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IN THE GRAND COURT OF THE CAYMAN ISLANDS

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CAUSE NO: ~~295~~ OF 2004

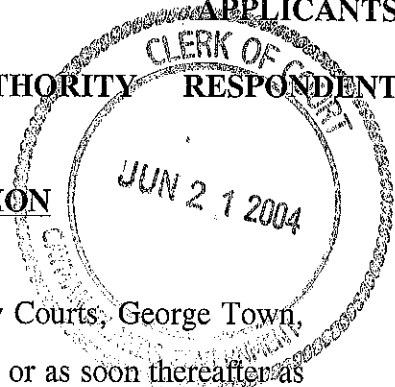
BETWEEN: (1) GOLDEN ACCUMULATOR LIMITED
(2) CORAL HOUSE LTD

APPLICANTS

AND: CAYMAN ISLANDS MONETARY AUTHORITY

RESPONDENT

NOTICE OF ORIGINATING MOTION



TAKE NOTICE that the Hon. Mr. Justice Henderson at the Law Courts, George Town, Grand Cayman will be moved on *21st July 2004* at *9.30* am/pm or as soon thereafter as Counsel can be heard, by Counsel on behalf of Golden Accumulator Limited and Coral House Ltd. for an Order that:-

1. An Order of Certiorari to quash the decision of the Defendant made on 6th April 2004 to exercise its powers under Section 34(9) of the Cayman Islands Monetary Authority Law (2003 Revision) to require LOM Securities (Cayman) Ltd. to produce such documents as are in its possession or control as set out in the schedule attached to the request and to provide such information that is listed in the schedule on or before Friday, 23rd April 2004 (“the Decision”).
2. A Declaration that the Decision is *ultra vires* and/or void.
3. An Order of prohibition and/or an injunction to prevent the Defendant from exercising its power to enforce the Decision and/or in the alternative, an order of prohibition and/or an injunction to prevent the Defendant disclosing any information obtained pursuant to the Decision to the Bermuda Monetary Authority.
4. Costs; and
5. Any other orders or relief that the Court deems appropriate.

AND FURTHER TAKE NOTICE that the grounds of this application are:

THE FACTS

The Cayman Direction

1. On 11th February, the Bermuda Monetary Authority wrote to the Defendant requesting assistance in relation to its regulatory functions. The copy of the letter supplied to the Plaintiffs is heavily redacted and the un-redacted parts say little, other than that the Bermuda Monetary Authority has initiated its own regulatory inquiry into three LOM businesses licensed under the Bermuda Investment Business Act 2003 (“the LOM companies in Bermuda”) pursuant to section 19 of the Bermuda Investment Business Act 2003.

2. On 1st April 2004, the Bermuda Monetary Authority again wrote to the Defendant providing further information. A heavily redacted copy of this letter has been supplied by the Defendant to the Plaintiffs. The un-redacted part of the letter does contain some detail of the regulations which have allegedly been breached by the LOM companies in Bermuda and includes the following list;
 - a. Possible breaches of the minimum licensing criteria (e.g. whether individual officers are fit and proper, and whether the firms have conducted their business in a prudent manner and with integrity and skill);

 - b. Possible breaches of our Investment Business Regulations, such as specific requirements regarding the maintenance of systems of control and accounting and other records; and

 - c. Possible breaches of the Codes of Conduct issued pursuant to the Investment Business Act which set out particular requirements in relation to, inter alia, standards of market conduct, market manipulation, the use of material non-public information, the handling of conflicts of interest.

