IN THE SUPREME COURT OF BERMUDA

CIVIL JURISDICTION

2018 : NO. 73

BETWEEN:

ROBERT SCOTT STALLARD

Plaintiff

v

THE ATHLETIC CLUB LIMITED (In Liquidation)

First Defendant

and

KYM HERRON SCOTT

Second Defendant

JUDGMENT

Plaintiff in Person

First Defendant and Second Defendant represented by Mr. Mark Pettingill, Chancery Legal

DATES OF HEARING: 10th and 11th January 2022

DATE OF JUDGMENT: 18th January 2022

JUDGMENT delivered by Elkinson, J. A/J

1. This is a matter where this court previously determined a Preliminary Issue between the Plaintiff and the First Defendant prior to it being placed in liquidation. Judgment was given on 29th November 2019 when evidence was heard from the parties over a period of a day as to whether the provision in an agreement between the parties precluded the Plaintiff from making any valid claim for payments due to him. At that time, I found against the First Defendant on the Preliminary Issue as, on the evidence presented to the court at that time by the First Defendant, there was no evidence which showed, on the balance of probabilities, that the actions of the Plaintiff were such as to amount to breaches which gave rise to a bar of the Plaintiff's claim. The Second Defendant has since been joined to the action.

2. Preliminary Issues are ordered where it is considered that the determination of the issue so ordered will determine the action one way or another. The rule in **Henderson v Henderson [1843] 3 Hare 167 ER 313** is that a party must bring out all of its case at once and cannot re-litigate the same subject matter concerning the same parties in serial litigation. Preliminary Issues can often offer a cost effective way of narrowing the matters in dispute between the parties and facilitating more efficient litigation and perhaps encourage settlement. There should be finality in litigation and the court should be vigilant to a scenario where there is subsequently re-litigation of the same issue. That may appear to be what is happening in this case where the court determined the Preliminary Issue which was put forward to debar the Plaintiff's claim on much the same basis as was put forward again in this trial. However, in all the circumstances of this case, it is not clear that the Defendants' conduct is an abuse of process, not least for the reasons of the additional party and the re-amendment of the Plaintiff's case subsequent to the determination of the Preliminary Issue. I allowed the Defendants to raise the issue again of whether the Plaintiff by his actions had released the Defendants from their obligations in connection with the "*sale*" of the Olympic Club to the Defendants.

THE FACTUAL BACKGROUND

3. The facts are set out in my judgment of 29th November 2019 and I will summarize them again here. This was a dispute between the parties which arose subsequent to an agreement of 12th

November 2014 between the Plaintiff, who was the principal in a fitness club called the Olympic Club Limited on the one side, and the Athletic Club Limited and its principal, Mrs. Kym Herron Scott ("Mrs. Scott") on the other. These limited liability entities are referred to in this judgment as the Olympic Club and the Athletic Club respectively. The Athletic Club's present standing is that there was a resolution of members to go into voluntary liquidation as of 3rd September 2020. The court was informed by counsel for the Athletic Club during the course of the hearing that the liquidation has not progressed beyond that resolution to date. It no longer operates a fitness club of that name and Mrs. Scott has left Bermuda to live in Florida.

4. On 12th November 2014, there was a Merger Agreement between Mr. Scott Stallard and the Olympic Club on the one side and the Athletic Club and Mrs. Scott on the other. ("the Merger Agreement"). Mrs. Scott was referred to as the Buyer and Mr. Stallard as the Seller. The Merger Agreement was pursuant to a Memorandum of Understanding ("MOU") which Buyer and Seller had entered into on 14th September 2014 and which was incorporated into the Merger Agreement as Schedule 4.

5. The MOU gives some sense of what was intended by the respective parties. There were two fitness clubs with substantial membership and brand recognition and at Clause C of the MOU it is stated that *"The material objective of the Parties is to amalgamate TOC and TAC, with the TOC branding ending."* The evidence on behalf of the Athletic Club was given by Mr. Wayne Scott, a former director of the First Defendant and husband of the Second Defendant, and Mrs. Scott. They said that the objective of the Athletic Club was to gain increased membership, to acquire more fitness club equipment and to eliminate competition. The priority given to these objectives was not always consistent in the course of their evidence.

6. The MOU set out the Olympic Club assets and equipment were *"… part of this transaction,"* and that the Athletic Club would be obliged to satisfy the remainder of the lease of the Dundonald Street premises which the Olympic Club occupied which was to be another six months from the date of the MOU. Under the Merger Agreement, it was specified that this would be 30th April 2015 unless earlier arrangements to vacate were made. The Olympic Club was also obligated to satisfy any outstanding bills which the Olympic Club had with any third parties. For all of what the Olympic Club was giving up, the Athletic Club and Mrs. Scott were to pay to Mr. Stallard an

estimated amount of $2,500 to $3,000 for a period of 50 to 70 months, subject to membership verification. The Merger Agreement, which is the legally binding arrangement between the parties, varied some of the understanding as set out in the MOU. The payment term was amended as was the term regarding the assets.

7. Merger Agreements are statutory agreements pursuant to Section 105 of the Companies Act 1981. Section 104H provides that two or more companies which are registered in Bermuda may merge and their undertaking, property and liabilities shall vest in one of such companies as the surviving company. The surviving company was intended by the parties to be the Athletic Club. Section 105 then sets out that those companies proposing to merge shall enter into an agreement setting out the terms and the means of effecting the merger and in particular should set out what should be included in the MOU of the amalgamated company. It is clear that the parties to this action contemplated that the surviving entity would be the Athletic Club. No point was taken by any of the parties at the trial about any technical breach of the statutory requirements.

