REPUBLIC OF TRINIDAD AND TOBAGO

IN THE HIGH COURT OF JUSTICE

CV 2010-00382

BETWEEN

H.C.U. COMMUNICATIONS LIMITED

Claimant

AND

ANAND RAMPERSADSINGH
INGRID RAMPERSADSINGH
UPWARD TREND ENTERTAINMENT LIMITED

Defendants

Before The Hon. Madam Justice C. Gobin
Appearances:
Mr. F. Scoon instructed by Dr. W. Debideen for the Claimant
Mr. A. Manwah for the Defendants

REASONS

Background facts

1. The bare facts relevant to the issue I have to decide are as follows:

   (1) The H.C.U. Co-operative Society (H.C.U.) as purchasers and the defendants herein, as vendors, entered into an agreement dated 9th May, 2005 for the sale of 75% of the shares the third defendant, Upward Trend Limited for a price of 5 Million dollars to be completed one year from the date of the agreement. Upward Trend was at all times the holder of a broadcasting license.

   (2) H.C.U. incorporated and established a separate company, the claimant herein (Communications), to operate and manage inter alia its print and electronic broadcasting portfolio.

(3) One month after the date of the agreement, by a resolution of the Board of Directors of the H.C.U. dated 6th June 2005 and well before completion of the contract H.C.U. purported to assign and transfer all its rights, interest and title to the shares, the subject of the above agreement.

(4) By further agreement dated 14th April, 2006 the parties to the original agreement agreed to a rescheduling of the timetable for payment as well as arrangements for the eventual vesting of the shares upon completion, the deadline for which was then extended to 30th December 2008.

2. This is an action brought by 'Communications' which was not a party to either, essentially for specific performance of those agreements against the vendors. This claimant says it is entitled to bring the action because the contract was assigned to it by H.C.U. by the terms of the Board's resolution of 6th May 2005, notice of which assignment was provided to the defendants by the agreement dated 14th April 2006.

Procedural History

3. On the 8th December 2010 in the course of case management, the defendants defences were struck out. A few days later on the 15th December 2010, the claimant filed an application for summary judgment. Since the claim was one for specific performance, I invited the claimant to file a formal application and evidence in support. Counsel for the defendants now submits that this is not the appropriate form of application. Counsel says that what should have been filed was an application pursuant to Part 12 for judgment in default of defence. He says that the fact that a defence is struck out renders the summary judgment rule applicable.

4. I do not agree. It seems to me that Part 12.4 contemplates judgment "over the counter" at the Court Office where a defence has not been served at all. Having regard to the circumstances of this case in which the defence was struck out in the course of case management, leaving few factual matters in dispute, and since the Court recognized that the expense of a trial could be avoided, it was considered appropriate for the claimant to make the application and I invited it to do so. This was no mere formality. The claimant still needed to show it was entitled to its judgment.

5. It is well known that the H.C.U. is in liquidation. After the Court had heard submissions on the claimant's application and before a ruling could be made, the litigation became protracted by the intervention of H.C.U's liquidator, who sought and was granted leave to be joined as a party. Several events and directions followed in the management of the case between the claimant and the liquidator. Eventually on the 21st March 2012 an order was entered under the terms of which, it was agreed by the parties that is, Communications and the liquidator of the H.C.U., that as between them, the liquidator is entitled to the benefit of the agreement dated 9th May 2005. As I understand it, the effect of this was that if either of these Companies was ultimately found to be entitled to specific performance, whether it is H.C.U. or "Communications", the benefit of the judgment would be for the liquidator.

6. That agreement did not bring an end to these proceedings. Counsel for the defendant (notwithstanding the fact that all the defences were struck out) filed an application to strike out the claim on the basis that "Communications" had no locus

to bring the claim against the defendants since it was not a party to the agreement of 9th May 2005. The fact that the defences were struck out did not bar the defendant from making this application. While there was no longer any lis between the defendants and the claimant as a result of the striking out of their defences, Counsel was entitled to raise the issue of locus which clearly arose on the face of the statement of case and documents attached thereto.

The issue – valid assignment?

7. The parties very helpfully agreed that at the heart of the determination of both the striking out and the summary judgment applications is one issue, and that is the validity of the purported assignment of the contract of 5th May 2005 from the H.C.U. to Communications. If there was a valid assignment then Communications is properly before the Court. On the other hand if there was no assignment "Communications" would have no standing and the claimant's application and indeed the claim must be dismissed. At all times the defendants through Counsel's submissions admitted the agreements of 9th May 2005, which showed that they contracted with the H.C.U. not with Communications.

8. The parties agreed that the basic requirements for the valid assignment of a chose in action are set out at S.23 (7) of the Supreme Court of Judicature Act Ch.4:01. The section provides that the assignment should be absolute and not just by way of charge, in writing under the hand of the assignor and for express notice to the debtor. On the facts, the questions which arose were did the resolution of 6th June

2005 satisfy the requirement of writing and did it effect an absolute transfer of the rights under the agreements of the H.C.U. to "Communications".