3. The letter also contained a statement that the Bermuda Monetary Authority would not further disclose the information received from the Defendant without the Defendant's consent.
4. On 7th April 2004 LOM Securities (Cayman) Limited ("LOM") was served by the Defendant with a "Direction to Provide Information Under Section 34(9) Of The Monetary Authority Law (2003 Revision)" (the "Cayman Direction").
5. The Cayman Direction requests information which inter alia relates to the financial affairs of both the Plaintiffs which are both Cayman Islands registered companies.
6. The Cayman Direction stated inter alia as follows;

Whereas a request had been made to the Cayman Islands Monetary Authority ("the Authority") by an overseas regulatory authority, the Bermuda Monetary Authority, for assistance and information pursuant to section 49(3) of the Monetary Authority Law (2003 Revision), (herein referred to as "the law"); and

Whereas the Authority has decided to exercise its powers under section 34(9) of the Law, I hereby direct that you LOM Securities (Cayman) Limited, PO Box 30997SMB, Third Floor, Buckingham Square, 720 West Bay Road, Grand Cayman, do within 10 business days of the date of the service of this direction upon you produce such documents as are in your possession or control listed in the schedule hereto and to provide such information listed in the said schedule".

7. The schedule to the Cayman Direction requests inter alia information concerning the financial affairs of the two Plaintiffs. It provides as follows;

"1. Information pertaining to the operation and ownership of accounts numbered 3030045 and 3030058 at LOM Securities (Cayman) Limited, including but not limited to:

(a) copies of account opening documentation showing full details of beneficial ownership and of all persons having powers to give instructions with regard to the accounts;

(b) *Copies of the account statements from July 1 2002 to March 31 2003;*

(c) *Copies of journal entries, client instructions, deposits, trade confirmations, wire transfers, fund transfers initiated or occurring from July 1 2002 to March 31, 2003;*

(d) *Copies of any powers of attorney, agreements, and general correspondence concerning the operation of the above accounts.*

2. *Information pertaining to Golden Accumulator and Todd Peever, including but not limited to:*

(a) *All documentation indicating the type of legal entity is "Golden Accumulator";*

(b) *Copies of documentation showing full details of the ultimate beneficial ownership, purported directors, officers, and agents of "Golden Accumulator";*

(c) *Any information as to persons having powers to give instructions or exercising effective control over "Golden Accumulator"; and,*

(d) *Any information relating to the LOM entities that may be connected with Todd Peever and/or Golden Accumulator.*

3. *Information pertaining to an entity named Warwick Ventures Ltd., including but not limited to:*

(a) *Copy of the certificate of incorporation and other company documentation;*

(b) *Any information held pertaining to ultimate beneficial ownership, purported directors, officers, and agents; and,*

(c) *Any information as to persons having powers to give instructions or exercising effective control over the company.*

8. Account number 3030058 referred to was held on behalf of the First Plaintiff at the relevant time and Account number 3030045 was held on behalf of the Second Plaintiff at the relevant time.

The Bermuda Direction

9. On or about 30th March 2004, the LOM companies in Bermuda received a direction dated 30th March 2004 from the Bermuda Monetary Authority to provide information, inter alia, in relation to the same two accounts contained in the schedule to the Cayman Direction from the Defendant (“the Bermuda Direction”).
10. The Bermuda Direction stated as follows:

“Take NOTICE that the U.S. Securities and Exchange Commission has requested the continued assistance of the Bermuda Monetary Authority (“the Authority”) in relation to a non-public investigation being carried out by it regarding possible violations of US federal securities law involving (i) trades in the shares of Sedona Software Solutions Inc., (ticker symbol SSSI, CUSIP No 81567A102), a Vancouver, Canada-based public company and (ii) trades in the shares of Shep Technologies, Inc., listed on the NASD OTCBB under the symbol STLOF. Consequently the Authority is now seeking the information and documents particularized below.”
11. The information requested is then set out at the bottom of the Bermuda Direction. The information requested included, inter alia, information in relation to account numbers 3030058 and 3030045.

