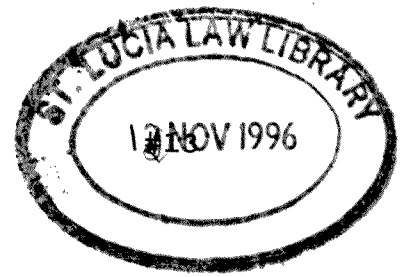


SAINT LUCIA

IN THE HIGH COURT OF JUSTICE
(CIVIL)
A.D. 1996



Suit No. 251 of 1993

BETWEEN:

INTERTRADE CORPORATION

Plaintiff
Judgment Creditor

and

DAVID CRAM

Defendant
Judgment Debtor

and

WINDJAMMER LANDING CO. LTD.

Opposant

Mr. P. Foster for the Plaintiff/Judgment Creditor
Mrs. B. Flemming for the Opposant

1996: January 19;
February 9.

J U D G M E N T

MATTHEW J. (In Chambers).

On October 20, 1993 the Plaintiff obtained judgment against the Defendant for the sum of \$797,015.45 with interest and costs of \$5,000 and on July 5, 1995 issued a writ of execution in respect of the Defendant's shares in the Opposant company after having complied with Article 436 of the Code of Civil Procedure.

On August 31, 1995 the Opposant issued a summons for opposition and seizure. The summons was supported by an affidavit of Donald Richard Smith to the effect that the Defendant has no shares in the Opposant he having transferred his only share in that company to a Bahamian company with the same name, Windjammer Landing Company Ltd. He tendered as exhibit a share certificate in the name of David Cram with the alleged transfer to the Bahamian Corporation effected at the back of the certificate.

On September 12, 1995 d'Auvergne J. ordered that the seizure and sale be stayed.

On October 16, 1995 Jeffrey Firestone of Miami filed an affidavit to the effect that David Cram still has an interest in the Saint Lucian Company, Windjammer Landing Company Ltd. One of the grounds on which Firestone relied is the fact that in bankruptcy proceedings filed in the United States Bankruptcy Court David Cram stated that he owns 50 per cent of Windjammer Landing Resore in Saint Lucia. An exhibit to that effect was tendered.

He further stated that the Saint Lucian company register did not indicate a change in the shareholdings of the company but he admitted that the Opposant had registered the Bahamian company as owning 2 shares in the Saint Lucian company in contravention of Article 110 (1) and (3) of the Commercial Code and he believes therefore that David Cram is owner of an equal interest in the Opposant company.

He said he had caused to search the register of the Bahamian company and that did not reveal a registration of the share transferred by David Cram to the Bahamian company. It is difficult to see how he would expect to find that in a register pertaining to the Bahamian company. I agree with the submission of learned Counsel for the Opposant that any Registry would only show what is held by the company there and would not show what shares the company in question holds in another company overseas.

The deponent also stated that since there was no proof of acceptance of the share by the Bahamian company he was putting the Opposant to proof of that allegation.

On November 14, 1995 the Opposant filed a summons to relieve the directors and officers of the company from any penalties which are liable to be imposed upon them and to grant permission to the

Opposant to file or to sanction the filing of the Return of Allotment dated June 16, 1994 and filed with the Registrar's Office on June 17, 1994. This summons was supported by one of two affidavits filed by Lynne Cram on November 14, 1995. This was the shorter affidavit consisting of 10 paragraphs.

But on the said November 14, 1995 Lynne Cram filed another affidavit consisting of 13 paragraphs made in support of the summons for opposition to seizure. Attached to this affidavit were several exhibits, A to G, to which I shall refer later in the course of this judgment as is necessary.

Lynne Cram also tendered a copy of a return of allotments which takes the form of an exhibit to her shorter affidavit.

