadings identify the issues, the extent of the dispute between the parties and the general nature of the case of the party which is pleading. The issue of whether the Defendants still

exercise sufficient control over the shares so as to be able to make them available is not an appropriate issue for determination in the context of a summary judgment application.

[66] Whether the transfers to the 3rd parties without more are a breach which would in any event entitle the Claimant to relief is also an issue which in my opinion is best resolved at trial. Similarly, the issue of whether the loss of the telecommunications licence previously held by Symbiote has changed the character of its shares and the Claimant ought not to be required to accept them without that asset is an issue which can only be properly addressed at trial.

The Claim for an equitable mortgage

[67] In the case of ***Swiss Bank Corporation v. Lloyds Bank Ltd.*** [1982] A.C. 584 the court commented on the origin of an equitable charge and equitable mortgage as follows at page 594:

> *"An equitable charge may, it is said, take the form either of an equitable mortgage or of an equitable charge not by way of mortgage.* ***An equitable mortgage is created when the legal owner of the property constituting the security enters into some instrument or does some act which, though insufficient to confer a legal estate or title in the subject matter upon the mortgagee, nevertheless demonstrates a binding intention to create a security in favour of the mortgagee, or in other words evidences a contract to do so:*** *see* Fisher and Lightwood's Law of Mortgage*, 9th ed. (1977), p. 13. An equitable charge which is not an equitable mortgage is said to be created when property is expressly or constructively made liable, or specially appropriated, to the discharge of a debt or some other obligation, and confers on the chargee a right of realisation by judicial process, that is to say, by the appointment of a receiver or an order for sale: see* Fisher and Lightwood*, p. 13…"*

[68] The Promissory Note is not referable to the Property and therefore cannot independently form the basis of a claim for an equitable interest in the Property. The Claimant is therefore relying on the effect of the Agreement and its payment of funds on the instructions of the Defendants to ground its claim for a beneficial interest.

[69] However, the Defendants on 30th August 2017 executed a letter in which, for receipt of the sum of JMD $36 million from the Claimant, authorized the bank to give the Duplicate Certificate of Title in respect of the Property and the Discharge of Mortgage thereto, to Ballantyne, Beswick & Company. The letter further stated that Ballantyne, Beswick & Company shall retain said security and discharge on such terms as contemplated by our agreement.

[70] It is therefore necessary for the Court to determine on what terms was it contemplated by the parties' agreement that the Duplicate Certificate of Title would be retained. The Court will have to decide whether this letter which authorized the handing over of the Duplicate Certificate of Title, and the handing over pursuant thereto, demonstrates a binding intention to create a security in favour of the mortgagee, and which can support the Claimant's assertion that it holds an equitable mortgage over the Property. This will require the global agreement contemplated by the parties since a particular written agreement is not identified. This will involve a partly fact based assessment which is suitable for the trial process. The implication of this finding for the Defendants is that the Court dismisses their application for the return of the Duplicate Certificate of Title because the Court cannot resolve the entitlement of the Defendants to the title at this stage.

[71] Having regard to my earlier findings some matters are best suited for a trial. I have already identified examples of issues for the Court's determination which ought to be left to the trial of the Claim, and accordingly the list provided below is not intended to be exhaustive but includes:

1. *Who are the parties to the Agreement and what were their respective obligations thereunder;*

2. *Whether "the Companies" failed due diligence, as determined solely by an independent auditor or financial analysist appointed by Skyrock pursuant to paragraph 15 of the Agreement.*

3. *Whether any failure in the due diligence process pursuant to the Agreement is attributable to the Defendants;*

> 4. *Whether the payment of the sum of $38,500,000.00 by the Claimant was an investment made in furtherance of the Agreement which has been converted to an equitable mortgage*
>
> 5. *Whether the Claimant was at liberty to and did convert "any monies invested as a debenture on the company and whether the Defendants are jointly and severally liable pursuant to paragraph 16 of the Agreement;*
>
> 6. *The effect of the provisions in paragraph 16 that Skyrock will settle the Mortgage on the Property in exchange for the release of the Title to Skyrock and that Skyrock will, inter alia, hold the title pending repayment by Minett Lawrence from the proceeds of sale and Skyrock will also be at liberty to register a caveat for its equitable interest and register a mortgage on the said title for the $38,500,000 at an interest rate of 19% per annum.*

[72] The Claimant is relying on the Privy Council case of ***Sagicor v Taylor-Wright*** [2018] UKPC 12, at paragraph 17 of the judgment the Court made the following observations:

> *17. There will in almost all cases be disputes about the underlying facts, some of which may only be capable of resolution at trial, by the forensic processes of the examination and cross-examination of witnesses, and oral argument thereon. But a trial of those issues is only necessary if their outcome affects the claimant's entitlement to the relief sought. If it does not, then a trial of those issues will generally be nothing more than an unnecessary waste of time and expense.*

[73] In the ***Sagicor v Taylor-Wright*** case, the bank had extended a demand loan to Mrs Taylor-Wright. The learned judge at first instance Sykes J (as he then was) concluded that the bank's entitlement to the amount claimed by way of principal and interest was not limited to its claim on the promissory note which Mrs Taylor Wright had executed. As a consequence, her challenge to the promissory note as being a forgery did not prevent the bank for obtaining summary judgment based on her admission that she had borrowed money from the bank. The Privy Council accepted Sykes J's conclusion as correct, preferring it to the opinion of the Court of Appeal that the Bank's claim was based entirely on the promissory note.

