

IN THE SUPREME COURT OF BELIZE, A.D. 2009

CLAIM NO. 433 of 2009

HOWARD OLDHAM
WILANA OLDHAM

CLAIMANTS

AND

VIVIANE HECKENDORN
VIVIANE HECKENDORN
as Executrix of the Estate of
OTTO HECKENDORN
BLACK ORCHID
ENTERPRISES LTD.
REGISTRAR OF LAND

1st DEFENDANT

2nd DEFENDANT

3rd DEFENDANT
INTERESTED PARTY

Hearings

2009

20th October

10th November

2010

14th January

19th February

Mr. Darrell Bradley for the Claimants.

No appearance by or for the Defendants.

LEGALL J.

JUDGMENT

The Company

1. Black Orchid Enterprises Limited is a company duly incorporated

under the Laws of Belize with registered offices situate at No. 89 North Front Street, Belize City, Belize. The company owns five hundred and ninety-one acres of land with buildings and erections thereon, situate at a place known as Mackay's Works, Belize, more fully described in certificate of title dated 2nd August, 1990, (hereinafter referred to as the land).

2. The articles of association of the company dated 25th October 1989 named two original directors of the company, one holding eleven shares, and the other holding one share, making a total of twelve shares. The said articles of association state the share capital of the company to be \$10,000, divided into 10,000 shares of \$1.00 each.

3. As the years passed, the directors of the company changed, as well as the shares bought by them. By the 29th November, 1998, the shareholders were Viviane Heckendorn, the first defendant, who held eight shares in the company, and Otto Heckendorn, who held four shares in the company. The first claimant swore in his affidavit that he was informed and believed that Otto Heckendorn was the husband of Viviane Heckendorn. Both of the Heckendorns were the only shareholders and directors of the company. Around 1999 Otto Heckendorn died. There is no evidence whether he had any heirs, or whether he left a will, or died intestate. There is no evidence whether anyone was appointed as executor or executrix of his estate, or anyone appointed to legally represent his estate and administer his assets.

4. Records of the Belize Companies Registry, for the period 1999 to 2005, establish that no director was appointed to replace the deceased Otto Heckendorn. The said records also reveal that from November 1999 to November 2005 the company had only one director – the first defendant. A report dated 9th March, 2007, which was a search of the said registry in relation to the company, reveals that the company had not appointed another director to replace Otto Heckendorn. There is also no evidence whether the four shares held by the said Otto Heckendorn were ever transferred to anyone. The said report, however, reveals that the four shares are held by the “estate of Otto Heckendorn” but, as I said above, there is no evidence that anyone was appointed to administer the estate of the deceased.

Agreement of Sale

5. On the 1st December, 2005 a written agreement was made to sell the land. I quote the first paragraph of the agreement, which states the parties to the agreement:

“This contract made this 1st day of December, 2005 by and between Viviane Heckendorn, of Felipe Carrillo Puerto, #540 Entre Altanmirano & Saraso Col. Lopez Maetos, Chetumal, Quintana Roo, Mexico hereinafter referred to as Seller and Howard Oldham and Wilana Oldham of Mile 58.5 Western Highway, Unitedville Village, Cayo, Belize hereinafter referred to as Buyers.”.

6. The agreed purchase price for the land was US \$60,000. The claimants paid a deposit of US \$15,000, and on the directions of the real estate agent, representing the seller or vendor named in the agreement, the claimants made several payments by installments over a period of about two years into an account held by the said seller or vendor at a bank situate at Chetumal, Mexico. All the installments and the deposit paid to the vendor amounted to US \$46,620, leaving an outstanding balance on the purchase price of US \$13,380.00. The claimants on the date of the agreement, 1st December, 2005, obtained possession and occupation of the land and are still in occupation of the land.
7. The agreement also states that the vendor agreed to convey title for the land to the buyers or purchasers “at the completion of the contract.” I interpret this phrase to mean that, on the completion of payment of the full purchase price, the vendor would transfer title to the claimants.
8. The claimants were not able to pay the full purchase price because, according to them, instructions were, around January 2008, received by telephone on behalf of the vendor, that the vendor’s account at the bank in Chetumal Mexico had been closed due to the fact that the vendor, who had taken ill, had gone to live with her daughter in the United States of America; and that further instructions would be given to them with respect to where future payments by installments were to be paid. The claimants state that they have not received any further instructions as to where the future payments are to be made.

