SCFR

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN THE CIVIL DIVISION

CLAIM NO. 2008 HCV 5916

BETWEEN	**EPSILON GLOBAL EQUITIES LIMITED**	**CLAIMANT**
AND	**PAUL HOO**	**FIRST DEFENDANT**
AND	**IAN LEVY**	**SECOND DEFENDANT**
AND	**JANETTE STEWART** (Administratrix of the estate of Peter Stewart, deceased)	**THIRD DEFENDANT**
AND	**SUPREME VENTURES LIMITED**	**FOURTH DEFENDANT**
AND	**MARTYN VEIRA**	**FIFTH DEFENDANT**

John Vassell Q.C, William Panton and Hyacinth Lightbourne instructed by Dunn Cox for Claimant.

John Graham and Miss East instructed by John Graham & Company for the First Defendant

Michael Hylton Q.C, and Kevin Powell instructed by Michael Hylton & Associates for the Second Defendant

Walter Scott instructed by Dianne Edwards for the Third Defendant

Annaleisa Lindsay instructed by John Graham & Company for the Fourth Defendant

Walter Scott instructed by Rattray Patterson & Rattray for the Fifth Defendant

Heard:

June 29 - 30, July 1- 2, September 1 - 2, November 12, 2010 & January 21, 2011

JONES, J.

INTRODUCTION:

[1] It is said that relatives, friends and irrational strangers are the individuals who often make the important financial investment needed to enable an entrepreneur to start a new business. The amount of capital that can be raised from these sources varies wildly. Epsilon Global Equities Limited hereafter "the Claimant" in this case, is not from this traditional group but is part of a global family of related entities that are engaged in sourcing, structuring, managing, and monitoring investments for a family of investment funds whose strategies are credit oriented. The strategy of the Epsilon Group is to make direct loans to high risk borrowers who do not qualify for, or are unable to obtain, business loans from commercial banks. They often seek a combination of loans together with equity participation in the business or businesses supporting such loans.

[2] In 2002, the Supreme Ventures Limited hereafter "the Fourth Defendant" needed financing and engaged the Epsilon Group for that purpose. Paul Hoo, Ian Levy and Peter Stewart, hereafter "the Founding Shareholders" negotiated with Mr. Paul "Gerry" Mouttet a deal which included:

i) A loan of US$29,500,000 to Atlantic Marketing Services Limited, and;

ii) A loan of US$500,000 directly to the Fourth Defendant;

iii) In return for these loans, Epsilon would get, amongst other things, 17% of the issued share capital of the Fourth Defendant under terms of a Forward Sale of Shares Agreement.

[3] The Founding Shareholders signed the 2002 Agreement and the Claimant, a special purpose vehicle, was specifically formed by the Epsilon Group to hold their 17% interest in the Fourth Defendant.

[4] In 2004, Paul Hoo hereafter "the First Defendant" executed a 2004 Agreement, forwardly selling to the Claimant 15,510 previously issued shares in the Fourth Defendant, along with undated instruments of transfer.

[5] The Agreements provided for an Acquisition Date which occurred on June 2005. This was triggered by the repayment by the Fourth Defendant of the US$500,000 loan. The Claimant failed to surrender the Transfer of Shares documents for registration of its shares or tender the $1 per share on the Acquisition Date as required by the Agreements. The Claimant submitted the required documents three years later and demanded from all the Defendants that it be registered as proprietor of the Subscription Shares as subdivided, and from the Fourth Defendant, that the dividends declared in June and October 2008, be paid. None of the Defendants complied with the Claimant's request.

[6] Arising from this, the Claimant brought an action in this court seeking to enforce its rights under the two Forward Sale of Shares Agreements. Specifically, the Claimant seeks a declaration of its rights, to the forwardly sold shares of the Fourth Defendant under the Agreements, specific performance of the Agreements, and the payment by the First, Second and Third Defendants of the dividends declared and paid to these Defendants in respect of the shares.

ISSUES:

i) Did full beneficial interest in the shares under the 2002 and 2004 Agreements pass to the Claimant at the time of signing?

ii) Is time of the essence of the contract with the result that the failure of the Claimant to pay the $1 per share referred to in the 2002 and 2004 Agreements and to return the Instrument of Transfer operate to discharge the contract?

iii) Did the Defendants, through the Option Agreement between St. George's Holdings Limited and the Fourth Defendant expressly or implicitly waive objection to any delay by the Claimants in taking the formal step, required for registration as owner of the shares under the 2002 and 2004 Agreements.