[74] The observations of the Privy Council in ***Sagicor v Taylor-Wright*** (supra) at paragraphs 21 and 26 also provide useful guidance:

> *"21. The Board considers it axiomatic that, if a pleaded claim is met with a defence (whether pleaded or deployed in evidence) on a summary judgment application which, if true, would still entitle the claimant to the relief sought, then generally there cannot be a need for a trial. If the pleaded claim justifies granting the relief sought then, if the claimant proves that claim, it will succeed. If the alleged defence also justifies the relief sought, then the claimant will succeed even though the defendant proves the facts alleged in her defence. In either case, the defendant will have no real prospect of successfully defending the claim, within the meaning of Part 15.2(b).*
>
> *26. In the Board's opinion however, the claim as it was pleaded at the time of the hearing before the judge was not solely limited to the Note, even if that is how it might be described if regard is had purely to the Particulars of Claim on their own. The Claim Form which, by Part 8.9(1), is a document to which recourse may be had for this purpose, describes the claim as being for repayment of the unpaid balance of a Demand Loan made by way of extended credit facilities by the Bank at the defendant's request. Furthermore, the Reply (which the Court of Appeal, correctly in the Board's view, added as a document to which recourse may be had for this purpose) plainly adopted Ms Taylor-Wright's admission that she had borrowed the money from the Bank, and adopted both the mortgages, each of which contained an express covenant by her to repay the loan. The Bank's pleaded case was not therefore, limited to a claim upon the Note, but included a claim to the repayment of a bank loan in respect of which both principal and interest were outstanding."*

[75] The Claimant also relies on the case of ***National Commercial Bank Jamaica Limited v Humphrey Lee Macpherson*** [2016] JMCC COMM 3 in which the claim was for recovery of a loan and the Defendant sought to rely on the fact that the promissory note was not signed. Batts J held that this was not a defence to the claim for repayment of sums borrowed.

[76] The case before this court is easily distinguishable from ***Sagicor v Taylor Wright*** and ***National Commercial Bank Jamaica Limited v Humphrey Lee Macpherson*** (supra). I have already noted and I repeat for emphasis that whereas in the Claim Form originally filed in the case before this Court, the claim was based solely on the Promissory Note. By the Amended Claim Form and Amended Particulars of Claim, the ambit of the Claim is now for money due under the Agreement "*supported by the Promissory Note*".

[77] The Defendants assert that the amount of J$38,500,000.00 was not a loan and that the execution of the Share Purchase Agreement has made the Promissory Note unenforceable in accordance with its terms. These facts which fall for resolution in the case before me are therefore distinguishable from those in ***Sagicor v Taylor-Wright*** because in the instant case there is no admission on the Defendants' Statement of Case which is sufficient to ground and justify the relief of summary judgment which the Claimant seeks. It is distinguishable from ***National Commercial Bank Jamaica Limited*** **v** ***Humphrey Lee McPherson*** in that the Defendants in the case before this Court are not simply challenging the promissory note. They are going further to challenge the allegation that they have breached the Agreement. The fundamental distinction is that the Defendants are challenging the entitlement of the Claimant to recover the funds by virtue of an alleged breach of the agreement by them. This I find is a triable issue which cannot be resolved on a summary judgment application.

Conclusion and disposition

[78] I have identified a number of issues which in my view are inappropriate for determination in the context of a summary judgment hearing. I have concluded that the Claimant has failed to establish that the Defendants do not have a real prospect of success on their Defence. Accordingly, I am of the firm opinion that the Claimant's Notice of Application filed on 22nd January 2019 must be refused in keeping with the guidance offered by cases such as ***Swain v Hillman****.*

[79] For the reasons contained herein I make the following Orders:

1. The Defendants' Notice of Application filed 13th November 2020 for a stay of proceedings and return of the duplicate certificate of title for the property registered at Volume 1355 Folio 834 of the Register Book of Titles is refused.

2. The Claimant's Notice of Application filed 22nd January 2019 is amended to substitute Caroline C Reid for Ballantyne, Beswick & Company in paragraph 5 thereof.

3. The Claimant's Notice of Application filed 22nd January 2019 for summary judgment and other relief is refused.

4. The Costs of both aforementioned applications are to be cost in the claim.

5. The Claimant's application for leave to appeal is refused.

6. The Claimant's Attorneys-at-Law are to prepare file and serve a copy of this Order.