



[2024] JMCC COMM. 32

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN THE COMMERCIAL DIVISION

CLAIM NO. SU2022CD00295

BETWEEN	DEVON BARRETT	CLAIMANT
AND	ANDREW KIDD	1ST DEFENDANT
AND	LOVEINE DYKE (Claim discontinued against the 2 nd Defendant pursuant to Joint Notice of Discontinuance filed May 21, 2024)	2ND DEFENDANT
AND	NEPAL DEVELOPMENT LIMITED	3RD DEFENDANT

Mr Kevin Powell and Ms. Timera Mason instructed by Hylton Powell, Attorneys-at-law for the Claimant

Mr. Neco Pagon instructed by Peter Champagne, Attorney-at-law for the 1st and 3rd Defendants

Company Law - Section 115 of the Companies Act- Breach of Agreement- Whether the Claimant is the beneficial owner of shares in the 3rd Defendant- Whether the share capital of the 3rd Defendant should be rectified pursuant to section 115 of the Companies Act

IN OPEN COURT

Heard on 10th, 11th, 13th June, and 31st July 2024

STEPHANE JACKSON-HAISLEY J

INTRODUCTION

[1] By way of Claim Form and Particulars of Claim filed on July 12, 2022, the Claimant Devon Barrett, (Mr. Barrett) is seeking damages for breach of contract entered into on January 14, 2020 against the 1st Defendant, Andrew Kidd (Mr. Kidd), and/or alternatively for orders pursuant to section 115 Companies Act for rectification of the 3rd Defendant's, Nepal Development Limited (Nepal Development), Register of Members.

[2] Mr. Barrett is also seeking the following reliefs:

- i. A declaration that the Claimant is the beneficial owner of 400 ordinary shares in the 3rd Defendant.
- ii. Specific performance of Share Purchase Agreement dated January 14, 2020.
- iii. And/or alternatively, an order pursuant to section 115 of the Companies Act that:
 - a. The Register of Members of the 3rd Defendant be rectified by striking out all shares purportedly held by the 2nd Defendant and/or any other person through her and on behalf and inserting in lieu thereof the name of the Claimant as the holder of 400 ordinary shares.
 - b. The Claimant be authorised to effect the necessary alterations in the Register for carrying such order into effect.
 - c. Notice of such rectifications to be given to the Registrar of Companies.

- iv. An order that Statement of Increase of Share Capital dated March 27, 2020 purporting to increase the share capital of the 3rd Defendant be cancelled.
- v. An order that Ordinary Resolution dated March 27, 2020 purporting to increase the share capital of the 3rd Defendant be cancelled.
- vi. A declaration that the 2nd Defendant is not and has never lawfully been a shareholder of the 3rd Defendant or Company Secretary or other officer of the 3rd Defendant.
- vii. A declaration that the purported meeting of the members of the 3rd Defendant on February 3, 2020 and all business, resolutions, decisions and other actions purportedly concluded at that meeting are null and void and of no legal effect.

[3] The Defendants deny that there was any agreement to purchase the shares owned by Mr. Kidd but rather aver that the shares were to be held as security for a loan from Victoria Mutual Building Society in the sum of Five Hundred and Fifty Million Dollars (\$550,000,000.00) for the development that was being constructed at 27 Charlton Avenue, Kingston 8 in the parish of St. Andrew.

[4] A joint Notice of Discontinuance was filed against the 2nd Defendant on May 21, 2024.

CLAIMANT'S CASE

Evidence of Devon Barrett

[5] Mr. Barrett's evidence is that sometime in October 2018 he became aware of plans to construct a residential development at 27 Charlton Avenue, Kingston 8 in the parish of St. Andrew on property owned by Nepal Development. He entered into

discussions with then developer Mr. Devon Evans who was seeking partners to acquire a stake in Nepal Development and subsequently they met with Garey Whittaker and invited him to partner with them in the acquisition. Mr. Barrett averred that at that time, Mr. Evans informed him that caveats were lodged against the property and funds were needed to repay the creditors in order to start the acquisition of the property. He averred that on November 18, 2018, the first payment of Nine Million, One Hundred and Twenty Thousand, Five Hundred and Fifty Dollars (\$9,120,550.00) was transferred from VM Wealth Management Limited (VM Wealth), and the acquisition was completed in April 2019. He also stated that, at that time, 1,000 ordinary shares were transferred to Mr. Whittaker who subsequently transferred 400 shares to Mr. Evans and on July 10, 2019, Mr. Evans transferred those 400 shares to Mr. Kidd as his trustee.

[6] He contended that in exchange for his investment of Thirty-Four Million Dollars (\$34,000,000.00), he was to acquire Mr. Kidd's 400 ordinary shares in Nepal Development which would be treated as the equivalent of Eighty-Five Thousand Dollars (\$85,000.00) per share or valued at Eighty-Five Million Dollars (\$85,000,000.00). Mr. Barrett also contended that he made further investments in the project of over Seventy-Three Million Dollars (\$73,000,000.00), however during cross examination, Mr. Barrett admitted that none of the payments came directly from his personal bank account.