9. In arriving at the answers I have found as follow. The agreement of 9th May 2005 was for the sale of 75% of the number of shares in the third defendant. The original completion date was 9th May 2006. On the 6th June 2005, the date of the resolution, no shares had yet been transferred. All that could have been assigned at that date by H.C.U. to Communications was the benefit of the contract as opposed to the property in the shares, which remained with the Vendor. When it is examined more closely, the resolution specifically records an agreement to assign the H.C.U's title or interest in the shares that are to be purchased under the agreement and this must obviously contemplate further acts some time in the future. When it is read in its entirety the resolution directs the Secretary of the Board of the H.C.U. to do all that is necessary to ensure the transfer and assignment of the shares at that future date.

10. It clearly contemplates the completion of the agreement by the H.C.U following which the beneficial ownership and management of and rights and entitlement to the radio license shall **thereafter** (and the word is actually used) be assigned in the claimant. By this resolution the H.C.U. cannot be said to have immediately vested its contractual rights in the claimant. This appears to be a resolution which relates to the future conduct of operations of the H.C.U. and one of its subsidiaries, the claimant. It records as part of a business plan an internal agreement between them as to its

intention for the assignment of the benefit of the contract after completion of the contract by the H.C.U. and when H.C.U. actually has the shares in hand.

11. The letter of the 14th April 2006 does more harm to the claimant's case than good in that it confirms that there was no absolute transfer of H.C.U's rights under the contract. It is relied upon by the claimant as proof that the requirement for notice under the Statute has been met. First, it is indeed notice to the defendants of the Board's resolution but its effect is limited to what I have found above and no more. The mere fact that it begins with a conclusion that "the agreement of 9th May 2005 is now assigned" does not change the effect of the Board resolution. This use of these words does not make it a valid assignment. The letter of the 14th April 2006 does confirm however, that the defendants must have been aware of existence of a Board resolution of the H.C.U. to transfer the shares after completion of its contract with them.

12. More critically the letter provides support for my finding that if anything was assigned by the resolution of June 6, 2005, it was not absolute or irrevocable. The letter is presented on the letterhead of the H.C.U. and signed by its President, it appears, in his capacity as President thereof and as Chairman of the claimant. It confirms therefore that both these entities acknowledged the following directives which clearly suggested the H.C.U. remained in control of the benefit of the contract as had originally been agreed, almost one year after the date of the resolution. The following clauses of that letter of 14th April 2006 clearly demonstrate that there had been no absolute transfer of anything to the claimant.

(4) At all end of the receipt of total payment the shares as per agreement on 28th May 2005 **would be transferred to Hindu Credit Union Co-operative Society Limited**.

(5) At all time the shares will not be transferred or sold to any other party **other than the Hindu Credit Union Co-operative Society Limited**.

(6) **At the request of the H.C.U. the shares may be transferred to H.C.U. Communications Limited on the completion of the balance due**.

(7) The 25% profit calculations for the first year would be on total sales attributed to H.C.U. Communication 2005-2006. Excluding Hindu Credit Union Co-operative Society Limited and H.C.U. Financial Limited (Group of Company).

(8) From 2006 June, the calculation will be on the Net Profit of the Sales on the balance due to Upward Trend Entertainment Limited as it relates to the share purchased. Excluding Hindu Credit Union Co-operative Society Limited and H.C.U. Financial Limited (Group of Company).

(9) At the end of the acquisition of the shares, all profit will be paid as net profit of the 25% shares of Upward Trend Entertainment Limited to be owned by Anand Rampersadsingh and Ingrid Rampersadsingh.

(10) The agreement dated 28th May 2005 is now extended until **30th December, 2008. At the end of December 2008 whatever shares that are paid for would be transferred to H.C.U. or H.C.U. Communications Company Limited, notwithstanding of clause 4 and 6 agreement. In the meantime the shares would be held in trust for Hindu Credit Union Co-operative Society Limited** and/or H.C.U. Communications Company Limited by Upward Trend Entertainment Limited under the following conditions……..

13. I have added my own emphasis to those paragraphs which clearly indicate that the H.C.U. remained the beneficiary of the transfer of shares under the contract with the defendants. The following test has been laid down by the learned authors of (Chitty on Contracts Ch.19.012).

> "The test seems to be – has the assignor unconditionally transferred to the assignee for the time being the sole right to the debt in question as against the debtor? If so, the assignment will be absolute but if the debtor cannot tell whether to pay the assignor or the assignee without examining the state of accounts between them it will be held to be by way of change only."

The above test is applicable in the current case. I find that when the documents are construed, it cannot be said that the debtors could have understood that they were obliged to directly transfer the shares to the claimant herein on completion, indeed they could only have done as H.C.U. directed. There was therefore clearly no absolute or irrevocable transfer of the H.C.U's rights. As a consequence I hold that the claimant had no *locus standi* to bring this action.

14. The claimant's application for summary judgment as well as the claim is struck out. The claimant will pay the defendants' costs of these applications assessed in the sum of $12,000.00.

Dated this 9th day of August, 2012

CAROL GOBIN

JUDGE