

**COMMONWEALTH OF THE BAHAMAS**

**IN THE SUPREME COURT**

**2011/CLE/gen/00990**

**BETWEEN**

**DAR INVESTMENTS & TRADING (FZE)**

**Applicant**

**and**

**MAMEE LIMITED**

**Respondent**

**BEFORE:           The Honourable Mr Justice Bernard Turner**

**APPEARANCES:   Mr Oliver Liddell and Mr Sean Moree for the Applicant  
                      Ms Courtney Pearce for the Respondent**

**HEARING DATE:   1 December 2011**

**RULING**

## Turner J

By an Originating Notice of Motion filed 27 July 2011 the Applicant herein seeks an Order, pursuant to section 57 of the Companies Act, that the Register of Members of the Respondent company herein be rectified by striking the names of Riaz Mawani and Badrudin Kassam therefrom as the holders of certain shares and by inserting in lieu thereof the name of the Applicant, together with an Order authorizing the Applicant to effect the necessary alterations in the said Register to carry the Order into effect and an Order that notice of the rectification be given to the Registrar of Companies, or for such other Orders as the Court may see fit. Section 57 of the Companies Act reads as follows:

**"57. (1) If the name of any person is, without sufficient cause, entered in or omitted from the register of members of any company incorporated under this Act, or if default is made or unnecessary delay takes place in entering on the register the fact that a person had ceased to be a member of the company, the person, the member aggrieved, any other member of the company or the company itself, may by way of motion apply to the court for an order that the register be rectified and the court may in either case grant or refuse the application with or without costs, to be paid by the applicant.**

**(2) Where the court is satisfied as to the justice of an application pursuant to this section, it may make an order for the rectification of the register, and may direct the company to pay all costs of such motion, application or petition and any damages the party aggrieved may have sustained.**

..."

2. By an affidavit filed 30 November 2011, the Applicant confirmed that they intended to rely on an affidavit of law of Mr. Leo Klug filed 25 November 2011 and the affidavit of Mr. Zahir Dmji filed 27 July 2011, initially in support of an ex parte application for an injunction, which application, as a matter of record, was heard 28 July 2011 in the presence of counsel for the Respondent, although she then indicated that she had no instructions to contest or support the application.

3. The affidavit of law deals with, in part, the issue of a clause in a share pledge agreement, the subject of the Notice of Motion, which indicates that the governing law for construing the respective agreement shall be the laws of the Province of Ontario, Canada. The affidavit asserts that the attornment contained in that agreement only applies to the Pledgors to the agreement (the aforementioned Messrs Riaz Mawani and Badrudin Kassam) and not to the Lender, the Applicant herein. A similar clause in a related Loan agreement between the Applicant and Respondent reads:

**“This Agreement has been made in the Province of Ontario, Canada and shall be construed interpreted and performed in accordance with the laws of the Province of Ontario and Canada where applicable and in accordance with the laws of the Commonwealth of The Bahamas, where applicable. The parties agree the Pledge Agreement shall have the laws of the Province of Ontario, Canada apply to its execution, delivery, compliance and enforcement.”**

4. This point has not been contested by the Respondent and I find on the attornment clause in the share pledge agreement that I have jurisdiction to hear this matter.

5. As indicated, the application seeks the rectification of the register of members of the Respondent. The factual background to the application is contained in the affidavit of Zahir Damji, a director of the Applicant. That affidavit indicates that there was a Loan Agreement, dated the 25 September 2002, with the Applicant as Lender and the Respondent as Borrower, and a Share Pledge Agreement, also dated 25 September 2002, with the Applicant as Pledgee and Messrs. Riaz Mawani and Badrudin Kassam as Pledgors.

6. By the loan agreement, the Applicant agreed to lend to the Respondent the sum of two million (US) dollars, with a maturity date of 25 September 2004 at an interest rate of 10% per annum on the unpaid balance. As a matter of record, the loan was for the purpose of the purchase and renovation of the Quality Inn Hotel on the corner of Bay and Nassau Sreets, Nassau, The Bahamas. Pursuant to clause 5.1 of the loan agreement, the Respondent agreed to execute and deliver to the Lender:

**“a pledge of all of the shares of the Borrower from the registered and beneficial owners thereof, being the shareholders and an acknowledgement and undertaking by the intended shareholders acknowledging that all the existing and outstanding shares of the Borrower are subject to the pledge agreement.”**

7. There were also agreements for the Respondent to register the Lender as a shareholder of the Respondent in the minute book of the Respondent and for the Respondent to take all necessary steps to obtain approval from the Central Bank with respect to the granting of the security and the re-payment to the Applicant of the loan, as well as an undertaking to obtain from the Bahamas Investment Authority a permit for the Applicant to have and to hold the security under Bahamian law.

