IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN THE CIVIL DIVISION

CLAIM NO. 2011 CD 00087

BETWEEN	**CYBERVALE LIMITED**	**CLAIMANT**
A N D	**INFOCHANNEL LIMITED**	**DEFENDANT**

Mr. Leonard Green and Mr. Seyon Hanson instructed by Seyon Hanson and Company for the claimant.

Mr. Conrad George and Ms. Kimone Pennant instructed by Hart Muirhead Fatta for the defendant.

Heard: June 11, 2012

CONTRACT FOR SALE OF BUSINESS – WHETHER CONTRACT WAS CONCLUDED – WHETHER DEFENDANT ACTED UPON CONTRACT FOR SALE OF BUSINESS – WHETHER MANAGEMENT CONTRACT WAS INTERIM – WHETHER MANAGEMENT CONTRACT WAS SUBSUMED IN AGREEMENT FOR SALE

SINCLAIR-HAYNES, J

[1] Both parties in this matter have applied for summary judgment pursuant to rule 15.2 of the Civil Procedure Rules. The defendant's application was first in time and so was heard.

[2] In or about November 2007, Mr. Terrelonge, Infochannel's (defendant's) executive chairman, offered to purchase Cybervale's (claimant's) customer base and the operations of its business. Cybervale was interested and the parties entered into discussions/negotiations. There was a breakdown in the negotiations. Consequently, in November 2008, the parties entered into an agreement whereby the defendant would manage Cybervale. This was necessary because Cybervale and Cable and Wireless,

were embattled. As a result there was disruption to Cybervale's services which affected its ability to effectively continue its business. Cybervale therefore required Infochannel's assistance to continue in business. The parties agreed that Infochannel would manage Cybervale. The parties resumed negotiations. Whilst negotiations were in progress, the management agreement continued. Infochannel was later sold to Columbus Communications Limited, (Flow). The transfer did not include Cybervale's assets, that is, its customer base. Instead it sought to return the business to Cybervale. This has fueled controversy between the parties. Cybervale contends that the agreement to transfer the business was concluded. Infochannel however insists that there was no concluded contract. Consequently, Cybervale instituted proceedings for specific performance and breach of contract, among other things.

THE CLAIMANT'S VERSION

[3] The claimant's case is that the parties arrived at an agreement to purchase the Cybervale shares on the 30 September 2009. The claimant argues that all the essential terms were agreed between the claimant and the defendant. Mr. Leonard Green, on behalf of the claimant submits that the following conduct of the claimant is evidence of a finalized contract:

(a) the parties agreed the price on the 24 September 2009;

(b) Mr. Terrelonge, the defendant's executive director, stated his intention to recommend to their financiers to accept the proposal, and;

(c) the defendant informed the claimant on the 30 September 2009 that they could 'move to a purchase agreement'.

[4] He submits that, although the agreement was unsigned on the 30 April 2010, the date agreed for completion, the contract was fully in force as the terms were not interfered with. He submits that at no time prior to the filing of the claim, did the defendant deny the existence of the agreement. The only issue, he argues, has been financing. The defendant's response was either that its financing was delayed, fell through or it was seeking alternative sources.

[5] According to him, the defendant acted upon the contract by its following actions which coincided with the date agreed for completion:

(i) the 1 April 2010 was set as the effective date to lay off staff;

(ii) the rented premises were vacated after the 1 April 2010;

(iii) management fees under the unsigned management contract with the customers, ceased in 2010.

He further submits that the management agreement was an interim measure which ended on the 30 September 2009 when the agreement for sale took effect.

[6] The conduct of the defendant was, according to him, consistent with the expressed intention to purchase the claimant's business and end the management agreement.

THE DEFENCE

[7] Mr. Conrad George, on behalf of the defendant, contends that there was never a concluded agreement for the purchase of the business. There was therefore, no binding contract between the parties. The management agreement was an independent agreement. It was not interim. He submits that the claimant's claim is fanciful and the defendant is entitled to summary judgment.

WAS THERE A BINDING AGREEMENT BETWEEN THE PARTIES FOR THE SALE OF THE DEFENDANT'S BUSINESS?

[8] In attempting to arrive at a conclusion the following issues arise for determination:

In the absence of a signed contract and payment of the deposit, is there evidence before this court that the parties regarded the contract as concluded and so acted as Mr. Green submits?

Was the management agreement merely interim and later subsumed in the agreement for sale or was it entirely independent?

