IN THE GRAND COURT OF THE CAYMAN ISLANDS
FINANCIAL SERVICES DIVISION

CAUSE NO FSD 148 of 2016(IMJ)

BETWEEN

LEWIS EBANKS

Plaintiff

AND

(1) WATERFRONT DEVELOPMENTS LTD
(2) HERITAGE HOLDINGS LTD
(3) JOHN BURKE
(4) PAMELLA BURKE
(5) INVICTA CONSTRUCTION LIMITED

Defendants

IN CHAMBERS

Appearances:	**Mr. L Ebanks in Person** **Mr. I Huskisson & Ms. Peccarino of Travers, Thorpe Alberga on behalf of the Defendants.**
Before:	**The Hon. Justice Ingrid Mangatal**
Heard:	**1 February 2017**
Draft Judgment Circulated:	**8 February 2017**
Delivered:	**13 February 2017**

HEADNOTE

Civil Practice and Procedure - Application to Strike out, pursuant to Order 18, Rule 19 of the Grand Court Rules - Section 46 of the Companies Law (2016 Revision) – Companies - Shares - Register - Rectification

RULING

1. This is an Application by the Defendants to strike out the claim herein made by the Plaintiff Mr. Lewis Ebanks ("Mr. Ebanks"), upon a number of bases.

2. Some time ago, this Application to strike out was listed for hearing on 30 January 2017. The Originating Summons commencing the proceedings was filed on behalf of the Plaintiff by the law firm, Carey Olsen. However, on the last working day before the scheduled hearing, i.e., on 27 January 2017, the Plaintiff filed a Notice of Intention to Appear in Person.

3. Regrettably I was not able to hear the matter on 30 January 2017. However, the matter was re-scheduled to today as this was convenient to both sides, as well as to the Court.

4. Before commencing the hearing, I indicated to the Plaintiff, Mr. Ebanks that this was potentially a fairly complex matter, and I asked whether he had considered obtaining alternative legal representation. He indicated that he had thought the matter through, had been in discussion of all of the issues up until recently with his former attorneys-at-law, and decided that he would be best placed to represent himself at this stage. However, he indicated that he may have attorneys-at-law represent him at a further stage if the application to strike out fails. Mr. Ebanks indicated that he was ready to proceed to oppose the application on his own behalf. He also indicated that amongst other qualifications, he is the holder of a Law Degree from Cardiff Law School in the UK.

5. Mr. Huskisson, Counsel for the Defendants also indicated that he was ready to proceed.

6. Although the summons dated 10 November 2016 does not spell out the basis for the applications, (and it should have - see the ***1999 Supreme Court Practice***, Volume 1, O. 18/19/4), in correspondence between the former attorneys-at-law for Mr. Ebanks and the

attorneys-at-law for the Defendants, as well as in their skeleton arguments, the Defendants have indicated that they primarily rely upon the Court's inherent jurisdiction to strike out a claim. In oral arguments, they have said that they rely upon O.18 Rule 19 (b) and (c) of the Grand Court Rules ("**GCR**"). In all of the circumstances, I thought it appropriate to proceed, notwithstanding that the summons did not set out the basis, in light of the fact that Mr. Ebanks was not taken by surprise and wished to proceed.

7. The Originating Summons seeks rectification of the Companies Register, pursuant to section 46 of the ***Companies Law (2016 Revision)*** (the "***Law***") as follows:-

"(i) Pursuant to section 46 of the ***Law***, the Register of Members of Waterfront Developments Ltd ("**WDL**") ("**the Register**"), be rectified by striking from the Register that entry dated 14 July 2016 purporting to record the transfer of 1 share of WDL from the Plaintiff to Heritage Holdings Ltd ("**HHL**") in order that the Register record that the Plaintiff and HHL are each holders of 1 share of WDL.

(ii) Pursuant to section 46 of the ***Law***, that there be an inquiry as to any loss or damage sustained by the Plaintiff as a result of having been omitted from the Register of Members of WDL since 14 July 2016 and an order that the Second and/or Third and/or Fourth and/or Fifth Defendants do pay to the Plaintiff any damages found to be due to the Plaintiff upon such inquiry having been made.

(iii) The costs of this Originating Summons be paid by the Second to Fifth Defendants.

(iv) There be such further or alternative relief granted as the Court shall think fit."