[7] Mr. Barrett indicated that when the investments were made, he was acting in his personal capacity and not as an agent of VM Wealth. During cross-examination, Counsel for the Defendant put to Mr. Barrett that he was acting as an agent of VM Wealth and sought to deceive the Court by redacting his name and work email address from an email dated November 16, 2018, which is evidence that he was not acting in his personal capacity. Mr. Barrett however, denied this contention and instead averred that on January 14, 2020, he appointed Mr. George Beckford as his agent in respect of his real estate investments and formalised a Share Purchase Memorandum (SPM) for the purpose of acquiring the 400 shares in

Nepal Development. The SPM was executed, stamped at Stamp Office and based on his understanding, Mr. Beckford was the legal owner of the shares. He further stated that on February 25, 2020, he instructed Mr. Beckford to transfer the 400 shares to Geoffrey Forde who is another of his business partners.

- [8]** Mr. Barrett averred that Mr. Kidd is in breach of the SPM as he failed to provide him with a copy of the duly executed Agreement and failed to update Nepal Development's share register by registering Mr. Beckford as the owner of the 400 ordinary shares despite paying the amount due under the SPM as well as paying the transfer tax and the stamp duty on the sale of the shares and as a result, his agent is not reflected as the registered owner of the shares.
- [9]** He further stated that he became aware that Mr. Kidd caused Nepal Development to convene an Extraordinary General Meeting around February 2020, where an ordinary resolution was passed to increase the company's share capital by 6,000 shares which were allotted to him and then further allotted to Ms. Lovene Dyke whose name was entered on Nepal Development's register of members and became the majority shareholder. Mr. Barrett averred that Mr. Kidd is also in breach of the SPM as having sold his 400 ordinary shares, he ceased to have voting rights and/or pass a resolution.
- [10]** Mr. Barrett contended that he has suffered great detriment as he is unable to recover the purchase price of the shares, the project is far from being completed and there is no clear indication as to what has become of the sum of One Hundred and Seven Million, Seven Hundred and Sixty-Seven Thousand, One Hundred and Seventy-Five Dollars (\$107,767,175.00) invested in Nepal Development.

Evidence of George Beckford

- [11] Mr. George Beckford expressed that he has been Mr. Barrett's business partner for approximately thirty years, and that he became aware that Mr. Barrett entered into an agreement to invest in a residential development being constructed on property at Charlton Avenue owned by Nepal Development. He averred that on or about January 2, 2020, Mr. Barrett asked him to act as his agent for his real estate investments and on January 4, 2020, an Agency Agreement was executed which formally appointed him as Mr. Barrett's agent. During cross examination, it was put to Mr. Beckford that he was never introduced to Mr. Kidd or Mr Evans and the only reason he was giving evidence is because he would be paid 0.25% profit once he performed his duties. Mr. Beckford however, denied the assertion and instead countered that he was introduced to Mr. Evans and Mr. Whittaker and that his knowledge of the matter was not based on what Mr. Barrett informed him.
- [12] Mr. Beckford averred that he was introduced to Mr. Kidd as Mr. Barrett's agent and was informed that he would be executing the SPM to acquire the 400 ordinary shares in Nepal Development but that he would be the legal owner holding them for the benefit of Mr Barrett. He further averred that on February 27, 2020, a Form of Transfer was executed to transfer the 400 ordinary shares to Geoffrey Forde who is another of Mr. Barrett's business partners and the relevant transfer tax and stamp duty paid.
- [13] He stated that during the period of February and April 2020, he caused sums to be transferred to Mr. Kidd and Ms. Dyke on behalf of Mr. Barrett. However, to date Nepal Development's register has not been updated to reflect him or Mr. Geoffrey Forde as holders of the 400 ordinary shares and it is unclear what has transpired with the investment as the residential development has not been completed to date.

1ST AND 3RD DEFENDANTS' CASE

Evidence of Andrew Kidd

- [14] Mr. Kidd is currently a Director of Nepal Development and his evidence is that he had no contractual relationship with Mr. Barrett or any of his agents in a personal capacity however, the relationship was solely based on his office as Chief Investment Officer of VM Wealth. He averred that he did not receive the sum of Thirty-Four Million Dollars (\$34,000,000.00) from Mr. Barrett or any of his agents pursuant to any SPM as all payments to his account were from or at the direction of VM Wealth for the funding of the construction of the project as negotiated by Mr. Evans.
- [15] Mr. Kidd denies the validity and enforceability of the SPM dated January 14, 2020 and the purported transfer of his shares in Nepal Development. He denies ever meeting Mr. Beckford or Mr. Forde or ever executing a document in the presence of a 'P. Hamilton'. He admits signing a blank SPM which was being used for the purpose of a security instrument. He contends that the document was signed along with a blank transfer and his understanding was that both documents were to be used in support of the VM Wealth loans.
- [16] Mr. Kidd acknowledged receiving the sum of Seventeen Million Dollars (\$17,000,000.00) and other sums from VM Wealth. He stated that Mr. Barrett, as the banker for the project was kept abreast of the development as well as the changes made in Nepal Development and also encouraged the increase of the share capital for the granting of the loan of Five Hundred and Fifty Million Dollars (\$550,000,000.00) for the completion of the construction works. During cross-examination Mr. Kidd admitted that he had been in banking for more than twenty years and that it is unlikely that a financial institution would lend money without a written application form and that the bank would keep some form of security for the loan. He also admitted that he did not sign any documents to open an account with VM Wealth and received no commitment letter or gave any personal guarantee.