SUBMISSIONS OF COUNSEL

Learned Counsel for the Opposant reduced her arguments to a typed skeleton form which was made available to the Court and opposing Counsel. Counsel submitted that the Judgment Creditor contends in Firestone's affidavit the following:

- (1) the said alleged transfer was never signed by the transferee and was never registered at all or within the time prescribed by law.
- (2) that the said transfer was not filed before registration of the judgment by Intertrade nor was it filed before issue of the writ of execution.
- (3) that in the circumstances the alleged transfer by the Defendant is void and of no effect and that accordingly the Defendant remains the holder of the shares.
- (4) the return of allotment filed by Windjammer Landing Co. Ltd. is in contravention of Article 110 of the Commercial Code.

I think this correctly describes the issues to be determined and I did not perceive that learned Counsel for the Plaintiff disagreed

with that. Indeed he followed the document in his reply to the submissions made.

Counsel then made submissions in respect of the following:

- (a) Non Execution by the transferee;
- (b) Non Registration of the Transfer;
- (c) Effect of Registration of the Judgment in favour of the Plaintiff;
- (d) Non compliance with Article 110; and
- (e) Lifting the Corporate Veil.

In the course of her submissions learned Counsel referred to the following:

Halsbury's Laws of England Fourth Edition Volume 7 (1) paragraphs 479 and 482;

CUNNINGHAME v. CITY OF GLASGOW BANK 1879 4 A.C. 607 H/C;

RE PARADISE MOTOR CO. LTD. 1968 2 ACR 625;

RE ROSE, ROSE v. 1 RC 1952 AER 1217;

PALMER'S COMPANY LAW, 25th edition Volume 1 Page 611 Paragraph 40 - 05;

Article 1923 of the Civil Code;

Articles 80 and 110 of the Commercial Code.

Learned Counsel for the Plaintiff/Judgment Creditor began by making reference to the background to the matter and stated that the purport of his arguments is that the share transferred by David Cram to the Bahamian company is a nullity and that Cram still therefore owns the one share out of the two shares which were issued by the company on incorporation and he is still 50 per cent share holder of the St. Lucian company as he alleged in his bankruptcy petition in the United States.

Counsel made reference to Article 28 of the articles of association of the company and to Article 80 of the Commercial Code.

With reference to the share certificate Counsel submitted that the transfer was signed only by David Cram and was not signed by the Bahamian company.

Counsel further submitted that the share transfer was not registered in Saint Lucia as required by Article 110 of the Commerical Code. He said indeed the transfer cannot be registered in Saint Lucia because it is not a proper transfer as regulated by the articles of association of the company.

Counsel made reference to a passage in RE ROSE at page 1228, letters A to C.

Counsel criticized a legal opinion given by McNamara & Co. which he stated the Opposant was relying on.

In reply to an argument from the other side Counsel submitted that there was no evidence that the fact of the transfer to the Bahamian Company was being acted upon for a long period.

In her submissions in reply learned Counsel for the Opposant reiterated the principle in Article 80 of the Commerical Code that the articles of the company bind only members and the company itself and accordingly no outsider can purport to take advantage of non-compliance by a member with the provisions of the articles. In that connection she cited Paragraph 141 of Halsbury's Laws of England Volume 7(1) and Gover's company law 5th edition at page 285.

CONCLUSIONS

One of the grounds on which the Plaintiff/Judgment Creditor relies as holding the transfer by David Cram of his one share to the Bahamian company to be void is that the Opposant and or the Bahamian company did not register the said transfer prior to the Plaintiff/Judgment Creditor obtaining judgment and prior to the

writ of execution being filed.

As stated above the judgment was obtained by the Plaintiff on October 20, 1993. It was entered on November 3, 1993. The earliest date on which the registration of the share transfer could be deemed to have taken effect is on June 17, 1994 which is clearly later than the entry of the judgment.