8. The following matters are not in dispute:

a. Mr. Ebanks is the sole director and shareholder of Empire development Company Limited ("**Empire**"), an ordinary company registered in the Cayman Islands.

b. Empire was incorporated for the purposes of undertaking a residential housing development known as Hilton Estates, Phase 11B, which consisted of the construction and sale of 14 Townhouses.

c. Mr. Ebanks and the 3rd and 4th Defendants had been friends for decades.

d. Mr. Ebanks and Mr. Burke had been involved together previously in a number of successful development projects.

e. On 1 December 2012, the Burkes, together with their construction company Invicta Construction Limited ("**Invicta**"), agreed to lend Empire the sum of $1,500,000 with interest on that loan to accrue at a rate of 15 % per annum.

f. On or about the 12 April 2013, the Burkes agreed to lend a further sum of US$300,000 to Empire.

g. Both Empire Loans were personally guaranteed by Mr. Ebanks.

h. In November 2013, Mr. Ebanks incorporated an ordinary company, registered in the Cayman Islands Waterfront Developments Limited ("**Waterfront**") for the purposes of developing seven parcels of land on the North Sound coast of Crystal Harbour ("**the Waterfront Land**"). Initially Mr. Ebanks was the sole shareholder and sole director of Waterfront.

i. Mr. Ebanks invited Mr. Burke to participate in the development of the Waterfront Land as a 50/50 partner, to which Mr. Burke agreed. In furtherance of this agreement Mr. Ebanks transferred one of his two shares in Waterfront to Mr. Burke's holding company HHL on 14 February 2014. Thereafter Mr. Ebanks and Mr. Burke both held one share each of Waterfront.

j. Mr. Burke and Mr. Ebanks then negotiated a loan of US$7 Million by Cayman National Bank ("**CNB**") to Waterfront in order that Waterfront could purchase the Waterfront Land. The Waterfront Land, along with additional undeveloped land which was owned by the Burkes, was put up as collateral for the CNB Loan. The CNB Loan was to be paid by monthly instalments (interest and principal) of US$72,547 with any outstanding balance of the loan to be paid in full on the third anniversary of the loan being made (March 2017).

9. There are a number of matters upon which the parties disagree in relation to matters which transpired, and in relation to the background, as well as backdrop against which the documents listed in paragraph 10 below, came into being. However, it is agreed that the documents listed in paragraph 10 are relevant. In my view, the following are the only documents I need mention for the purposes of this application.

10. They are, as follows:

(a) A Promissory Notice dated 16 July 2015 in which Empire agreed to repay to the 3rd, 4th and 5th Defendants (**"the Lenders"**) borrowings of US$2,161,500 plus interest by 30 September 2016.

(b) A Guarantee of the same date in which Mr. Ebanks agreed, amongst other matters, to repay Empire's liability to the Lenders as principal debtor.

(c) An equitable Mortgage of Shares of the same date, in which Mr. Ebanks gave the Lenders security over his Waterfront share (**"the Share Mortgage"**). Annexed to the Share Mortgage was, amongst other documents, an executed but undated transfer of the Waterfront Share.

(d) An Agreement to Purchase Shares and Deed of Release, (**"the SPA"**) also of the same date, by which Mr. Ebanks granted the Lenders an option to purchase his one share in Waterfront in the (Clause 2) "*Event of Default occurring pursuant to the Charge of Shares of even date.*" It was also part of the agreement that, upon the purchase of the mortgaged share, the Lenders would cause CNB to release Mr. Ebanks from his guarantee in relation to the indebtedness of Waterfront.

Mr. Ebanks' Case

11. There are a number of arguments that Mr. Ebanks has ably presented on his own behalf. One that loomed large was that Mr. Ebanks is seeking an order that the Register of members of Waterfront be rectified on the basis that at the time of the removal of his name and interest from the Register in July 2016 and the transfer of his share to HHL, the Lenders did not have any right to do so as they had not complied with the strict notice requirements under the Guarantee. Therefore, the argument continues, Mr. Ebanks did not have any personal liability to the Lenders, and thus the Lenders had no right to exercise any of their rights under either the Share Mortgage or the SPA. As such, the alterations made to the Register in July 2016 were made by the Lenders without any legal right to do so, and should be struck.

The Defendants' Case

12. It is part of the Defendants' case that the Lenders have now, since the service of these proceedings on them, served a number of Notices of Demand on Mr. Ebanks, without admission that they were required to do so. They argue that they were not required to do so because the Guarantee provided for Mr. Ebanks to be liable as primary debtor, and not as Guarantor. They argue that Paragraph 6.1 of the Mortgage entitles the Lenders to enforce without notice following an Event of Default <u>or</u> following demand. (Counsel's emphasis). "*Event of Default*" is defined in the Mortgage as "*having the meaning given to such term in the Guarantee and/or the failure by Mr. Ebanks to observe or perform any covenant or agreement contained in the Mortgage.*" "*Event of Default*" is not defined in the Guarantee. Mr. Huskisson argues that unless "*Event of Default*" is construed as meaning Mr. Ebanks' failure to pay the loan off by 30 September 2015 without further demand, the second part of the sentence in Paragraph 6.1 would become superfluous and that would not be a proper commercial construction of the document.

