COMMONWEALTH OF THE BAHAMAS

IN THE SUPREME COURT
Common Law and Equity Division 394/2007

Between

FIRST CAPITAL INVESTMENTS MERCANTILE INC.
Plaintiff

AND

[1] GLOBAL VILLAGE MARKET HOLDINGS LTD.
[2] YANK BARRY
Defendants

(By Original Action)

And Between

[1] GLOBAL VILLAGE MARKET HOLDINGS LTD.
[2] YANK BARRY
Plaintiffs

AND

[1] FIRST CAPITAL INVESTMENTS MERCANTILE INC.
[2] JAY GOTLIEB
Defendants

(By Counterclaim)

Before: The Honourable Senior Justice Mr. J. Lyons

Appearances: Mr. Maurice Glinton with Mr. Raynard Rigby for the Plaintiffs on the counterclaim.

Mr. Philip Davis with Mr. Ian Winder and Mr. D. Ellis for the Defendants on the counterclaim.

9, 10 & 12 December 2008

J U D G M E N T

(1) Yank Barry and Jay Gotlieb are self defined as businessmen. They are certainly both men who look for the main chance.

(2) Mr. Barry and Mr. Gotlieb met sometime in either late 2002/early 2003. It would appear they both saw in each other an opportunity to do business.

(3) Mr. Gotlieb advanced Mr. Barry the sum of three million dollars ($3,000,000.00). Mr. Barry accepted it. That amount is due and owing. Judgment has been entered in respect of that three million dollars ($3,000,000.00). The judgment has been stayed pending the hearing of this, Mr. Barry's counterclaim. The total judgment is for the sum of three million one hundred and forty-one thousand dollars ($3,141,000.00) plus costs. (See my ruling of 22 October 2007.)

(4) First Capital Investments Mercantile Inc. and Global Village Market Holdings Ltd. are corporate vehicles used by Mr. Gotlieb and Mr. Barry respectively. Mr. Gotlieb and Mr. Barry are the beneficial owners of their respective corporal vehicle.

(5) The counterclaim here made by Global Village Market Holdings Ltd. (Global Village) relates to an agreement entered into between Global Village and First Capital Investments Mercantile Inc. (First Capital) and it is dated 23rd December 2003. Mr. Gotlieb, as beneficial owner of First Capital, gave his personal guarantee in respect of that agreement. Global Village claims that pursuant to that agreement, Mr. Gotlieb, (by virtue of a guarantee) and First Capital are indebted to Global Village in the sum of $7.5 million dollars.

(6) The first point to be decided here is that raised by Mr. Gotlieb. It relates to the question as to whether or not he signed the agreement dated the 23rd December 2003. Mr. Gotlieb accepts that it is his handwriting and signature on the attestation page of the document. What he says though is that he did not sign it. He suggests that the signature/attestation page may have been lifted from another agreement that he recalled signing that related to a California casino proposition.

(7) I can deal with this point very quickly.

(8) I took time to observe Mr. Gotlieb in the witness box and at other times during the court proceedings. I carefully observed his demeanour. I also noted that, despite his confidence in his own abilities of recollection, his recollection was sorely tested in cross examination by Mr. Rigby to the point that I found little difficulty in rejecting his claim that he did not sign the agreement. In my view he was not telling the truth on this particular point.

(9) In my judgment he did sign the agreement with the view to cashing in on what he saw to be the potential of considerable profits coming from the subject matter of the agreement, that subject matter having something to do with certain litigation in the United States against the big tobacco companies. This will be discussed in a moment.

(10) Having decided that on a question of fact, Mr. Gotlieb signed the agreement of the 23rd December 2003, I now turn to this particular agreement. It is here where the nub of the case resides.

(11) By way of background history, it is noted that the big U.S. tobacco companies have found themselves beleaguered with litigation over questions pertaining to the harmful effects of tobacco smoking, both long term and short term. Acting on this, some enterprising persons, imbued with the entrepreneurial spirit, devised a way to earn a dollar and in the process set up an investment fund.