8. In respect of the Pledge Agreement, the Agreement indicated that Pledged Securities means:

**"all of the issued and outstanding shares of the Corporation which are beneficially owned by the Pledgors as further set forth in Schedule A hereto. Counsel for the Corporation in the Bahamas shall be taking all necessary steps to amend the share register for the Corporation to reflect beneficial ownership and shall advise (and obtain where required) all government bodies who require such information of the change of ownership of the Pledged Securities."**

Article 2.1 of the Pledge Agreement, reads, in part:

**"The Pledgors hereby deposits with, assigns, transfers, pledges and hypothecates to the Lender and grants to the Lender a security interest in:**

**(a) the pledged securities;**

**...."**

Article 2.3, (headed power of attorney) reads:

**"The Lender is hereby appointed an irrevocable attorney of the Pledgors with full power of substitution from time to time upon the occurrence of a Default to endorse and/or transfer any of the Collateral to the Lender or the Lender's nominee and in connection therewith the Lender or the Lender's nominee are hereby empowered to exercise all rights and powers and to perform all acts of ownership in respect of the Collateral to the same extent**

**as the Pledgors might do save and except dividends or distributions payable in property except after a Default has occurred and has not been cured within the time constraints provided for in this Agreement. This appointment is coupled with an interest and shall not be revoked by the insolvency, bankruptcy, reorganization, arrangement, composition, dissolution, liquidation, winding-up or similar proceeding involving or affecting the Pledgors or for any other reason. The Pledged Securities shall be registered in the name of the Lender and the share certificate register of the Borrower contained in the minute book shall reflect the change in registration in favour of the Lender. The parties also acknowledge that the Articles of the Borrower and By-law No. 1 of the Borrower shall be amended to provide that all borrowings shall be approved by the shareholders of the Borrower and in this respect the Lender or its nominee shall be required to approve all borrowings of the Borrower during the currency of the Agreement and the Loan Agreement."**

9. The affidavit exhibited a copy of both the Loan Agreement and the Share Pledge Agreement.

10. The affidavit went on to indicate that the Respondent paid interest on the loan up to 31 October 2009 and to assert that since that date, no interest and/or capital had been paid, leaving an outstanding amount as at 30 June 2011 of \$2,347,999.93.

11. Further, the affidavit also asserts that the Respondent has failed and/or refused to transfer and register the beneficial ownership of 100% of the Respondent to and in the name of the Applicant and to record in the Registry of Records the Memorandum of Deposit of Title Deeds.

12. It is asserted that the Applicant exchanged numerous phone calls and correspondence with the Respondent since the default in payments and were advised that the reason for the failure of the Respondents to pay the interest and/or the capital on the loan was because of the refusal of the Central Bank of The Bahamas to grant permission to exchange the necessary funds into US dollars. It is asserted that the Applicant did not become aware of the failure to the Respondents to register the shares of the Respondent in the name of the Applicant until after February 2010, when they had hired local counsel who checked the Company Registry.

13. It is further asserted that the Applicant's Bahamian counsel also had to apply for, and ultimately obtain (in December 2010), retroactive approval from the Bahamas Investment Authority to give effect to the transfer of shares agreement contemplated in the Loan and Pledge Agreements and also had to obtain Central Bank approval (in June 2011) to transfer the shares in the Respondent to the Applicant.

14. Finally, in respect of the issue raised in the Notice of Motion, the affidavit of Mr Damji asserts that notwithstanding the terms of the Loan and Pledge Agreements, and despite requests from the Applicant's counsel to counsel on behalf of the Respondent, the Respondent has failed to register the shares of the Respondent in the name of the Applicant as envisaged in those agreements.

15. There is no factual contest in this application, the Respondent having failed to file any affidavit evidence. Counsel on behalf of the Respondent had indicated during the hearing of this matter a consideration of seeking leave to file affidavit evidence, but were content to argue the matter based on the evidence before the court. Their submissions are therefore restricted to the facts before the Court as put by the Applicant and any legal submissions which may be made thereon.

16. The Respondent, in the face of the factual scenario as summarized above, candidly conceded that there has been a default in respect of the re-payment of the loan. They submitted that notwithstanding this default (in essence really because of it) the application is at best premature and ought to be dismissed on the basis that the application is nothing other than an attempt at enforcing an "event of default" under the Loan and Pledge Agreements and the Applicants have failed to prove that they complied with the requirements of the Loan and Pledge Agreements in respect of notifying the Borrowers of their default (a 'Notice of Default') in the manner stipulated in the said agreements.

17. Counsel for the Respondent asserts that, even without the Respondent putting forward any evidence to say that the default notification provisions of the Agreements were not complied with, there is a positive duty on the Applicant to satisfy this court that the terms of the Agreements in respect of notification were in fact complied with,



as the Agreement also states that there can be no attempted enforcement of an alleged breach, until there is compliance with the notification requirements. Counsel also asserts that there was no requirement for the shares to be registered in the name of the Applicant, unless there was a default and that even if the Agreements created such a requirement, then that constituted a positive covenant on the Respondent, which, if it was not done, itself constituted a default and again triggering the requirement for notification of this breach of the Agreements.

