NMLS

IN THE SUPREME COURT OF JUDICATURE

IN CIVIL DIVISION

CLAIM NO. C.L. N-090 0F 2002

BETWEEN	*NEW FALMOUTH RESORTS LIMITED*	*CLAIMANT*
A N D	*INTERNATIONAL HOTELS JAMAICA LIMITED*	*DEFENDANT*

Miss Carol Davis for Claimant.

Dr. Lloyd Barnett and Walter Scott instructed by Weiden Daley of Hart, Muirhead and Fatta for Defendant.

Agreement for sale of land – Authority of Director of a company – Ostensible authority of an agent – Assignment of the rights under a contract – Requirement of notice

Heard: 3rd to 7th July, 27th to 30th November, 2006
22nd January, 26th February, 2007
& 20th February, 2009.

Hibbert, J.

Lot 3A, part of New Court in the parish of Trelawny and registered at Volume 1066 Folio 929 of the Register Book of Titles is the subject of this suit. It lies adjacent to the Starfish Hotel (formerly the Trelawny Beach Hotel). New Falmouth Resort Limited (N.F.R.) the Claimant is the registered proprietor of this lot of land and International

Hotels Jamaica Limited, (I.H.J.L.) the Defendant which operates the Starfish Hotel is the occupier.

On the 13th August, 2002 the Defendant was served with a notice to quit. Consequent on the non-compliance with this notice, the Claimant instituted these proceedings.

Based on the pleadings, the Claimant seeks to recover possession of the property, claiming that the Defendant is wrongfully in possession. The claimant also claims that the Defendant wrongfully constructed a sewerage pond on the land and seeks damages for the Defendant's use and occupation of its land and for the removal of the sewerage pond.

Paragraph 2 of the statement of claim reads:

2. The Defendant since May 2000 and continuing has wrongfully and without the consent of the Plaintiff been in possession of the Plaintiff's land as trespasser/and in the alternative as a tenant of the said land.

The Defendant asserts that it is entitled to be registered as the proprietor of the land and is rightfully in possession as a purchaser in possession. It claims to be the ultimate assignee of the rights under a contract of sale entered into between the Claimant and National Hotels and Properties Limited (N.H.P.) dated 17th February 1982. Completion of this contract was agreed to take place on or before 31st March 1982 but time was not stated to be of the essence.

Paragraph 2 of the Defence reads:

2. The contract was not completed on or before 31st March, 1982 and the Plaintiff's Attorneys, Clinton Hart and Company who

had carriage of sale under the said contract, wrote to Myers, Fletcher and Gordon, Attorneys for N.H.P, on 28th April 1992 and stated as follows:-

> "We have your letter of April 26th 1982. We have consulted with Mr. John Phelan, the Managing Director and the duly authorized agent of the company who has authorized us to advise you that your client may take possession of the land purchased under the agreement for sale. In the circumstances, the vendor will not claim interest on the balance of purchase money so long as completion takes place within a reasonable time after the vendor has cleared title. We trust the foregoing meets with your client's approval".

Paragraphs 6 and 7 of the Defence should also be noted. They state:

6. The Defendant is ready, willing and able to complete the agreement, and has offered to pay the balance of the purchase due. Despite the Defendant's request to the Plaintiff that it should complete the agreement, the Plaintiff has refused to do so.

7. Accordingly, the Defendant has sought specific performance of the agreement by the Plaintiff in Suit No. E-616 of 2001

In response the Claimant contends that on the 17th February 1982, John Phelan III was not a Director of N.F.R neither was he authorized to enter into any agreement for sale on its behalf nor was he held out to be so authorized.

