

2004
Lubany
GRAND COURT
CAYMAN ISLANDS

1 IN CHAMBERS
2 IN THE GRAND COURT OF THE CAYMAN ISLANDS

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4 CAUSE NO: 390 OF 2004

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6 BEWTEEN: GLENDA GALE **TIBBETTS** PLAINTIFF
7
8 AND: SAMUEL NIKFARJAM DEFENDANT
9

10 Before: Chief Justice Anthony Smellie

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12 Appearances:
13 Ms. Sandie Corbett of Walkers for the plaintiff.
14 Ms. Melanie Crinis of Campbells for the defendant.

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16 Date: 14.10.04, 18.10.04, 19.10.04
17



18 **RULING**
19

20 This is an application by Notice of Motion by the plaintiff, by which she seeks an order
21 that the Stop Notice filed herein on 26th August 2004 by the defendant, to stop the
22 transfer of certain securities, be discharged.

23 The securities in dispute are all the issued shares of a locally registered company named
24 Beneath the Waves Ltd. ("the Company").

25 The only significant asset of the Company is a registered lease which it holds over certain
26 commercial property located in George Town.

27 The plaintiff and the defendant entered into an agreement for the sale and purchase of the
28 shares in the Company for a sum of \$350,000.

29 A written offer dated 24th June 2004 requiring acceptance by that same date was signed
30 by both parties and the deposit of 10% of the purchase price was also then paid .

31 The written offer did however contain two conditionalities which arise now for
32 consideration:
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(i) completion was set to take place on or before September 28th 2004;

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(ii) the offer was expressed to be subject to the purchaser (the defendant)

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obtaining the necessary business licence, receipt of such licence to be

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notified to the Vendor (plaintiff) within 60 days of the acceptance of the

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offer (ie: within 60 days of 24th June 2004 or by 24th August 2004).

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On the defendant's admission of its non-satisfaction on the 24th August 2004 - the very

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date for the satisfaction of the conditionality of licensing- the plaintiff wrote to the

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defendant's agent Mr. Robert Gibb purporting to rescind the agreement and releasing the

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deposit which had been held in escrow.

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There is conflicting evidence as to whether an extension of the deadline of satisfaction of

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the conditionality was granted by the plaintiff. The defendant asserts that such an

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extension was verbally agreed by Mr. Robert Gibbs, but Mr. Gibbs denies this. The

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defendant's further assertion, that the escrow agent for the transaction also agreed the

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extension on behalf of the plaintiff; is not commented by that person. The plaintiff's

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response is that in any event, that person was not her agent and had no authority to so

18

agree on her behalf.

19

The conflicting evidence on this issue is not a matter which I need resolve. What is clear

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from the plaintiff's letter of 24th August 2004, is that the plaintiff purported to terminate

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the agreement of sale/purchase as of that date, well within the completion date of 28th

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September 2004. So, even if I were to find that the extension was orally granted - a

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matter which I must say I regard as attended with difficulties - it is clear that the

1 agreement would have been rightfully rescinded or wrongfully repudiated (depending on
2 what view one takes of the respective rights under the contract) by the letter of 24th
3 August 2004.

4 The subsequent events did not alter that reality.

5 The next day, the 25th August 2004, the defendant's attorney served a letter upon Mr.
6 Gibbs which asserted that he had agreed to enter into a formal Share Purchase Agreement
7 on behalf of the plaintiff. The letter enclosed a draft of that Agreement. The letter also
8 asserted the verbal agreement of the extension of time already referenced, for the
9 fulfillment of the conditionality of the earlier agreement.

10 The draft Agreement is a more elaborate form of the earlier written offer for the purchase
11 of the shares including, among other things, many warranties to be given by the plaintiff
12 as to the state of affairs of the Company.

13 Despite the assertion in the letter of the 25th August, Mr. Gibbs also denies having
14 verbally agreed on behalf of the plaintiff to enter into this formal agreement in
15 substitution for the earlier agreement.

16 Again, I see no need to resolve this factual conflict as it is clear, in this context, that there
17 was no effective novation of contract which is what is being essentially asserted by the
18 defendant. This draft agreement was on any account, never executed by the plaintiff.

19 Against that background and in particular notwithstanding the termination by rescission
20 or repudiation (rightful or wrongful) of the earlier agreement by the plaintiff; the
21 defendant proceeded on the 26th August 2004 to issue the Stop Notice which is the
22 subject of this application.