13. It was also argued that Mr. Ebanks knew that he was in default from 30 September 2015 and had requested time to pay. Counsel says that if this case went to trial the Defendants' evidence will be that Mr. Ebanks acknowledged his default and waived or is estopped from requiring service of a demand, if one is necessary.

14. Mr. Huskisson argues that the case for strike out is compelling. Reference was made to Notes 18/19/38 and 18/19/35 in the 1999 ***Supreme Court Practice*** where it is stated that a claim is liable to be struck out where the claimant had no substantial interest in the subject matter of the litigation, had suffered no damage that could not easily be rectified and the action was "*a useless piece of litigation*". Counsel also referred to the fairly recent decision of the Judicial Committee of the Privy Council in ***Nilon Ltd. and another v Royal Westminster SA and others*** [2015] UKPC 2. Paragraph 12 of the Defendants' written submissions put forward the following as some of the main bases for strike out:

"12. ……

a. The Lenders/Defendants have complied with Mr. Ebanks' request that he be served with a demand and release. There is therefore no doubt that it is they (and not Mr. Ebanks) who have a present right to have themselves recorded as the owners of the shares.

b. At its highest, Mr. Ebanks' case is that the register should show that he was the legal owner of the shares up until service of the demand and related documents. The Defendants have offered to consent to an order in these terms.

c. Restoring Mr. Ebanks' name to the register would amount to him avoiding his contractual obligations under the security documents. It would expose the Defendants to the risk of claims by other creditors or (which seems quite likely) a trustee in bankruptcy. Ironically, it would probably also compel the Defendants to seek to have the register rectified themselves. All of this would be circular, pointless and disruptive.

d. Even if the Court were to disagree with the above analysis, there is a legal factual dispute about the need to serve a demand, which must be tried in the usual way before an order can be made. As explained in ***Nilon****, the summary jurisdiction under s. 46 cannot be used to determine disputes of this nature. The proper order in any event would be to strike out the claim and put the onus on Mr. Ebanks to bring a writ action."*

15. I think that it is useful to set out the words of section 46 of the ***Law***, which provides as follows:

"Remedy for improper entry or omission of entry in register

46. If the name of any person is, without sufficient cause, entered in or omitted from the register of members of any company, or if default is made or unnecessary delay takes place in entering on the register the fact of any person having ceased to be a member of the company, the person or member aggrieved or any member of the company or the company itself may, by motion to the Court, apply for an order that the register is rectified; and the Court may either refuse such application with or without costs to be paid by the applicant or it may, if satisfied of the justice of the case, make an order for the rectification of the register, and may direct the company to pay all the costs of such motion, application or petition, and any damages the party aggrieved may have sustained. The Court may, in any proceeding under this section, decide any question relating to the title of any person who is a party to such proceedings to have his name entered in or omitted from the register, whether such question arises between two or more members or alleged members, or between any members or alleged members and the company, and generally, the Court may, in any such proceeding, decide any question that it may be necessary or expedient to decide for the rectification of the register:

Provided that the Court may direct an issue to be tried, on which any question of law may be raised."

The Guarantee

16. Sections 1,2 and 20 of the Guarantee, are also of some relevance to this application, and read as follows:

"1. This Guarantee is a continuing guarantee of the Borrower's liabilities to the Lender. The Guarantor's liability is that of a guarantor as between the Guarantor and the Borrower but that of a principal debtor as between the Guarantor and the Lender and the Guarantor will remain liable as principal debtor even if all or any of the Borrower's liabilities to the Lender are or become void or unenforceable for any reason whatever.

2. The Lender need not exhaust its rights against the Borrower or enforce any other security or obligation it has before demanding payment from the Guarantor under this Guarantee. The Lender must not start legal proceedings based on this Guarantee until it demands payment from the Guarantor, and the Guarantor's liability first arises after the Lender notifies it of a default by the Borrower and demands payment from the Guarantor....

.....

20. This document contains all the agreements between the Lender and the Guarantor about this Guarantee. No other representation or promise concerning this Guarantee affects or binds the Guarantor or the Lender."