THE LEGISLATIVE FRAMEWORK

12. The Defendant was established pursuant to the Monetary Authority Law 1996. It is a body corporate with perpetual succession and may sue and be sued in its corporate name (section 5(1) of the Monetary Authority Law (2003 Revision) (“the Law”)).
13. The purposes of the Defendant are set out in section 6 of the Law. In other sections of the Law, the Defendant is granted a number of statutory powers for the purposes of carrying out its functions.
14. Section 6 (1) provides that the principle functions of the Defendant are;
 - a. Monetary functions;
 - b. Regulatory functions, namely;
 - i. To regulate and supervise financial services business carried out in or from within the Islands in accordance with the Law and the regulatory laws;
 - ii. To monitor compliance with the money laundering regulations; and
 - iii. To perform any other regulatory or supervisory duties that may be imposed on the Defendant by any other law.
 - c. Co-operative functions, namely to provide assistance to overseas regulatory authorities in accordance with this Law; and
 - d. Government advisory functions.
15. The Cayman Direction was purportedly made pursuant to section 34(9) of the Law which provides as follows:

(9) Where in accordance with section 49, the Authority is satisfied that assistance should be provided in response to a request by an overseas regulatory authority it may in writing direct-

- (a) *a person regulated under the regulatory laws;*
- (b) *a connected person;*
- (c) *a person that is engaging in an activity that is subject to regulation under the regulatory laws; or*
- (d) *a person reasonably believed to have information relevant to enquiries to which the request relates,*

within a stated time, to-

- (i) *provide the Authority with specified information or information of a specified description with respect to any matter relevant to the inquiries to which the request relates;*
- (ii) *produce specified documents or documents of a specified description relevant to those inquiries; or*
- (iii) *give to the Authority such assistance in connection with those inquiries as the Authority may specify in writing. (Emphasis added).*

16. The relevant parts of Section 49 of the Law (as amended by the Monetary Authority (Amendment) Law 2003 is as follows:

(3) Subjection to subsection (9) –

- a. where the Authority is satisfied that a request for assistance from an overseas regulatory authority is a routine regulatory request, the Authority may disclose to the overseas regulatory authority the requested information, but shall keep a record of all such requests and disclosures and an inventory of the information disclosed, and shall make the records and inventory available to the Attorney-General or the Financial Secretary upon request; and*
- b. where the Authority is not satisfied that a request for assistance from an overseas regulatory authority is a routine regulatory request, the Authority, after having sent a copy of the request to the Attorney-General and to the Financial Secretary in accordance with subsection(1), may disclose to the overseas regulatory authority information necessary to enable the overseas regulatory authority to exercise regulatory functions including the conduct of civil and administrative investigations and*

proceedings to enforce laws, regulations and rules administered by the overseas regulatory authority; and (Emphasis added).

c. where the Authority has provided information under paragraph (a) or (b) and the Authority has received the advice of the Attorney-General, that there are reasonable grounds for believing that an offence specified in an overseas regulatory authority's request for assistance has been committed and –

i. the information already provided by the Authority to the overseas regulatory authority relates to the offence; or

ii. the Cayman Authority, under a treaty for the provision of mutual assistance between the authorities in the Islands and the relevant country or territory, has given permission for disclosure of the information,

the overseas regulatory authority may, with the consent of the Authority, further disclose the information for the purpose of criminal investigation into contraventions of laws or regulations administered by that regulatory authority identified in its request;

(4) In deciding whether or not to assist an overseas regulatory authority (whether by use of the Authority's powers under subsection (3), section 34, section 35, or otherwise), the Authority shall take into account –

a. whether corresponding assistance would be given in the relevant country or territory to the Authority;

b. whether the inquiries relate to the possible breach of a law or other requirement which has no close parallel in the Islands or involve the assertion of a jurisdiction not recognised by the Islands;

c. the seriousness of the matter to which the inquiries relate, the importance to the inquiries of the information sought in the Islands; and

d. except in the case of a routine regulatory request, whether in the light of advice from the Attorney-General or the Financial Secretary, it is not in the public interest to give the assistance sought.