8. The Merger Agreement imposed certain obligations on each of Buyer and Seller and the clauses which are focused on by the parties in support of their respective positions are recited in this judgment. The first of these is at Clause 9 where it was stated that *"As consideration of the Merger, the Surviving Company and the Buyer shall assume responsibility for payment of the invoices listed in Schedule 5 hereto and the Seller shall receive a monthly cash payment of $3,000 for a period of 42 months ("Consideration Period") commencing December 1, 2016 from the Surviving Company ("Merger Consideration")."*

9. Clause 15 provided that *"Any asset (including gym equipment) owned by the Surviving Company from the Effective Date which is not required by the Surviving Company after the Effective Date ("Excess Assets") may be sold to third parties. The sale of such assets is to be agreed by both the Seller and Buyer. The Parties agree that the proceeds raised from the sale of the Excess Assets shall be the property of the Seller."* Complaint is made that Mr. Stallard sold assets without agreement of Mrs. Scott.

10. Specifically relied upon by the Defendants, both in the Preliminary Issue hearing and at this hearing, was Clause 26 which stated *"The performance by Seller of his obligations under this Agreement shall be a condition precedent to the performance by the Buyer of her obligations under this Agreement to*

the intent that, if Seller shall fail or shall be unable to perform any of such obligations, the Buyer shall at her option (and without prejudice to any other remedies or rights which it may have against Seller in respect of such non-performance) cease to be liable to perform their obligations under this Agreement." It is contended for by the Defendants that by the Plaintiff's breach of this clause, the Defendants are relieved of all their obligations to the Plaintiff under the Merger Agreement.

11. There are other clauses in the Merger Agreement which were touched on by the parties in the course of their evidence and submissions which I will reference in dealing with those matters. However these were the principal terms which were the focus of the pleadings and in particular the Plaintiff's claim that he did not receive the consideration set out in the Merger Agreement due to him by way of a monthly cash payment of $3,000 for a period of 42 months commencing 1st December 2016. Further, that the debts which the Athletic Club had committed to pay pursuant to the Merger Agreement, the amounts due to BELCO, the Government for Social Insurance and Payroll Tax and Argus Insurance Company for health premiums, had not been paid and that he continued to receive those bills for those outstanding amounts up to the date of trial.

12. The Defence and Counterclaim filed on behalf of the Defendants relies on Clause 26 of the Merger Agreement and their position is that because of the Plaintiff's failure to perform his obligations under the Merger Agreement, there was no liability to perform any obligations on the part of the Athletic Club subsequent to 31st March 2015 when he locked them out of the former Olympic Club premises on Dundonald Street. The Defendants rely on what they allege was a failure of the Plaintiff to act in good faith and that without notifying them and in total disregard of their rights, he *"…locked up the said premises denying TAC or their employees or representatives access thereto for purpose of operating their business and despite repeated requests and demands made to him and his landlord, were unable to gain access to the premises. As a result TAC had to consolidate its business operations into its premises at Washington Street in the City of Hamilton"* (paragraph 13(a) of the Defence and Counterclaim).

13. They further claim that without Athletic Club's authority or permission, Mr. Stallard had sold fittings and gym equipment which were properly the property of the Athletic Club pursuant to the terms of the Merger Agreement. There are also allegations that he failed to provide services

as a consultant pursuant to paragraph 22 of the Merger Agreement to ensure a smooth transition from the Olympic Club to the Surviving Company until the lease held by the Olympic Club on the premises came to an end. The Defendants claim that he was absent for large periods of the Consultancy Period and hindered the transition. There were many other allegations concerning misrepresentations, namely about the status of an employee, failing to pay all outstanding debts as at the date of the Merger Agreement, that he had granted renewals of memberships, misrepresented the number of prepaid membership contracts, that he had failed to advise the Athletic Club that there were membership cards at discounted rates to members without expiration dates, failed to account for income received following the merger, failed to produce certain business records, failed to deliver up in a timely manner the share certificates of the Olympic Club, failed to use best efforts to make an orderly transition of members, staff and clients between the two clubs, failed to advise that the Olympic Club was insolvent at the time of merger and finally that he established a competing business known as High Point Health Limited in St. George's contrary to the non-competition and non-solicitation Agreement forming Schedule 7 of the Merger Agreement.

14. Defendants also counterclaimed for the costs of replacing fittings and gym equipment which the Athletic Club had sent over to the Olympic Club premises, purportedly for the purpose of refurbishment. Claim was also made for additional cost and expenses in respect of the Athletic Club wanting to use the Olympic Club premises during a period that they claimed would be for the purpose of refurbishing the equipment in the Athletic Club itself. There were also claims for the cost of representation before an Employment Tribunal concerning a complaint made by one of the former employees of the Olympic Club and income lost due to discounted sale of renewal of memberships. The Athletic Club seeks a Declaration in these proceedings that the Merger Agreement was void *ab initio* and that the Defendants have no obligations pursuant to the Merger Agreement. The Defendants also seek monetary compensation by way of Counterclaim as a consequence of all they alleged against Mr. Stallard in an amount of approximately $500,000.