THE LAW

[9] Lord Donovan, in **BG Credit Corporation v DA Silva** 1969) 7 WIR 530, a decision of the Privy Council from Guyana, cited with approval, the following principle enunciated in **Hussey v Horne-Payne** (1879), 4 A pp Case 311. At page 534, he said:

> *"Where negotiations are in progress between parties intending to enter into a contract the whole of those negotiations must be looked at to determine when, if at all, the contract comes into being."*

He further stated:

> *"Once the contract comes into being, however, subsequent negotiations by either party seeking, for example, to obtain better terms will not affect the existence of the previously concluded contract."*

[10] In that case the plaintiff offered his service to the defendant corporation. The defendant accepted the plaintiff's offer by way of letter which appointed him as general manager of the defendant corporation. Subsequently, the corporation appointed another person as general manager. The defendant argued *inter alia* that all the defendant did, by sending the letter, was to select the plaintiff. His selection was only the first step towards the next stage, which was the conclusion of a formal contract.

[11] The Board rejected that argument as being artificial and held that the contract was concluded on the day the letter of appointment was sent. It was also argued that the contract was not concluded as certain important terms were not agreed, for example, the date the plaintiff should commence duties and the contractual period. The Board was of the opinion that neither of the two omissions prevented the formation of the contract.

[12] In the English Supreme Court case of **RTS Flexible Systems Ltd. v Molkerei Alois Muller GmbH and Co KG** [2001] UKSC 14, the parties, by way of letter of intent dated 21 February 2005 and letter of 1 March 2005, (the LOI contract) entered into a contract which enabled the commencement of work. The claimant commenced work. The LOI contract expired but it was agreed that it should be extended to accommodate the execution of the 'full contract'. After the expiration of the LOI contract, the claimant

continued the work it had begun on the project. The contract was never signed, however the terms were 'substantially agreed' except that there were some issues which required 'further negotiations'. There was a disagreement regarding money.

[13] The issues before the Supreme Court were:

(a) whether there was a contract subsequent to the 'expiry of the LOI contract;

(b) if so, whether that contract had been subject to some or all of the terms of the MF/1 terms'.

[14] The court held:

> *"Whether there was a binding contract between parties and, if so, on what terms, depended upon what they had agreed. It depended upon a consideration of what had been communicated between them by words or conduct and whether that led objectively to a conclusion that they had intended to create legal relations and had agreed upon all the terms which they regarded, or the law regarded, as essential for the formation of legally binding relations. Even if certain terms of economic or other significance to the parties had not been finalized an objective appraisal of their words and conduct could lead to the conclusion that they had not intended agreement of such terms to be a pre-condition to a concluded and legally binding agreement… In the instant case the parties had agreed to be bound by the agreed terms without the necessity of a formal written contract." (See the head notes)*

[15] At paragraph 61 Lord Clarke said:

> *"The striking feature of this case which makes it very different from many of the cases which the courts have considered is that essentially all the terms were agreed between the parties and that substantial works were then carried out and the agreement was substantially varied in important respects. The parties treated the agreement of August 25th as a variation of the agreement that they had reached by 5 July. Nobody suggested in August that there was no contract and thus nothing to vary. It was not until November by which time the parties were in dispute, that points were taken as to whether there was a contract. We are of the firm conclusion that by the 25th August at the latest the parties' communications and actions lead to the conclusion that they had agreed that RTS would perform work and supply materials on the terms agreed between them…".*

[16] Mr. Green submits that the instant case is analogous to those cases. This court is of the view that the facts of this case are distinguishable. The agreement to purchase the property has not come into existence as did the agreement in the **BG Credit Corporation v DaSilva** case. This court is of the view that that case is unhelpful.

[17] Like **RTS Flexible Systems Ltd,** the parties have agreed the price. The departure is that in the instant case other terms remain unsettled and the defendant has not been able to obtain financing. Unlike the **RTS** case, the management contract was not an interim agreement, it was an alternative agreement which was entered into, not while the parties were negotiating, but at a point when negotiations were discontinued because of the existence of certain events that were unacceptable to the defendant, that is, the institution of legal proceedings against Cable and Wireless by the claimant among other things.