The Plaintiff did not give any authority as to why that priority in obtaining the judgment could affect the registration. Learned Counsel for the Opposant however submitted in this respect that the judgment obtained by the Plaintiff has no effect on the shares of the Defendant/Judgment Debtor as a judgment operates as a judicial hypothec on the immovables and not on the movables of a judgment debtor. Counsel cited as authority Article 1923 of the Civil Code which states in part:

"Judicial hypothec affects generally the immovables owned by the debtor at the time of the registration of such hypothec and those subsequently owned by him unless the same are exempt from seizure or are incapable of alienation otherwise."

It seems to me that Article is a perfect answer to the submission and accordingly I hold that the judgment did not affect any share owned by David Cram nor could it affect any share transferred by him to the Bahamian company.

On the other aspect of the submission learned Counsel for the Opposant simply stated that the writ of execution filed by the Plaintiff had no effect on the transfer of shares as the return of allotment of two shares to the Bahamian company preceded the writ of execution. The writ of execution was filed on July 5, 1995. Counsel's submission is only maintainable if it is accepted that the registration of the shares was made on June 17, 1994. But in the Opposant's summons filed on November 14, 1995 one of the relief sought of the Court was the granting of permission to the Opposant

to file or sanctioning the filing of the return of allotment dated June 16, 1994 and filed with the Registrar on the following day.

But here again the Judgment Creditor did not indicate any authority to show why the earlier date of the writ of execution should affect the transfer of the share by David Cram to the Bahamian company.

I shall consider the application of Article 110 of the Commercial Code later but in accordance with the view expressed below I rule that the writ of execution has no effect on the transfer by David Cram of his one share to the Bahamian company.

This leads me straight away to consider the effect of non compliance with Article 110 of the Commerical Code. The material provisions are as follows:

"110(1) Within one month after making an allotment the company shall file with the Registrar -

(a) A return of the allotment, stating the number and nominal amount of the shares comprised in the allotment, the names, addresses and description of the allottees, and the amount, if any, paid or due and payable on each share; and

(b)

(2)

(3) If default is made in complying with these requirements every director, manager, secretary, or other officer of the company who is knowingly a party to the default, shall be liable to a fine not exceeding two hundred and forty dollars for every day during which the default continues:

Provided that, in case of default in filing with the Registrar within one month after the allotment any document hereby required to be filed the company, or any person liable for the

default, may apply to the Court for relief, and the Court, if satisfied that the omission to file the document was accidental or due to inadvertence or that it is just and equitable to grant relief may make an order extending the time for the filing of the document for such period as the Court may think proper."

It is clear from a reading of the above provision that the failure of the company to file a return of allotment within one month after making it does not invalidate the transfer. The Court is given a wide discretion in the proviso to extend the time for registration.

In support of its application for relief the Opposant states that it relied on the opinion of its lawyers and so assumed that the corporate records were in order.

The Opposant tendered in support a legal opinion by Messrs McNamara & Co. to Barclays Bank of Canada dated January 8, 1988 in which it was stated as follows:

- "1. Windjammer Saint Lucia is a company incorporated and subsisting in good standing under the laws of the State of Saint Lucia.;
2. The share capital of Windjammer Saint Lucia is \$20,000,000 divided into 2,000,000 shares of \$10.00 each of which two shares have been issued. All of such issued shares are owned by Windjammer Bahamas as the registered and beneficial owner thereof and have been issued as fully paid and are not subject to further call."

Learned Counsel for the Plaintiff/Judgment Creditor has submitted that the opinion of McNamara was wrong but that in my view, even if correct, could not detract from the company's reliance on the opinion to show that the omission to file the allotment in time was accidental or due to inadvertence or to prevent the Court from finding that in the circumstances it is just and equitable to grant

relief.

As learned Counsel for the Opposant submitted it was in the circumstances reasonable for the Opposant to rely on the opinion of its lawyer and to assume that the corporate records were in order.

Accordingly I grant the Opposant the relief sought and I order that the time extended to file the allotment made on July 1987 be extended to June 17, 1994.