1 The primary question presented by the plaintiffs Notice of Motion for me now and that
2 upon which the issue of the validity of the Stop Notice turns, is whether the defendant
3 had a beneficial interest in the shares of the Company such as to vest her with standing to
4 issue the Notice, at the time it was issued. The plaintiff's primary argument is that the
5 defendant had no such interest.

6 The Notice reads:

7 "STOP NOTICE

8 Beneath the Waves Ltd.
9 PO Box 30862 SMB
10 Grand Cayman

11
12 TAKE NOTICE that the securities referred to in the affidavit to which this notice is
13 annexed consist of the following:

14
15 All of the issued and outstanding shares of Beneath the Waves Ltd. being the 100 Shares
16 registered in the names of Glenda G. Tibbetts.

17
18 This notice is intended to stop the transfer of the said securities".

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21 The process by which a Stop Notice is issued is governed by the Grand Court Rules.

22 Order 50 Rule 11 (1) provides that "any person claiming to be beneficially entitled to an
23 interest in any securities" of the kind set out in paragraph 2 (2) (b) of Schedule III to the
24 Judicature Law (which includes shares in locally registered companies) "and who wishes
25 to be notified of any proposed transfer or payment of those securities, may avail himself
26 of the provisions of this rule".

27 Rule 11 (2) then describes the steps to be taken by such a person, including the filing of
28 an affidavit describing his interest in the securities and the filing of the prescribed form of
29 Stop Notice which is in the form of the one used here and set out above. The affidavit is

1 required to have endorsed on it an address for service of the Stop Notice upon the person
2 concerned.

3 Rule 12 then explains the effect of the Stop Notice, once it has been filed and served
4 upon the person concerned. It provides essentially, that so long as the Stop Notice is in
5 force, the person or body on which it is served shall not register a transfer of the
6 securities or take any other steps restrained by the Stop Notice; until 14 days after
7 sending notice (which I will describe as a "counter-notice") of the intended transfer or
8 other step by post to the person on whose behalf the Stop Notice was filed.

9
10 Here the plaintiff has not sought to serve a counter-notice.

11 Her evidence explains that instead of seeking to sell the shares which are the subject of
12 the Stop Notice to another buyer, (for which purpose the counter-notice would have been
13 needed) she intends to assign the lease which is the underlying subject-matter of the
14 dispute. She has therefore been advised that it is not necessary to serve a counter-notice
15 as contemplated by Rule 12.

16 She has nonetheless brought this Notice of Motion to discharge the Stop Notice on the
17 grounds cited; so as not to be accused of "proceeding through the back door".

18 There are deadlines for the execution of the assignment of the lease by the plaintiff to the
19 new party and those have been notified to the defendant. They have however been
20 extended, whether intentionally so or not, but effectively so as to allow the defendant to
21 take any other recourse which may be available to her, in the event, that the Stop Notice
22 is discharged.

1 The process for issuing a Stop Notice as described above, is essentially administrative as
2 distinct from judicial in nature; and is ex parte. It is important that the affidavit evidence
3 in support of the application for its issuance must show, at least on the prima facie basis,
4 a beneficial interest of the applicant in the securities which are to be restrained. It is clear
5 that Stop Notice is not intended to be used merely as a device by an applicant for
6 obtaining a commercial advantage over persons claiming a competing interest in
7 securities. And is certainly not intended to be used as a device for obtaining an
8 opportunity to establish a beneficial interest which did not clearly exist before.

9 The purpose and effect of the Stop Notice is to prevent the securities being dealt with
10 without the person who issues the Stop Notice, who already has a beneficial interest in
11 them, having had a fair opportunity of asserting his claim. Hence the rule, that a
12 company having been served with a Stop Notice, cannot permit the shares claimed to be
13 dealt with by the registered holder, except after prior notice to the claimant.

14 As authority for this proposition see GCR Order 50 Rule 12 and Halsbury's Laws of
15 England 4th Edition 1996 Reissue Vol 7 (1) para 386 citing Societe Generale de Paris v
16 Walker (1885) 11 App Cas 20 HL.