18. The basis of these submissions are, it is submitted, Article 8.2 of the Loan Agreement, which reads:

**"After an Event of Default has occurred, the Lender shall provide the Borrower notice to cure the default within the Notice Period ('Notice of Default'). Upon the expiration of the Notice Period if the Event of Default has not been cured, the Lender may commence such legal action or other proceedings as it in its discretion deems expedient to realize upon the Security or any part thereof." ,**

Together with Article 1.1(d) of the Share Pledge Agreement which defines Default as:

**"(i) A default in payment of any sum payable under the Loan Agreement on a due date which default continues for thirty (30) days after notice in writing of default in payment (with sufficient particulars is given by the Lender to the Corporation and the Pledgors); or**

**(ii) A breach by any of the Pledgors or a failure by the Corporation to perform any non-monetary obligation contained in the Loan Agreement and to be performed or observed by it which has not been cured within thirty (30) days of notice of such breach being given by the Lender to the Pledgors on behalf of the Corporation."**

And Article 4 of the Share Pledge Agreement which reads, in part:

#### **"4.1 Remedies on Default**

**Upon Default, and after the time to cure as provided in the Loan Agreement, the Lender shall have, without obligation to resort to other security or to recourse against any guarantor or other party liable, the right without notice to the Pledgors (except as required by applicable law), to realize on all or any portion of the Collateral at any time...."**

19. The Applicant's response to this argument is that the application under section 57 of the Companies Act has nothing to do with a breach of the Loan or Pledge Agreement, but is a simple rectification of the share register application to give effect to a fundamental term of the Loan and Pledge Agreements. They refer to correspondence attached to Mr. Damji's affidavit between counsel on behalf of the Respondent and Applicant.

20. One such piece of correspondence, from Mr. Lester Mortimer of Callendars & Co, Counsel and Attorneys, dated 20 July 2011 and addressed to counsel for the Applicant, indicates that that firm **"...as the mere Registered Office of Mamee Ltd., has no authority to perfect the security of the subject loan as requested. ...Further , it is our understanding that in 2002 the parties mutually agreed not to proceed with stamping and recording the loan documents or with transferring the shares to DAR Investment Trading."**

21. In my view, this is an apparent acceptance that the terms of the Agreements do in fact require a transfer, in contrast to the submission of counsel from that firm that the terms do not require any such registration. No evidence has been placed before this court to indicate that in fact there was any agreement not to transfer the shares to the Applicant. However I do not rely on this statement from counsel contained in the exhibited letter.

22. Having reviewed the Loan and Share Pledge Agreements, I accept the submission of counsel for the Applicants that those Agreements do require the registration of the shares in the name of the Applicant. Article 2.3 of the Share Pledge Agreement (ibid) states as much in clear terms, and I do not find that the requirement for the Pledged Securities to be registered in the name of the Lender is only triggered after an event of default and after the notice period in respect of any such event of default. I find that requirement to be a free standing requirement in Article 2.3.

23. I also find that the Applicant is not precluded from seeking rectification of the share register by the terms of the Loan and Share Pledge Agreements. Indeed in respect of the Loan Agreement, Article 8.4 states that:



**“Each and every right, remedy and power granted to the Lender hereunder or in the Security shall be cumulative and in addition to any other right, remedy or power herein specifically granted or now or hereafter existing in equity, at law, by virtue of statute or otherwise and may be executed by the Lender from time to time concurrently or independently and as often and in such manner as the Lender may deem expedient....”**

And the Share Pledge Agreement states, at Article 4.2:

**“ The rights, powers and remedies of the Lender hereunder shall not be deemed exclusive, but shall be concurrent with and in addition to all other rights and remedies existing at law or in equity, including, without limitation, all of the rights, powers and remedies available to a secured creditor .....and any companies legislation applicable to the issuer of the Collateral. The Pledgors shall indemnify and save harmless the Lender from and against any and all liabilities, loss and damages which it may incur in the lawful and proper exercise or performance of any of its rights or powers as authorized hereunder.”**

24. In these circumstances, I find that the Respondent's submissions are not supported by the terms of the Agreements. I find that the Applicant is not precluded from applying for the registration of its name on the share register, pursuant to the provisions of section 57 of the Companies Act, by the terms of the Agreements. This right, to give effect to the terms of the Agreements by the registration of the shares in the Applicant's name, I find to be an additional right existing at law under the terms of the said Companies Act.

25. I find that the name of the Applicant has been omitted from the register with no sufficient cause, having regard to the fundamental terms of the Loan and Share Pledge Agreements and I therefore order that the register of Members of the Respondent company herein be rectified by striking the names of Riaz Mawani and Badrudin Kassam (the Pledgors of the shares) therefrom as the holders of certain shares and by inserting in lieu thereof the name of the Applicant.

26. Having regard to the provisions of section 57(2) of the Companies, I am satisfied as to the justice of the application brought by the applicant to give effect to the terms of the Agreements. I find that the Agreements contemplates the indemnification of

the Lender against any loss or expenses, and for these reasons I order costs to the Applicant on a full indemnity basis.

Dated this 12<sup>th</sup> day of March 2012

A handwritten signature in black ink, appearing to read "Bernard Turner", written in a cursive style.

**Bernard Turner**  
**Justice**