I think the major thrust of the Plaintiff's objection to the summons for opposition to seizure and sale is the fact that the transfer of the share by David Cram to the Bahamian company is void and of no effect because the Bahamian company never signed the alleged share transfer. Counsel relied on Article 28 of the Articles of Association of the Saint Lucia company. The Article is found at Exhibit "A" to the longer of Lynne Cram's affidavit and is as follows:

"28. The instrument of transfer of a share shall be executed both by the transferor and the transferee and the transferor shall be deemed to remain the holder of the share until the name of the transferee is entered in the register of members in respect thereof".

Paragraph 479 of Halsbury's Law of England, Fourth edition Volume 7(1) is instructive on the form and execution of transfer. It states in part:

"The instrument of transfer must either be in accordance with the articles of association and be executed in the manner thereby prescribed or it must be a stock transfer, or in a common or usual form complying with the requirements as to execution and content which apply to a stock transfer. Notwithstanding anything in the articles of a company, it is not lawful for a company to register a transfer of shares unless a proper instrument of transfer has been delivered to

the company."

In footnote 3 to this paragraph the meaning of a proper instrument of transfer is given as *"an instrument which would attract stamp duty, not an instrument complying with every formality required by the articles RE PARADISE MOTOR CO. LTD. 1968 2 AER 625."*

It would appear that judicial dicta from the highest courts of England have sought to interpret and apply similar wording as found in Article 28 of the Articles of Association of the Opposant.

Paragraph 482 of the said volume of Halsbury's Laws of England states"

"When, as is usual, articles of association provide that the instrument of transfer shall be executed or signed both by the transferor and the transferee, non-execution by the transferee only makes the transfer irregular and not a nullity, and if it has been acted upon for a long period, it cannot be impeached."

Two of the authorities given in support of that proposition of law is: CUNNINGHAME v. CITY OF GLASGOW BANK 1879 4 A.C. 607, H.L; and RE PARADISE MOTOR CO. LTD. 1968 2 AER 625, C.A.

In Cunningham's case, A, one of five trustees appointed under a marriage contract, signed with his co-trustees a note approving the purchase of stock in a joint stock banking company of unlimited liability. By the authority of the law agent of the trustees, acting on the note of approval, all the names of the trustees appeared in the transfers as accepting the stock, and in the register of members of the company. A did not sign the transfer, but he signed a subsequent letter to the company authorizing the payment of dividends. The company was wound up, and A and his co-trustees were placed on the list of contributories as personally and individually liable for calls. In a petition at the instance

of A for rectification of the register and list of contributories:- the House of Lords held, affirming the decision of the Court below, that A had authorised his name to be placed on the register. That the trustees were liable in solidum for the whole of the stock, and not pro rata parte for one-fifth part only.

The distinguished Lord Chancellor, Earl Cairns, who delivered the judgment of the Court stated at page 611 as follows:

"The only thing that can be suggested as not being present is the formal imposition of a signature by the Appellant to the deed of transfer. That, my Lords, seems to me to be the purest form, the merest ceremony, and the want of it can have no substantial operation whatever in the present case".

In RE PARADISE there was a similar requirement in Article 8 of the Company's articles of association that a transfer of shares had to be signed by both transferor and transferee and had to be attested; and by Section 75 of the Companies Act 1948 it was not lawful to register a transfer unless a proper instrument of transfer was delivered to the company. In that case there was a compulsory liquidation of a company and one of the questions which arose was whether there had been an effective gift by W of 350 shares in the company to his stepson J. The transfer did not name the transferee but it bore a signature purporting to be that of J and J denied that he had signed it. The Judge accepted the evidence of J that he did not execute the transfer.

The Court of Appeal held that the phrase "porper instrument" in Section 75 of the Companies Act meant an instrument such as would attract stamp duty not an instrument complying with every formality required by the articles of association; and in the circumstances, having regard to the lapse of time the failure to procure the execution of the transfer of the 350 shares by J amount only to an irregularity, and W had made an effective gift, so far as it lay in hiw power to do so, of the 350 shares.