THE FORWARD SALE OF SHARES AGREEMENTS:

Summary of the 2002 Agreement

[7] The rights and obligations under the 2002 Agreement are as follows:

a) The Fourth Defendant would pass a resolution increasing its authorized share capital by the issue of an additional 204,820 ordinary shares at par value of J$1.00 to rank pari passu in all respects with its existing ordinary shares.

b) The shares, referred to in the 2002 Agreement as the "Subscription Shares", would be subscribed for and be issued to the Founding Shareholders as follows:-

(i) Paul Hoo 84,350 shares

(ii) Peter Stewart 84,329 shares

(iii) Ian Levy 36,141 shares

c) The Founding Shareholders would transfer the said shares, representing 17% of the issued capital of the Fourth Defendant, to the Claimant at par upon the occurrence of the earliest of certain events referred to in the Agreement as the "Acquisition Date". The events are as follows:

> *"5.1 One month prior to the date of change of control of the Company (control shall have the same meaning as it set out in the definition for "Affiliate")*
>
> *One month prior to the date of an initial offering of the share capital of the Company or its Affiliates to the public in Jamaica or elsewhere.*
>
> *One month prior to the date of completion of the sale of any portion of the shares which are held by the Founding Shareholders on the signing of this Agreement (i.e. any portion of 1,000,000 ordinary shares)*
>
> *The Maturity Date of the Loan which is the earlier of (i) the repayment of all principal and accrued interest of the Loan or (ii) August 31, 2005."*

d) Pending the occurrence of the event constituting the Acquisition Date, each Founding Shareholder would execute and deliver to the Claimant undated Instruments of Transfer in prescribed form in respect of the Subscription Shares he agreed to sell together with Irrevocable Powers of Attorney entitling the Claimant to exercise voting rights in respect of the said shares, by itself or by proxy;

e) The Fourth Defendant would, upon the issue of the share certificates, deliver them to the Claimant.

f) Upon the occurrence of an event constituting the Acquisition Date, the Claimant would be entitled to date and deliver the previously executed Transfers to the Fourth Defendant for registration, which registration the Fourth Defendant would forthwith effect, in accordance with the Agreement and would pay the Founding Shareholders the price of J$1.00 per Subscription Share.

g) The Founding Shareholders would pay all stamp duty and transfer taxes in respect of the Agreement and in respect of the transfer and registration of the Subscription Shares in favour of the Claimant.

h) Pending registration of the Subscription Shares in favour of the Claimant, all dividends and distribution declared, paid, or made in respect of the shares would be paid by the Founding Shareholders to the Claimant for the Claimant's sole benefit.

i) The Claimant was entitled to appoint two persons to the Board of Directors of the Fourth Defendant upon the issue of the Subscription Shares.

j) The intent and effect of the Agreement was that the Claimant's 17% interest in the Fourth Defendant would be preserved and not diluted without the consent of the Claimant.

What Constitutes Performance under the 2002 Agreement?

[8] The Epsilon Group, through its investment funds disbursed US$30,000,000. There is no issue that the Fourth Defendant received US$500,000 that was intended for it. As to the US$29,500,000 loaned to Atlantic Marketing Services Limited, the Second Defendant admitted receipt of his share of it representing, he says, about 15%. The First Defendant has not admitted that the funds loaned to Atlantic Marketing Services Limited were to be for the benefit of the Founding Shareholders and he also denies receiving any share of those funds.

[9] In accordance with the 2002 Agreement, the Fourth Defendant passed the necessary resolution increasing its share capital by J$204,820.00, divided, into 204,820 ordinary shares of J$1.00 each. The Founding Shareholders applied to the Fourth Defendant and were issued the Subscription Shares. Each Founding Shareholder executed and conveyed to the Claimant the undated Instruments of Transfer for the number of shares he agreed to transfer to the Claimant, as well as the share certificates, and signed and dispatched the irrevocable powers of attorney to the Claimant.

[10] In May 2005, the Fourth Defendant:

a) converted into a public company;

b) increased its authorized share capital from 2,000,000 ordinary shares of J$1.00 each to 100,000,000 ordinary shares of J$1.00 each to rank pari passu with existing ordinary shares.

c) converted its shares into shares without par value;

d) subdivided its issued shares into 3,000,000,000 ordinary shares;

e) converted its ordinary shares into ordinary stock units and resolved that stock certificates of equivalent value be issued; and,

f) made a private placement of its shares of 500,715,405 ordinary shares which raised J$1,862,600,000.

[11] The effect of the capital reorganization was that the Claimant became entitled upon the occurrence of the Acquisition Date, under both the 2002 Agreement and the 2004 Agreement to the transfer and registration of the following shares/stock units:

Paul Hoo	175,313,564
Ian Levy	63,448,904
Estate Peter Stewart	152,821,778
	391,584,242

What Constitutes Performance under the 2004 Agreement?

[12] On 27th February, 2004, the First Defendant executed the 2004 Agreement, thereby forwardly selling to the Claimant 15,510 previously issued shares in the Fourth Defendant. By that act the First Defendant transferred to the Claimant all of his economic interest in the 15,510 shares, together with the irrevocable right to vote those shares at shareholders meetings. He also parted with physical possession of the share certificates, together with the undated instruments of transfer.

[13] The 2004 Agreement between the Claimant and the First and Fourth Defendant was similar to the 2002 Agreement. The divergence between the 2004 Agreement

and the 2002 Agreement was that the First Defendant was the sole seller of shares and that those shares, rather than being newly issued, had already been issued to the First Defendant. The purpose of the 2004 Agreement was to secure the loan that Mr. Gerry Mouttet received from Westford Special Situations Fund (the Atlantic II Loan). This was an Epsilon Group Fund. The First Defendant in performance of the Agreement delivered to the Claimant the blank Instruments of Transfer, Share Certificates, and irrevocable Powers of Attorney.