- [17] Mr. Kidd stated that upon Mr. Barrett's instructions, the share capital was increased and first offered to Mr. Whittaker and Mr. Kidd who declined to take up any more shares, therefore, 5,000 shares were offered to Ms. Dyke. During cross-examination, he agreed that there was no evidence that Mr. Barrett instructed him to increase the share capital. He averred that in or around January 2020, the registered shareholders and directors of Nepal Development were Garey Whittaker who owned 600 shares and the remaining 400 shares were owned by him. He stated that the shares were first transferred to him from Mr. Evans on July 10, 2019 pursuant to a business arrangement and the shares were to be held as a security instrument where repayment to VM Wealth would be from the sale of the units plus interest of 20% per annum.
- [18] Mr. Kidd contended that all interactions with Mr. Barrett were handled at the offices of VM Wealth and the impression given was that Mr. Barrett was acting in his capacity as the CEO. He also contended that he never received any demand calls from Mr. Barrett, Mr. Beckford or Mr. Forde regarding their concern about his actions and that Mr. Barrett abused his office which caused serious financial harm to the successful completion of the project.
- [19] Mr. Kidd averred that Nepal Development is prepared to repay the loan to VM Wealth at 20% per annum once sales of the apartment units commence which is in keeping with the agreement. He denies the enforceability of any share purchase agreement between himself, Mr. Barrett or Mr. Beckford or any other persons and instead stated that any documents executed by him were for the sole purpose of being a security instrument in support of a loan from VM Wealth to fund the continuation of the development. He also denied receiving any personal gain by virtue of the arrangement between Nepal Development and Mr. Evans and indicated that all communication regarding the loan was between Mr. Evans and Mr. Barrett in his capacity as CEO or agent of VM Wealth. He contended that this is an unfortunate attempt of a banker in whom trust was reposed to steal the

development which in 2020, had an appraised value of Two Billion Dollars (\$2,000,000,000.00).

Evidence of Devon Evans

- [20]** Mr. Evans averred that he was introduced to the residential development in October 2018 and at that time, Nepal Development and its principal, Mr. Alexander Coke, were experiencing severe financial and legal challenges as a result of a failure to commence construction work. He stated that there were discussions for him to acquire 50.1% shares in Nepal Development and upon agreement of the terms of acquisition of the share, he immediately contacted Mr. Barrett. Mr Barrett was a VM Wealth banker whom he had known professionally and socially for in excess of fifteen years, throughout his banking career, as well as a fellow Kingston College alumnus.
- [21]** Mr. Evans stated that at their first meeting, Mr. Barrett informed him that VM Wealth expects good returns on any investment transactions that their monies are utilized in, as they are not a commercial bank. His evidence is that there was an agreement that VM Wealth would lend him the sum of Thirty Million Dollars (\$30,000,000.00) in order to purchase 50.1% shares in the company in exchange for 20% interest per annum along with delivery of a free and clear title belonging to the 27 Charlton Avenue property. During cross-examination, Mr. Evans admitted that he didn't sign a commitment letter or any form of documents to open an account with VM Wealth, neither did he give a personal guarantee. He indicated that the relevant building approvals as well as the duplicate Certificate of Title for Nepal Development were delivered to Mr. Barrett at the Knutsford Boulevard office of VM Wealth.
- [22]** He contended that upon receipt of the documents, Mr. Barrett transferred the sum of Nine Million, One Hundred and Twenty-Thousand Dollars (\$9,120,000.00) to the law firm Harrison & Harrison upon his instructions, in order to withdraw an upcoming court case. He also contended that he did not receive the remaining

balance of Twenty Million, Eight Hundred Thousand Dollars (\$20,800,000.00) from VM Wealth as the entity was experiencing a corporate restructuring therefore, he had to secure a new partner to complete the purchase of the 50.1% shares. Mr. Evans stated that there were no further payments from Mr. Barrett until December, 2019 when a payment of Seven Million Dollars (\$7,000,000.00) was made to Ms. Dyke's account.

[23] He stated that Mr. Barrett informed him that in order to continue with the VM Wealth loan disbursements, a share purchase agreement would need to be executed by Nepal Development as unless VM Wealth has in its possession the 400 shares as security, it would be unwilling to extend any loan. He indicated that he directed Mr. Kidd to sign a blank form as well as a share purchase document which was stamped at Tax Office however, there was no intention for the document to be stamped or presented to Companies Office as it was solely for security purposes. Mr. Evans averred that the sum of Thirty-Four Million Dollars (\$34,000,000.00) was stated in the share purchase agreement solely for tax assessment purposes instead of the value of the loan of Five Hundred and Fifty Million Dollars (\$550,000,000.00). He admitted that after the execution of the share security documents, Mr. Barrett began disbursement of the loan proceeds in tranches during January-August, 2020 after presentation of material invoices or payroll requests.

[24] Mr. Evans averred that Mr. Barrett contacted him and informed him that VM Wealth is no longer able to fund the full Five Hundred and Fifty Million Dollars (\$550,000,000.00) for the project unless they are in possession of all 1,000 shares in Nepal Development. He further averred that Mr. Barrett informed him to increase the share capital to 6,000 ordinary shares which was done and thereafter made demands that the newly increased shares be delivered to VM Wealth as additional security before the resumption of the construction loan disbursement. He admitted during cross examination, that the sum of One Hundred and Four

Million Dollars (\$104,000,000) was disbursed during the period November 2018 to April 2020 however, there has been no repayment as there is no formal demand.