(12) By agreement dated 29th December 1998 the promoters of the investment scheme, (being a United States law firm and an attorney, Mr. Fuentes), came to an agreement with persons purporting to be the General Management Department of the President of the Russian Federation. Pursuant to the agreement, the lawyers (attorneys) would represent the Russian Federation in a claim for damages "related to the consumption of tobacco products provided or manufactured by the United States tobacco companies as well as their subsidiaries directly involved in the marketing, advertising, distribution and or sale of tobacco products in the Russian Federation" (see Agreement 29th December 1998 Clause I).

(13) Acting on the advice of the U.S. (Florida) lawyers (attorneys) Messrs. Podhurst, Orseck, Josefsberg, Eaton, Meadow, Olin and Perwin P.A. and Mr. Fuentes (also of Florida), the Russian Federation instructed those attorneys to

commence action against the United States tobacco companies in the State of Florida. On the 25th August 2000 in the Circuit Court of the Eleventh Judicial Circuit, Miami Dade County Florida, the Russian Federation sued what has been termed the Big Tobacco companies (Big Tobacco). The case number was 0020918CA24.

(14) The claim lodged in Florida is a lengthy document. It can be summarized as follows. The plaintiffs allege that Big Tobacco, knowing of the harmful effects of tobacco smoking, exported their harmful and addictive product to Russia. As well Big Tobacco undertook a very effective and sophisticated advertising campaign. As a result of this many Russians took up smoking tobacco. This increase in tobacco smoking and its related adverse side effects led in turn, to the Russian Federation having to spend large sums of money to counter the advertising campaign and also to treat those suffering from tobacco related injuries or illnesses. It was further alleged that this allocation of government funds would continue well into the future. The complaint alleged a conspiracy by Big Tobacco to promote and sell its products in the Russian Federation, well knowing of the toxic side effects, and well knowing that financial hardship would be put upon the government as a result of these activities.

(15) The Russian Federation sued for compensatory damages in respect of this alleged conspiracy.

(16) The (Investment) scheme that was cooked up in this matter was what Mr. Davis of counsel described as “maintenance and champerty”. The scheme was set up whereby investors could contribute to the cost of funding the tobacco litigation taken by the Russian Federation and in respect of which they would receive, as dividend, a percentage of the return supposedly coming from any successful litigation. The fund concerned was called the Tobacco Litigation Participation Fund (‘TLF’). Such an investment scheme was contrary to law in the United States. Investors were sought from outside the United States, or

investments were made into the fund (domiciled in the Bahamas) from investors worldwide, which may have included investors from within the United States. The Bahamian investment fund was titled the TL Participation Fund. It operated under the auspices of the Companies Act in The Bahamas as an international business company.

(17) The agreement of the 23rd December 2003 is termed a Sale and Transfer Agreement. Set out hereunder is what I consider to be the salient terms of that agreement.

> "WHEREAS Global Village owns and/or controls approximately nine hundred and two hundred (9,200) units (the "Units") of the Tobacco Litigation Fund, a Bahamian exempt fund (the "Fund");
>
> WHEREAS the Fund owns point sixty-five percent (0.65%) of the total possible gain of a lawsuit presently pending in the Circuit Court of the Eleventh Judicial District in and for Miami-Dade County, Florida, involving the Russian Federation, as Plaintiff, and Philip Morris Companies, Inc. et als, as Defendants (the "Tobacco Lawsuit");
>
> WHEREAS First Capital is desirous of acquiring from Global Village a fifty percent (50%) interest in and to the Fund (hereinafter the "Interest");
>
> NOW, THEREFORE, THE PARTIES HAVE AGREED AS FOLLOWS:
>
> SECTION 1 PREAMBLE
>
> 1.1 The preamble hereof is true and correct and forms an integral part of these presents as though herein recited at length.