The Acquisition Date

[14] The Acquisition Date occurred by June 2005. This was activated by the repayment by the Fourth Defendant of the US$500,000 loan. The Claimant failed to submit the Instruments of Transfer for registration or tender the $1 per share as requested. The Claimant says that this was not done as it had entered into an Option Agreement with St. George's Holdings Limited, a Mouttet company, which remained in force until it expired in March 2008.

[15] However, by letter from the Claimant dated 17th October, 2008, to the Fourth Defendant, and by letter from the Claimant's Attorneys dated the 27th October, 2008, to the Fourth Defendant, the Claimant submitted Instruments of Transfer for the Subscription Shares sold by the First and Second Defendants which had been delivered to it under the Agreements, duly stamped, and demanded that it be registered as proprietor of the Subscription Shares.

[16] In its letter to the Fourth Defendant dated 27th October, 2008, the Claimant's Attorneys-at-Law indicated the Claimant's willingness and ability to pay the consideration for the shares and complete the transaction and demanded that it take the necessary steps to complete the transfer of the said shares to the Claimant.

[17] By letter from the Claimant's Attorneys to the Third Defendant dated the 27th October, 2008, the Claimant demanded that the Third Defendant prepare new Instruments of Transfer for the Subscription Shares forwardly sold by her deceased husband, Peter Stewart, and register title to the corresponding Subscription Shares, as subdivided, in the Claimant's name. In the letter the Claimant advised that it had deposited with its attorneys the money for the shares with the instructions that this is to be paid upon receipt of said shares.

[18] Dividends were declared by the Fourth Defendant in June and October 2008. By letter dated October 17, 2008 to the First, Second and Third Defendants, the Claimant demanded that the dividends paid for the Subscription Shares be paid to them. The letter to the First Defendant also made a demand for the dividends in respect of the forwardly sold shares. The Defendants refused to comply with the Claimant's demands.

ISSUE ONE:

Did full beneficial interest in the shares under the 2002 and 2004 Agreements pass to the Claimant at the time of signing?

[19] It is a proposition of law that in an agreement for the sale of shares, the beneficial ownership would pass at the time of the agreement. In ***Wood***

Preservations Limited v Prior **[1969] 1 All E.R. 364** the Court of Appeal had to decide the effect of an execution of the agreement for the sale of shares on the beneficial interest in the shares. The following passage is taken from the judgment of Harman L.J. He said:

> *"By the offer of 25th March 1960 British Ratin Ltd., through its director, Mr. Burgin, made an offer for the shares owned by Silexine, Ltd. That offer was accepted on 30th or 31st March (it does not matter which) by the latter. The acceptance was an absolute acceptance. The acceptor did not make any conditions: he agreed to part so far as he could with all his interest in the shares. It is true that in order to be able to enforce his rights he must obtain a letter (which Lord Donovan has described) and abide by the other conditions imposed by the purchaser; but the vendor, if one looks at him, has parted with everything at that point: he has not got anything left. True, there is a defeasance – i.e., if he cannot get the letter, and British Ratin, Ltd., insists on it, he may find the property come back to him. But until one of those events happens he has parted with every title, right and interest which he has, except the legal ownership which follows from the fact that he is the registered owner of the shares on the books.*
>
> *Now s.17 of the Finance Act 1954 deals with "ownership". It then goes on to say that where the word "ownership" is used it means "beneficial ownership". That means, I think an ownership which is not merely legal ownership by the fact of being on the register but the right at least to some extent to deal with the property as one's own. After accepting this offer Silexine, Ltd., was not able to deal with the property in any way at all, as has already been pointed out by Lord Donovan. Therefore it seems to me to be a contradiction in terms to talk about beneficial ownership in Silexine, Ltd. There was no benefit at all in its ownership; it was a mere legal shell."*

[20] Donovan L.J. had this to say:

> *"The issue turns entirely on the effect of the contract of 25th March 1960. By that contract a company called British Ratin, Ltd., offered to buy the whole of the share capital of the taxpayer company, and the offer, slightly amended by the agreement as to price, was accepted on 31st March 1960, by all the shareholders in the taxpayer company. If that were all there were to the case, it was clear and undisputed that the beneficial ownership would have passed out of the hands of the previous owners of*

the shares in the taxpayer company (and of these Silexine, Ltd., was the largest with over 75%.) into the hands of British Ratin, Ltd., with the consequence that the taxpayer company would not have been able to carry forward for tax purposes the previous trading losses of Silexine Ltd."

[21] On the facts of this case, Counsel for the Claimant contended that upon the execution of the 2002 and 2004 Agreements, the full beneficial interest in the shares, passed to the Claimant. However, the ***Wood Preservations case*** is distinguishable on the facts from this case as here the agreement between the parties in 2002 was not to buy and sell shares, but an agreement for the forward sale of shares. The essence of the Forward Sale of Shares Agreement was that it allowed the Claimant to obtain at a future date (the Acquisition Date) the shares in the Fourth Defendant. This finding is consistent with my interpretation of the 2002 Agreement. From this, it follows that the contention by the Claimant that beneficial ownership passed to it in 2002 must fail.