THE EVIDENCE

15. Each of the three witnesses who gave evidence were cross-examined on their witness statements. There was one further witness statement from Mr. George Melo, a fitness consultant from Canada, who did not attend for cross-examination and the Defendants did not in any event seek to rely upon it. His evidence would have been that the premises of the Olympic Club had a new lock so that he could not gain access. The fact of a new lock was not a controversial point but the intent of changing the lock was. Mr. Stallard in his witness statement and on cross-examination said that he had changed the lock because he had observed someone he did not recognise unlocking the door late in the evening of 29th March 2015 and the next day noticed that there were items missing, including photographs from the walls which belonged to him personally. He made the decision to call a locksmith who came the next day and changed the lock, providing Mr. Stallard with two keys. Mr. Stallard's evidence was that he asked for a further key for Mrs. Scott as one of the keys was being given to the landlord. When he saw Mrs. Scott's assistant the following day, he asked her would she take it to Mrs. Scott but was informed by her that Mr. and Mrs. Scott were going on vacation for a couple of weeks and that she would give it to Mrs. Scott as soon as she saw her. In the course of the evidence, Mr. & Mrs. Scott both described the change of the lock as a "*lock-out*" from the premises.

16. In March 2015, correspondence in the form of emails and letters had started to be exchanged between the parties on this and other issues and the court is assisted by this contemporaneous correspondence in so far as it is able to discern whether it corroborates or not the evidence given by the witnesses in their witness statements or on cross-examination. The parties disputed whether Mr. Stallard was entitled to sell the equipment and items remaining in the Dundonald Street premises. The Defendants claimed that this was all the property of the Athletic Club. Mr. Stallard maintained that once he had given them the best of the equipment, he was entitled to sell off the equipment and items to discharge debts and whatever was left over, would be disposed of at the dump. The role of Mr. Scott as someone who came in and out of the business of the Athletic Club, is also to be seen in these emails.

17. On the issue of the obligations of the Athletic Club, emails were exchanged between 4th and 5th March 2015 which related to the Government annual economic activity survey of 2015 and the collection of data for 2014. Government officers had contacted Mr. Stallard for some information and he had responded about the merger with the Athletic Club and that they should direct their questions there. The government officers then followed up with Mr. & Mrs Scott and got two separate replies, one from Mr. Scott and one from Mrs. Scott.

Mrs. Scott responded, *"The Olympic Club no longer exists. Any correspondence regarding this facility can be forwarded to Scott Stallard at sstallard@northrock.bm."*

Mr. Scott responded, "*Olympic Club has closed down and never changed ownership from Scott Stallard. Therefore this request cannot be satisfied by us."*

18. In an email of 6th March 2015 to Mr. Scott, Mr. Stallard followed up on the issue, noting that Mr. Scott was not a director or owner and that writing to the government officers as Mr. Scott had done was giving them false information. He pointed out that Government, BELCO and Argus as creditors were to be paid by the Athletic Club but they still had not been contacted. Mr. Scott's response email was that Mr. Stallard had breached the Merger Agreement by showing a copy of the Merger Agreement to these creditors and to the government officers. Mr. Stallard responded that ownership was transferred from him to the surviving company, the Athletic Club. These emails were followed up by a letter from Appleby on behalf of Mr. Stallard on 12th March 2015 to Mrs. Scott where it was pointed out by them that there had been no payment to the creditors listed in Schedule 5, that the monthly rent of the Olympic Club premises had not been paid and that the former Olympic Club premises had been closed a month early in breach of the Merger Agreement, Clause 12.

19. The position of the attorneys for Mr. Stallard was that as a result of the Athletic Club's failure to comply with its obligations and liabilities, the Non-Competition and Non-Solicitation Agreement ("the Non-Compete Agreement") which was a part of the Merger Agreement was null and void. The attorneys also went on to set out that Mrs. Scott had incorrectly claimed that all of the equipment belonged to the Athletic Club and that specific equipment only was to be retained by the Athletic Club which they listed in this letter. It was this equipment which Mr. Stallard had

agreed to give to the Athletic Club on the agreement and understanding of Mrs. Scott that the remaining equipment was to be sold to third parties so that Mr. Stallard could repay an outstanding loan of $50,000 which had been borrowed to pay off the overdraft which the Olympic Club had with HSBC at the time of sale. This discharge of the overdraft was required by the Merger Agreement. Appleby's letter sought the return of any equipment which the Athletic Club may have taken above and beyond what was in the list and there was a threat of an Injunction if this did not occur. A week later, on Athletic Club paper, Mr. Scott responded noting that he was a director of the Athletic Club and in respect of the premises, put forward the position that the Athletic Club is *"a subletting tenant only and that the responsibility for the terms of the lease remained with Mr. Stallard*." It is unclear what is the exact meaning of the response given by Mr. Scott but he goes on to state that the Athletic Club *"remains in compliance."* It is hard to discern how this can be correct given the terms of the Merger Agreement about the Surviving Company paying the rent. I find that the Athletic Club should have been paying the rent to the landlord as it was the Athletic Club, pursuant to the Merger Agreement, which had agreed to sublet the property and to pay the rent from the date of the merger until 30th April 2015.

20. As regards the debt due to the creditors pursuant to Schedule 5, Mr. Scott's response was *"none of the items listed had a time requirement to satisfy."* He then stated that Mrs. Scott is in full compliance and "*…can/will make arrangements at her leisure. This process is already begun."* In respect of the management of the two locations, Mr. Scott set out that management *"… does not imply that any services need to be conducted out of both of those locations. Cleaning services have continued, on a weekly basis, at the Dundonald Street location, thus fulfilling the requirement. Also note that as of 15 March 2015, all services are being offered out of the Dundonald Street location, and no services are being provided out of the Washington Street location. These options are at the sole discretion of Mrs. Scott."*

21. His letter then goes on to set out that he did not accept the attempt to limit the definition of "*any assets"* and that "*we have recently uncovered very serious, multiple financial improprieties which were completed subsequent to the signing of the MOU and the Agreement, which has resulted in adverse liabilities to Mrs. Scott. We deem these to be breaches of the Agreement as well as violations of Bermuda Criminal Code."* He then gave as an example a yearly membership with the expiration of

November 2015 which he said was given to the landlord of Mr. Stallard. He said Mr. Stallard was specifically told by Mrs. Scott not to do this and that this had created a liability to Mrs. Scott of approximately $25,000. He then threatened an Injunction.