[18] By letter dated 9 September 2008, Mr. Patrick Terrelonge, wrote to Mrs. Georgia Gibson Henlin stating that he could not proceed with the agreement for sale and proposed a new and different arrangement. The letter reads:

> "*Thank you for your letter of August 30th, in follow up to earlier discussions regarding our purchase of the business operations of Cybervale Ltd.*
>
> *Although, after due consideration, we are unable to accede to the specific terms and processes proposed by you for an acquisition, for reasons set out below, we are nonetheless still interested in a business relationship along the lines outlined in this correspondence.*
>
> *Your proposed approach for purchase of the company's shares is unacceptable to us for the following reasons:*
>
> *a) The litigation involving the company and Cable & Wireless, which has commenced, provides an untenable uncertainty of outcome with an uncertain time for resolution. I am sure you will understand that one could not make a purchase decision "under this cloud".*
>
> *b) We would not want to "inherit" the outstanding obligations of tax and statutory arrears which would become our responsibility. We are also advised of the likely disinclination of the relevant*

tax authorities to allow a transfer of shares without settlement of this liability.

c) *Even if the above points could be overcome, the sum of the outstanding liabilities represents a figure far higher than a feasible purchase consideration. We are confident in this regard having just completed a similar ISP business purchase.*

In lieu of your proposed approach, we are pleased to recommend an alternative proposal. This arrangement would involve the following major considerations:

a) *InfoChannel would, under contract, assume the management of the business operations of Cybervale. This would be done under the Cybervale name with distinct revenue accounting.*

b) *All expenses for ongoing telecommunications and network items, staffing and benefits, office and administration facilities and utilities would be the responsibility of InfoChannel.*

c) *A **fixed monthly fee** would be paid to current Cybervale shareholders as advised. The quantum of this would be decided in advance of the inception of the agreement subject to a due diligence update.*

We believe that this approach would be extremely beneficial to Cybervale shareholders as it would provide an immediate positive return on previous investment without ongoing further obligations and responsibilities.

We feel that our proposal could be implemented within thirty (30) days and look forward to an early indication of your response. We would of course be happy to enter into further dialogue with you in this regard."

It is quite plain from this letter that the management agreement came into existence not as an interim measure, which was intended to be subsumed in the agreement for sale, but rather an independent alternative.

[19] Mr. Green's submission that the defendant's conduct of laying off staff and the renting of premises is consistent with the assumption of ownership is untenable in light of the terms of the management agreement. It is evident that the proposal under the management agreement was that Infochannel would be responsible for issues relating

to staff and office location. By way of letter dated 27 October 2008, addressed to Cybervale, Mr. Terrelonge wrote:

> "*Further to our recent discussions, we are pleased to propose the following terms under which InfoChannel Ltd. would assume the management of the operations of the business services of Cybervale Ltd.*
>
> *This arrangement would involve the following major considerations:*
>
> a) *InfoChannel would, under contract, assume the management of the business operations of Cybervale. These operations would be conducted under the Cybervale name (which would remain the property of existing Cybervale shareholders) with distinct revenue accounting reported monthly within five days of the end of each period.*
>
> b) *All expenses for ongoing telecommunications and network items, staffing and benefits, office and administration facilities and utilities would be the responsibility of InfoChannel.*
>
> c) *InfoChannel would be solely responsible for staff selection; choice of office facilities and location, choice of telecommunication and other suppliers and all matters germane to the proper operation of the Cybervale internet services.*
>
> d) *During the contract period, a monthly management fee would be paid to current Cybervale shareholders or other designated parties as advised. The quantum of this would be* ***eight percent (8%)*** *of the months revenue (excluding GCT) collected from Cybervale internet subscribers on a monthly basis.*
>
> e) *The monthly fee would be paid within forty five days after the last day of the month of each revenue period.*
>
> f) *The initial contract period would be for 12 months and would be renewable for further periods of 12 months thereafter.*
> g) *If either party elects to terminate the agreement at the end of a contract period, a notice period of 90 days would be required.*
>
> h) *The inception of this contract would be subject to the written agreement of Cable & Wireless Ltd. The securing of such agreement would be the responsibility of Cybervale Ltd.*

We believe that this approach would be extremely beneficial to Cybervale shareholders as it would provide an immediate positive return on previous investment without ongoing further obligations and responsibilities.

We feel that our proposal could be implemented within thirty (30) days and look forward to an early indication of your response. We would of course be happy to enter into further dialogue with you in this regard.

On agreement of these terms we would ask our respective attorneys to prepare a final formal contract for execution."

[20] In September 2009 there was a resumption of negotiations for the purchase of the said business. Mr. Terrelonge extended an offer to purchase by way of the following email dated 7 September 2009 which reads:

"*Further to discussions at our recent meeting, I write to confirm Infochannel's willingness to purchase the ISP "business" of Cybervale.*

By way of clearer understanding we define "business" for the proposed purchase as the subscriber base inclusive of ongoing revenues, goodwill, explicit or implied customer contracts for internet services including access by dial-up, broadband, wireless, web hosting and related domain registration services and any other network services or application provided in a standard ISP operation. It does not assume the transfer or adoption of a company structure or its liabilities.