ISSUE TWO:

Is time of the essence of the contract with the result that the failure of the Claimant to pay the $1 per share referred to in the 2002 and 2004 Agreements and for the return of the Instrument of Transfer operates to discharge the contract?

[22] The determination of this issue depends on a construction of the 2002 and 2004 Forward Sale of Share Agreements. I agree with Counsel for the Claimant that the interpretation of the agreements cannot be divorced from the commercial context in which they were made. In ***Investors Compensation Scheme Ltd v West Bromwich Society*** **[1998] 1 All ER 98 at page 114** Lord Hoffman laid down five principles of contractual interpretation. The pertinent passage is set out below:

I should preface my explanation of my reasons with some general remarks about the principles by which contractual documents are nowadays construed. I do not think that the fundamental change which has overtaken this branch of the law, particularly as a result of the speeches of Lord Wilberforce in Prenn v Simmonds [1971] 3 All ER 237 at 240-242, [1971] 1 WLR 1381 at 1384-1386 and Reardon Smith Line Ltd v Hansen-Tangen, Hansen-Tangen v Sanko Steamship Co [1976] 3 All ER 570, [1976] 1 WLR 989, is always sufficiently appreciated. The result has been, subject to one important exception, to assimilate the way in which such documents are interpreted by judges to the common sense principles by which any serious utterance would be interpreted in ordinary life. Almost all the old intellectual baggage of 'legal' interpretation has been discarded. The principles may be summarised as follows.

(1) Interpretation is the ascertainment of the meaning which the document would convey to a reasonable person having all the background knowledge which would reasonably have been available to the parties in the situation in which they were at the time of the contract.

(2) The background was famously referred to by Lord Wilberforce as the 'matrix of fact', but this phrase is, if anything, an understated description of what the background may include. Subject to the requirement that it should have been reasonably available to the parties and to the exception to be mentioned next, it includes absolutely anything which would have affected the way in which the language of the document would have been understood by a reasonable man.

(3) The law excludes from the admissible background the previous negotiations of the parties and their declarations of subjective intent. They are admissible only in an action for rectification. The law makes this distinction for reasons of practical policy and, in this respect only, legal interpretation differs from the way we would interpret utterances in ordinary life. The boundaries of this exception are in some respects unclear. But this is not the occasion on which to explore them.

(4) The meaning which a document (or any other utterance) would convey to a reasonable man is not the same thing as the meaning of its words. The meaning of words is a matter of dictionaries and grammars; the meaning of the document is what the parties using those words against the relevant background would reasonably have been understood to mean. The background may not merely enable the reasonable man to choose between the possible meanings of words which are ambiguous but even (as occasionally happens in ordinary life) to conclude that the parties must, for whatever reason, have used the wrong words or syntax (see

Mannai Investment Co Ltd v Eagle Star Life Assurance Co Ltd [1997] 3 All ER 352, [1997] 2 WLR 945.

(5) The 'rule' that words should be given their 'natural and ordinary meaning' reflects the commonsense proposition that we do not easily accept that people have made linguistic mistakes, particularly in formal documents. On the other hand, if one would nevertheless conclude from the background that something must have gone wrong with the language, the law does not require judges to attribute to the parties an intention which they plainly could not have had. Lord Diplock made this point more vigorously when he said in Antaios Cia Naviera SA v Salen Rederierna AB, The Antaios [1984] 3 All ER 229 at 233, [1985] AC 191 at 201:

> *'... if detailed semantic and syntactical analysis of words in a commercial contract is going to lead to a conclusion that flouts business common sense, it must be made to yield to business common sense.'*

[23] In summary, Lord Hoffman criticized purely textual, literal or plain meaning interpretations of contracts and took the view that all instances of contractual interpretation involved contextual interpretation, or looking at the "matrix of facts" or background. Counsel for the Claimant contends that looking at the "matrix of facts" and the context time is not of the essence in any of the Agreements in this case. In support of this contention he refers to the following passage from the learned authors of ***Halsbury's Laws of England, Fourth Edition Reissue*, Volume 9 (1), Paragraph 931** which set out the applicable law:

> *"At common law stipulations as to time in a contract were as a general rule, and particularly in the case of contracts for the sale of land, considered to be of the essence of the contract, even if they were not expressed to be so, and were construed as conditions precedent. Therefore, one party could not insist on performance by the other unless he could show that he had performed, or was ready and willing to perform, his part of the contract within the stipulated time. However, in the exercise of its jurisdiction to decree specific performance, the Court of Chancery adopted the rule, especially in the case of contracts for the sale*

of land, that stipulations as to time were not to be regarded as of the essence of the contract unless either they were made so by express terms, or it appeared form the nature of the contract, or the surrounding circumstances, that such was the intention of the parties: unless there was an express stipulation or clear indication that time should be of the essence of the contract specific performance would be decreed even though the plaintiff failed to complete the contract or take the various steps towards completion by the date specified.