17 As to the prerequisite existence of a beneficial interest, the Rules of the Supreme Court
18 Order 50 Rule 14/2 page 868 1999 Edition states the position thus:

19 "The Applicant must be a person who claims to be beneficially interested in [the]
20 securities. Application A. Form No. 80 --- requires the deponent to prove the
21 party's beneficial interest "in the stock compromised in the (settlement, will etc) -
22 -". There must therefore be a beneficial interest in the stock sought to be
23 affected, comprised in some document or legal instrument in writing. A
24 beneficial interest [(can be)] created by deposit of a certificate of shares as
25 security for a debt and interest, without a transfer or memorandum; citing Harrold
26 v Plenty [1901] 2 Ch. 314".
27

1 In Harrold v Plenty the plaintiff had obtained the deposit of a share certificate as security
2 for a loan to the defendant. Upon the defendant's default the plaintiff sued upon the
3 security claiming an equitable title in the shares, seeking an order for transfer of the
4 shares to himself, or in the alternative, the sale of the shares on the basis that the deposit
5 operated as a pledge of the shares as security.

6 It was held (per Cozen – Hardy J.) that the deposit of the certificate by way of security
7 for the debt, amounted to an equitable mortgage; an agreement to execute a transfer of the
8 shares by way of mortgage. The plaintiff was therefore entitled to judgment in effect
9 vesting title to the shares in him, instead of only to an order permitting him to sell the
10 shares on the basis of realizing security by way of a pledge. In other words, the plaintiff
11 had acquired the beneficial interest in the shares themselves, not merely a lien against
12 them.

13 Here there has been no deposit by way of pledge of the shares or executed transfer of
14 them.

15 Instead, the defendant seeks to rely for proof of his beneficial interest in the shares, upon
16 what he asserts is a valid enforceable agreement for sale of the shares.

17 In this regard, Ms. Crinis cited the venerable case of Lysaght v Edwards (1876) 2 Ch. D.
18 499:

19 “It is a settled doctrine of the Court of Equity that the moment there is a valid
20 contract for sale the vendor becomes in equity a trustee for the purchaser of the
21 estate sold and the beneficial ownership passes to the purchaser” per Jessel MR at
22 page 506.

23
24 While that basic settled proposition appeared very much to be in the defendant's favour,
25 the issue of the validity and enforceability of the contract for sale had been rendered moot

1 by the defendant's admitted failure to meet the conditionality and the plaintiff's election
2 to rescind or repudiate the contract on that basis.

3 The further words of Jessel MR from Lysaght v Edwards at page 507 are therefore
4 equally on point:

5 "Now, what is the meaning of the term "valid contract?". "Valid contract" means
6 in every case a contract sufficient in form and substance, so that there is no
7 ground whatever for setting it aside as between the vendor and purchaser ---- a
8 contract binding on both parties----".
9

10 Taking that approach to the analysis of the issue here, it means that the defendant's
11 beneficial entitlement to the shares as having passed under contract and as the basis of his
12 claim to the Stop Notice, is at least doubtful.

13 The onus being clearly upon him to establish the existence of that beneficial entitlement,
14 the defendant also argued that the plaintiff had no right to rescind the agreement. He
15 asserted his own right to waive the conditionality of licensing; the very conditionality
16 which the plaintiff purportedly relied upon to rescind the agreement for the defendant's
17 failure to comply. The defendant argued that as the obtaining of the licence was for his
18 benefit - a mere prerequisite to the conduct of his business from the demised premises -
19 he could waive it so as to deny the plaintiff the ability to rely upon it for rescission of the
20 agreement.

21 The case law does recognize that a party for whose benefit only a conditionality is
22 imposed in an agreement can elect to waive it: Zebmoon Ltd. V Akinbrook Investment
23 Dir. Ltd. 1988 S.L.T 146; Manheath Ltd. v H.J. Banks & Co. Ltd. 1996 S.L.T. 1006 and
24 Wood Preservation Ltd. v Prior [1969] 1 WLR 1077

1. A significantly difficulty with this argument here, however, was that far from seeking to
2 waive the conditionality prior to the expiry of the deadline (the defendant's purported
3 waiver was after the plaintiff's "rescission") the defendant also claims to have negotiated
4 and obtained the extension of the deadline already discussed above. Thus, implicitly also,
5 the defendant acknowledges the plaintiff's assertion that the conditionality was very
6 much for his benefit, in ensuring that the defendant would be able to carry on precisely
7 the kind of business contemplated by the lease.