9. The claimants state that they have the full balance of the purchase price to pay the vendor, but though they are willing to make the payment, they do not know the address of the vendor, nor do they have any idea where the vendor resides, or her whereabouts. The claimants therefore brought a claim against the defendants for an order authorizing the claimants to pay the balance of the purchase price for the land to the Supreme Court. They also claim an order directing the Registrar of the Supreme Court to execute the required documents to convey the property to the claimants and an order directing the Registrar of Lands to transfer title to the land in the names of the claimants.

Substituted Service

10. Since the whereabouts of the vendor, the first defendant, were unknown, the claimants made an application to the court for substituted service of the claim on the first defendant at her last known address at Chetumal, Mexico. The Registrar on 16th June, 2009 made the order for substituted service on the first defendant by DHL. The first defendant was not served because she no longer resided at the address in Mexico.
11. By affidavit dated 20th July, 2009, notice of the claim was published in local newspapers on two separate occasions with the intention of bringing the claim to the attention of the first defendant or any person who knew the whereabouts of the said defendant, with the hope that the claim would come to the attention of the said defendant and for

- her to enter an appearance. For the same purpose, the claimants caused to be sent by DHL to Chris O. Heckendorn and Serje D. Heckendorn, perhaps relatives of the first defendant, copies of the claim; but still no appearance to the claim was entered by the first defendant.
12. The court also granted counsel for the claimants, a period of time to contact one of then original directors of the company for any information as to the whereabouts of the first defendant, but no useful information was obtained. There is no affidavit of service that the claim was served on the third defendant who has an address at 89 Front Street, Belize City, Belize nor is there an affidavit of service with respect to the interested party. When the trial began there was no appearance by any of the defendants. The No. 1 claimant appeared and was represented by counsel. In his evidence, he relied on the matters stated in his affidavit dated 11th May, 2009.

Authority to Sell

13. The land is owned by a duly incorporated company, the third defendant. The agreement states that the first defendant is the seller; but it does not state that the first defendant sold the land for and on behalf of the company. The said defendant held eight shares in the company and was one of two directors. The other director died around 1999 and he was not replaced by another director. Did the first defendant have the authority to sell the land owned by the company?

14. Learned counsel for the claimant eloquently urged the court to find, on the evidence, that the first defendant had the ostensible or apparent authority to bind the company to the agreement of sale; and that the court is entitled to pierce the corporate veil and find that the company, the third defendant, is bound by the agreement of sale. He relied on several authorities to support his submissions, such as *Royal British Bank v. Turquand* 1843-60 All ER Rep 435; *Hely- Hutchinson v. Brayhead and Another* 1968 1 Q.B. 549; *Freeman L. Locker (a firm) v. Buckhurst Park Properties (Mangal) Limited and Another* 1964 2 W.L.R. 618; *Jones v. Lipman* 1962 1 A.E.R. 442 and *Elliott v. Pierson* 1948 1 A.E.R. 939.
15. In *Royal British Bank v. Turquand*, the directors of a company were allowed, by deed of settlement of the company, to borrow on bond, sums of money as might, by resolution of the company passed at a general meeting, be authorized to be borrowed. By a bond signed by two directors, the company acknowledged that it was bound to the plaintiff for £2000. In an action by the plaintiff for this amount, the company however pleaded that there was no resolution authorizing the directors to make the bond; and therefore it was not liable. The court held that the company was liable whether or not the resolution had been passed. Jervis CJ gave the reasons for so holding, which have come to be known as the Rule in *Turquand's* case. His Lordship said:

“We may now take for granted that the dealings with these companies are not like

dealing with other partnerships and that the parties dealing with them are bound to read the statute and the deed of settlement The party here on reading the deed of settlement would find, not a prohibition from borrowing, but a permission to do so on certain conditions. Finding that the authority might be made complete by a resolution, he (the) party would have a right to infer the fact of a resolution” see 1843-60 ALL E.R. Rep. 435, at page 437-38. (emphasis mine)

16. The parties in *Turquand* were dealing with the company, and they were entitled to assume that the internal procedure of the company was properly performed. In this case before me, the claimants made no contract or agreement with the company and had no dealings with the company. The claimants dealt, and made contact with, the first defendant, as the written agreement mentioned above clearly shows.