By statute, wherever stipulations as to time are not, according to the rules of equity, deemed to be or to have become of the essence of the contract, the same rule prevails at law. The common law rules still apply to those contracts in respect of which equity did not intervene.

The modern law, in the case of contracts of all types, may be summarized as follows. Time will not be considered to be of the essence, except in one of the following cases: (1) the parties expressly stipulate that conditions as to time must strictly be complied with; or (2) the nature of the subject matter of the contract or the surrounding circumstances show that time should be considered to be of the essence; or (3) a party who has been subjected to unreasonable delay gives notice to the party in default making time of the essence

If time is not of the essence, a party who fails to perform within the stipulated time does not commit a repudiatory breach ..."

[24] Second, Counsel for the Claimant pointed to the following passage from the learned authors of ***Cheshire, Fifoot & Furmston's Law of Contract (14th Ed.) at page 614*** where it was said:

"In short, time is of the essence of the contract if such is the real intention of the parties and an intention to this effect may be expressly stated or may be inferred from the nature of the contract or from its attendant circumstances."

[25] Third, Counsel for the Claimant referred to the statutory equivalent of the ***UK Law of Property Act 1925 Section 41*** (referred in the Halsbury quotation above) as it exists in Jamaica in the **Judicature (Supreme Court) Act Section 49** at paragraph g:

"(g) Stipulations in contracts, as to time or otherwise, which would not before the commencement of this Act, have been deemed to be or have become of the essence of such contracts in a Court of Equity, shall receive in all Courts the same construction and effect as they would have heretofore received in equity".

[26] Counsel for the Claimant pointed out that there is no provision in the Agreements expressly stating that time was of the essence for the exercise of the Claimant's rights. Furthermore, time was not made of the essence by serving a notice after the Acquisition Date passed.

[27] Counsel for the Claimant contends that for the Defendants to succeed in their defence, they must show that the Agreements, on a proper construction, provided that time is of the essence, or alternatively, that the Court can properly infer from the nature and circumstances of the Agreements that the parties intended time to be of the essence. On his argument he says that the plain meaning of the words in the Agreements cannot be construed to mean that time is of the essence. Additionally, Counsel for the Claimant contends that there is nothing in the background facts or any of the circumstances leading up to the execution of the Agreements that would support a necessary inference that time is of the essence.

[28] Counsel for the Claimant then advanced the proposition that the parties clearly intended that once the Acquisition Date occurred and the right to be registered as owners of the forwardly purchased shares in the Fourth Defendant became active, the Claimant's failure to exercise that right immediately cannot invite a loss of its rights under the contract. This, he says, is clear from paragraph 20 of both Agreements which provides that:

"No failure to exercise and no delay in exercising on the part of any of the Investor any right, power or privilege hereunder shall operate as a waiver thereof nor shall any single or partial exercise of any right, power or privilege preclude any other right, power or privilege".

[29] There are two points to make at the outset. Time of the essence can be implied into a contract given the context. In **South Australia Asset Management Corp. v York Montagu Ltd [1996] 3 WLR 87 at 93**, Lord Hoffman said:

As in the case of any implied term, the process is one of construction of the agreement as a whole in its commercial setting

[30] The point has been extensively developed by the Learned Authors of ***Halsbury's Laws of England at paragraph 482***. They state that:

Apart from express agreement or notice making time of the essence, the court will require precise compliance with stipulations as to time wherever the circumstances of the case indicate that this would fulfil the intention of the parties. Whilst the time of performance will not ordinarily be considered to be of the essence, it will readily be so construed in a 'mercantile contract'. For example, time will be considered of the essence in stipulations specifying a fixed date for performance in such a way as to show that the date was essential, such as in a sale of...of shares...Generally, time will be considered of the essence in other cases where the nature of the contract or of the subject matter or of the circumstances of the case require precise compliance...

[31] The implication of time being of the essence in a contract for the sale of shares was more specifically dealt with in the case of ***Hare v Nicholl* [1966] 1 Q.B 130.** In that case, under an agreement made in February 1963, the plaintiff had the right to re-purchase certain shares. The plaintiff should have paid the purchase price by June 1, 1963, but it did not tender it until June 7, 1963. The plaintiff's claim was dismissed by the Court of Appeal, which held that time was of the essence in relation to the

plaintiff's obligation to pay the purchase price, and its late purported compliance was ineffective. Willmer LJ said:

> *"It is well established that an option for the purchase or re-purchase of property must in all cases be exercised strictly within the time limited for the purpose. The reason for this, as I understand it, is that an option is a species of privilege for the benefit of the party on whom it is conferred. That being so, it is for that party to comply strictly with the conditions stipulated for the exercise of the option."*

[32] I accept that the rights given to the Claimant in this case was not an option. However, all the judges in that case were of the view that even if the contract did not involve an option, time would nonetheless be of the essence, given the subject matter. Willmer LJ went on to say :