22. On its face, much of what Mr. Scott set out was incorrect, both factually and legally. Further, in contradiction of Mr. Scott's evidence about giving membership to the landlord, there is an email from Mrs. Scott some six days later to the landlord in which she references a conversation she had with the landlord where Mrs. Scott was proposing memberships for the landlord's employees, approximately 15 to 20 people until the end of 2015 *"… in exchange for April's rent and to be released early from the six months' notice Scott was required to give. The Athletic Club can be off the premises by March 31, 2015 as discussed permitting Scott to close the property in a timely manner by end April so you can start your project moving forward."*

23. The landlord responded the same day indicating they did not wish to accept that offer and the response from Mrs. Scott to that was to ask whether the water and electricity costs would be assumed by the landlord as of 31st March. Again, the response was in the negative and that the landlord would only assume responsibility for the utilities after the end of the lease agreement. The response from Mrs. Scott to this was that this was no problem, that she would make arrangements to shut off those utilities as of 31st March 2015 as *"we won't be using it."* Whilst it is not apparent from the emails which were exchanged between Mrs. Scott and the landlord whether Mr. Stallard was copied or provided with a copy, he on the same day wrote to Mrs. Scott saying that it was inappropriate to have the electricity or water turned off as the interior was completely dark even in daytime and that the loss of air circulation and air conditioning would cause mould and rust. He also pointed out that there was meant to be a functioning alarm system for safety and that in any event how could he sell or move equipment all of which she was claiming to be hers. He complained that she was not adhering to the Merger Agreement that the rent was not being paid and the Schedule 5 creditors had not been paid.

24. This led to another Appleby letter to Mr. and Mrs. Scott which emphasised again that the rents had not been paid, that having a cleaning service come into the premises did not meet the requirement to manage the two independent locations as provided for in the Merger Agreement and that while there may have been no time requirements set out in Schedule 5, the invoices

provided by the Schedule 5 creditors imposed a time requirement. As regards the complaint of yearly memberships to the landlord, Appleby confirmed that the memberships issued to the landlord expired on 30th November 2014, some two and a half weeks after the merger and that Mr. Stallard had not issued any subsequent memberships.

25. Despite the exchanges from lawyers, Mrs. Scott and Mr. Stallard continued to correspond on first name terms and on 30th March 2015, Mrs. Scott emailed Mr. Stallard to inform him that she was bringing over several pieces of equipment *"… in place of some items on the list for you to sell and keep the proceeds as per the agreement."* In closing, it stated *"I would also appreciate that you turn the lights off to keep the electricity bill down in cost, when you are not on the premises."*

26. Mr. Scott responded to Appleby's letter on behalf of the Athletic Club on 28th March 2015, informing them that he and his wife would be off Island until the week of 12th April 2015 and that they wanted no official communication until after their return. He stated that they had documentation that the new memberships had been given to the landlord expressly against the wishes of Mrs. Scott.

27. In this letter, he also states that *"that TAC was never interested in the business of TOC, but in specifically keeping the equipment and membership out of the hands of the competition."* This statement appears to have been made to somehow support his position that there was no justification for Appleby to refer to just a list of specific equipment and that it meant all equipment. Subsequently, on 31st March 2015, Mr. Scott wrote again to Appleby setting out that it had been discovered that day that Mr. Stallard had changed the locks on the Athletic Club's Dundonald Street location, formerly the site of the Olympic Club. He complained that this was an egregious breach of the Merger Agreement and that he took this action to be an immediate cancellation of the sub-lease to the Athletic Club and that he was giving notice that the Athletic Club was opting to cease to be liable for any obligations, specifically referencing responsibility for the payment of the invoices listed in Schedule 5 and the cash payment of $3,000 for 42 months commencing December 1st, 2016.

CONSIDERATION OF THE EVIDENCE

28. The correspondence is helpful in a consideration of the key matters which are in dispute and to determine where the truth lies in respect of the competing interpretation of events some 7 years ago, the legal obligations and the evidence which was given in this matter.

The first and important aspect is what was the consideration provided by the Seller for the Merger Agreement? It is clear what Mr. Stallard was to receive but what was the Athletic Club to get from the merger?

In the course of his evidence, Mr. Scott vacillated about the Athletic Club's objective and he said under cross-examination that it was *"all about the assets and we didn't get the assets."* He further referenced in his evidence how they had lost inventory by the actions of Mr. Stallard and that the value for the Athletic Club was the assets, again referencing the fitness equipment. He said that the Athletic Club was not interested in the business of the Olympic Club as he knew how much it was taking in per annum. He said he didn't believe it was as much as the records showed and that in any event only a small percentage of the members would probably move to the Athletic Club. Later in evidence, he said that one of the things was to prevent new competition and only part of the objective was to get some of the membership of the Olympic Club; the main benefit was being able to control the assets and to stop the competition.

Counsel for the Defendants in his closing said the crux of the Merger Agreement and the purpose of it was to have an operational business acquired from the Plaintiff and to do that one had to have the business and the equipment. It was submitted on behalf of the Defendants that you cannot have a fitness gym without equipment and that the evidence of Mrs. Scott was that the Athletic Club wanted the assets of the Olympic Club and their membership.

