

1 **IN THE GRAND COURT OF THE CAYMAN ISLANDS**
2 **HOLDEN AT GEORGE TOWN, GRAND CAYMAN**

3
4 **CAUSE NO. G0485/11**

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6 **BETWEEN:**

7
8 **ESSO CAYMAN LIMITED**

9 **Plaintiff**

10 **AND:**

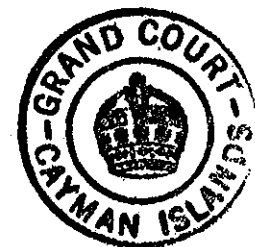
11 **PETER SOUTH**

12 **Defendant**

13
14 **Appearances: Mr. N. Timms, Q.C., for the Plaintiff**
15 **The Defendant in person**

16
17 **Before: Hon. Justice Henderson**

18
19 **Heard: 10th August, 2012**
20
21



22 **JUDGMENT**

23
24 1. The essential question presented during this hearing is whether a corporation can
25 exercise control over the transfer of a liquor licence even though the licence must
26 be issued in the name of a natural person.
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28

1 **Facts**

2

3 2. The Plaintiff Esso Cayman Limited (“Esso”) is the owner of a piece of real
4 property on Grand Cayman upon which a fuel service station and convenience
5 store is located. The Defendant Peter South (“Mr South”) is a shareholder in and
6 sometime director of PSB Ltd. (“PSB”), a company doing business within the
7 Cayman Islands. By a lease agreement made 3rd November, 2006 (“the Original
8 Lease”), Esso agreed with PSB that the service station and convenience store
9 would be leased to PSB and PSB would operate the business. Mr. South,
10 executed the Original Lease as an authorised representative of PSB. Mr. Barry
11 Smith, who was at that time a principal in PSB, also executed it and was a party to
12 it.

13

14 3. The previous operator of the service station and convenience store, Mr. Shane
15 Peynado, was the holder of a liquor licence (“the Licence”) permitting him to sell
16 liquor at the convenience store. The Licence had been issued under the Liquor
17 Licensing Law (2007 Revision) (“the Law”), the material parts of which read:

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*7. (1) A licence is a permit to an individual person or to two individual
20 persons jointly, who may or may not be the servants or
21 representatives of another named person, in compliance with this
22 Law, to dispose of:*



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- (a) *such intoxication liquors;*
- (b) *in such quantities;*
- (c) *to such persons;*
- (d) *at such times;*
- (e) *at such premises; and*
- (f) *subject to such general conditions,*

as may be specified therein, and shall be in Form 3.

(2) *Persons licensed under subsection (1) are licensees under this Law.*

8. (1) *A Board may not grant a licence to any person unless it is satisfied that such person:*

- (a) *is of good character, and exhibits to the Board a certificate signed by the Commissioner showing his record of criminal convictions, if any, over the preceding fifteen years;*
- (b) *is over the age of twenty-one years;*



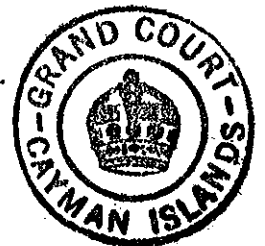
1 (c) *is of sufficient business capability to understand and*
2 *comply with this Law; and has paid the fee prescribed for*
3 *the grant of a licence.*
4

5 4. In 1993, Esso had paid the sum of \$84,000 to “acquire” the Licence. As a
6 corporate entity, it could not hold the Licence in its own name. The provisions
7 quoted above are clear in their intent: a licence must be issued to an “individual”
8 person, i.e., a natural person, who therefor has personal responsibility including
9 criminal liability for compliance with its terms. The licensee must be a natural
10 person of good character, without criminal convictions, and over the age of 21.
11

12 5. Although Esso owned the premises to which the Licence applied and had paid the
13 price to acquire it, its tenant and operator, Mr. Shane Peynado, became the
14 Licensee. The intention of the Original Lease was that PSB would replace David
15 Peynado & Co. Ltd as operator of the service station and convenience store.
16 Consequently, it was necessary to transfer the Licence to a natural person
17 associated with PSB. The Original Lease provided that Mr. Barry Smith would
18 be the Licensee. The material parts of the Original Lease pertaining to the
19 Licence are as follows:

20 3.14 *Liquor Licence*

21 3.14.1 *The Licensee acknowledges that he holds the Liquor*



1 *oppose a renewal of the Liquor Licence or*
2 *of any arrest, charge or conviction of the*
3 *Operator or the Licensee or any employee of*
4 *the Operator or the Licensee;*

5 3.14.2.5 *not without Esso's consent which Esso may*
6 *give or withhold in its absolute discretion,*
7 *without giving any reason therefor, to*
8 *permit any other person or persons to*
9 *become the holder of the Liquor Licence;*

10 3.14.2.6 *not without Esso's consent which Esso may*
11 *give or withhold in its absolute discretion,*
12 *without giving any reason therefor, to apply*
13 *for or obtain any occasional liquor licence*
14 *as holder of the Liquor Licence.*

15
16 6. I infer from the fact that Mr. South executed the Original Lease on behalf of PSB
17 that he understood and accepted the intent of the agreement pertaining to the
18 Licence. In effect, the natural person holding the licence was doing so as a
19 representative of Esso. The Licensee was required to keep the Licence in good
20 standing by renewing it but was not permitted to agree to any variation of it. The
21 Licensee had no power to transfer or assign the rights represented by the Licence



1 (without Esso's consent) and could not apply for an additional licence in his
2 name. The Licence represented a valuable asset: the right to sell liquor to the
3 public from the convenience store not only during normal liquor store hours but
4 also during certain periods of time when ordinary liquor stores were required to
5 be closed. The value of the Licence is enhanced substantially by the fact that it
6 represents a non-conforming use; the evidence shows that such licences are no
7 longer being issued to service station convenience stores.

8
9 7. As it happened, Mr. Smith (for personal reasons which are not material here)
10 decided he did not wish to hold the Licence in his name. It was proposed that Mr.
11 South do so instead.

12
13 8. On July 24th, 2007, Mr. South sent a draft letter (to be signed by Esso's Country
14 Manager for the Cayman Islands) to the Chairman of the Liquor Licensing Board
15 ("the Board") requesting a transfer of the Licence from Mr. Peynado to Mr.
16 South. In this draft, Mr. South described himself as Esso's "nominee" and as "our
17 nominated dealer representative". Earlier, Mr. Peynado had advised the
18 Chairman that he held the Licence "as representative of Esso" and gave his
19 consent to the transfer of the Licence "to some other representative of Esso, as
20 nominated by Esso". Mr. South's emailed message by which he transmitted his
21 draft letter to Esso shows that he was aware of the terms of Mr. Peynado's letter.

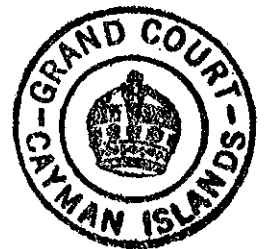


1 9. In due course, the Licence was issued to Mr. South. The Licence identified the
2 fuel service station and convenience store as the “Licensed Premises” in question
3 and specified the hours during which the sale of liquor would be permitted. At
4 Mr. South’s initiative, the Licence was renewed on several occasions.
5

6 10. The Original Lease, which had an initial term of one year, was renewed. Esso and
7 PSB then entered into negotiations for a new lease agreement. In July, 2010 a
8 fresh agreement (“the New Lease”) was presented to PSB and Mr. South for
9 signature. It was contemplated that PSB would execute the New Lease as the
10 operator of the fuel service station and convenience store and Mr. South would
11 execute it as the liquor Licensee. The provisions of the New Lease pertaining to
12 the Licence are identical to those found in the earlier Original Lease.
13

14 11. The Registered Land Law, (2004 Revision) contains (in section 46) a requirement
15 that a lease for a specified period exceeding two years must be registered. The
16 New Lease was not registered.
17

18 12. Mr. South did sign the New Lease in his personal capacity as Licensee but the
19 agreement was never executed by PSB. (Esso alleges that PSB had no directors at
20 the time, although that is denied. It is unnecessary for present purposes to resolve
21 that dispute.)
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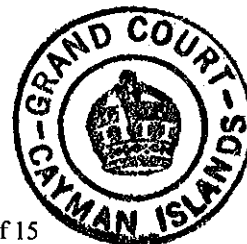
1 13. By this time, the business relationship between Esso and PSB had deteriorated
2 significantly. Esso served a notice of termination on PSB dated 3rd December,
3 2010. It issued a writ seeking possession of the premises in the following month.
4 By order dated February 18th, 2011, Foster J. of this Court stayed the proceedings
5 in favour of arbitration.