[25] Mr. Evans stated that he did not approach Mr. Barrett in a personal capacity to fund the development as he was not of the impression that he possessed that financial capacity and that all communication, and interactions were done through VM Wealth or at its offices. He stated that Mr. Barrett sent him threatening messages and calls and he became disappointed and uncomfortable with Mr. Barrett's actions therefore he informed the directors of Nepal Development not to pledge any more shares as it appears he was attempting to steal the company.

SUBMISSIONS ON BEHALF OF THE CLAIMANT

[26] Counsel for the Claimant, Mr. Kevin Powell commenced his submissions by identifying that the issues for resolution are:

- a) Whether there was an agreement for 400 ordinary shares in Nepal Development to be transferred to Mr. Barrett in exchange for him investing Thirty-Four Million Dollars (\$34,000,000.00) in the development;
- b) Whether Mr. Barrett is the beneficial owner of the 400 ordinary shares in Nepal; and
- c) Whether the share register in Nepal Development should be rectified pursuant to section 115 of the Companies Act.

[27] Mr. Powell invited the Court to find that the Claimant's witnesses were credible, not just from their demeanour but more importantly that the documentary evidence and the objective facts support their version of events. Counsel submitted that the Defendants' witnesses, on the other hand on multiple instances, were less frank and their documentary evidence conflicted.

- [28] Mr. Powell pointed out that Mr. Barrett was consistent in stating that he was acting in his personal capacity and not as an agent of VM Wealth. Counsel averred that Mr. Barrett did not attempt to refute or challenge the suggestion that the SPM did not refer to him neither did he deny that VM Wealth offers lending solutions however, he was certain that those lending solutions commenced in 2021, long after the Defendants received the purported loans. Mr. Powell submitted that the Court should accept Mr. Barrett as a frank and truthful witness.
- [29] Mr. Powell also contended that Mr. Beckford was forthright in giving the evidence that he acted as Mr. Barrett's agent and identified the agency agreement. He made it clear that he was not motivated by the compensation in the agency agreement and that it meant little to him. He invited the Court to accept Mr. Beckford as a truthful witness.
- [30] Counsel submitted that the court should consider that it is incredible that Mr. Kidd, a former banker with twenty-two years' experience in banking up to the position of an Assistant Manager of Retail Banking could not identify a security instrument even more so that the document does not include any language that suggests it was a security instrument. Counsel relied on **Jamaica Citizens Bank Limited v Leon Reid** JM 1995 SC 1 where Beckford J said:

“There is a heavy burden of proof on the defendant who is relying on the plea of non est factum. He must show that he acted in a reasonable manner. Here is a businessman and company director who deals in real estate yet he is asking the court to believe that he does not know what is meant by security or collateral in relation to this land. He said he signed the pages in reliance on the plaintiff's officers whom he trusted.”

The learned Judge quoted from *Saunders v Anglia Building Society* [1970] 3 AER 91 at 963 and thereafter concluded that: ***“It would seem to me that this passage is germane to the instant case. The defendant was not induced to sign a document of a class or character different***

from that which he intended to sign. He knew that what he signed was meant to deal with his land. The Defendant says that as a responsible businessman dealing in real estate he signed pages in blank and handed them to the plaintiff leaving the details to be filled in at a later date by some other person. It is not open to the defendant to say that he did not consent to whatever the completed documents contained.”

- [31] Mr. Powell submitted that the dicta applied equally to Mr. Kidd, a former banker with more than two decades of experience, claiming that he believed the SPM to be a security instrument and not intended for the sale of shares. He further submitted that Mr. Kidd was not induced to sign a document of a class or character different from what he intended to sign and that he knew what he was signing was meant to be the sale of shares.
- [32] Counsel pointed out that Mr. Evans’ ever-changing version of events under cross-examination is obvious. He contradicted himself when he stated initially that he was the contractor responsible for the day-to-day activities then changed his evidence to say that he arranged the loans from VM Wealth as part of his job description. He also contradicted himself when he stated he was never told about George Beckford however admitted to receiving an email with Mr. Beckford’s driver’s licence.
- [33] Mr. Powell submitted that that the Defendants’ contention that the money invested by or on behalf of Mr. Barrett were loans granted by VM Wealth is untenable. He contended that both Mr. Kidd and Mr Evans admitted that they did not sign any documents to open any account at VM Wealth or complete any documents for the grant of the loans. He stated that Mr. Evans, in fact stated that the loans were granted verbally based on telephone instructions which is incredible. Counsel stated that Mr. Evans was elusive when asked about repayment terms of the loans and how much of the debt had been repaid to date. Counsel submitted that it is incredible that a licensed financial institution disbursed more than One Hundred

Million Dollars (\$100,000,000.00) in loans and neither demanded repayment nor took steps to recover those funds.

- [34] Counsel submitted that there is no dispute that Mr. Beckford was acting as Mr. Barrett's agent and signed the SPM on his behalf. He also submitted that Mr. Beckford effectively dropped out of the picture thereby leaving Mr. Barrett as the purchaser of the 400 ordinary shares and suggested that the court should rely on the learned authors in Commonwealth Caribbean Contract Law which indicate that:

“the basic function of an agent is to establish a contractual relationship between the principal and a third party and, having done so, he normally ‘drops out the picture’, leaving the principal and third party bound by a contractual obligation.