(5) For the purposes of paragraph (a) of subsection (4), the Authority may require an overseas regulatory authority which requests assistance to give a written undertaking, such form as the Authority may require, to provide corresponding assistance to the Authority.....

(7A) The Authority shall decline to give its consent to further disclosure of information pursuant to subsection (3)(c) unless the overseas regulatory authority has given a written undertaking that the information will not be

used in any criminal proceedings without the consent of the relevant Cayman Islands authority; and..... ...

- (9) *The Authority shall not give to an overseas regulatory authority any assistance involving the disclosure or gathering of, or the giving of access to, information or documents unless –*
- (a) *the Authority has satisfied itself that the intended recipient authority is subject to adequate legal restrictions on further disclosures which shall include the provision of an undertaking of confidentiality; or*
 - (b) *the Authority has been given an undertaking by the recipient authority not to disclose the information provided without the consent of the Authority; and*
 - (c) *the Authority is satisfied that the assistance requested by the overseas regulatory authority is required for the purposes of the overseas regulatory authority's regulatory functions including the conduct of civil and administrative investigations or proceedings to enforce laws corresponding to the regulatory laws and administered by that authority; and*
 - (d) *the Authority is satisfied that information provided following the exercise of its powers under subsection (3) will not be used in criminal proceedings against the person providing the information, other than proceedings for an offence under section 34(17) or an offence of perjury.*
- (10) *Where the Authority is not satisfied that a request for assistance from an overseas regulatory authority is a routine regulatory request, the Authority shall notify the Attorney-General and the Financial Secretary immediately the request is received, with particulars of the request, and shall send them copies of all documents relating to the request, and the Attorney-General shall be entitled, in a manner analogous to amicus curiae, to appear or take part in any proceedings in the Islands, or in any appeal from such proceedings, arising directly or indirectly from any such request.*
- (11) *For the purposes of this section and subject to any general direction given by the Governor under section 33, a "routine regulatory request" in relation to an overseas regulatory authority is a request for the purpose of allowing the overseas regulatory authority to carry out its day to day functions of approval of licences, approval of persons subject to regulation and registration of applicants.*

THE GROUNDS FOR REVIEW

17. The Plaintiffs are companies which are individually affected by the decision of the Defendant to issue the Cayman Direction. It is therefore contended that the Plaintiffs have sufficient standing to bring this application.
18. By virtue of the provisions of sections 34 and section 49 previously referred to, when considering whether to provide assistance in response to a request by an overseas regulatory authority, the Defendant must:
 - a. take into account the matters referred to in section 49(4);
 - b. be satisfied that the assistance requested by the overseas regulatory authority is *required* for the purposes of the overseas regulatory authority's regulatory functions;
 - c. be satisfied that the information or documents sought by the overseas regulatory authority is *relevant* to the inquiries to which the request relates;
 - d. be satisfied that any investigation being conducted by the overseas authority is civil and administrative rather than penal in nature.
19. The Plaintiffs contend that the Defendant could never have satisfied itself as to any of the foregoing matters by taking into account only the material provided to it by the Bermuda Monetary Authority in support of its request.
20. Further, in the case of the non-routine regulatory request, which request would be from the Bermuda Monetary Authority, was that the Defendant had to:
 - a. notify the Attorney General and the Financial Secretary immediately when the request was received and send them copies of all documents relating to the request; and
 - b. consider the advice of the Attorney General or the Financial Secretary as to whether it was in the public interest to give the assistance sought.