6
7 14. The arbitration was between Esso and PSB; Mr. South was not a party to it. The
8 Arbitrator (Mr. Nigel Meeson, Q.C.) said (in his interim award against PSB of
9 November 29th, 2011) that he had no jurisdiction to make any award against Mr.
10 South. The Arbitrator's final decision of March 14th, 2012 refused to grant an
11 adjournment which PSB had requested and then dismissed PSB's counterclaim
12 because it was entirely unsupported by evidence.

13
14 15. On December 22nd, 2010 the Liquor Licensing Board renewed the Licence in the
15 name of Peter South. At the behest of Esso, the Board included this wording in
16 the Licence:

17 *The following special conditions apply to this Licence:*

18
19 *Sales prohibited to other licencees for the purpose of disposal by him/her*
20 *under the terms of his/her licence. Conditions subject to contract between*
21 *Licensee and Esso Standard Oil S.A. Limited. Authorised to open outside*
22 *permitted hours for the sale of non-alcohol items. (underlining added)*



1 16. By letter dated October 26th, 2011 Mr. South asked the Liquor Licensing Board to
2 transfer the Licence (still in his name) to a different geographical location where
3 he planned to establish a liquor outlet. Esso took objection to this and alleged that
4 Mr. South held the Licence only as its representative. By letter dated November
5 30th, 2011 Mr. South responded. He reiterated his request to transfer the location
6 of the Licence, denied that he held the Licence as a nominee or representative of
7 Esso, and asserted erroneously that the Arbitrator had found that he had “never
8 been a party to any valid legal and binding agreement to act as nominee for Esso
9 or at all”.

10
11 **Issue**

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13 17. Mr. South, who represented himself at the hearing before me, argued that a liquor
14 licence is a piece of property which can be owned only by an individual or natural
15 person because of the provisions of the Law cited above. He said that this is not a
16 requirement which can be altered by contract. He argued, in essence, that the
17 provisions of the Original Lease and the New Lease concerning the Licence to
18 which he had consented on two occasions were of no force or effect, with the
19 result that he had an unconstrained right to request a transfer of the Licence to a
20 business of his own.



1 **Severability**

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3 18. The New Lease was not executed by the tenant but it was executed by Mr. South,
4 the Licensee. It contained a severability clause which reads:

5 *The parties expressly state that in entering into this Agreement it is not their*
6 *intention to violate any law, ruling or regulation in effect on this date, and if any*
7 *sections, sentences, paragraphs, phrases, clauses or combinations thereof*
8 *("provision") should violate any law or be or declared unenforceable by a court*
9 *of law, such provision shall be annulled, but the remainder of this Agreement*
10 *shall continue to be binding for the parties, unless the remaining portions should*
11 *become inadequate to define the rights and obligations of the parties.*

12

13 19. The provisions of the New Lease pertaining to the Liquor Licence are entirely
14 capable of standing on their own, severed from the other, inoperative terms of the
15 contract. They are adequate to define the rights and obligations of Esso and the
16 Licensee with respect to the Liquor Licence even though other provisions of the
17 New Lease may be unenforceable and the Operator has not executed it.

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19 **Decision**

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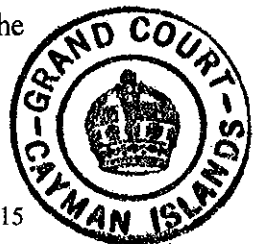
21 20. The real question, and the only one argued by Mr. South, is whether Esso can rely
22 upon the severed provisions of the New Lease or upon the incorporation of the



1 Licensee terms in the Original Lease to prevent Mr. South from inducing the
2 Board to transfer the lease to another geographical location at which Esso does no
3 business and to require Mr. South to transfer the Licence to a nominee of Esso. Is
4 a Liquor Licence so exclusively personal in nature that the licence holder cannot
5 by contract bind himself in this manner?
6