- [35] Mr. Powell also relied on **Epsilon Global Equities v Paul Hoo and others** Claim No. 2008 HCV5916 delivered September 2, 2011 (which was upheld on appeal) and asked the Court to adopt the reasoning of Woods Preservations Limited which Jones J. cited with approval in **Epsilon Global Equities Limited** that the beneficial interest in the shares were transferred to Mr. Barrett in January 2020 thereby making Mr. Barrett the beneficial owner of the 400 shares.

- [36] Counsel averred that if the Court is minded to agree that the true nature of the agreement was for Mr. Barrett to receive the 400 shares in exchange for his Thirty-Four Million Dollars (\$34,000,000.00) investment, his name should be entered on the share register for Nepal Development. Counsel contended that it has been four years since Mr. Barrett was entitled to have his name entered on the register of shareholders and there is no good reason why it should not be entered. He stated that the Court has power to order the rectification of the company's share register pursuant to Section 115 (1) of the Companies Act, to remove Mr. Kidd and replace him with Mr. Barrett as the owner of 400 ordinary shares.

[37] Counsel refutes the contention of the allegation of fraud which is not specifically pleaded as stated in **Bancroft Brown v Daveton Williams & ors** [2016] JMSC Civ 192 and submitted that the Defendants' allegation of fraud is made by way of submissions without any evidence of even a pleading to support it. In such circumstance, he urged the Court to dismiss the argument.

SUBMISSIONS ON BEHALF OF THE 1ST AND 3RD DEFENDANTS

[38] Counsel for the Defendants, Mr. Neco Pagon submitted that the core of the issues arising between the parties is the nature of the relationship between the parties and what were the intended terms and agreement which may have been made in light of this relationship. Counsel averred that the issues may be stated as:

- a. Has the Claimant satisfied the Court that there is an agreement between the parties, as alleged or whether the parties were at *consensus ad idem*?
- b. Is the Share Purchase Memorandum a separate agreement from the alleged initial agreement between the parties?
- c. Is the Share Purchase Memorandum enforceable against the Defendants by reason of failure of consideration and having regard to the terms of the agreement?

[39] Mr. Pagon submitted that the Court ought to find that there is no contract. He relied on paragraphs 13-19 of John Cartwright in the text entitled *Misrepresentation, Mistake and Non-Disclosure* (Fifth Edition) Sweet & Maxwell at 2019. Counsel submitted that the Claimant's case is eroded by the contemporaneous documentary evidence before the court that the parties were not *consensus ad idem* in their dealings. Counsel sought to discredit the Claimant. He averred that Mr. Barrett stated in his witness statement that he made an investment of Nine

Million, One Hundred and Twenty Thousand Five Hundred and Fifty Dollars (\$9,120,550.00) however, on amplification he stated that he made investment of Nine Million, One Hundred and Twenty Thousand Five Hundred and Fifty Dollars (\$9,120,550.00) plus Eight Hundred and Seventy-Nine Thousand, Four Hundred and Fifty Dollars (\$879,450.00) and under cross examination, Mr. Barrett admitted that the payments were not made from his account.

- [40] Mr. Pagon submitted that Mr. Barrett failed in his duty to make full and frank disclosure by redacting critical information and sought to conceal that communications with him were through VM Wealth and not in his personal capacity. He submitted that the court should draw an adverse inference in respect of this conduct and pointed to **Infabrics Ltd. v Jaytex Ltd Ltd. (No. 2)** [1985] FSR 75.
- [41] Counsel submitted there is no evidence before the Court where the Claimant has shown that the funds were not associated with VM Wealth, and he failed to call any witnesses from VM Wealth to corroborate his assertions. He averred that the Defendants believed they were doing business with VM Wealth and therefore invited the Court to find that the Claimant failed to establish *consensus as idem*.
- [42] Counsel averred that the SPM contains an entirety clause, and the Claimant has sought to conflate the purported 2018 Agreement with the Share Purchase Memorandum to say that payments were made in relation to the 2018 Agreement which is unsustainable. Mr. Pagon stated that the terms of the SPM are clear that the purchase price in the sum of Thirty-Four Million Dollars (\$34,000,000.00) is payable to Mr Kidd's account on closing being January 14, 2020 and both Mr. Barrett and Mr. Beckford confirmed that this payment was not made. Counsel also averred that the Claimant accepted that there were no terms in the SPM which incorporates the purported 2018 agreement and there is no mention of Mr. Barrett's name in the document.

[43] Mr. Pagon submitted that the 2018 agreement cannot be treated as one with the SPM and commended the Court to paragraph 29 of the decision of Edwards J (as she then was) in **ADS Global Limited v Fly Jamaica Airways Limited** [2018] JMCC Comm 51 and also placed reliance on **Inntrepreneur Pub Co (GI) v East Crown Ltd** [2000] All ER (D) 1100 to substantiate his point.

[44] Counsel submitted that it is trite that where no consideration passed, the agreement fails. The Defendants' evidence is that they received no money for any sale of shares and the funds went back into the construction of the development. Counsel submitted that for these reasons the Claimant is not entitled to specific performance nor the other orders sought.

ISSUES

[45] Having considered the evidence and submissions presented by Counsel for both parties, the issues may be simplified as firstly, whether the parties entered into an agreement for the sale of the 400 ordinary shares in the 3rd Defendant and secondly whether the Claimant has acquired beneficial ownership of the 400 ordinary shares and if so whether the share register of the 3rd Defendant should be rectified pursuant to section 115 of the Companies Act.