SECTION 2 SALE AND TRANSFER

2.1 Global Village does hereby transfer and assign unto First Capital, hereto present and accepting, the Interest.

SECTION 3 PURCHASE PRICE

3.1 The Purchase Price for the Interest shall be the sum of seven million five hundred thousand dollars U.S. (US$7,500,000.00) (the "Purchase Price").

SECTION 4 PAYMENT OF PURCHASE PRICE

4.1 The Purchase Price for the Interest shall be paid by no later than June 15th, 2004 (the "Payment Date")."

(18) As I have said Mr. Gotlieb guaranteed the performance of this agreement. The $7.5 million purchase price has not been paid.

(19) The plaintiff by counterclaim (Global Village), came to have an interest of 0.65% as specified in the Sale and Purchase Agreement by way of a series of earlier agreements.

(20) The first of these agreements was an agreement between Mr. Fuentes and the Bahamas law firm Messrs. Lennox Paton.

(21) The agreement between Mr. Fuentes and Lennox Paton was made on the 3rd August 2001. Again, set out hereunder is what I see to be the salient terms of that agreement.

"FUENTES AND LENNOX PATON
REFERRAL FEE AND DIVISION OF FEE AGREEMENT

THIS AGREEMENT is made 3rd August, 2001

BETWEEN

1. GUSTAVO E. FUENTES, P.A., a Florida Professional Corporation, represented by its President, Gustavo E. Fuentes, an Attorney licensed to practice law in the State of Florida, one of the United States of America ("Fuentes").

AND

2. LENNOX PATON, a Bahamian partnership, represented by one of its partners, Michael L. Paton, an Attorney licensed to practice law in the Commonwealth of The Bahamas ("Lennox Paton").

AND

3. DAVID J. RASMUSSEN, an Attorney licensed to practice law in the State of Illinois ("Rasmussen").

WHEREAS

1. By an undated agreement Fuentes and Rasmussen entered into a Co-Counsel Agreement ("Co-Counsel Agreement") in respect an action filed on behalf of the Russian Federation, Case Number 0020918 CA24 in the Circuit Court of the Eleventh Judicial Circuit in and for Miami-Dade County, Florida, General Jurisdiction Division (the "Action").
2. Lennox Paton certifies herein that its partnership has no conflict of interest in performing the anticipated obligations in the Action and this related Agreement.
3. Rasmussen wishes to withdraw from the Co-Counsel Agreement in respect of the Action and to novate and set aside the Co-Counsel Agreement.
4. Fuentes has agreed to novate and set aside the Co-Counsel Agreement and to enter into a Referral Fee and Division of Fee Agreement with

Lennox Paton, as referring counsel, upon the terms and conditions set forth herein.

NOW THIS AGREEMENT WITNESSETH AS FOLLOWS:

1. Fuentes and Rasmussen each release the other party from their respective duties and obligations under the Co-Counsel Agreement absolutely.
2. Fuentes has been retained by the Government of the Russian Federation (“Principal”), as co-counsel with the firm, Podhurst Orseck Josefsberg Eaton Meadow Olin & Perwin, P.A., (“Lead Co-Counsel”), to represent the Principal in the Action in respect of claims brought in the United States for damages related to the consumption of tobacco products in Russia supplied or manufactured by U.S. tobacco companies and their international subsidiaries.
3. The Action is anticipated to be complex international litigation which will call upon special knowledge and resources of the international legal system and may require selecting legal services or coordination of such services in various sovereign jurisdictions and legal systems which include but are not limited to the United States of America and the Russian Federation.
4. The main duty and participation of Fuentes is to coordinate all aspects of legal services, conduct and facilitate discovery in all Action related activity to take place outside the United States of America, including but not limited to those pertaining to the corporate or business structures of potential U.S. Defendants and their subsidiaries in the Russian Federation.
5. The “Representation Agreement Authority” executed by the Principal, “the “Representation Agreement”), grants Fuentes the right and discretion to employ or retain additional counsel,

consultants and/or experts to assist in pursuing the claims of the Action the subject of the Representation Agreement.