The agreement for sale

James Chisholm, a director/shareholder of the Claimant company gave evidence that he was appointed Managing Director of the Claimant company on the 26th January, 1973. He further testified that John H. Phelan III ceased to be a director of the company when he was adjudged a bankrupt in or about June, 1971, and that he was never reinstated as a director. He admits entering into negotiations between March and November 1981 with Mr. Moses Matalon, acting on behalf of N.H.P. concerning the sale of the property to N.H.P. He, however states that the offer made by N.H.P. was rejected. In December 1981 Mr. Patrick Blair of N.H.P. brought a document to his attention. This purported to be the minutes of a meeting of the Board of Directors of the Claimant company, at which Mr. Chisholm was removed as Managing Director and John H. Phelan III was appointed in his stead.

On becoming aware of this document he, on the 12th January, 1982 wrote to N.H.P to the attention of Mr. Patrick Blair and Mr. Campton Rodney, refuting the validity of the appointment and advised against negotiations with, Vincent Chin, Clinton Hart and Company, John Phelan III and Frank Phelan. A copy of this letter was exhibited to his witness statement.

The assertions of Mr. Chisholm that John Phelan III was not a director of N.F.R on 17th February, 1982 and that neither Vincent Chen nor Clinton Hart and Company were authorized to act as Attorneys-at-law for N.F.R. were challenged during cross-examination. Through him, minutes of the Directors Meetings held on 4th December, 1968, 30th September, 1969, 6th July,1970, 11th September, 1970 and 30th September, 1970 were tendered as exhibits 1 to 5. Each of these showed John Phelan as a director.

The minutes of the meeting held on 26th January, 1973 which was admitted as exhibit 6 listed David Phelan as an Alternate Director for John Phelan III. At that meeting David Phelan and James Chisholm were appointed as directors.

At a meeting held between David Phelan and John Phelan III on 24th November, 1981 it was decided to remove James Chisholm as a director of N.F.R. and to appoint John Phelan III as the Managing Director. Mr. Chislolm challenges the authenticity of this meeting and the validity of the decisions made, stating that at that time John Phelan III was not a director of N.F.R. Interestingly, however, a memorandum concerning the meeting of Directors to be held on 2nd June, 1982 was signed by David Phelan, John Phelan III, Frank Phelan and James Chisholm as directors.

The minutes of the meeting held on 21st June, 1982 were admitted in evidence as exhibit 8. These minutes refer to Mr. Vincent Chen as "Attorney-at-law for the company" and records the endorsement of John Phelan III as the Managing Director with effect from 24ith November, 1981 upon the dismissal of James Chisholm. At this meeting the sale agreement concluded between John Phelan III on behalf of N.F.R., and N.H.P was also ratified.

Also exhibited through James Chisholm were the Annual Returns of N.F.R for the years 1981-1984, 1988 and 1990 each of which showed John Phelan III as a director of the company.

Hugh Dyke who was the Managing Director of N.H.P. from 1982 to 1991 gave evidence on behalf of the Defendant. N.H.P which owned the Trelawny Beach Hotel, and which was desirous of purchasing what was commonly referred to as the "tennis court lands" contacted N.F.R and consequently met with a Mr. Phelan and Vincent Chen.

Following this meeting another meeting was arranged and an agreement for sale was signed on behalf of the parties and a deposit of sixty-two thousand dollars ($62,000.00) was paid to Clinton Hart and Company which represented N.F.R.

This parcel of land was commonly referred to as the tennis court lands as on it were tennis courts used by guests of the Trelawny Beach Hotel and as was stated by Mr. Dyke was at on stage erroneously believed to be a part of the property of the hotel when it was purchased by N.H.P from Trelawny Resorts Limited in 1978.

Vincent Chen, Attorney-at-law also gave evidence on behalf of the Defendant concerning the contract for sale entered into between N.F.R. and N.H.P. At the time he was a partner in the firm, Clinton Hart and Company and acted on behalf of N.F.R. He stated that having met with John Phelan III who was introduced to him as the Managing Director of N.F.R. he drafted the agreement for sale which was subsequently signed by the parties. Subsequently he received a deposit from N.H.P. from which he stamped the agreement for sale.