DISCUSSION & ANALYSIS

Whether the parties entered into an agreement for the sale of the 400 ordinary shares in the 3rd Defendant?

[46] There is no issue concerning whether there was in fact a transaction between the parties involving the transfer of an initial sum of Thirty-Four Million Dollars (\$34,000,000.00) followed by additional sums amounting to a grand total of One Hundred and Seven Million, Seven Hundred and Sixty-Seven Thousand, One

Hundred and Seventy-Five Dollars (\$107,767,175.00). The parties are agreed that these sums were transferred from and on behalf of the Claimant to and on behalf of the Defendants, however they are not agreed as to the purpose of the transfers and the real source of these funds.

- [47]** According to the Claimant, the sums reflected an investment in the Company and the agreement was for him to acquire 400 ordinary shares in the 3rd Defendant. According to the 1st Defendant, the sums represented a loan from VM Wealth and there was never any agreement or discussions with either the Claimant or Mr. Beckford in respect of the sale of the 400 ordinary shares.
- [48]** In the submissions presented by both Counsel, they raised a few legal issues. They relied on authorities for which I am grateful as they have provided a useful guide to me in narrowing the issues. However, I am of the view that the issues raised are largely factual and so the Court's decision will be based primarily on the view taken as to the credibility of the witnesses.
- [49]** The parties are also agreed that a SPM was executed but there is conflicting evidence regarding its purpose and the manner in which the execution came about. The Claimant has maintained that the SPM was executed by his agent on his behalf and that Mr. Evans arranged for it to be executed by Mr Kidd. He says that it was Mr. Evans who brought it to his office for Mr. Beckford to sign.
- [50]** Initially, in the 1st and 3rd Defendants' submissions the issue of fraud was raised as it relates to whether Mr. Kidd signed the SPM however, this was not developed during the course of the trial. In fact, the evidence of Mr. Kidd is that he did in fact sign the document but that what he signed was a blank document which he expected to be used as a security instrument and it was signed along with a blank transfer, the purpose for which was to secure a loan from VM Wealth.

[51] I found it difficult to accept that Mr. Kidd, who disclosed that he is a former banker for in excess of twenty years, would affix his signature to a blank document and that he did not appreciate the difference between a security instrument and an agreement for sale of shares. In any event, his evidence in this regard is self-contradictory. Although he at first gave the impression that the document was blank in that there were no details contained in it, during cross-examination he accepted that that the SPM was not incomplete or missing words and that what he meant was that it was a holding document never to be acted upon.

[52] The accounts given by Mr. Kidd and Mr Evans seemed to be shifting as the case progressed. With respect to the SPM, Mr Evans initially mentioned a blank share purchase agreement as having been executed by Mr Kidd but thereafter expressed that the share purchase agreement was stamped at the Tax Office and mentioned a separate document referred to as a blank transfer of shares document which he expressly indicated was never intended to be completed or presented at the Tax Office. He did not say this in relation to the SPM. The clear inference from his evidence is that it was not intended for the SPM to be stamped. It was the transfer of shares document that he says was intended to be used as a security document. Mr Kidd although initially saying the SPM was blank, during cross-examination explained that the SPM was not missing any content. This supports Mr. Barrett's position from the outset that the SPM signed by Mr. Kidd was not in fact blank. I have taken the view that both Mr. Evans and Mr Kidd were fully aware of the contents of the SPM. I find as a fact that they were both aware that the SPM was stamped and the relevant duties and transfer tax to be paid.

[53] Further, in cross-examination, Mr. Evans admitted that he received an email from Mr. Barrett with Mr Beckford's driver's licence. This lends credence to Mr Barrett's evidence that he had a discussion with Mr. Evans and Mr. Kidd advising them that Mr. Beckford would act as his agent for the purpose of acquiring the 400 ordinary shares in the company. I accept that Mr. Evans was aware that Mr. Beckford was Mr. Barrett's agent.

[54] It is the main contention of the Defendants that they were and have always operated on the basis that the sums represented a loan from VM Wealth. This is a critical issue for me to determine. On behalf of the Defendants, it was highlighted that the actions of the Claimant are suspicious. In the first instance, in the correspondence he submitted to the Court, he redacted his email address which was a VM Wealth email address. He did admit to doing this without offering any explanation as to why he acted in this manner. It is also quite curious that although he was the main man behind the transactions, he sought to conduct his affairs through an agent. This raises questions as to whether he had something to conceal and so the Court must take all this into account when considering his veracity.

[55] It is also true that the 1st Defendant Mr. Kidd made no mention of his current position in the Ministry of Education in his witness statement and only made reference to being a former banker. There have been a lot of things unsaid in this matter and it appears that not all the truth has been unearthed. The case must be decided on a balance of probabilities, in other words it is a question of which account is more credible.

[56] I have considered the evidence presented on behalf of the Claimant. Despite obvious gaps and inconsistencies on the Claimant's case, it is at the end of the day a balancing act between two different accounts. A lot of what Mr. Barrett has said is supported by the documentary evidence which lends more veracity to his account when compared to that of the Defendants. After making the initial payment of Nine Million, One Hundred and Twenty Thousand, Five Hundred and Fifty Dollars (\$9,120,550.00) to Harrison and Harrison, he received an email from the Practice Manager Ms. Lisa Harrison thanking him for the payment into their client's trust account and indicating that a soft copy of the receipt is attached. This letter is supportive of the Claimant's account that it was he who made this payment and

not VM Wealth. This was followed by a receipt which indicated that the funds were from VM Wealth, so this presents as an inconsistency on the Claimant's case. However, the undisputed evidence is that at the time VM Wealth was not a bank and was not involved in the business of issuing loans. They were on the face of it an investment company and so the fair inference is that the sums came from an investment account. Based on the way the transaction flowed, I am of the view that it is more likely that the funds were in fact the personal funds of the Claimant and not those of VM Wealth.