> *"But I think that there are also other reasons for holding that the stipulated time for payment was of the essence of the contract... In the present case it seems to me that both the nature of the property and the surrounding circumstances call for consideration. As to the nature of the property, the subject-matter of the option consisted of shares of a highly speculative nature, liable to considerable fluctuation in value. Even without the assistance of authority, I should have been disposed to say that that of itself was a reason for holding that time was of the essence of the contract."*

[33] Dankwertz LJ added :

> *"In my view, in the present case, apart from an option being involved, the time of payment would be an essential matter because the deed is a commercial transaction, and the subject-matter was shares which fluctuated in value."*

[34] Winn L.J went even further. He held that it was not an option at all, but that the plaintiff should fail because the contract related to shares. He said:

> *"In my judgment this case is a case of a privilege rather than an option...In my judgment, where there is a provision for the purchase of shares on payment by a stated date, it is to be presumed, in the absence of any*

contrary indication, that the parties to such a contract have impliedly stipulated and mutually intend that the time of payment shall be of the essence of the contract."

[35] In ***Re Schwabacher, Stern v Schwabacher, Koritschoner's Claim*** **[1908] Law Times Reports Chan. Div. 127** Parker J also held:

"With regard to contracts for the sale of shares, I think that time is of the essence of the contract both at law and in equity. Shares continually vary in price from day to day, and that is precisely why courts of equity have considered such a contract to be one in which time is of the essence of the contract, and not like a contract for the sale and purchase of real estate, in which time is not of the essence of the contract. It is in effect analogous to another class of cases in which equity views time always as being of the essence of the contract - namely, where there is a purchase of a business and its goodwill as a going concern. There is a variation from day to day in the value of such a goodwill and in many other matters which go to make up what is being sold; and it would be in the highest degree inconvenient if equity considered that time was not of the essence of the contract, but that at some time indefinitely afterwards any party could by notice fix a time for completion long after the time fixed by the party to the contract, and then for the first time make time of the essence."

[36] In ***British and Commonwealth Holdings plc v Quadrex Holdings Inc*** **[1989] 3 All ER 492** the parties agreed that a sale of shares would take place "as soon as practicable" after the occurrence of certain events. The relevant companies carried on a money broking business. Sir Nicholas Browne-Wilkinson, V.C delivered the leading judgment of the English Court of Appeal. He observed:

"In the present case there was no express stipulation that time was of the essence. The subject matter of the sale (shares in unquoted private companies trading in a very volatile sector) is such that if a date for completion had been specified, in my judgment time would undoubtedly have been of the essence of completion."

[37] It is hard to resist the conclusion that given the nature of the Fourth Defendant's business and the fact that it had no previous track record, its shares were "of a

highly speculative nature". First, the 2002 Agreement listed the Fourth Defendant's principal business as "on-line lottery services pursuant to a licence granted on the 11th day of January, 2001". The audited financial statements for 2003 says:

> *"The company was incorporated in Jamaica on June 29, 1995 as a limited liability company. Its main activities are the promotion and operation of lottery type games under a licence from the Betting, Gaming & Lotteries Commission of Jamaica (BGLC). The licence granted to the company is for a period of ten (10) years effective from January 11, 2001. Licence granted permits the company to promote certain lottery type games, namely: drop pan, keno and cash lotto."*

[38] From the evidence, the trading value of the shares varied considerably over the years. When the parties entered into the 2002 Agreement the Fourth Defendant was a privately held gaming company that had never made a profit. The First Defendant gave unchallenged evidence that the Fourth Defendant sustained losses between inception and 2002. After admitting to performing a due diligence examination of the Fourth Defendant's financial history the Claimant's witness Mr. Emami could not recall one year in which the Fourth Defendant made a profit. From the evidence, the shareholders were planning to make a public offering, and no one could predict at that time whether it would be successful or not.

[39] It is important to note that the Acquisition Date would be the earliest of a number of events, and that one of them was "one month prior to the date of an initial offering of the share capital of the Company or its Affiliates to the public in Jamaica or elsewhere". This meant that in any event, the Claimant was required to pay the agreed purchase price before the public offering and therefore before the parties knew whether it would be successful. In my view, the business enterprise

embarked on and therefore the shares of the Fourth Defendant were manifestly "of a speculative nature".

[40] Three findings are important here. First, I find as a fact that the shares in the Fourth Defendant were not acquired by the Claimant in exchange for the loans. I find that the shares were to be acquired in exchange for "the consideration" of the payment of the purchase price. Second, the parties agreed that the purchase price would be paid at the Acquisition Date using a formula which provided various alternatives. Thirdly, the Claimant could not use the blank Instruments of Transfer executed by the Founding Shareholders until the Acquisition Date materialised, and it was then required to present them at that time duly completed and stamped for registration. This it seems to me would point to the importance that the parties to the agreement gave to the obligations regarding time.