13.1 The Representation Agreement provides that the work and compensation under the contingency fee agreement will be divided on the basis of work performed and in accordance with the Canons of Ethics. It is anticipated that the work to be performed by Fuentes under the Representation Agreement would entitle the same to 11.5% of the total gross recovery. This Agreement entitles Lennox Paton to 3.75% of the total gross recovery as referral fee compensation. Said compensation is to be obtained only from any contingency fee to which Fuentes may be entitled. If Fuentes'; contingency fee of 11.5% is reduced, for whatever reason, then Lennox Paton's referral fee of 3.75% shall be proportionally reduced."

(22) Messrs. Lennox Paton were acting as fiduciary for a Panamanian company, Chadwick Park S.A. By an agreement dated the 27th August 2001 Messrs. Lennox Paton, as fiduciary, transferred 26.13% of its benefit under the above agreement with Mr. Fuentes to Global Village Marketing International (Bahamas) Inc. That was also one of Mr. Barry's companies. By subsequent assignment Global Village Marketing International (Bahamas) Inc. transferred its whole interest to Global Village Market Holdings Ltd. (Global Village). By mathematical calculation, the 26.13% of 3.75% of the total gross recovery from the Russian Federation litigation as specified in the agreement of the 3rd August 2001, is, rounded off, 0.65%.

(23) Global Village therefore had 0.65% interest in the total recovery funds in the litigation commenced in Florida. First Capital purchased 50% of that 0.65% from Global Village for the sum of $7.5 million dollars. Mr. Gotlieb personally

guaranteed the payment of that amount. Payment was supposed to be made by June 15th 2004. Payment was not made. It was only after Mr. Gotlieb took action against Mr. Barry (and their corporate interests became involved also) for the $3 million dollars advanced by Mr. Gotlieb, that the question of the $7.5 million dollars was raised. Global Village pleaded by way of counterclaim that it was owed $7.5 million dollars by First Capital and Mr. Gotlieb as guarantor.

(24) It is, of course, not as simple as it looks. As so often happens with persons who engage in the endeavour of looking for the main chance, the fickle finger of fate intervenes to flick the dice in unanticipated directions.

(25) It appears that the Republic of Venezuela, not surprisingly, was also convinced to take action against big tobacco. The Republic of Venezuela commenced action in Florida for similar health related claims as those of the Russian Federation. The case of the Republic of Venezuela was thrown out by the Florida courts. I understand the Florida courts held that it did not have jurisdiction to hear such claims. That decision scuttled the Russian Federation hopes as well.

(26) The lawyers for the Russian Federation were of course disheartened by the crushing decision of the Florida courts that it did not have jurisdiction. On the 25th August 2003 the plaintiffs (the Russian Federation) in action number 0020918CA24 entered a voluntary dismissal. The case was dead. It was apparent to the Russian Federation lawyers that the claim relating to health issues would not fly in Florida.

(27) I heard evidence that the promoters of the investment scheme considered that instead they would commence similar litigation in Louisiana. That has not happened. It was also raised that the tobacco companies could be attacked on the grounds of “smuggling”. I understand that this related to evidence that the Big Tobacco companies had evaded import duty when selling their products into

Russia. It was hoped that this would form the basis of some liability and that action could be taken by the Russian Federation on the grounds of this alleged "smuggling". On the evidence before me, it seems that no action has yet been commenced in the United States in relation to this claim either. One thing is fairly certain – that is that it is highly unlikely that a claim will ever be brought in Florida. Mr. Melton's evidence on this likelihood was pessimistic, to say the least.