[57] It is of note that none of the documents exhibited made any reference to any loan. The Claimant exhibited WhatsApp conversations between himself and Mr. Evans. Nowhere in any of this correspondence was there any reference to any loan. In the WhatsApp conversations, a letter is exhibited which appears to be a formal letter from Mr. Evans on behalf of Nepal Development Limited for the attention of a Mr. Alexander Coke. This letter made reference to Mr. Barrett being authorised to execute payment to Mrs Harrison. There was also no reference to any loan here. In the informal discussions between Mr. Evans and Mr. Barrett, they spoke about the sums of money to be paid, about who was to make payments, about money to be used for stamping but nothing at all about any loan and any terms of repayment. I would have expected that if this was in fact a loan some reference would have been made to a loan or an expectation of receiving it from the institution and even the terms under which it was to be disbursed.

[58] The Claimant exhibited copies of bank statements showing some of the funds paid over and received. On the other hand, neither Mr. Kidd nor Mr. Evans have disclosed how the funds they acknowledged receiving were transferred to them. Of note is a copy of Mr. Kidd's bank statement from National Commercial Bank showing a lodgement of Seventeen Million Dollars (\$17,000,000.00) on March 6, 2020 reflecting an Elink transfer from VM Wealth. This lends support to Mr. Kidd's contention that those funds came from VM Wealth however the explanation provided by Mr. Barrett is a reasonable one. He explained that the funds had been

sent on his behalf from VM Wealth and so were reflected as a payment from VM Wealth because it is not a bank. I also accept his undisputed evidence that VM Wealth only started offering lending solutions in 2021.

[59] Of note is the copy of George Beckford's statement of account from Jamaica Money Market Brokers Limited which reflects several credits and debits over a period in excess of three months. On four occasions he received transfers from VM Wealth being the sum of Ten Million Dollars (\$10,000,000.00) on March 19, 2020, the sum of Twenty Million Dollars (\$20,000,000.00) on March 24, 2020, the sum of Nine Million Dollars (\$9,000,000.00) on April 8, 2020 and the sum of Four Million Dollars (\$4,000,000.00) on April 24, 2020. All these payments were followed by debits from his account to persons associated with this transaction. On March 23, 2020, the sum of Seven Million Dollars (\$7,000,000.00) was transferred to the account of Andrew Kidd. On March 25, 2020 the sum of Fourteen Million and Twenty Thousand Dollars (\$14,020,000.00) was transferred to the account of Andrew Kidd and on March 30, 2020 the sum Two Million, Nine Hundred and Eighty Thousand Dollars (\$2,980,000.00) was again transferred to Andrew Kidd's account. This supports the Claimant's position that Mr. Beckford was one of the persons who transferred funds to Mr. Kidd's account.

[60] Despite the submissions of Counsel on behalf of the Defendants that this supports the case that the funds were coming from VM Wealth, I do not accept this because it would be difficult to accept that a financial institution would operate in this way of effecting indirect transfers. It is more consistent with the Claimant's account that these funds were transferred on his behalf.

[61] Another point that stands out regarding these significant sums of money being transferred to Mr. Kidd's account according to him by an unknown person with the name of George Beckford. This contradicts his evidence that all payments to his account were from or at the direction of VM Wealth. It also puts into question his evidence that he has never met, spoken to or seen anyone by the name of George

Beckford but yet he would have received these exorbitant sums from Mr George Beckford without seeking to ascertain who this individual was.

[62] There are no documents presented by the Defendants that support any loan transaction between themselves and VM Wealth. This is a transaction involving payments of over One Hundred and Four Million Dollars (\$104,000,000.00) to the Defendants but yet according to both Mr. Kidd and Mr. Evans, they never held any account with VM Wealth, they never applied for any loan, and they never signed any documents pertaining to any loan. Although the Defendants' account is that the financing was to be in the sum of some Five Hundred and Fifty Million Dollars (\$550,000,000.00), no sums near to that amount were transferred. The sum transferred was just over One Hundred and Four Million Dollars (\$104,000,000.00) and so is more consistent with the Claimant's account.

[63] This is a transaction in which they would be purporting to sell units to the public after completion. It is particularly difficult for me to accept that having received such a substantial amount of funds from a financial institution, no mortgage, lien or any other endorsement would be registered on the Title for the property and that even now no documentation was executed for the procurement of a loan and no firm arrangements made for any repayment of any sums pursuant to a loan or mortgage. If I were to accept the 1st Defendant's version, I would have to say that a licensed reputable financial institution such as VM Wealth disbursed over One Hundred Million Dollars (\$100,000,000.00) in loans without any documentation on behalf of persons including a company that had no account with them and further that over four years has passed and there has been no attempt on behalf of the institution to recover these funds.