17. In *Hely-Hutchinson* above, the plaintiff Hutchinson sued the defendant company, Brayhead, and another person called Richards, claiming sums of money based on an indemnity contract, signed by Richards as chairman and de facto managing director of the company. The contract stated that it was agreed that the plaintiff would be indemnified against certain losses. The plaintiff placed reliance on the apparent authority of Richards to sign the indemnity contract on behalf of the company. The indemnity contract was however not reported or disclosed by Richards to the board of the company.

18. In an action by the plaintiff, the defendant company, Brayhead, denied that Richards, the chairman of the company, had the authority to sign the indemnity contract. The court held that the contract of indemnity was enforceable by the plaintiff against the company, because the company had knowingly allowed Richards to hold himself out as having ostensible or apparent authority to enter into the contract of indemnity. Roskill J made the point:

“I have no doubt that the board knew that he (Richards) was doing this sort of thing all the time, and that whenever he thought it was necessary he assumed, or purported to assume, authority to bind Brayhead and that the Board allowed him to do it and acquiesced in his doing it He quite clearly was allowed by Brayhead to hold himself out as having ostensible or apparent authority to enter into commitments of the kind which he entered into or purported to enter into.”

19. There is no evidence before me that the third defendant company knowingly allowed the first defendant to hold herself out as having ostensible or apparent authority to enter into the written agreement to sell the land to the claimants. The first defendant may have warranted and represented to the claimants that she had authority to sell the land,; but it does not necessarily follow that the company knowingly allowed her to hold herself out as having ostensible or apparent authority to sell the land owned by the company, especially at a time

when she was only one director of the company, and the other director had died and not replaced.

20. The same principle of *Hely-Hutchinson* can be distilled from the decision of **Freeman L. Locker** above. In that case, the articles of association of the defendant company, contained power to appoint a managing director, but none was appointed. A director, Shiv Kumar Kapoor, of the defendant company instructed the plaintiffs, a firm of architects to apply for planning permission to develop a large estate, and to do other work thereon. The plaintiffs did the work and claimed their fees in the amount of £291.65 from the defendant company.

21. In an action by the plaintiffs for the fees, the Court of Appeal held that the plaintiffs were entitled to the fees; and the court found that, though Kapoor had no actual authority to employ the plaintiffs, he had ostensible authority, as he acted throughout as managing director, even though he was not appointed to that position, to the knowledge of the board of the defendant company. Wilmer LJ, having considered the facts of the case, said:

“Having regard to all these considerations, I can see no good ground for interfering with the Judge’s finding of fact that Kapoor throughout was, to the knowledge of the Board, acted as Managing Director of the defendant company.”

I cannot, in this case, say that the first defendant was acting to the knowledge of the board of the third defendant company, when there is no evidence of any such board in existence at the time of the agreement to sell the land. Moreover at that time there was only one director of the company. The other had died and not replaced.

22. In **Jones v. Lipman** above, the defendant agreed to sell land to the plaintiffs for £5,250. Prior to completing the sale to the plaintiffs, the defendant transferred the land for £3,000 to a company, which he acquired and in which he and another person were the sole shareholders and directors. In an action by the plaintiffs for specific performance of the written agreement of sale of the land, the court ordered the defendant to specifically perform the plaintiff's agreement. Russel J held that the defendant company was a creature of the defendant; that it was a "device and a sham, a mask which he held before his face in an attempt to avoid recognition by the eye of equity.". The court held that the company was a mere cloak for enabling the defendant to commit a breach of the agreement to sell the land to the plaintiff.

23. *Elliott v. Pierson 1948 1 A.E.R. 939* was an action to enforce a contract for the sale of freehold property. The contract consisted of two documents signed by the defendant and the first plaintiff, a Mr. Elliott, who had control of a private company incorporated in 1937. The share capital of the company was £2500 in shares of 1£ each, and Mr. Elliott held 2,499 shares. The remaining single share was held by an accountant, who acquired it as Mr. Elliott's nominee. By the

articles of association of the company, every share carried one vote, and Mr. Elliott was appointed first director for life. A quorum for board meetings of the company, according to the articles, had always been one; and Mr. Elliott, was and had always been the sole director of the company.