21. The Defendant has adduced no evidence that any of those steps were taken and the Plaintiffs put the Defendant to strict proof that they were.
22. It is therefore contended that the decision of the Defendant to issue the Cayman Direction is ultra vires and/or unlawful and/or unreasonable for the following reasons:
 - a. The information and/or documents requested are not relevant to the investigation being carried out by the Bermuda Monetary Authority pursuant to the Bermuda Investment Business Act 2003. The information requested relates to financial information relating to, and the beneficial ownership of, two Cayman Islands registered companies who are clients of LOM Securities (Cayman) Ltd. which is also a registered Cayman Islands Company. However, the investigations being carried out by the Bermuda Monetary Authority are into the conduct of the LOM companies in Bermuda and relate to the possible misconduct set out in its letter of 1st April 2004. There is nothing in the material provided to the Defendant by the Bermuda Monetary Authority which would enable the Defendant to take into account the matters referred to in section 49(4) or to enable it to conclude or properly to conclude that it was satisfied that the information was relevant to the Bermuda Monetary Authority's investigation.
 - b. Where a request from an overseas regulatory authority is not a routine request, then section 49(3)(b) only allows disclosure of information by the Defendant where the information disclosed is to the overseas regulatory authority is "*information necessary to enable the overseas regulatory authority to exercise regulatory functions including the conduct of civil and administrative investigations and proceedings to enforce laws, regulations and rules administered by the overseas regulatory authority*" (Emphasis added).

- c. First, there was no material upon which the Defendant could have concluded that the information requested was necessary for the investigations being carried out by the Bermuda Monetary Authority as set out in their letter of 1st April 2004. On the contrary, it appears that the information is not necessary both by virtue of its irrelevance as set out in paragraph (a) above and also by virtue of the fact that pursuant to the Investment Business Act 2003 of Bermuda, the Bermuda Monetary Authority has wide reaching powers of their own to obtain information for the purposes of their investigation. No reasons were given by the Bermuda Monetary Authority as to why it could not obtain the information from other sources and why it was necessary for the purposes of their investigation for the information to be requested.
- d. Secondly, in this case given the similarity between the information sought in its request to the Defendant and the information which it was asked by the U.S. Securities and Exchange Commission (“the SEC”) to provide, the Court is not bound to accept the Bermuda Monetary Authority’s statement that the information is required for its investigation. The Plaintiffs contend that the real purpose of its request is to obtain information to enable it to pass the information disclosed to the SEC and that in reality, its true motivation is in attempting to assist an investigation by the SEC rather than conducting its own investigation.
- e. In addition, the investigation which the Bermuda Monetary Authority contend it is conducting is not a “*civil and administrative investigation*”. The Bermuda Monetary Authority has stated in its letter of 1st April 2004 that it is investigating potential breaches of the Investment Business Act 2003, codes of conduct and regulations etc. Some of these alleged breaches are criminal in nature and therefore it is not purely civil and administrative. The Defendant has no power to provide assistance in these

circumstances and any attempt by the Defendant to do so is unlawful and ultra vires.

- f. Further and in the alternative the investigation being carried out by the SEC is not civil and administrative in nature. Under the US federal securities law a breach of any of the laws will entitle the SEC to elect to prosecute the matter civilly or to refer the matter to prosecutors to have it prosecuted criminally. Where the matter is prosecuted civilly and it is found that a person is in breach of the law, a fine is usually imposed along with other sanctions depending upon the breach. Where the matter is prosecuted criminally, in addition to a fine, a custodial sentence may be imposed. Such a request does not fall within the powers of the Defendant pursuant to the Law.
- g. The Defendant is therefore in breach of section 49(9)(c) which requires the Defendant to be "*satisfied that the assistance requested by the overseas regulatory authority is required for the purposes of the overseas regulatory authority's regulatory functions including the conduct of civil and administrative investigations or proceedings to enforce laws corresponding to the regulatory laws and administered by that authority*" for the reasons set out above.

Dated the 15th day of June 2004



CAMPBELLS,
ATTORNEYS-AT-LAW FOR THE PLAINTIFFS

TO: The Clerk of the Court

AND TO: The Cayman Islands Monetary Authority

This Notice of Originating Motion was issued by Campbells, Attorneys-at-Law for the Plaintiff, whose address for service is P.O. Box 884 GT, 4th Floor Scotiabank Building, Grand Cayman (JRM/MPC)