The financial offer which we would be willing to consider represents a multiple of seven months of average J$ revenues over the proceeding three months at the time of closure. (Formula – 7 x AMR where AMR = avg. monthly revenue). This approach is standard for valuations and acquisitions in the ISP_industry).

In addition, we are prepared to consider a further amount of 1 million J$ dollars for the brand name "Cybervale".

We would appreciate an early response from you on the above proposed offer. Of course we would be happy to meet to discuss any questions or clarification that may arise and to discuss "next steps".

[21] Mr. Michael Henlin, Director of Cybervale, responded on the 23 September 2009 on behalf of Cybervale thus:

"I must apologise for the delay in responding on this matter.

Further to your email indicating InfoChannel's willingness to purchase the ISP business of *Cybervale inclusive of the brand "Cybervale" we have examined several alternatives to your stated offer and are willing to accept the following:*

1. *7 times the Average Revenues since January 2009, the date you assumed Management of the entity, and*
2. *$1.5M for the brand "Cybervale"*

Based on my calculation this should amount to approximately $4,953,301.32

If you are in agreement with this we can proceed to have a sale agreement executed as quickly as possible."

[22] Mr. Green's submission that the contract for sale was concluded on or about the 30 September 2009 and is therefore binding and enforceable cannot be substantiated. His reliance on the emails dated 7, 23, 24, September 2009 is misplaced. In his email to Mr. Henlin dated 7 September 2009, Mr. Terrelonge offered to purchase Cybervale's business. His offer regarding price was not accepted; it was modified by Mr. Henlin as stated in his email of 23 September 2009. Mr. Henlin's counter offer found favour with Mr. Terrelonge who indicated in his response by way of email of the 24 September 2009, that he would recommend that their financiers accept the proposal. That statement, in this court's view, cannot be interpreted as finalizing the agreement. The proposal was to be recommended to the financiers whose acceptance was a prerequisite to its completion.

[23] His, Mr. Terrelonge's, further email of the 30 September 2009, cannot amount to a consummation of the agreement as advanced by Mr. Green. The fact that Mr. Terrelonge stated, "We can now move to a purchase agreement" is plainly an invitation for the parties to do what was required to complete whatever process was necessary to conclude the agreement. His further statement that, "*In preparing the legal document you may wish to be guided by the format of the earlier agreement between us as our attorneys will have to review and accept and he was familiar with that one*" cannot be construed as meaning that the parties accepted the terms which, as Mr. Green

submitted, were left only to be distilled in a document. Infochannel's attorney was yet to scrutinize the document to determine whether the terms were acceptable.

[24] It is significant that under the first agreement for sale, Mrs. Henlin, in her letter of 21 April 2008, expressed that payment of the deposit as a condition precedent to the coming into effect of the agreement together with its signing." Further, that conclusion flies in the face of Mr. Henlin's email dated 30 December 2010 in which he instructed Mr. Terrelonge to regard the email as a draft which obviously required the approval of Mrs. Henlin. Further, the aspect of the 'subject to financing' clause was unsettled as Mr. Terrelonge required it but Mr. Henlin felt it was undesirable. The email reads:

> "*As we discussed this morning Mrs. Henlin is off the island and returns on Monday. This is a draft of the modifications done by her Associate which needs to be perused by her, so please just use as a draft for now. She intends to send a letter explaining the modifications upon her return.*
>
> *With regards to the "subject to financing" clause, we are of the option that a clause like this would end this contract if you are not successful in sourcing financing. In light of the progress we have made since your last attempt to purchase Cybervale and later the Management of the entity we feel that such a clause would end all our efforts thus far.*
>
> *In our conversation earlier today, you had mentioned that Infochannel is definitely interested in purchasing Cybervale and that not getting financing would just vary the completion period. A clause indicating that sentiment would be a better one rather than just "subject to financing".*
>
> *Please let me know your thoughts.*

[25] Indeed the subsequent correspondence between the parties make it manifest that the agreement remained inchoate. As late as April 2010, Mr. Henlin clearly regarded the sale as incomplete and separate from the management agreement. It is useful to set out the said emails. Mr. Henlin sent the following email to Ms. Deon Robinson, Cybervale's Manager Finance and Administration on the 17 April 2010:

> *"I have again noticed that Cybervale's email service is down, the timing for the service to be down so frequently is also bad. With the closure of the store front in Portmore and the irregular operation of the email service this is sending the wrong signals to the customers. I am sure we both would like to ensure that we communicate positive vibes to the customers at this*

time and therefore would like for the service to be restored and some stability brought to this issue.