29. Indeed, Mrs. Scott's evidence was that the entire value to the Athletic Club was the assets and the membership and in her evidence she complained that neither were provided or else they were sabotaged by the Plaintiff. Mr. Stallard challenged Mrs. Scott on this in cross-examination and he put to her that she had secured the best of the equipment and that the remainder of the equipment was his to sell and then to be disposed of. She did not agree. He put to Mrs. Scott copies of the Financial Statements of the Athletic Club for the years 2014 and 2015 which showed

an increase in asset value from 2014 to 2015 of over $206,000 and an increase in revenue of over $147,000. Her response to Mr. Stallard was that anything to do with the financials needed to be answered by Mr. Scott. This aspect is considered further in this judgment.

30. On the issue of what was the consideration, the Defendants appear to have ignored what was stated in the MOU which was the foundation of the Merger Agreement. As recited earlier in this judgment, the MOU at Clause C states *"the material objective of the parties, is to amalgamate TOC and TAC, with the TOC branding ending."* It accords with the terms of Merger Agreement in respect of Clause 15 which provided that *"any asset, (including gym equipment) owned by the Surviving Company from the Effective Date which is not required by the Surviving Company after the Effective Date ("Access Assets") may be sold to third parties. The sale of such assets is to be agreed by both the Seller and the Buyer. The parties agree that the proceeds raised from the sale of Excess Assets shall be the property of the Seller*."

31. So it is clear from the Merger Agreement, leaving aside for the moment the issue of the sale of the assets to be agreed by both parties, that the proceeds raised from the sale of surplus assets were to be the property of the Seller, Mr. Stallard.

32. The evidence of the Defendants was that Mr. Stallard had no right to sell any equipment and that the sale of surplus equipment was for the benefit of the Buyer. I cannot accept that. I accept Mr. Stallard's evidence. His testimony is supported by emails from Mrs. Scott to him, in particular emails exchanged between 30th October and 31st October 2014 where Mrs. Scott confirmed that the equipment sale could be used to satisfy any remaining Olympic Club debts. The particular debt which Mr. Stallard had in mind was the debt of $50,000 owed to a friend, Mr. Keith White. He had borrowed this amount from him in order to clear the overdraft on the HSBC Account of the Olympic Club. This had to be done to so as to satisfy the statutory condition of the merger and the agreement concluded between the parties which required that the Olympic Club be free of debt at the time of the merger. Mr. Stallard signed a Promissory Note to Mr. White on 10th November 2014 and his evidence was that he then sold, with the written consent of Mrs. Scott, equipment to the value of $37,000 and ultimately repaid Mr. White, making up the balance from his own funds. I am satisfied that there was full knowledge on the part of the Defendants in respect of the sale of this equipment and I find that not only was Mr. Stallard entitled to sell this

equipment but that the written acquiescence to this sale in the email from Mrs. Scott to Mr. Stallard corroborates what he says occurred. This and the terms of the Merger Agreement make it clear to me that there is no basis for a claim by Mrs. Scott to be given the proceeds of the sale of the gym equipment which Mr. Stallard sold or otherwise disposed of. I accept the Plaintiff's evidence in respect of the condition of any equipment which was put into the former Olympic Club premises, which he ultimately arranged to have removed and disposed of, his evidence being that it had little or no value.

33. The competing evidence which the court had to deal with was whether or not **all** assets of the Olympic Club were to be the property of the surviving company, the Athletic Club, or whether they were for the benefit of the Seller. The Merger Agreement does not make it clear as by Clause 15 it expresses that any assets which include gym equipment owned by the Surviving Company from the Effective Date of the merger, being 12th November 2014, not required by the Surviving Company, may be sold to third parties and that the proceeds would be the property of the Seller. There is also a rider in Clause 15 which says that the sale of such assets is to be agreed by both Seller and Buyer. The fact that this provision provides for further agreement in the face of the Merger Agreement purporting to be the entire agreement between the parties, creates the position that there is no ready clarification as to what can and cannot be sold by the Seller such that the Seller then keep the proceeds of that sale. The court was presented with various lists of equipment which were in the Olympic Club facility before it closed down and that included equipment brought over from the Athletic Club to the Olympic Club. Mr. Stallard said this equipment was in a bad condition which could only be disposed of at the dump. The evidence of the Defendants was that they were going to renovate some of this equipment and that it had value.

34. The Defendants' position at trial was that the merger was all about getting the assets and the membership, which was where the value and the deal was for them. However from the purpose expressed in the MOU, the Merger Agreement and acquisition of the Olympic Club was to eliminate a competitor. My view that this was the intent of the deal is supported by the letter written by Mr. Scott as a director of the Athletic Club to Appleby on 28th March 2015. In that letter, in referencing the list of equipment, he states that *"… the Athletic Club was never interested*

in the business of the Olympic Club, but in specifically keeping the equipment and membership out of the hands of the competition." I have no doubt that the Athletic Club were keen to get some of the equipment from the Olympic Club and there was no dispute in respect of Mr. Stallard's evidence that he had provided them with five pieces of the latest equipment worth more than $40,000. In his evidence, Mr. Stallard made the compelling point that the Olympic Club occupied a much greater square footage than the Athletic Club, that the Athletic Club already had a full inventory of equipment and that the equipment in his 10,000 square feet premises could not simply be moved over to their 7,000 square feet facility. His evidence was that they took the best of the equipment and put older and rusted equipment into Dundonald Street. Mr. Stallard said that this equipment was his to sell and to deal with. This is corroborated by emails written by Mrs. Scott even as late as 30th March 2015 where she wrote that *"As per our discussions I am in the process of bringing over several cardio and resistant pieces in place of some items on the list for you to sell and keep the proceeds as per the agreement."*