(28) The upshot then is that there is no claim pending in the United States by Russian Federation against Big Tobacco. By the term claim pending I mean an action actually commenced in the courts of the United States and still running. Evidence was given by Mr. Melton, a promoter of the fund in the United States, that the Tobacco Fund (TLF) was hopefully negotiating a settlement with Big Tobacco in respect of its claims. No evidence was given as to the progress of that. No evidence was given as to whether or not there would be any real prospects of not only obtaining a settlement but actually getting paid cold hard cash. It is one thing to negotiate a settlement for several millions or billions of dollars. It is entirely another thing to actually get paid it. One would think that the promoters of such an investment scheme would have done their homework and check how 'judgment proof' Big Tobacco had made itself, or whether or not Big Tobacco had indemnified itself against such litigation with a still solvent insurer!

(29) Returning then to the matter at hand. The Sale and Purchase Agreement therefore entered into after the action in Florida had been dismissed. Mr. Davis, counsel for First Capital and Mr. Gotlieb, advanced the argument that as the subject matter of the Sale and Purchase Agreement had gone up in smoke, the parties to that agreement were, at the time of entering into the Sale and Purchase agreement, operating under a common mistake.

(30) Before getting to this point, there was the small matter of Mr. Gotlieb's evidence relating to this point.

(31) All of the witnesses, save for Mr. Gotlieb, gave evidence that it was not until early in January of 2004 that they had heard that the Florida action had been dismissed on the plaintiff's own motion. All those witnesses, including Mr. Gottlieb, said that they first heard this disturbing news from Mr. Gotlieb's brother, Todd. Todd Gotlieb, in his witness statement, said that he first received this news from a reporter from the Globe and Mail Newspaper in Canada. In his witness statement he says that that was in the first or second week of December of 2003. Mr. Jay Gotlieb also says that he heard about it from his brother in early to mid December of 2003. Mr. Barry and Mr. Michael Paton (of Lennox Paton) both say that it was not until the first week in January that they found out this news. Their source of information was also from Todd Gotlieb. Todd Gotlieb's evidence was that he knew nothing about this dismissal until contacted, as I have said by the reporter from the Globe and Mail.

(32) As to when the news of the dismissal came to light, I prefer the evidence of Mr. Barry and Mr. Paton. It appears to me that Todd Gotlieb and Jay Gotlieb are mistaken as to when they actually heard this news. If it emanated as they say, from the reporter of the Globe and Mail, then the newspaper report itself points to their mistake. The newspaper article is dated the 12th January 2004. In the final paragraph of that newspaper article, which refers to discussions with Mr. Todd Gotlieb, the reporter states that it was only the week before that he first contacted Mr. Todd Gotlieb. That would indicate that it was in the first week of January of 2004 that the reporter contacted Mr. Gotlieb with the news of the dismissal, not in December of the previous year. Mr. Todd Gotlieb then, as he says, checked it. On finding out that the information was correct he then relayed that information to his brother and to Mr. Barry. Mr. Todd Gotlieb was not called for cross-examination. He may have corrected himself. Mr. Jay Gotlieb's evidence on this point was most unreliable. Unfortunately I found him to have a vastly over-rated opinion of his powers of recollection.

(33) It would seem to me that on the evidence before me, that the information of the voluntary dismissal was made available to the parties to the Sale and Purchase Agreement in or about the first week of January of 2004 and after the Sale and Purchase Agreement was signed.

(34) That being the case, it is my finding that neither Mr. Barry nor Mr. Gotlieb nor First Capital or Global Village were aware that at the date of signing the Sale and Purchase Agreement that the Florida litigation had been dismissed.

(35) The argument therefore advanced by Mr. Davis is that pursuant to this common mistake, the Sale and Purchase Agreement should be determined as being void there being a total failure of consideration.

(36) Mr. Rigby counters that there was not a total failure of consideration because the agreement should be read to cover the wider meaning - that is to cover the entirety of the Russian Federation's proposed litigation costs including not only health related claims but the smuggling claim and any negotiations that may be afoot.

(37) Mr. Davis, on the other hand, submits that the question of consideration should be given a narrow interpretation, that interpretation limiting it to the Florida court's action and only that action.