[64] Although there were gaps in the case presented by the Claimant that have not been closed, I do find that on a balance of probabilities his account is more credible than that of Mr. Kidd and Mr Evans. On a balance of probabilities, I accept the submissions of Counsel for the Claimant that some parallels can be drawn with the

instant case and the case of **Jamaica Citizen Bank Limited** where the court commented on the Defendant's occupation as a businessman and company director who deals in real estate yet he was asking the court to believe he does not know what is meant by security or collateral in relation to land. The 1st Defendant being a banker for over two decades would not be likely to sign a document which on the face of it provided for the sale of shares when he believed it to be a security instrument. On a balance of probabilities, it is more likely that these funds were the personal funds of the Claimant or his agent or agents and that the SPM was prepared with the intention to reflect the agreement of the parties to transfer the 400 ordinary shares to the Claimant through his agent Mr. Beckford.

[65] On behalf of the Defendants, it was submitted that the parties should not be bound by the SPM as the sums referred to in it were not paid on the date indicated and therefore it is not valid or enforceable and that the agreement is devoid of consideration and so it fails. I do not find favour with these submissions as it is accepted that the sum was paid at a later date and in any event the agreement between the parties is not only contained in the SPM. The court has to examine all the discussions between the parties as well as other sums paid at a later time. I do not agree with the Defendants' submissions that the SPM is devoid of consideration and therefore unenforceable.

[66] The essence of the SPM is that it purports to sell 400 shares in the 3rd Defendant for the sum of Thirty-Four Million Dollars (\$34,000,000.00). It makes no reference to VM Wealth or to any loans and so could not be intended to be a security instrument. The existence of the SPM is supportive of the Claimant's account and reflective of the intention of the parties and the fact that it was stamped and accompanied by the transfer document demonstrates their intention to be bound by its contents. I accept that the parties' intention was that the interest in the shares would be passed to him through his agent Mr. Beckford.

[67] I accept Mr. Barrett's evidence that he entered into an agency agreement with Mr. Beckford for the acquisition of the 400 ordinary shares in Nepal Development in exchange for his investment. I therefore find on a balance of probabilities that the true nature of the transaction was that the parties agreed that Mr. Barrett would invest in the project in exchange for 400 shares in the Company and that Mr Beckford would act as his agent in the acquisition.

Whether the Claimant has acquired beneficial ownership of the 400 ordinary shares and if so whether the share register of the 3rd Defendant should be rectified pursuant to section 115 of the Companies Act?

[68] I have accepted that there was an agreement between the parties for the Claimant to acquire 400 shares in the company. Although the Claimant is not named in the SPM, Mr. Beckford was acting as his agent pursuant to an Agency Agreement. This Agency Agreement was executed on the 4th of January 2020 some ten days before the SPM was executed on the 14th January 2020 and so at that time Mr Beckford was the agent of Mr Barrett. Mr. Beckford's evidence is that he only signed on the instructions of Mr. Barrett and for his benefit. I accept Counsel for the Claimant's submission that the basic function of the agent has been established and that Mr Beckford having dropped out of the picture, Mr. Barrett is the purchaser of the 400 shares under the SPM and it is therefore Claimant who holds the interest in the shares.

[69] Further support for this position can be gleaned from the judgment of Jones J (as he then was) in **Epsilon Global Equities Limited** relied on by the Claimant to buttress the claim for beneficial ownership. It is clear that the beneficial ownership of the 400 shares would have passed out of the hands of the previous owner and into the hands of the Claimant at the time of the signing of the agreement. Jones J at paragraph 19 of the judgment highlighted the legal proposition that in an agreement for the sale of shares, the beneficial ownership would pass at the time

of the agreement. This position was sanctioned by the Court of Appeal who found that the learned judge had applied the correct principles in law.

[70] I therefore agree with the Claimant's submission that Mr. Barrett is the beneficial owner of the shares. The next question is whether his name should be entered on the share register of Nepal Development.

[71] Pursuant to section 115(1) (a) Companies Act, if:

(a) the name of any person is, without sufficient cause, entered in or omitted from the register of members of a company.

the person aggrieved, or any member of the company, or the company, may apply to the Court for rectification of the register.

[72] The Claimant has by virtue of this Claim applied for a rectification of the register. I agree that the omission of Mr. Barrett's name from the register is without sufficient cause and that it should be rectified. Further, the Defendants have not given any plausible reason for not updating the share register. In those circumstances, I am prepared to order that the share register of Nepal Development be rectified to remove Mr. Kidd as the owner of 400 ordinary shares and replace him with Mr. Barrett. The section also provides for the payment by the company of any Damages sustained by the aggrieved party.

[73] The Claimant requested Damages but did not present any evidence or make submissions to substantiate an award for Damages. The Claimant also sought an Order for Specific Performance of the SPM but I do not think it is necessary in these circumstances to make the Order in those terms as I have already decided that the Claimant is the beneficial owner of the 400 shares and that the Register of Companies should be rectified to reflect that.

[74] My orders therefore are as follows:

1. That the Claimant Devon Barrett is the beneficial owner of 400 ordinary shares in the 3rd Defendant;
2. That the Register of Members of the 3rd Defendant be rectified to remove Mr Andrew Kidd or any other person as the owner of the 400 ordinary shares in the Company and replace with the Claimant Devon Barrett;
3. That the Claimant Devon Barrett be authorised to effect all necessary alterations in the Register for carrying such order into effect;
4. That Notice of such rectifications be given to the Registrar of Companies; and
5. Costs to the Claimant to be agreed or taxed

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Stephane Jackson-Haisley
Puisne Judge