35. To further support the Plaintiff's position that he could sell or dispose of equipment, there is also an email of 17th March 2015 which Mrs. Scott wrote in response to an email from Mr. Troy Furbert, Divisional Officer of the Training Division of the Bermuda Fire & Rescue Service. He had written to Mrs. Scott explaining how the Fire Service had need for certain equipment which he was aware the former Olympic Club had and which would be useful for them to use in their physical ability test of new applicants to the Fire Service. He asked whether or not she was willing to sell safety harnesses which he was aware had been used with the climbing wall at the former Olympic Club. He received a response by return from Mrs. Scott, copied to Mr. Stallard, saying that she had forwarded his email to Mr. Stallard *"as he will be clearing the property in April of all equipment."* This exchange again corroborates the Plaintiff's position that the Athletic Club had got what equipment it wanted and the rest of it was for him to deal with and sell or dispose of as he saw fit. In fact, Mr. Stallard complained that he ended up taking on the responsibility of emptying the Olympic Club facility in April 2015 as he considered it an obligation to the landlord to do so. He maintained that the equipment had little or no value at that time and proceeded to pay $8,000 to have the premises cleared.

36. Having heard the witnesses and considered the contemporaneous documents, I find that the disposition of the assets remaining in the Dundonald Street premises at the end of March 2015 was pursuant to the Merger Agreement and Mr. Stallard did not breach it.

37. Further corroboration as to the Plaintiff's position as regards the interpretation of Clause 15 is found in correspondence written some two weeks before the Merger Agreement was signed. Whilst there was no evidence given as to the timing in relation to the drafting of the Merger Agreement, it would appear that it must have been substantially advanced as of the time that the exchange of emails took place on 30th and 31st October 2014 between Mrs. Scott and Mr. Stallard. This concerned the fact that Mr. Stallard had borrowed money from a friend to discharge the Olympic Club's debt at HSBC Bank Bermuda. There was an overdraft on the chequing account in the amount of $50,000. Mr. Stallard borrowed this amount from a friend, Mr. Keith White, and then gave a Promissory Note to Mr. White on 10th November 2014. In anticipation of that, in the exchange of emails about a draft agreement, Mr. Stallard informed Mrs. Scott that the funds from the sale of the assets should be tied to the repayment of the overdraft; that while the draft refers to the sale of the equipment to satisfy the Olympic Club debt it should be to satisfy the loan that paid off the Olympic Club's overdraft. In her response, in addition to referring to the larger outstanding amounts due to creditors which would be paid by the Athletic Club being placed in an addendum, to be referred to as Schedule 5, she referenced the overdraft payment and stated that *"the equipment sale to (sic) satisfy any remaining TOC debts."* Mr. Stallard wrote underneath that *"No, satisfy overdraft first as it is an Olympic Club debt, not a personal debt."*

38. I recite the above to demonstrate that, as regards the issue as to whether Mr. Stallard had the right to sell or dispose of assets, and having heard the witnesses give their evidence and be cross-examined on these issues, and where there is any conflict in the evidence I accept that of Mr. Stallard, I find that he was entitled to sell and dispose of the assets as he did and that he was not in breach of the Merger Agreement in doing so. He had a genuine belief that he was in charge of these assets and the contemporaneous correspondence establishes that he was correct to have that belief. Mrs. Scott on behalf of the Athletic Club and herself had effectively given *carte blanche* to Mr. Stallard to sell the remaining equipment and items in the Dundonald Street premises. He had with her full knowledge authority to sell and the emails she wrote clearly acknowledge that

and provide the agreement which the Merger Agreement contemplated as regards the sale of equipment.

THE "LOCK-OUT"

39. In relation to Clause 26 requiring as a condition precedent the Seller's compliance with his obligations, Mr. Scott in his evidence relied on his letter of 31st March 2015, written by him in his capacity as director of the Athletic Club to Appleby. This set out *"…it has been discovered today, that your client has changed the locks on TAC's Dundonald Street location, formerly the site of TOC. We take this action as an egregious breach of the Agreement. Further we take this action to be an immediate cancellation of the sub-lease to TAC, by your client. Pursuant to the Agreement, notice is hereby given that with immediate effect, Kim Herron Scott and TAC will be opting to cease to be liable for any obligations under Clause 9, as per Clause 26."*

40. As I raised with Mr. Scott in the course of his evidence, why didn't Athletic Club, now the lawful tenant which was paying the $11,000 per month rent, exercise its lawful rights to require the landlord to provide them with a key? The legal position was that the Athletic Club had all the rights and obligations of the Olympic Club pursuant to the Certificate of Merger as of 12th November 2014 and that he could have demanded the landlord to provide a key to the premises. The Athletic Club was the party that had the obligation to pay the rent of $11,000 per month, including for the month of April. Mr. Scott instead chose the course of invoking Clause 26 and setting out that the Seller had not performed his obligations under the Merger Agreement. In choosing this course, I find that the Defendants had no legal basis to do so. The obligation in Clause 26 which he claimed gave rise to the right to terminate the Athletic Club and Mrs. Scott's obligations to Mr. Stallard, would be on analysis, a negative one, namely not to lock the Athletic Club out of the Dundonald Street premises. This does not exist on any reading of this clause. Even if I was to accept that there had been a lock-out as contended for by the Defendants, which I do not, the only clause in the Merger Agreement which may have relevance is Clause 22 which provides that the Seller will continue on at the premises as a Consultant to ensure smooth transition from the Olympic Club to the Surviving Company until the lease currently held by the Olympic Club on the premises comes to an end. This does not even assist the Athletic Club. The inability to access the former Olympic Club premises could have been resolved by requesting the

key from the landlord or even asking Mr. Stallard for it. I find that there was no lock-out. Athletic Club, if they really wanted to, could have got into the premises but it appears to me a decision was made to claim the lock-out as a purported basis to deny Plaintiff any benefit under the Merger Agreement.