8 Given that set of circumstances, it simply was not permissible for me to determine, one
9 way or the other, the issue of the efficacy of the waiver of the conditionality. The
10 decision in Wood Preservation Ltd. v Prior, (above) relied upon by Ms. Crinis and where
11 the condition was clearly for the benefit of the buyer of the shares, did not avail the
12 defendant here.

13 Ms Crinis, in her brief but nonetheless able submissions; also sought to rely upon the
14 following passage from Modern Principles of Companies Law by Gower, 6th Edition
15 1997 at page 3481 on Acquisition and Disposal of Company Securities:

16 "---notwithstanding that registration (of a share transfer) has not occurred, the
17 beneficial interest in the shares may have passed from the transferor to the
18 transferee. In the case of a sale, the transaction will normally go through three
19 stages: - (1) an agreement (which particularly if a block of shares conferring de
20 facto or de jure control is being sold, may be a complicated one) (2) delivery of
21 the signed transfer and the certificate by the seller and payment of the price by the
22 buyer and (3) lodgment of the transfer for registration by the company.
23 Notwithstanding that the transfer is not lodged for registration or registration is
24 refused, the beneficial interest in the shares will, it seems, pass from the seller to
25 the buyer at the latest stage (2) and, indeed will do so at stage (1) if the agreement
26 is one which the Courts would order to be specifically enforced. The seller then
27 becomes a trustee for the buyer and must account to him for any dividends he
28 receives and vote in accordance with his instructions".
29

1 This, for all the reasons already discussed, was not an agreement which could clearly be
2 regarded as one “which the Courts would order to be specifically enforced”.

3 Ultimately, that was the failure in the defendant’s case preventing me from concluding
4 that he had an already established beneficial interest in the shares themselves giving him
5 the right to the issuance and maintenance of the Stop Notice.

6 There were still further considerations.

7 The defendant had issued the Stop Notice on 26th August 2004 but had taken no steps by
8 the time of the hearing before me on 14th October 2004, to obtain an order for specific
9 performance of the original or of the further formal “agreement”. The disruption to local
10 services caused by the hurricane in the meantime was to my mind, no proper excuse. The
11 Courts themselves were out of commission for only a few days. The plaintiff had
12 managed to file and secure a hearing date for this Notice of Motion. If so intended, the
13 defendant had had ample time to file a writ claiming specific performance and/or
14 damages and an injunction.

15 In effect therefore in having taken no such steps, the plaintiff sought to rely upon the Stop
16 Notice as a form of indefinite restraint. That, as the following passage from the RSC (op-
17 cit 050/14/6) illustrates, is impermissible. The passage refers to the former process of
18 distringas or restraint for which the Stop Notice process was substituted:

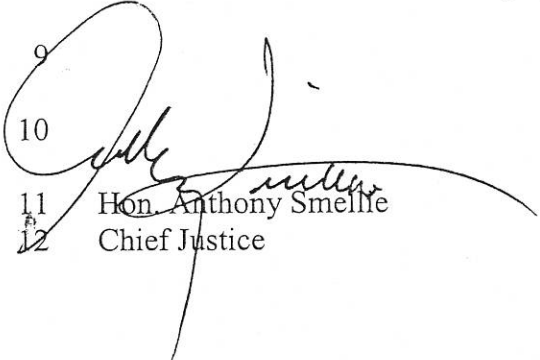
19 “where there is a distringas on stock the (respondent gives notice after application
20 to deal with the stock) to the issuer that unless he takes proceedings in a short
21 time to assert his right the distringas will be disregarded. – The effect of a writ of
22 distringas, therefore, was, and by these rules the effect of notice under the new
23 procedure is, merely temporary, and the person issuing it must proceed to obtain a
24 restraining order under Rule 15 [(GCR Order 50 Rule 15)], or an injunction in a
25 suit against a person in whose name the stock stands ---”.

1 In my view, the restraint had been in place long enough for a party, being confident in his
2 equitable entitlement to shares and of success in a claim for specific performance of a
3 contract for the purchase of those shares, to take steps to enforce those rights.

4 For the foregoing reasons of the absence of a clear beneficial entitlement in the defendant
5 to the shares and untimeliness on his part; the Stop Notice was discharged.

6 As to costs: having heard both sides on the issues and having reflected upon the
7 uncertainties of the factual assertions on both sides, the presentation of which absorbed
8 significant amounts of the costs, I make no order as to costs.

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Hon. Anthony Smellie
Chief Justice