7 21. It is understandable that the Legislature would require that a liquor licence, which
8 can be abused easily to the detriment of the public, must be held by an individual.
9 By this means, personal accountability for adherence to the terms of the licence
10 can be enforced most effectively. Nonetheless, many licensees will prefer to
11 operate their businesses through a corporate entity for the obvious advantages that
12 brings. Any such corporation will have a financial interest in deciding which
13 individual will hold the licence. Not unnaturally, the corporation may wish to
14 constrain the licence-holder's right to deal with the licence in a manner
15 detrimental to the company's interests. The Legislature can be assumed to have
16 appreciated all of that. It is entirely in accordance with commercial practice.
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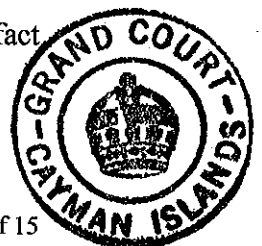
18 22. A Liquor Licence is a collection of rights (with concomitant obligations) defined
19 in the Law. The rights surrendered by Mr. South to Esso by contract are not
20 integral to the regulatory scheme under the Board's jurisdiction. He has agreed
21 with Esso, among other things, to refrain from applying for a variation of the
22 Licence terms. Giving up his right to apply for a variation cannot affect the



1 Board's power to regulate liquor outlets. The Board's jurisdiction remains
2 unchanged. Similarly, he has agreed "not to apply for any additional or different"
3 licence. Again, that does not trench upon the Board's jurisdiction in any way. In
4 the absence of express language in the Law forbidding a licensee from divesting
5 himself of the right to apply for a variation or the right to apply for an additional
6 or different licence, I would not hold that such a contract is forbidden. There is
7 no such express language in the Law. I find that Mr. South is prohibited by the
8 terms of his agreement with Esso from seeking to have the Licence transferred to
9 another geographical location.

10
11 23. The ultimate request by Esso is for an order requiring Mr. South to consent to a
12 transfer of the Licence to Esso's nominee. The Licence can have no application
13 to any location except the convenience store without Esso's consent. PSB's
14 operation of that store has ceased. Mr. South's involvement with the store is at an
15 end. The fair and natural result of these circumstances is that Mr. South must
16 now transfer the Licence to a representative of Esso.

17
18 24. Three collateral points can be disposed of shortly. Mr. South's assertion that the
19 Arbitrator found the New Lease to be "invalid" is incorrect. His interim award
20 concerned his own jurisdiction and the final award dismissed PSB's counterclaim
21 due to a lack of evidence. There is also no merit in the assertion that Foster, J.
22 found the New Lease to be invalid; the point was not before him. Finally, the fact



1 that the New Lease was not registered under the Registered Land Law cannot
2 affect Mr. South's obligations of a personal nature to Esso.

3
4 **Judgment**

5
6 25. For these reasons, I make a declaration that:

7
8 (1) *on a true construction of the 2010 Deed and in the events that have*
9 *happened, the defendant holds the Package Liquor Licence number P20-62:*

10
11 (a) *upon terms described in clauses 3.14 of the 2010 Deed;*

12
13 (b) *as representative of and nominee of the Plaintiff and at its direction and*
14 *will; and*

15
16 (c) *upon terms that, at the direction of Plaintiff, he shall consent to the*
17 *transfer of the Licence to a person nominated by the Plaintiff.*

18
19 and grant to Esso an injunction:

20
21 (a) *restraining the Defendant, by himself, his servants or agents from*
22 *dealing with the Licence save at the direction of the Plaintiff;*



1 (b) *restraining the Defendant, by himself, his servants or agents from*
2 *making or pursuing any application for variation of alteration of the*
3 *Licence save at the direction of the Plaintiff; and*

4
5 (c) *requiring the Defendant to consent in writing to the transfer of the*
6 *Licence to a person nominated by the Plaintiff.*

7
8 26. Esso is also entitled to damages in the amount of \$3015.50 for its cost of
9 intervening in Mr. South’s wrongful application to the Board, to interest thereon
10 at the court rates, and to its costs on the standard basis.

11
12 Dated this 31st day of August, 2012.

13
14 *Henderson, J.*
15
16 Henderson, J.
17 Judge of the Grand Court
18