41. I am satisfied that the evidence which Mr. Stallard gave to the court about why he changed the lock on 30th March 2015 was truthful. He was concerned that someone unknown to him had come into the then closed up Dundonald Street facility of the former Olympic Club and had removed property, including personal items of his. I accept his evidence that he provided the landlord and an agent of the Athletic Club with a key subsequently. I do not accept that he locked the Defendants out of the Dundonald Street premises. The Athletic Club and Mrs. Scott had no right to rely on this event and then claim that the Athletic Club and Mrs. Scott had no further obligations under the Merger Agreement. They sought to deprive Mr. Stallard of the benefits which otherwise would have accrued to him under the Merger Agreement; that they would never make the agreed payment to him for acquiring his business and would have no obligation to pay the Schedule 5 creditors.

THE FINANCIAL STATEMENTS

42. By means of discovery, the Plaintiff received the financial statements of the Athletic Club for the years 2014 to 2020. Mr. Stallard had made a specific application for discovery of these documents and having obtained them subsequent to the preliminary hearing incorporated them into his list of documents and he spent a substantial portion of his time in cross-examination of the witnesses referencing these statements. Put briefly, his analysis of the financial statements was that the income rose between 2014 and 2015 from $744,854 to $983,358, an increase of nearly $240,000. On the financial statements from the Athletic Club, gym equipment increased in value from 31st December 2014 to 31st December 2015 by approximately $206,000. The bank loan shows for the years 2014 to 2018 starting in 2014 in the amount of $411,701 and for each of the years 2015, 2016, 2017 and 2018, showing us $350,000. Dividends were paid in 2014, 2016, 2017 and 2018. An email presented by Mr. Stallard from Chancery Legal to Mr. Scott of 11th August 2021 confirmed that

Mr. Stallard had been given all financial statements that were available to the Athletic Club and that nothing further exists. Armed with these documents, being the balance sheets for these years, and the compilation made by the Plaintiff on one sheet, Mr. Stallard asked questions of the first witness for the Defendants, Mrs. Scott. Her response to questions about the financial statement, the increase in asset value and the increase in income and the payment of dividends subsequent to the merger were met with the general response that anything to do with the financials, you need to ask my husband. But Mr. Scott on his examination gave some explanation about the loan of $350,000 and that in fact that loan was owed to him as he had repaid the bank loan in the first quarter of 2015. He said that the financial statements had been restated in 2015 and appeared to contest much of what was put to him and in response to one question from Mr. Stallard said, *"I have a Master's Degree in Finance and I may know what I am talking about."* It was hard to discern from his evidence why the financial statements which were disclosed in evidence were not correct and the witness indicated there had been a change of accountants in 2014 because he was dissatisfied with them and that he had recognised that the figures were historically incorrect on prior balance sheets. He indicated that he did not have access to the proper financials as they were done on a system which he described as ending up being a mess but that in respect of the accounts there would have been notes when the accountant made changes. He said that the notes had been given with the financial statements but that the notes no longer exist. He said that because the company had gone into liquidation, the books had been handed over to the corporate secretary, Miss Carmen MacDonald of Harbourview Corporate Services, and that as far as this Discovery Order was concerned, he was aware that Mrs. Scott had reached out to Miss MacDonald but had got no response. His position was that the financial statements had been restated and that essentially the income and asset increases were not as portrayed on the financial statements which had been disclosed.

OTHER CLAIMS

43. Given my findings on those matters already addressed in this judgment, I do not believe that I need to make any findings in respect of matters concerning the financial statements. On the balance of probabilities, given that Mr. Scott had said these were the only financials available in

response to Mr. Stallard's discovery request, I find that these financials are corroborative of the Plaintiff's position that the Defendants got the value that they bargained for under the Merger Agreement which was that they eliminated a competitor, secured some assets and increased membership and for that they should have performed their obligation under the Merger Agreement to pay him the agreed amount of $3,000 per month for 42 months commencing on 1st December 2016.

44. The other claims made by the Defendants as set out in their Defence and Counterclaim, briefly described in paragraphs 13 and 14 above, I consider have no substance to them and certainly the evidence adduced by the Defendants did not support the allegations. If anything, Mr. Scott in his evidence made reference to what appeared to me to be without prejudice discussions which had taken place between himself and Mr. Stallard which appeared to me to me to be an attempt by Mr. Scott to show that he was being reasonable with Mr. Stallard by offering to withdraw the Counterclaim in return for Mr. Stallard walking away from his claim. It goes without saying that such a discussion could also be interpreted as the Counterclaim had been brought in order to leverage the Athletic Club's position and to intimidate the Plaintiff to drop his claim. I form no view as to what was the purpose of Mr. Scott informing the court of the without prejudice discussions. In any event, the evidence supporting the various items set out in the Counterclaim, other than the ones already dealt with, was vague and inconclusive. In respect of the allegation from the Defendants that Mr. Stallard issued additional memberships or renewed memberships or misrepresented the number of prepaid membership contracts, none of this was addressed by Mrs. Scott with reference to any documentation. Mr. Scott pointed to cards which had a sequence of numbers from 1 to 25 printed around the edges with punch holes in some of them. These cards had handwritten on them a four digit number and a name, sometimes two names, with the Olympic Club name printed in the middle. Some of these cards had the words 'spin' printed on them. None of them had a date on them. Mr. Scott sought to rely on these to say that some of these had been issued post-merger but this was totally unhelpful in terms of proving any basis for the Counterclaim. The evidence was wholly unhelpful and inadequate to support any claim related to the membership.