24. Mr. Elliott carried on the business as a proprietary club on the property; but due to failing health, he found it arduous to carry on the business and decided to sell the freehold property. As a result, Mr. Elliott and the defendant signed two documents which allegedly constituted the contract to sell the freehold property, with furniture, fixtures and fittings. The defendant subsequently refused to honour the contract, on the first ground, that the two documents were vague and did not constitute an enforceable contract. But the second ground is what is relevant in this case. It was submitted by the defendant that the contract could not be enforced because it was made by Mr. Elliott who did not hold the freehold interest in the property, which was held by the company. The court, on the facts of the case, rejected this second submission and ordered specific performance of the contract. Harman J, gave his reasons:

“At law A may contract to sell to B any defined subject matter and can enforce the contract if by the time when he is obliged to do so he has obtained sufficient interest or can compel other interested parties to concur in the sale. It matters not at all that at the date of the contract A had no interest, if he obtains it in time to fulfill the bargain.

The law is that a vendor who has or can compel the assurance of all necessary interests in the subject matter of the sale may enforce the contract: see, for instance, the decision of Astbury J in *Re Hailes and Hutchinson's Contract*, where the cases are collected, and having regard to Mr. Elliott's position vis-à-vis the plaintiff company, I hold that he was always in that position, notwithstanding the fact that there was no resolution in the minutes of the company nor any contract under the company's seal agreeing to concur on the sale

It seems to me to be enough that he was in a position, either by exercising his power as sole director or if necessary by winding up the company to procure it to act as he chose."

25. This case is distinguishable from the case before me in that Mr. Elliott had by the articles of association of the company held the office of director for life, owned all the shares in the company, except one share held by his nominee, and by the said articles a quorum for board meetings was one. Mr. Elliott because of the amount of his shares and his ownership of the company had the power to compel the company to concur in the sale.

26. In this case before me, the company, had a share capital of \$10,000 divided into 10,000 shares of \$1.00 each. The No. 1 defendant held eight shares and Otto Heckendorn the deceased held four shares. Both of them were directors of the company. According to the articles of association the management of the business of the company shall be

vested in the directors. Article 88 states that the quorum necessary for the transaction of the business of the directors may be fixed by the directors, and unless and until so fixed shall be two directors. There is no evidence that the directors fixed a quorum. At the time of the agreement in this matter there was one director, the other had died, and there is no evidence that he was replaced or whether an administrator was appointed to administer his shares and estate. The No. 1 defendant for all of the above reasons and whose whereabouts are unknown is therefore not in a position to compel the company to concur in the sale, as the court in Pierson found Mr. Elliott was in a position to do.

27. The claimants have found themselves in the rather infelicitous position of being unable to prove that the first defendant had ostensible or apparent authority to enter into the agreement of sale on behalf of the company to sell land owned by the company. But the claimants must bear some blame for their predicament, because instead of retaining a good attorney-at-law to draft the agreement of sale, they opted instead to have the agreement drafted without the assistance of a lawyer. This is a practice which ought to be discouraged; for it not only contributes to an ever increasing amount of civil litigation in Belize, but it also causes expense and inconvenience; and, as in this case, a denial of the rights of the claimants to enforce their agreement of sale. I have had occasion in *Chicone v. Corder* No. 163 of 2009 (unreported) to mention this problem and I recommended remedial legislation. I do so again.

Personal Representatives

28. The claimants also relied on section 4(1) of the Administration of Justice Act which provides for the devolution of property of a deceased person on his personal representatives. There is no evidence of any personal representative of the deceased Otto Heckendorn. The claimants also rely on Order 22 of the United Kingdom Non Contentious Probate Rules 1987 made applicable to Belize by virtue of Rule 56 of Order 69 of the Supreme Court Probate Rules. But Order 22 applies where the deceased died wholly intestate and it prescribes the order of priority for a grant of letters of administration. The evidence does not support a finding that the deceased Otto Heckendorn died “wholly intestate,” as is required by the said Order 22.

29. The fortunate thing is that the claimants have been in occupation of the land since 1st December, 2005, and they continue in occupation at present. Hopefully, when the whereabouts of the first defendant are known she would be persuaded to have appointed a director of the company, obtain letters of administration in her late husband’s estate, if he died intestate, and cause the agreement of sale to be ratified.

30. As I see it, I have sadly no alternative but to dismiss the claim. I make the following orders:
 1. The claim is dismissed.

2. There is no order for costs.

Oswell Legall
JUDGE OF THE SUPREME COURT
19th February, 2010