[41] I accept that the Claimant may well have decided in the long run not to pursue the purchase of the shares at all. From the evidence, in 2002, the value of the shares were uncertain. At the time of the Acquisition Date the outlook for the Fourth Defendant was not much better and so no one could predict the outcome of the public sale of shares. What is clear, however, is that the Claimant may well have decided not to pursue its right to purchase the shares. The 2002 Agreement provided that the sums loaned would be repaid with interest and the Claimant may well have chosen to accept that, without risking being a shareholder in an unsuccessful venture with the attendant problems that may be involved.

[42] For all the above reasons, this court concluded that time was intended to be of the essence in both the 2002 and 2004 Agreements. It was important that the Claimant pay the purchase price at par value and confirm its intention to acquire the shares on the Acquisition date by returning the Instruments of Transfer for registration. Whether this failure operated to discharge the 2002 and 2004 Agreement depends on the determination of the next issue.

ISSUE THREE:

Did the Defendants, through the Option Agreement expressly or implicitly waive objection to any delay by the Claimant in taking the formal steps, if any, which were required to have the Claimant registered as owner of the shares under the 2002 and 2004 Agreements.

[43] The Claimant entered into an Option Agreement under which it agreed to transfer to St. George's Holdings Limited all its rights under the 2002 and 2004 Agreements. This was signed by the First Defendant, and Mr. Brian George, on behalf of the Fourth Defendant, and by Mr. Gerry Mouttet on behalf of St. George's Holdings Limited. Mr. Mouttet was at that time also a director of the Fourth Defendant. The Option Agreement gave St. George's Holdings Limited until December 6, 2005, to exercise the option and take the place of the Claimant under the Agreements. The real meaning of the Option Agreement is set out in paragraph 67 to 69 of the witness statement of Mr. Amir Reza Emami:

> *"The essence of the Option Agreement was that the shares acquired by the Claimant under the 2002 Agreement and the 2004 Agreement could be purchased by St. Georges by dates specified in the Option Agreement. The Option Agreement established a range of purchase prices for the*

shares, which purchase prices varied depending on when the option was exercised and which translated into an implied valuation for SVL between US$145 million to US$175 million. The Option Agreement was set to expire on December 6th, 2005, however it was extended multiple times and ultimately expired on March 31st, 2008. As part of the negotiations leading up to the execution of the Option Agreement, SVL and Mr. Gerry Mouttet promised not only that the Epsilon Groups loans would be repaid, but also that the Epsilon Groups equity stake in SVL would be purchased at a pre-defined price. It was in return for that promise that the Epsilon Group agreed to enter the Option Agreement and further agreed that it would not exercise its rights to take title to the shares under the 2002 and 2004 Agreements until the Option Agreement expired".

[44] In ***Plasticmoda Societa Per Azioni v Davidsons (Manchester) Ltd.*** **[1952] 1 Lloyd's Rep. 527**, conduct amounting to waiver was defined by Denning L.J. in the following passage at page 539:

> *"If one party, by his conduct, leads another to believe that the strict rights arising under the contract will not be insisted upon, intending that the other should act on that belief, and he does so act on it, then the first party will not afterwards be allowed to insist on the strict rights when it would be inequitable for him so to do"*

[45] In this case, I accept that for the principle of waiver to apply, all parties to the 2002 and 2004 Agreements must be aware of the Option Agreement. Is there evidence that the Founding Shareholders, who signed the 2002 and 2004 Agreement, were aware of the Option Agreement?

Waiver as against the First Defendant

[46] At trial, the First Defendant testified that he regarded the Agreements as binding on him and he was prepared and willing to transfer his shares to St. George's

Holdings Limited until that time. The evidence is contained in the following exchange:

> *FIRST DEFENDANT (PAUL HOO): CROSS-EXAMINATION BY MR. VASSELL Q.C.*
>
> *Q. you say that your understanding of this agreement is that Epsilon wanted an option to sell the shares?*
>
> *A. To sell their rights to the shares.*
>
> *Q. Well, they gave it by this document; they gave an option to Mr. Mouttet's company, Georges?*
>
> *A. Because we were a party to those shares. We had to sign on behalf of SVL to facilitate the transactions.*
>
> *Q. I just want you to note the date that it was signed the 7th of July, 2005?*
>
> *A. Yes.*
>
> *Q. And do you see that they gave Mr. Mouttet up to December to exercise the right, if you look at - yes, if you look at page 270, you will see that the expiry date is the 6th of December, correct?*
>
> *A. Correct.*
>
> *Q. So that you understood this both as Paul Hoo the shareholder, whose shares are the subject of this and as a Director of SVL, that Mr. Mouttet could, at any time up to December, stand in the shoes of Epsilon and acquire these shares from you and the other founding shareholders?*
>
> *A. Yes.*

[47] Counsel for the Claimant contends from the evidence of the First Defendant, that although the Acquisition Date under the Agreements had passed in June 2005, the right of the Claimant to register its shares had not been extinguished and the Agreements had not been discharged. Furthermore, he submits that if time was originally of the essence, the First Defendant's execution of the Option Agreement in

favour of St. George's Holdings Limited (Mr. Gerry Mouttet's company) constituted a waiver of that obligation, as against the First Defendant.