45. As regard the cost for a Management Consultant, referred to in the documents provided to the court as a Fitness Manager Consultant, it is hard to comprehend why, given the facts, the Defendants sought to recover the cost of Mr. George Melo who was brought into Bermuda by the Athletic Club on a temporary fast-track permit. The application for him put forward by the Athletic Club on 15th March 2015 referenced an arrival date of 25th March 2015, and was for him to *"assist with the reinventing of the new TAC including, planning of a new floor design for the equipment, complete the renovations, marketing and promotions to sell the reinvented TAC branding. He will also be training the staff in new club procedures, customer service and sales. As he has extensive experience with building, renovations, floor design, marketing and promotion and staff training of several fitness facilities in Canada, we are hoping to accomplish all this in a short stay. His arrival date is scheduled for 25th March 2015 in two weeks."* Given that the renovations of the Athletic Club at its Washington Street location were complete by the time that Mr. Melo arrived, noting that his work permit which when granted only commenced on 27th March 2015, it is hard to comprehend how the costs of his work permit and his salary could be put as an obligation of Mr. Stallard.

46. Similarly, it is hard to understand how the legal costs incurred by the Athletic Club in an employment dispute brought by a former employee of the Olympic Club who was working at the Athletic Club were also claimed as an expense for Mr. Stallard to pay. The court was provided with the Employment Tribunal Decision of 30th October 2015 in respect of a claim made by Miss Shirley Daniels. The Athletic Club terminated her employment on the basis that she was an independent contractor when Miss Daniels believed that she was an employee. Mr. Stallard gave evidence to the Tribunal where, in the Determination of the Tribunal, it is recited *"the Tribunal accepts the evidence of the former owner of the now defunct company as forthright and credible but recognised a weakness in the fact that no contract for the period after January 2011 could be produced."*

47. The Tribunal accepted the Athletic Club's argument that she was an independent contractor and Miss Daniels was not entitled to any compensation. It is noteworthy that the Athletic Club was represented by Mr. Scott at the Tribunal hearing and so it is hard to discern where the legal costs claimed arise from or what claim there could be against Mr. Stallard given that the Athletic Club prevailed in the case.

48. Another claim recited in the Counterclaim is that the Plaintiff set up a competing business contrary to the Non-Compete Agreement incorporated into the Merger Agreement. It was alleged that Mr. Stallard had established a limited company which operated two corporate gym facilities at AIG and HSBC. Mr. Stallard accepted that he did this but it was never established by the Defendants that the operation of these in-house gyms for AIG and HSBC could properly be regarded as "*Restricted Activities*" as defined in the Non-Compete Agreement which was set out at Schedules 7 of the Merger Agreement. This definition referenced a connection by Mr. Stallard with a *"full service gym and/or wellness centre in Bermuda."* It is arguable as to what a full service gym would encompass, and I had no argument on the point, but it hardly seems appropriate that this description would be applicable to the smaller in-house facility provided by a corporate entity for its own employees. In the absence of any proof to the contrary, I cannot accept that Mr. Stallard was in breach of this agreement. Even if I was wrong in this, I find that given that no payment had ever been made by the Defendants to the Plaintiff as required by the Merger Agreement, that this engages the corresponding clause in the Merger Agreement which the Defendants had sought but failed to be able to rely upon. Clause 27 provided that if the Buyer did not perform her obligations under the agreement, the Seller would at his option cease to be liable to perform his obligations under the agreement. This clause is mirrored at Clause 4, 2. A of the Non-Compete Agreement and on 12th March 2015 Mr Stallard's then attorneys wrote to Mrs. Scott invoking it for her breaches. It is in those circumstances that I consider that the Defendants' reliance on Mr. Stallard being 100% shareholder and a director of a limited liability company managing the gyms inside the corporate entities is not an actionable breach.

DISPOSITION

49. Given the failure of the Defendants to substantiate the allegations which they made in their Counterclaim and given the conclusions reached in respect of the main plank of their argument that the Plaintiff was in breach by locking them out of the premises and for all the reasons set out in this judgment, I find that the Plaintiff is entitled to judgment in respect of his claim, being $3,000 for a period of 42 months. This amount should have been paid in full by 1st June 2019. On this amount of $126,000 he is entitled to Interest at the statutory rate of 3.5% from 1st June 2019 to

the date of payment. These amounts are to be paid to the Plaintiff by the Defendants on a joint and several basis within 7 days of the date of this judgment. The Defendants are also liable to the Plaintiff for the outstanding payment in respect of the Plaintiff's social insurance in the amount of $2,116.62 which amount is owed to the Plaintiff by the Defendants jointly and severally and, in so far as there is Interest due and owing to the Accountant General on that amount, the Defendants are also liable to pay interest on this amount to the Plaintiff on a joint and several basis.

50. In respect of costs, I make a preliminary order that costs follow the event and the Defendants, on a joint and several basis, are liable to the Plaintiff for his costs save that they indicate they wish to be heard on the issue of costs by filing the appropriate notice within 14 days of the date of this judgment.

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JEFFREY ELKINSON, ASSISTANT JUSTICE