The evidence presented to the Court, particularly the contents of the Annual Returns made to the Registrar of Companies and the minutes of the meetings of the Board of Directors clearly demonstrates that at the time of the agreement for sale, John Phelan III was regarded by N.F.R. as a director of the company.

Section 34 (1) of the Companies Act of 1965 which was in force in 1982 states:

34 (1) Contracts on behalf of a company may be made as follows:-

(a) a contract.....

.....

(b) a contract which if made between private persons

would be by law required to be in writing, signed by the parties to be charged therewith may be made on behalf of the company in writing signed by any person acting under its authority express or implied".

Even if there was a defect in the appointment or qualification of John Phelan III this would not necessarily render his acts invalid, as section 172 of the Companies Act, 1965 states:

> 172 – The acts of a director or manager shall be valid notwithstanding any defect that may afterwards be discovered in his appointment or qualification."

This provision reflects the decision in several previously decided cases concerning the validity of agreements made by persons who had the ostensible authority to enter into them on behalf of companies.

In **Freeman and Lockyer v. Buckhurst Park Properties (Mangal) Limited and Anor. [1964] Q.B. 480,** Willmer L.J. at page 491 states:

> "The doctrine of ostensible authority in relation to a Limited company necessarily gives rise to difficult legal problems. For a company can only act through its officers, and the power of its officers are limited by its articles of association. It is well established that all persons dealing with a company are affected with notice of its memorandum and articles of

association, which are public documents open to inspection by all;.....".

He also cited with approval the decision in **Mahony v. East Holyford Mining Company (1875) L.R 7HL 869.**

He went on to state:

> "But by the rule in **British Royal Bank v. Turquard [(1856) 119 E 868]** reaffirmed in Mahony's case, it was also established in the words of Lord Hatherley in the latter case [at page 894] that when there are persons conducting the affairs of the company in a manner which appears to be perfectly consonant with the articles of association, then those so dealing with them, externally, are not to be affected by any irregularities which may take place in the internal management of the company."

Moreover, I am of the opinion that the ratification of the agreement for sale at the meeting of the board of directors held on the 21st June, 1982 should lay to rest any questions as to the validity of the agreement for sale. I find support for this view in the decisions on **Reuter v. Electric Telegraph Company (1856) 119 ER 892, and Hooper v Kerr, Stuart and Company Limited (1900) 83 LT 729.** In this latter case Cozens – Hardy, J at page 730 states:

> "The question is whether although the notice was not authorized beforehand, it has been so ratified now so as to make it a good and valid notice. In my opinion it has. The principle of the cases, which I am not prepared

to go through, is that the ratification of an act purporting to be done by an agent on your behalf dates back to the performance of the act."

The assignment

The evidence presented to the court shows that the rights and obligations of N.H.P under the agreement for sale between itself and N.F.R. were on 20th December, 1989 assigned by deed to Linval Limited, a company incorporated on the 10th January, 1989 and which on the 22nd December, 1989 changed its name to International Hotels Limited. On the 22nd May 2000 International Hotels Limited assigned by deed its rights and obligations under the agreement for sale to International Hotels (Jamaica) Limited.

The claimant challenges the validity of these assignments on the ground that no notices were given to N.F.R.

The question of assignment of a chose in action and the effect of notice was considered **in Gorringe v. Irwell Indian Rubber and Gutta Percha Works (1886) 34 Ch. D 128.** An extract from the head note reads:

> "A limited company being indebted to H & Co. on an acceptance, wrote to them a letter in January, 1885 in the following terms: We hold at your disposal the sum of £425 due from Messrs. C and Co. for goods delivered by us to then up to the 31at December, 1884, until the balance of our acceptance for £660 has been paid".

No notice was given by H & Co. to C & Co. until the 5th of February, 1885, which was after a petition for winding up the company had been presented:-

Held, that the letter was an immediate equitable assignment to H & Co. of all the debt due from C & Co. to the amount of £425, and was complete as between the assignors and the assignees without any notice to C & Co.