17. In ***Nilon***, an application under section 43(1)(a) of the ***British Virgin Islands*** ("***BVI***") ***Business Companies*** Act, the equivalent of our section 46 regarding rectification of a company's share register, was struck out. The Headnote, in part reads as follows:

> *"the summary nature of the jurisdiction to rectify the share register of a company made it unsuitable for the trial of a substantial factual question in dispute, and if there was such a dispute the court ought to order the trial of the issue or adjourn or stay the application or dismiss or strike it out."*

18. In holding that on the facts of that case it was appropriate to strike out, rather than order trial of issues or stay or adjourn the claim, the Board (Lord Collins), at paragraphs [51] – [53], discussed some of the pertinent issues in this way:

> *"[51] In the view of the Board, proceedings for rectification can only be brought where the applicant has a right to registration by virtue of a valid transfer of legal title, and not merely a prospective claim against the company dependent upon the conversion of an equitable right to a legal title by an order for specific performance of a contract. It follows that* ***Re Hoicrest*** *was wrong as a matter of principle, however sensible it might have been as a matter of case management.*
>
> *[52] The claim form seeks an order that the register be rectified forthwith to give effect to what is described as the true and proper state of affairs pertaining to it, in accordance with the terms of the joint venture agreement, by entering the names of the Mahtani parties as the legal owners of the relevant number of the shares in* ***Nilon****. The Mahtani parties have no such present right, which could only arise after they have been successful in their principal claim against Mr. Varma, and only after he had been ordered to procure the issue and allotment of the shares to them. In these proceedings the Mahtani parties have no arguable case to a present right to rectification, and there is therefore no claim against* ***Nilon*** *to which Mr. Varma can be a necessary and proper party.*
>
> *[53] Even if, contrary to the view of the Board, proceedings for rectification could be a vehicle for deciding questions of beneficial interest or the right to specific performance of an obligation to transfer, or procure the allotment of, shares, this case is not a suitable one for the application of what has always been meant to be the summary procedure which, in the BVI, is contained in s 43 of the* ***BVI*** *Act. Although in general it is not objectionable to bring a viable claim against D1, who is within the jurisdiction, with the principal object of joining D2, who is*

outside the jurisdiction, as a necessary/proper party, the combination of the motive and the artificiality of the rectification proceedings, and the fact that they are dependent on the trial of the underlying facts, means that the appropriate order in these circumstances is not to stay or adjourn the rectification application, but to strike it out."

19. In my judgment, the issues involved in the Originating Summons and claim in this case are quite different and far removed from the issues involved in ***Nilon***. In the first place, Mr. Ebanks is not relying upon a prospective right. He is saying that, at the time when the Register was altered in July 2016, the Defendants had no right to do so. The proceedings do not seek a general determination or about the Lenders' rights as at any other date. No authorities have been cited about the issue of the requirement of Notice or regarding Mr. Ebanks being a primary obligor and not merely a Guarantor. Although the Defendants say they have not conceded that the Lenders needed to serve Notice, they have now given (or purported to give Notice - since Mr. Ebanks does not concede that proper notice has now been given), and even indicate that they would be prepared to agree to an order that the Register show that Mr. Ebanks was the legal owner of the shares up until service of the Notices of demand and related documents. However, it is not at all clear to me that such an order could be properly made. The point about the giving of all these Notices since the date of filing of these proceedings, is that, if they point in any direction, it is in the opposite direction to a striking out, whether under the GCR or under the inherent jurisdiction of the Court.

20. In my judgment, even if there is a factual dispute surrounding waiver, it would not involve a substantial dispute as to fact. More importantly, it would not arise for determination before the resolution of a number of legal issues such as, for example:

(a) Were the Lenders required to serve a demand, under the terms of the Guarantee before they could exercise any rights under the Share Mortgage and /or the SPA?

(b) Could any admission or acknowledgement by Mr. Ebanks of his default amount to a waiver, or provide the basis for him being estopped, from being given Notice, in light of the terms of the Guarantee, when properly construed?

21. I wish to stress that I only give the issues above a rough and ready framing by way of example. This is because I am minded to dismiss the Defendants' application to strike out, and additionally, ask the Registrar to set this matter back down in a convenient hour slot on the next convenient court date, for a directions hearing, including a consideration of what, if any issues of law, or fact, should be directed to be tried or determined, and in what sequence, if any. At that time the parties can profer their views as to the issues to be determined.

22. On the question of costs, included amongst the correspondence going back and forth between the Defendants' Attorneys-at-law and Carey Olsen exhibited herein, is a letter dated 18 January 2017, in which Carey Olsen invited the Defendants' Attorneys to withdraw the strike out summons and agree to the listing of the Originating Summons for hearing. However, at this stage Mr. Ebanks is now a litigant in person. I am of the view that it would be appropriate reserve the question of costs on the strike out summons for hearing at the directions hearing.

23. The Defendants' summons dated 10 November 2016 is therefore dismissed, with the question of costs reserved to the Directions Hearing. The matter is to be set down by the Registrar of the Financial Services Division for a Directions Hearing for one hour, at the earliest convenient date.

THE HON. JUSTICE INGRID MANGATAL
JUDGE OF THE GRAND COURT