In support of her submissions learned Counsel for the Opposant referred to Exhibit F which is an agreement between Smith Windjammer Holdings Ltd., a Canadian company, of the first part; David Cram of the second part; and WINDJAMMER LANDING COMPANY LTD., the Bahamian Company, of the third part. The agreement was executed on July 3, 1987 by all three parties. The preamble reads as follows:

"Whereas Don and David have decided to development certain property known as the Waltson Property and the Frederick Property in St. Lucia and have caused Windjammer to be incorporated for the purposes of carrying out such development through its wholly-owned subsidiary Windjammer Landing Company Limited, a corporation duly incorporated July 17, 1987 pursuant to the laws of the State of St. Lucia ('Windjammer Saint Lucia');

Now THEREFORE THIS AGREEMENT WITNESSETH" etc.

In my judgment this memorandum of agreement is an indication that the Bahamian Company has acted on the transfer of shares and has recognised itself as being owner of the two shares issued in the Saint Lucia company.

On the authority of the judicial dicta referred to above I hold that the non-execution of the transfer by the Bahamian Company does not render the transfer void and of no effect as alleged by Firestone.

The Opposant has fortified its position by reference to Article 80 of the Commercial Code; paragraph 140 of Volume 7(1) of Halsbury's Laws of England; and a reference to page 284 of the 5th edition of Gower's company law. These authorities were to the effect that no outsider can purport to take advantage of non compliance by a member with the provisions of the article. In the passage from Gower is a quotation by Astbury J in HICKMAN v. KENT 1915 1 Ch. 881 at page 897 that

"An outsider to whom rights purport to be given by the articles in his capacity as such outsider, whether he is or subsequently becomes a member, cannot sue on those articles, treating them as contracts between himself and the company, to enforce these rights."

The Plaintiff/Judgment Creditor had no response to that submission.

I think I have already touched on the effect of non registration of the transfer within the time provided by Article 110 of the Commercial Code.

I agree with the submission by learned Counsel for the Opposant that failure to register the instrument of transfer does not invalidate the transfer. This submission seems to be borne out by the case of RE ROSE: ROSE v. INLAND REVENUE COMMISSIONERS 1952 1 AER 1217 C.A. In that case the instrument of transfer had been signed by both the transferor and the transferee as required by the company's regulations. The issue here pertained to its registration. Dates were material for that would determine whether or not the Inland Revenue Commissioners would be successful in their claim for estate duty arising upon the death of Mr. Rose. The transfers concerned seemed to have been executed by all the Parties between March 30, 1943 and April 5, 1943. The transfers were not registered until June 30, 1943. According to the relevant Finance Act all the shares would be liable to estate duty unless before April 10, 1943 there had been a bona fide disposition of the shares purporting to operate as immediate gifts inter vivos.

The Court of Appeal held that the Deceased had done all in his power to divest himself of the shares and to vest them in the transferees and the transfers were effective as between the Deceased and the transferees to divest the deceased of beneficial ownership and to constitute the transferees the beneficial owners of the shares; the circumstances that the transferees must, to

perfect their legal title, apply for and obtain registration, did not prevent the transfers from so operating, and the pending registration the Deceased was the trustee for the transferees of the legal estate in the shares which still remained in him; and therefore, the gift of the beneficial interest in the shares had been made and completed prior to April 10, 1943 and no estate duty was exigible.

Paragraph 40-05 of the 24th edition of Gower's Company Law states that once the contract has been entered into the transferee has an equitable title to the shares and the transferor holds then, until registration, as trustee for the transferee.

For the reasons given above I dismiss the writ of execution filed by the Plaintiff/Judgment Creditor with costs of \$500.00 to the Opposant.

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A.N.J. MATTHEW
Puisne Judge