In this Judgment Cotton, L.J states at page 132:-

> 'It is contended that in order to make an assignment of a chose in action, such as a debt, a complete charge, notice must be given to the debtor. It is true that there must be such a notice to enable the title of the assignee to prevail against a subsequent assignee. That is established by Dearle v. Hall, but there is no authority for holding this rule to apply as against the assignor of the debt. Though there is no notice to the debtor the title of the assignee is complete as against the assignor."

The question of notice is also dealt with in Cheshine, Fifoot and Furmston's Law of Contract, Thirteenth Edition. At pages 520 to 521 the learned authors wrote:

> "Even without notice to the debtor the title of the assignee is complete, not only against the assignor personally, but also against persons who stand in the same position as the assignor, as for instance, his trust in bankruptcy, a judgment creditor or a person claiming under a later assignment made without consideration.
>
> Nevertheless there are at least two reasons why failure to give

notice may seriously prejudice the title of an equitable assignee. Firstly, and assignee is bound by any payment which the debtor may make to the assignor in ignorance of the assignment. Secondly, it is established by the rule in Dearle v Hall that an assignee must give notice to the debtor in order to secure his title against other assignees."

It seems therefore that the purpose of giving notice is to protect the rights of the assignee.

Nevertheless, the Defendant claims that notice of the ultimate assignment to it was given to N.F.R. Reliance was placed firstly on a letter written by Mr. Hugh Hart, Attorney-at-Law associated then with Hart, Muirhead and Fatta, to the Managing Director of New Falmouth Resorts Limited which was admitted as exhibit 24. In that letter dated 30th August, 2001 the completion of the agreement for sale entered into between N.F.R and N.H.P. on the 17th February, 1982 was sought, and stated in part:

"The benefits and liabilities under the aforesaid agreement of sale were duly assigned by N.H.P. to Linval Limited which changed its name to International Hotels Limited. All of the assets and liabilities of I.H.L. were transferred to International Hotels (Jamaica) Limited (I.H.J.L.)."

Although Mr. Chisholm who was then the Managing Director of N.F.R. claims not to have been aware of this letter, he wrote a letter dated 6th September, 2001 to Messrs. Hart, Muirhead, Fatta stating in part:-

"We now understand from you that I.H.J.L is responsible for

the liabilities of N.H.P".

I am satisfied that notice of the assignments was given to N.F.R., thereby making the assignment to I.H.J.L complete as between N.F.R and I.H.J.L. I.H.J.L would then have all the rights conferred upon N.H.P. under the agreement for sale entered into on the 17th February, 1982, and would therefore have the right to possession which was given to N.F.R. in the letter dated 28th April, 1982 from Clinton Hart and Company, acting on behalf of N.F.R. to Myers, Fletcher and Gordon acting on behalf of N.H.P.

The question which is left to be resolved is whether or not I.H.J.L would be affected by laches. The letter dated 30th August, 2001 from Clinton Hart and Company signed by Mr. Hugh Hart to the Managing Director of N.F.R. came after the conclusion on the 18th December, 1998 of a suit between New Falmouth Resorts Limited as Plaintiff and Chisholm and Company Limited and Mr. J. Henry Chisholm as Defendants. In the judgment Edwards, J ruled that the land registered at Volume 1066 Folio 929, which is the subject of this present suit, is legally and beneficially owned by the Plaintiff and not the Defendants. He also ruled that the mortgage registered on the land in favour of the first Defendant was null and void. He further ruled that the termination of the second defendant appointment as Managing Director of N.F.R was valid. This therefore placed N.F.R. in a position to fulfill its obligations under the agreement for sale.

In the circumstances, I do not find that I.H.J.L would be affected by laches.

I therefore find that I.H.J.L was in possession of the land registered at Volume 1066 Folio 929, not as a trespasser or a tenant of N.F.R., consequently the claims against the Defendants must fail. Accordingly judgment is entered in favour of the Defendant with cost to be taxed if not agreed.