[48] St. George's Holdings Limited would be required to exercise its option by December 30, 2005, the date for the Option Agreement to come to an end. Consequently, in so far as the Option Agreement is a waiver by the First Defendant and Fourth Defendant it would only have operated until December 30, 2005. After that date, it would be necessary for the Claimant to fulfil its obligations under the Forward Sale of Shares Agreements. The Claimant only fulfilled its obligations under the Agreements in October 2008. The result is that the Claimant cannot now rely on the First and Fourth Defendant' waiver of its obligations under the 2002 and 2004 Agreements by way of the Option Agreement as that had already expired.

Waiver against the other Defendants

[49] Counsel for the Claimant contended that the First Defendant candidly admitted that the Second and Third Defendants were also aware of the Option Agreement. The evidence is contained in the following exchange:

> *FIRST DEFENDANT (PAUL HOO): CROSS-EXAMINATION BY MR. VASSELL Q.C.*
>
> *Q. And this, of course, hold, if Mr. Mouttet exercise his rights under the option any time within the option period, that is up to December of that year?*
>
> *A. Yes.*
>
> *Q. Now, the Directors of the company knew about this arrangement, correct?*
>
> *A. Yes.*

Q. And that would be - those Directors would include Mr. Levy, Mr. Stewart had died?

A. That's correct.

Q. But would include Mr. Levy?

A. Yes.

Q. Did Miss Janet Stewart attend the board meetings?

A. We didn't have formalized board meetings until we became public and yes, she did attend those meetings.

Q. After May or June, 2005?

A. Yes.

Q. So she would have been aware of this option agreement? This was July '05, you were public by then?

A. She could have been, yes.

[50] On this basis, Counsel for the Claimant argues that it would be highly improbable that a transaction of this type involving the sale of a significant percentage of the Fourth Defendant to an interested party would not be discussed with the full board of directors including the Defendants. Furthermore, he argues that it is also highly improbable that the First Defendant, having signed the Option Agreement on behalf of the Fourth Defendant, would not disclose it to the full board, particularly, after the Fourth Defendant had recently conducted a private placement and had enlarged its board of directors with independent directors.

[51] Under cross-examination by Counsel for the Second Defendant the First Defendant made the following correction to his earlier evidence:

FIRST DEFENDANT (MR. HOO): CROSS-EXAMINED BY MR. HYLTON Q.C.

Q It's actually one point, Mr. Hoo, in the course of this morning Mr. Vassell asked you whether the other directors, I think that was the question knew about the option agreement and as I recall you said that the other directors, and I think specifically Mr. Levy, knew about it. My question is how did he know about it? How did you know he knew about it?

A He asked if Mr. Levy knew about it and I said he would have known about it, I could have been incorrect.

Q What's the basis for you saying, did he sign it, did you show it to him?

A In my recollection I would have, but maybe I did not. It is merely a matter of the executive in trying to remember at that point in time, there was no change in any economic value to the company or shareholders, one agreement to somebody else.

Q Well, I suggest to you for the record that he did not know about it?

A Okay, sir, I stand corrected.

[52] However, Counsel for the Claimant says that this apparent retraction by the First Defendant of his evidence that the other directors knew about the Option Agreement, should be disregarded having regard to the language and meekness of his statement including the tone in which it was communicated. He says that this is merely an attempt by the First Defendant to try to repair any damage that his prior answers given might have done to the Second and Third Defendants' case on the issue of their knowledge of the Option Agreement.

[53] I disagree. I accept that there is no evidence from the Claimant or otherwise that the Second Defendant was even aware of the Option Agreement. Accordingly, there is no evidence that the Second Defendant waived any of his rights under the

terms of the 2002 Agreement and therefore the Claimant's case against him must fail.

[54] In cross examination by Counsel for the Second Defendant, the Claimant's witness Mr. Emami said that he did not tell the Second Defendant that the Claimant did not exercise its rights because of the Option Agreement. Mr. Emami also conceded that the Second Defendant did not indicate to him that Mr. Gerry Mouttet was his agent in relation to the Option Agreement.

[55] With regard to the Third and Fifth Defendants the Claimant's claim that they waived their right to insist on the dates to exercise the 2002 Agreement must also fail. The Claimant's witness Mr. Emami under cross-examination admitted that he had had no discussions with either the Third Defendant or the Fifth Defendant. As a result, it cannot be said that either the Third Defendant or the Fifth Defendant indicated to anyone that Mr. Mouttet was their agent for the purpose of the Options Agreement. Furthermore, I find as a fact that Mr. Peter Stewart (deceased) could not have waived any conditions of the forward sale of shares agreement, as he was at the time of the Option Agreement, deceased.

[56] In my judgment there is no evidence that the Third and Fifth Defendants "expressly or impliedly waived" their rights to insist on compliance with the terms of the 2002 Agreement. As far as the First and Fourth Defendants are concerned, the Option Agreement expired prior to the Claimant complying with the obligations under the 2002 and 2004 Agreement.

[57] For this and all the above reasons there shall be judgment for the First, Second, Third, Fourth and Fifth Defendants with costs to be agreed or taxed.