(38) The determination of this point is a question of fact for the tribunal (see Associated Japanese Bank (International) Ltd. v Credit Du Nord S.A. [1989] 1 WLR 255 per Steyn J and the cases considered therein including Bell v Lever Brothers Ltd. [1932] AC 161 and Kenneth D v Panama, New Zealand and Australian Royal Mail Co. Ltd. (1867) L.R.2 QB 580.)

(39) To determine this question one needs to go no further than the agreements both being the Sale and Purchase and the Referral Agreement entered into by Lennox Paton, that agreement being the genesis of the interest sold pursuant to the Sale and Purchase Agreement.

(40) Clause I of the Referral Agreement clearly sets out that the subject matter is an action filed on behalf of the Russian Federation Case No. 0020918CA24 in the Circuit Court of the Eleventh Judicial Circuit in and for Miami Dade County. That action is termed the action. In Clause 2 of the body of the agreement, the action is referred to "0020918 CA2"' as it is in Clauses 3, 4 and 5.

(41) It appears to me that the referral fee that Lennox Paton were hoping to obtain as set out in Clause 13.1 of the Referral Agreement refers to and is limited in its parameters by Clause 1 of the preamble – that it refers to the recovery anticipated from the court action 0020918CA24. It does not refer to any other court actions nor does it refer to any wider cause of action.

(42) In my judgment the Referral Agreement and hence the Sale and Purchase Agreement must be limited in its meaning to refer to the Florida case number 0020918CA24 and to that alone. The argument advanced by Mr. Rigby that a wider meaning should be given to the Sale and Transfer Agreement and that it should refer to the Russian Federation action as a whole (which would include the smuggling cases, for example) is misconceived. Such an interpretation is not supported by the contractual agreements before the court.

(43) By the time the Sale and Purchase Agreement was entered into in December of 2003, the Florida court action had been dismissed. It had been dismissed by the plaintiff on a voluntary basis, presumably to try and preserve some other rights that it thought it may have. Those 'rights' have not been pursued anywhere else. There has been talk of some intended action in Louisiana or in some 'negotiations with Big Tobacco'. This, in my view, is not

what First Capital contracted for. First Capital contracted to purchase an interest in the Florida litigation. That litigation was non-existent when the parties entered into the Sale and Purchase agreement. It had been dismissed. There was therefore a total failure of consideration. The Sale and Purchase Agreement is therefore void and unenforceable. The Sale and Purchase agreement is clear. As to its subject matter, the agreement refers to 'a lawsuit presently pending in the Circuit Court of the Eleventh Judicial District in and for Miami-Dade County, Florida.' As at the 23rd December 2003, there was no lawsuit pending. It had been dismissed. It was non-existent. The parties were, at the time, mistaken as to its existence.

(44) Some suggestion was advanced in the submissions that there may still be scope for some negotiation. I consider that highly unlikely if not most improbable. Having voluntarily accepted that the action will not succeed in Florida and having voluntarily dismissed it, it would appear to me that the plaintiff in that action (the Russian Federation) has abandoned all hope and all leverage of ever getting a settlement in Florida. There is no prospect that such a settlement would be entered into in the Florida courts. The action in Florida is gone. It is none existent. There are no prospects of having it revived there. What First Capital bargained for, (and Mr. Gotlieb guaranteed), did not exist at the time of the Sale and Purchase Agreement) and nor can it exist. It had, as I said, "gone up in smoke".

(45) In my judgment the plaintiff on the counterclaim cannot succeed. The counterclaim in the sum of $7.5 million dollars must be dismissed.

(46) I give judgment therefore to the defendant on the counterclaim. The defendant on the counterclaim is entitled to its costs to be taxed if not agreed.

(47) The stay order in respect of the judgment for $3,141,000.00 (22 October 2007) is removed. The plaintiff has its rights to pursue its judgment in respect thereof together of course with its costs of having successfully litigated its claim for the judgment sum.

(48) I thank counsel for their assistance.

Delivered this 16th day of January 2009.

John Lyons
Senior Justice