I get a number of calls asking what is happening to Cybervale and I have to be explaining and assuring those who call me that all is well.
On the other issue, can either you or Mr. Terrelonge provide an update to the Purchase?"

[26] On the 18 June 2010, Mr. Terrelonge emailed:

"I had missed this earlier.

Our plans for additional financing which would have provided the resources to complete the purchase, unexpectedly and surprisingly fell through.
We are now urgently seeking an alternative source and will advise further.

Apologize for the delay in responding."

[27] Email dated August 30, 2010, from Mrs. Henlin to Mr. Terrelonge states:

"I apologise for the delay in responding to your last email. It is almost two years since you have taken over Cybervale, that is since December 2008. The sale should have been completed within a short period thereafter. However, this has not materialized. In the circumstances, we are recommending that we convene a meeting to discuss an alternative financing option.

Kindly liaise with Tanya Campbell who is copied hereon to make that arrangement."

WHETHER FAILURE TO PAY MANAGEMENT FEE AN INDICATION THAT PARTIES WERE OPERATING UNDER THE SALE AGREEMENT

[28] Mr. George submits that the number of payments claimed to have been outstanding was not. Certain factors affected payment, for example a downturn in the business as a result of the loss of a number of customers. He submits that there were other factors which affected payments, such as the apportionment of the proceeds. He relies on the following email exchanges between the parties;

On 20 July 2009 Ms. Deon Robinson sent the following email to Mr. Henlin:

"As a confirmation based on our telephone conversation last week, the amount due and payable for management fees effective May 2009 will be

split 50%-50% between reducing the C & W conversion costs and paying the outstanding taxes as you requested. The amount that has already accrued up to April 2009 as set out in the attached spreadsheet will be set off against the conversion cost.

Please confirm acceptance of the above."

It is evident from this email that payment was dependent upon the availability of funds after certain costs were deducted.

[29] On 9 May 2012 this email was sent from Mrs. Deon Robinson to Mr. Patrick Terrelonge reminding him of an email sent by Mr. Henlin on the 15th of October 2009 regarding management fees. It states as follows:

"Based on the correspondence below where we were confirming the payments of the Management fees I am yet to receive payments on a regular basis.

The spreadsheet attached only showed fees up to April. Also I know we had agreed that you would pay 50% to tax office for me and the other 50% towards the LIME conversion fee. In my recent meetings with the tax authorities I will have to make those payments directly to Mr. Taylor for him to apply it to the arrears and not to 2009 payments and so you will have to pay me directly my portion of the management fees and I will make the payments to Mr. Taylor.

Please provide an update as to

1. *How much has been paid to tax office on my behalf for my arrears so far.*
2. *When the balance of the management fees will be paid to me, I think a number of months is outstanding.*

A spreadsheet indicating all of this would be nice, I know as an accountant you have all of this available.

I have since received only 1 cheque, last month, in the amount of $18,364.42 which I will return to you as I would like the payee to be Cybervale as I would like to lodge into an account from which I will pay the tax office."

[30] There were issues relating to the division of the proceeds from the business. This court is not satisfied that even if payments were not made in a timely manner, it is support for the contention that parties were operating under the sale agreement. In any

event, the above-mentioned emails from Mr. Henlin dated October 2009 and 9 May 2012, provide evidence that the parties understood that they were operating under the management contract.

[31] The following emails from Mr. Henlin to Infochannel and the above stated email of 15 October 2009 refute any claim that the management agreement was subsumed in the sale agreement:

> Email of 28 February 2011 from Mr. Henlin to Ms. Robinson reads:
>
> *"Can you say when the next set of payments can be expected, also can I have a statement as to what's due and what's paid already. I am totally lost when it comes to how current we are with the payments.*
>
> *My directors are requesting a report from me."*

[32] On the 17 April 2010, Mr. Henlin sent the following email to Ms. Robinson:

> *"I have again noticed that Cybervale email service is down, the timing for the service to be down so frequent is also bad. With the closure of the store front in Portmore and the irregular operation of the email service this is sending the wrong signals to the customers. I am sure we both would like to ensure that we communicate positive vibes to the customers at this time and therefore would like for the service to be restored and some stability brought to this issue.*
>
> *I get a number of calls asking what is happening to Cybervale and I have to be explaining and assuring those who call me that all is well.*
>
> *On the other issue, can either you or Mr. Terrelonge provide an update to the Purchase?"*

[33] In light of the foregoing:

1. Summary judgment is hereby granted to the defendant;
2. Costs to the defendant pursuant to the CPR;
3. Leave to appeal granted.